CHAPTER - IX

CONCLUDING OBSERVATIONS AND SUGGESTIONS
CHAPTER - IX

CONCLUDING OBSERVATIONS AND SUGGESTIONS

The expression 'Uniform Civil Code' i.e. UCC has its origin in European legal systems. Commonly the expression 'Civil Law' is used in the sense of family related laws though it has other components of civil matters such as contracts compensation etc., as well. Thus, the expression 'Civil Code' is used in the sense of a comprehensive work of legislation regulating the entire province of matrimonial matters. And when the term 'civil Code' is read in conjunction with the adjective uniform it refers Civil Code uniformly applicable to citizens irrespective of race, religion, caste and sex etc. However, in India there has been controversy with relation to the real content of a civil code. In the Constituent Assembly itself the opponents of the UCC contested that the expression civil code does not cover personal law of the citizens and that the personal law is integral part of the religion.

On the other hand supporters of the UCC successfully argued and clarified that the personal law is not part of religion. In the light of the Constituent Assembly debate we may say that in Indian context the expression 'Civil Code' is used in a very specific sense, meaning thereby a code of law regulating civil matters including marriage, divorce, inheritance and also other subjects which are at present governed by different personal laws and the expression 'Uniform Civil Code' has a reference to enacting a uniform civil law intended to replace the different personal laws governing Hindus, Muslims, Christians, Parsis and Jews in matrimonial matters.
The historical background of the UCC is closely linked with the history of personal laws. In ancient and medieval period all branches of law namely civil, criminal and commercial were based on religion and custom. This religion and custom oriented legal system become complicated and unprogressive. The British rulers attempted to bring a systematic and progressive legal system in India. British rulers gradually codified and brought secular criminal and procedural legislations. As regards to the personal/materimonials laws they refrained from enacting a comprehensive and secular civil code. Here the British adopted the policy of non-interference in matters traditionally linked with the religion. However, the British rulers had no intention to completely exclude the civil matters from their plan for law reform. The survey of the legal development before the Government of India Act, 1915, shows that there was nothing restraining the Government in British India from making laws in the areas traditionally regulated by personal laws. Under the Act of 1915 all the personal laws were brought within the scope of the Act and none of the constitutional documents brought after the Act effected any change in the situation. The legislative entries in the Government of India Act, 1935 included almost all matters traditionally regulated by the personal laws. The Constitutional history of India reveals that a comprehensive codification of personal laws was not generally favoured by the British rulers because they did not want to infuriate the religions sentiments of the Indian society. They were more interested to maintain their political authority rather than social reforms. Thus, in British India no attempt had been made to prepare a secular civil code and the legislative power was used to bring piecemeal reform to satisfy the vocal demands of progressive sections of Indian society.
For the first time it was the Constituent Assembly in which the idea of UCC was legally mooted in India. Initially the efforts were made to put it in the Fundamental Right chapter but Sub-Committee on Fundamental Rights by majority decided to put it in Directive Principles chapter. In the Constituent Assembly the Muslim members opposed the idea of a UCC and several amendments were proposed by Sri Mohammed Ismail Sahib, Sri Naziruddin Ahmed, Sri M. A. B. Sahib Bahadur, Sri B. Pocker Sahib Bahadur and Sri Hussain Imam. On the other hand Sri K. M. Munshi, Sri K. M. Alladi Krishna Swami Ayyar and Dr. Ambedkar strongly supported the idea of UCC. However Dr. Ambedkar assured the Muslim members that to make a beginning the future parliament might adopt the UCC purely on voluntary basis. In the end of the debate the proposed provision was adopted as Article 44 in the Constitution.

There are several provisions in the Indian Constitution directly or indirectly related to the UCC. Broadly the UCC has been discussed with relation to Fundamental Rights, the Directive Principles and The Fundamental Duties. One of the important problem for enacting the UCC has been related with the conflict between the power of the State to enact a UCC and the Fundamental Right of the people to exercise their right to freedom of religion including right to be governed by their religions personal laws. Here the provisions of the Constitution of India are ambiguous and the conduct of the State to reform the religious personal laws has been inconsistent. The important question that need to be clarified is whether Part III-Fundamental Rights, of the Constitution governs personal laws and if so whether personal laws that
discriminate on the basis of sex, and religion violate the Constitution. This controversy has arisen partly because Constitution does not directly mention the personal laws. The only mention of personal law is found in entry 5 of list III of Schedule VII. Article 44 indirectly recognises the existence of various personal laws. Again though Article 13 provides that the laws inconsistent with Part III of the Constitution shall become void but, at times, the Indian courts have ruled that personal laws are not governed by Part III of the Constitution. In this connection the important judicial decisions namely Narasu Appa Mali (1952. Bombay High Court) Saraswathi Ammal (1952 Madras High Court) and Mathura Ahir (1980 Supreme Court) have been analysed. In the light of arguments advanced against these decisions we have argued that personal laws do not form a special category of laws that is not governed by part III of the Constitution and the Constituent Assembly debates also substantiate this conclusion.

Our discussion relating to Fundamental Right also touches the question that whether fundamental Right to freedom of religion has been a bar to reform the personal laws. If there has been any single most important hurdle in the way of UCC, it has been the religious freedom as guaranteed in the Constitution. In this connection we have examined the scope of the freedom of religion and the judicial decisions thereof. Our discussion makes it clear that our founding fathers wanted to abolish all the ill practices associated with the religion and, therefore, provided necessary power to the State under Article 25 (2) (a) and (b). On few occasions our courts have given overriding effect to the freedom of religion upon State's regulatory power and such interpretations have often
strengthened the hands of religious fundamentalists. It is submitted that the court must see ill effects of such interpretation and must help the legislature and the executive to achieve secular ideas and gender justice. Moreover, the personal laws of the community must also be interpreted in such a manner that the Indian society may be prepared to adopt the progressive civil laws.

Under the Constitution of India, Fundamental Duties are directory in nature and can not be enforced through mandamus as they cost no public duties. However, our discussion shows that under the Constitutional scheme the importance of Fundamental Duties has been increasing. The Fundamental Duties along with the Directive Principles have been used to determine the reasonability of the law under Article 14, 19, 21 and 25. We have demonstrated the close relationship between the Fundamental Duties and the purposes of UCC. It is submitted that Fundamental Duties also demand the enactment of a UCC and such a law would be a reasonable law under emerging doctrine of reasonableness of the Indian Constitution.

The objectives or purposes of the UCC are closely related with spirit of the Indian Constitution. Firstly, we have discussed the uniting factor of the UCC. The unity and integrity of the nation has been primary consideration with the emergence of the idea of the Nation-State. In the light of the historical experiences and in order to build a strong nation, founding fathers incorporated several unique features in the Constitution and Article 44 is one of them. Founding Fathers saw the UCC as a source of unity and integrity of the country. The Indian judiciary has also recognised this fact. However, the academics are divided over the issue. In the light of
our detailed discussion it is submitted that though the UCC alone is not a guarantee of the unity and integrity of India, yet it may play a vital role to achieve it. When India is experiencing the problem of separatism, it is natural to look towards every possible factor which unites the society. If the Indian rulers succeeds to enact a UCC it will go a long way to achieve the Constitutional goal of unity and integrity of the country.

The second important objectives of the UCC is equality including gender-justice. Though various personal laws provide discriminatory treatments, yet such laws are still surviving under religious freedom clause. The potential of equal protection clause, thus failed to abolish the discriminatory personal laws. At times, the progressive movements have demanded a UCC to achieve equality or gender-justice. In this connection some of the critics have alleged that provision of the UCC could not become fundamental right because male founding fathers failed to appreciate the problem of gender-justice. However, in this work we have contested this contention. The Indian judiciary has appreciated the equality factor of the UCC and the Shah Bano and Sarla Mudgal and cases are important reflections of the judicial thinking. Similarly the academics have unanimously upheld the UCC's equality potential.

The goal of secularism is another objective of the UCC. It was the religious fundamentalism which divided India in 1947. After the tragic partition of the country the founding fathers wanted to have a secular State. But, they failed to adopt a UCC at that moment and it was put in the Constitution as a future goal. Unfortunately, because of the political considerations the non-progressive rather than secular ethos has become the guiding principles of the Indian
rulers. Now, when the Bommai ruling has raised the secularism up to the basic structure of the Constitution, it is high time for the Indian rulers to make every effort to enact a secular civil code in India.

The clarity and simplicity of civil laws is important goal of a UCC. The people of India have suffered a lot because of the ambiguous and conflicting nature of personal laws therefore, badly need a simple clear and complete civil laws.

The objections, difficulties and constraints relating to UCC are as old as the idea of the UCC itself. So far objections are concerned, the first objection relates with the religion. It has been said that UCC is against the religious freedom as it aims to replace the religious personal laws. We can not accept this objection because social life does not necessarily relate to religious beliefs. Secondly, Constitution permits State regulation to secular activities associated with religion. Thirdly, in European countries every citizen accepts the uniform civil laws and such laws are not considered tyrannical or oppressive by the minorities. And lastly, in the changed social senario it would be wrong to say that replacement of personal laws with a State enacted UCC will retire the scope of further development of religious laws.

The second objection against the UCC in India has been that the imposition of uniform civil laws on people will damage their culture and that the forced uniformity will alienate the people from the State. It has been said that law and legal system is closely inter-linked with the culture of a society, therefore, the protection of culture requires protection of personal laws. Here we have argued
that culture includes the whole way of life and has a dynamic character and it will not be damaged if one component of culture is subjected to modification or reform. Again, discriminatory personal laws can not be preserved in the name of cultural protection. In view of Constitutional protection and political patronage available to the minorities there is no scope of such apprehensions. In order to bring a UCC in India and to protect it from unnecessary objections on cultural ground it may be suggested that a proviso to Article 29 (1) may be inserted explaining that nothing contained in this clause shall prevent the State from enacting any law to achieve social welfare, social reform or regulating any secular activity associated with culture.

The immutability of personal laws is another objection against the UCC. Though this objection is not new, yet in course of time except the Muslims, others communities have diluted their stands and codification of Hindu personal law is fine example of it. The immutability argument was advanced and rejected in the Constituent Assembly. The immutability argument has brought many ill effects in India, it has prevented progressive interpretation, stands against the reform and secularism, makes a community blind and orthodox and finally it affects the natural growth of a community in a fast changing world. The British rulers rejected the immutability argument, but it is a pity that in free India the rulers have not shown the required courage to reject it. It may be submitted that the argument of immutability of personal laws should not have any place in India, as it has potential to destroy the constitutional objectives of equality, justice and secularism.
Another objection against the UCC has been that if the State hold sweeping power to regulate the personal affairs of the people it will enhance its power and a ruler of the day may misuse such power for oppression. In this connection the history of evolution of the State's power and concepts such as development of limited power of State, Human Rights and independence of judiciary have been discussed. There may be some substance behind the idea of limited power of the State that a community may better regulate certain areas of their own affairs. But, in Indian circumstances this argument has no application. Indian Constitution provides effective check on the State power and a free judiciary is effective guardian of the rights of the people.

There has been objection as to appropriate time for codification of laws in general and civil laws in particular. The objections relating to time factor is directly or indirectly based on theory of Savigny (1779-1869). This theory was successfully used to reject the French Code and it also delayed the codification in Germany. In India, it was argued in the Constituent Assembly that time had not come to adopt a UCC. Our discussion shows that Savigny was not against the codification per se, in fact, he wanted to secure a reasonable period for Germans so that real spirit of the people must reflect in the proposed German Civil Code. It is a pity that the successive Governments in India have taken the stand that society is not prepared to accept a UCC. It is submitted here that the time factor objection have lost its appeal in India. The successive governments have failed to enact a UCC not because of time factor but because of political considerations.
So for constraints of the enactment of UCC is concerned, there has been certain practical difficulties. In this connection the problems related to lack of information, lack of public opinion and lack of a draft Bill have been discussed. There is a real need to collect the information about all the personal laws in India. For this there should be a body of experts. The efforts made by various Law Commissions are not sufficient. Again, Law Commissions have been over-burdened, therefore, a separate body of experts may be assigned this job. As regards to public opinion, there is a great need to educate the people about the benefits of a UCC. The preparation of a draft Bill will invite a serious debate about the UCC. It is a pity that till now the debates relating to UCC have been made more in the air. It is submitted that a Draft Bill may remove the un-necessary doubts and fears about the UCC. If Government is serious to achieve a UCC it must therefore, prepare a Draft Bill so that Parliament may discuss it and try to find a consensus over it.

The review of the progress made towards implementation of UCC in India, shows that in British period very little progress was achieved. However, the British rulers were forced by few but enlightened leaders to abolish certain ill effects of personal laws. Consequently, they passed few progressive legislations namely Special Marriage Act 1872, Married Women's Property Act 1874, Indian Minority Act, 1875, The Guardians and Wards Act, 1890, Indian Succession Act 1925 and the Child Marriage Restraint Act 1929.

The British rulers were least serious with the UCC but, they made a beginning to secularise the personal laws. This fact is
important because in free India, the successive rulers have not been able to show the kind of courage demonstrated by the British rulers. In free India the Governments at times implemented various Directive Principles but no serious efforts have been made to enact a UCC. However, the legislations which have been enacted to govern the civil matters, irrespective of the religion of the parties, are: the Special Marriage Act 1954, The Hindu Code of 1955-56, The Dowry Prohibition Act. 1961, and the Medical Termination of Pregnancy Act, 1971. The analysis of these legislations along with the Indian Adoption Bill, 1976 and Criminal Procedure Code, 1973 reveals the problems associated with these efforts. Our discussion shows that the successive government often failed to overcome the pressure mounted by orthodox sections of the society and Indian rulers have been often guided by political considerations rather than ideals of the Constitution.

As regards the judicial approach to UCC, we have seen that under the Constitution judiciary has not been made responsible to implement the Directive Principle including the UCC. But, judiciary has played a important role to achieve the goal of a civil Code in India. The history of judicial behaviour tells that in the beginning it adopted a non-interference approach with regard to constitutionality of personal laws. It also expressed its limitation when the question of implementation of the UCC came before it. In *Shah Bano* (1985) judgment the Supreme Court extended the benefits of a secular legislation i.e. Criminal Procedure Code to a Muslim divorced women and gave new look to the provisions of the Muslim personal law. This judgment invited maximum controversies and whole concept of the UCC was once again
challenged and a legislation to undo the effects of the judgment was demanded. Once again the government of the day failed to resist the political pressure of the opponents of the UCC. Government of India enacted the Muslim Women's (Protection of Right on Divorce) Act, 1986. The Jorden Diengdeh case (1985) was another important case which focused on the immediate and compulsive need for a UCC. In the history of judicial approach, the Sarla Mudgal case (1995) once again generated big controversy. In this case Supreme Court ventured to ask the executive to file an affidavit about the steps which it had taken to implement Article 44 of the Constitution reiterated by the apex court in John Vallamthion's case in 2003. The Court’s activism once again put the problem of UCC on the national agenda. Though this direction of the court was latter treated as obiter but it shows the keen desire on the part of Indian judiciary to secure the goal of the UCC. Thus, the judicial behaviour relating to UCC has been positive and particularly the Supreme Court has come out in favour of it.

To sum up judiciary has been instrumental in bringing a change in attitude of ruling class towards the UCC and it has succeeded to create a strong public opinion in favour of the UCC.

Suggestions:

In the light of concluding observation, we humbly suggest that:

1.(i) For codification of personal laws it is necessary to reduce the distance between the laws of separate communities as well as laws of sects within the community.
(ii) Proposed change in personal laws of different community must be made obligatory for the followers of that personal law.

(iii) Carving out of more rights for weakest and oppressed sections of the society such as women, children and tribals people.

2. UCC is a sine-qua-non for national integration.

   For enacting UCC three conditions are indispensable

   (i) Codification of personal laws of various communities

   (ii) For transition period UCC may be optional but after some time it must be made compulsory for all.

   (iii) if the UCC comes into conflict with the personal laws of a community the UCC must have overriding authority.

3. It must be remembered that our constitution guarantees the freedom of conscience and religion. The guarantee is of religion and not of personal laws. It is very much clear from the wording of Art 44 that state shall endeavour to secure for the citizens a uniform civil code through out territory of India. Since the words, "Excepting in respects of Muslims, Christians and other minorities" have not been added Art 44 is not in any way interferes in religions freedom of the minorities this facts must emphasised again and again.

4. In India the Constitutional provisions relating to freedom of culture and religion have been used against the UCC. In order to remove the confusion it is suggested that a proviso
may be added in Articles 25 (1) and 29 (1) to the effect that nothing contained in these Articles shall affect the operation of any law made under Article 44 of the Constitution.

5. The executive has not supplemented the "Judicial will to achieve UCC. It is humbly suggested that political considerations should not be made an excuse for frustrating progressive Judicial march towards the UCC.

6. The positive political interference is the need of the hour to meet the demands of the communities suffering from the dictates of the male dominated culture. The new ways and mens are to be found out to liberate the majority of the minorities from this crisis of its own identification. For this the process of continuous dialogues and debates must be made routine life of those who rule the country. If the unity, integrity and fraternity as goal of our constitution is to be achieved the rulers must adopt this process irrespective of political ideologies. The sprite of the constitution should be realised in positive way if nation's building process is to be continued. The minorities in our country should make it a point that right now they would not permit the political bosssess to treate them as mere floating votes. This attitude will not make the constitutionalism rather it would wreck it. The misinformation which breeds hatred among different communities must be done away by the positive compagian of mutual trust building.

7. In order to achieve a UCC the first need is to have a comprehensive draft Bill. This draft must be prepared by
an expert body in consultation with the Minorities Commission-having regard to modern day concept of human right.

8. It is high time that the Law Commission must undertake a comparative study of the different personal laws of different communities in India. A scientific, classification must be made of the similarities and dissimilarities in the various personal laws. In the first stage there should be a uniform civil code on those subjects on which there is very little controversy. With regard to issues on which wide dis-agreements exist we must seek the help of the principles of natural justice in framing the Uniform Civil Code.

The criminal law provisions, which are secular in nature, should be effectively enforced to arrest the dangerous anti-national trends in minority demands. Inter-religion, Inter-caste, Inter-citizen intercourse should be encouraged and developed for the healthy growth of consensus on the realisation of the constitutional mandate.

9. The religious sentiments should not be hurt and as Some Muslims respondents have suggested their religious identification may not be over looked, but national interest and unity of the nation must be safeguarded and in the name of religion no community should be permitted to interfere in the legislative competence of the parliament. The Shariat its self, according to some scholars, contain the clear provisions of modification. It will therefore not be again the Muslim Law to frame the U.C.C. The party in power must take into account this aspect also.
10. The Supreme Court, as guardian of the constitution has the inherent power to issue any direction to give the complete Justice hence it can and it must direct the state to legislate a Law to implement U.C.C. for the welfare of the nation and the Government of the day should accept the direction of the apex court in goodfaith and implement it at once.

In the light of the above suggestions it is submitted that enactment of a UCC is necessary to achieve the constitutional objectives of justice, liberty, equality, fraternity and above all unity and integrity of the Indian nation.