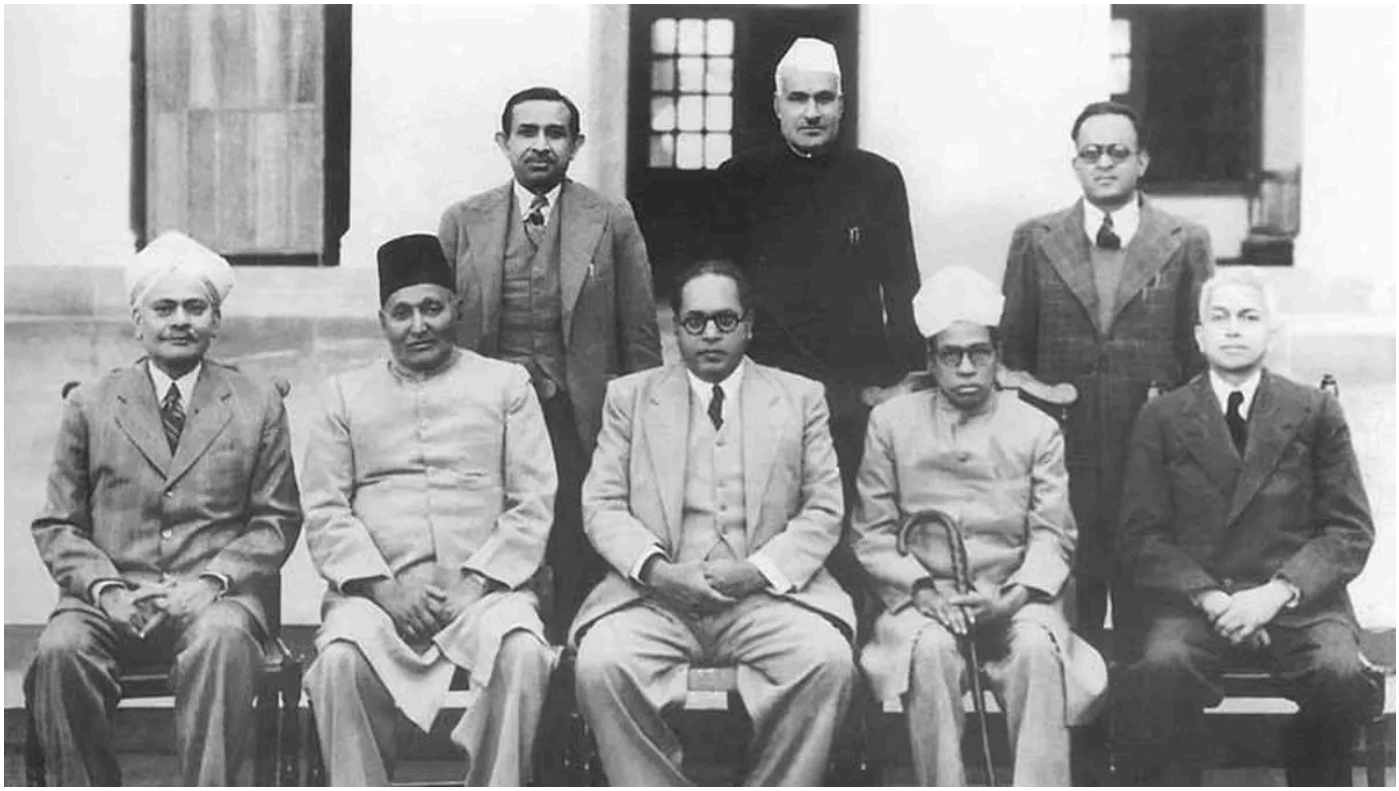
Consent or coercion? Looking back at the Constituent Assembly debate on Uniform Civil Code

The 1948 debate exposes the tensions between majority rule and minority rights in a young democracy, which has important takeaways for today.

Published : Mar 13, 2024 17:34 IST - 26 MINS READ

SAMBAIAH GUNDIMEDA



Dr. Babasaheb Ambedkar, chairman, with other members of the Drafting Committee of the Constituent Assembly of India, on August 29, 1947. | Photo Credit: By Special Arrangement

Alexis de Tocqueville's *Democracy in America,* published in two volumes, the first in 1835 and the other in 1840, is universally appreciated as one of the most influential books

ever written about the functional aspects of democracy in America. The greatest danger that Tocqueville saw in the functioning of democracy in general and in the United States in particular was the tyranny of the majority, which overpowers the will of minorities and marginalised individuals.

But the question is, can a majority impose its will upon the unwilling minority? If it does, then what is the meaning of democracy? Interestingly, these are some of the significant questions that many a political scientist and democratic-minded people in India and abroad have been asking ever since the BJP assumed political power in the Centre under Narendra Modi's leadership, and more specifically following the passing of the Uniform Civil Code (UCC) Bill by the BJP-led State government in Uttarakhand. Did Uttarakhand take the consent of its religious minorities, who have been following their respective religious personal laws and who would be affected by the new law? Is it essential in a democracy to secure prior consent of the communities that were likely to be affected by an action of the state?

A look at the Constituent Assembly debate on the UCC would give us a better perspective on how we should go forward with this vexing issue.

On November 23, 1948, the Constituent Assembly of India witnessed a highly animated discussion. It was on this day that the draft Article 35 (now Article 44) on UCC was placed before the Assembly for a discussion followed by final voting. The draft Article read: "The State shall endeavour to secure for the citizens a uniform civil code throughout the territory of India".[1] Both the proponents and opponents of the provision advanced nuanced and passionate arguments in support of their positions. One could see that visibly shaken Muslim members were gripped by a sense of fear. Probably this was the main reason why all those who spoke against the provision came from a Muslim background, while most of those in favour belonged to Hindu upper castes.

Arguments for and against

One of the major ideas around which the opponents built their arguments was a "secular state". M. Muhammad Ismail, a Muslim League member from Madras, argued that no community or group of people who have been adhering to their own personal laws should be forced to give up those laws in the event of the actualisation of UCC. Justifying his position from the vantage point of the secular state, he noted that a secular state was one which "should not do anything to interfere with the way of life and religion of the people", because a personal law, which was adhered to by a community "for generations and ages", constituted a part of that community's way of life, way of practising their religion and culture. Therefore, a true secular state, Khan said, should allow its people to adhere to those laws rather than doing anything to affect them.

Taking a similar stand, Mahboob Ali Baig, another Muslim League member from Madras, noted that it was generally assumed by people that "under a secular State, there must be a common law observed by its citizens in all matters, including matters of their daily life, their language, their culture, their personal laws." Such an assumption, for Baig, was an incorrect way of looking at the secular state. "In a secular state", according to him, "citizens belonging to different communities must have the freedom to practice their own religion, observe their own life and their personal laws should be applied to them."

Also Read | Politics around the uniform civil code

Hussain Imam, a Muslim League member from Bihar, also made an insightful argument around the idea of a secular state. According to him, a secular state does not mean one that it is an anti-religious state or irreligious state. It simply means a non-religious state. What Imam was inferring here is that a secular state will not have a religious ideology but it paves the way for its people and communities to follow their respective ideologies and practices. Thus saying, he announces that the apprehension felt by the members of the minority community is real. The framers, true to their commitment to the secular ideology, in Imam's opinion, should provide safeguards in the provision so that communities will adhere to their personal laws.

It is interesting to see how proponents and opponents differed with each other on the ultimate purpose of the provision on the UCC. For instance, Alladi Krishnaswamy Ayyar, a Congress member from Madras Province and an ardent supporter of a UCC, opined

that the differential systems of inheritance, marriage, and other related matters are the factors that contribute to the differences among different people of India. The main aim of the UCC, Alladi noted, is to arrive at a common measure of agreement on the matters mentioned above. This, in turn, according to Alladi, would lead to harmony among all the people of India.

As one could have imagined, Muslim members did not share this enthusiasm. A UCC, in their opinion, endangers harmony rather than engenders it. Mohammad Ismail Khan, a Muslim League member from the United Provinces, argued that if the purpose of a UCC is "to secure harmony through uniformity", then it is futile "to regiment the civil law of the people including the personal law". Such regimentation, Khan maintained, not only results in discontent among all the affected parties, it essentially disrupts harmony among all the communities in society. Conversely, "if people are allowed to follow their own personal law", Khan assured the Assembly, "there will be no discontent or dissatisfaction". In short, the path to realise harmony among the diverse communities is not by coercing them to abandon their personal laws, but by giving them the required freedom to adhere to their respective personal laws.

Naziruddin Ahmad, a Muslim League member from West Bengal, claimed that it was not just the Muslim community that felt a certain "inconvenience" by the proposed Article; rather, every community must be enduring the same inconvenience because "each religious community has certain religious laws, certain civil laws inseparably connected with religious beliefs and practices".

Ahmad was making a very serious and sincere claim. If the proposed Article were to become a part of the constitutional law, then all those religious and semi-religious laws, that shaped the religious and cultural lives of those communities, and that gave a certain identity and meaning to their very existence would now stand to lose their salience and eventually disappear from their religious and cultural lives. If that is to happen, then all those communities of people with their own personal law would lose the essence of their being and who they are.

M. Ananthasayanam Ayyangar, a Congress member from Madras, refused to agree with the Muslim members. Marriage in Islam, in Ayyangar's opinion, is not a religious matter, rather it is "a matter of contract". Mehboob Ali Baig, who felt a certain discomfort at this

uncharitable remark, responded by informing the Assembly that Ayyangar had always entertained "very queer ideas about the laws of other communities". It is precisely on account of such a queer attitude that Ayyangar and others like him, Baig opined, construe marriage among Muslims as a contract, "while the marriage amongst the Hindus is a Samskara and that among Europeans is a matter of status".

Marriage among Muslims might be a contract, Baig retorted, "but this contract is enjoined on the Mussalmans by the Quran and if it is not followed, a marriage is not a legal marriage at all". Moreover, Baig claimed that Muslims had been following this system of law for the last 1,350 years. Therefore, "If today Mr Ananthasayanam Ayyangar is going to say that some other method of proving the marriage is going to be introduced", Baig was very firm, "we refuse to abide by it because it is not according to our religion".

Continuing his argumentation, Baig once again reached out to the idea of a secular state in his defence. In a secular state, it is perfectly possible that some communities might have their own way of dealing with their religious tenets and practices through their personal laws. If such communities "insist that their religious tenets should be observed," then no Civil Code can be imposed upon those communities, Baig argued.

"The political and moral legitimacy of any state and its government in a democratic set-up is essentially derived from the consent of the people it governs. This consent has to be reflected in every activity—either in the form of a policy or in the form of a programme—of the state."

Naziruddin Ahmad joined Baig on this. Ahmad maintained that the state should see that no religious laws of any community were affected by the proposed Article 35. If the state wished to enact a certain law that might affect the personal laws of a certain community, then, Ahmad proclaimed, securing the consent of that community was sine

qua non. In other words, no law can be enacted without the prior consent of the community or communities that were likely to be affected by it.

Both Baig and Ahmad drew their arguments from an essential feature of democracy—consent. The political and moral legitimacy of any state and its government in a democratic set-up is essentially derived from the consent of the people it governs. This consent has to be reflected in every activity—either in the form of a policy or in the form of a programme—of the state. A state will remain legitimate as long as it stands for realising the interests of the governed. Consequently, it loses its legitimacy the moment its activities contravene the interests of its people or when it attempts to impose its "will" upon its "unwilling" populace. In accordance with this foremost democratic principle, what Baig and Ahmad are asking the state is simple.

If it wants to bring about a common civil code that overpowers existing personal laws, then the first and foremost thing to be done by the state would be to seek the consent of the communities that will be affected by the proposed code. In one sentence, in a democracy it goes without saying: "no consent, no UCC." We will see later how Babasaheb Ambedkar, one of the framers of the Article in question was actually in agreement with this argumentation of the Muslim members.

The Constituent Assembly during one of the debates. | Photo Credit: THE HINDU PHOTO ARCHIVES

Another member to argue against the UCC on the grounds of democracy was B. Pocker Sahib Bahadur. He was elected to the Constituent Assembly from Madras on the Muslim League ticket. Calling the proposed provision as "tyrannous", he questioned the intention of the framers of the Article. "By one stroke of the pen", the framers sought to trample all those customs and traditions practised by so many communities for centuries. "What is the purpose served by the uniformity," Pocker lamented, "except to murder the consciences of the people".

Continuing his argument, Pocker pointed out how different communities follow different systems of laws in Indian society. We encounter these differences not just among and between various communities. The prevalence of Mitakshara and Dayabhaga among Hindus tells us that even within the same community different systems of laws are being followed. If this is so, then, Pocker wondered, "which particular law, of which community" would be taken as the standard for a new civil code?

Pocker seemed to be determined to leave no stone unturned. Towards justifying his position, he sought to deploy the idea of democracy as the final arrow in his quiver. Terming the UCC as a matter of a majority-minority question in a democratic framework, Pocker asks the Assembly hypothetically whether it would agree even if a majority of its members were to support such a tyrannous measure. "If the framers of this article say that even the majority community is uniform in support of this... I say, it has to be condemned and it ought not to be allowed, because, in a democracy, as I take it, it is the duty of the majority to secure the sacred right of every minority." What is further, if the majority in a democracy uses its brute force to violate the rights of minorities, such a system, according to Pocker, cannot be a democracy, but tyranny: "It is a misnomer to call it a democracy if the majority rides roughshod over the rights of the minorities. It is not democracy at all; it is tyranny."

Naziruddin Ahmad built an interesting argument around the draft Article 19 (now Article 25) on the right to religious freedom discussed by the Assembly a while ago. The first part of the draft Article 19 reads, "Subject to public order, morality and health and to the other provisions of this Part, all persons are equally entitled to freedom of conscience and the right freely to profess, practice and propagate religion." Ahmad maintained that he was aware that all is not well with all the religious practices; and that there are so many pernicious practices which would accompany religious practices.

No malicious practice, Ahmad was adamant, can be part of any religious system and such practices must be controlled; that can be done effectively by using the restrictions already available in clause 1 of draft Article 19—public order, morality, and health.

Ahmad also pointed to how Article 35 clashes with Article 19. While Article 19 protects individuals from any arbitrary state action, a provision on UCC sets out to undo what has been given in that Article. For instance, the provision on UCC, Ahmad explains, gives to the state "some amount of latitude", which, in turn, may enable the state to ignore the right to religious freedom. That being said, he did realise that unlike Article 19, which is justiciable in a court of law, the Article on UCC, one of the Directive Principles of State Policy (DPSP), is placed in the non-justiciable part of the Constitution.

Yet, he is apprehensive of the provision on UCC; for "It recommends to the State certain things and therefore it gives a right to the State." That is to say, under the draft Article 35, any state would be justified to interfere with the settled laws of different communities at once. An unrestrained power to the state on UCC would certainly lead to a considerable amount of misunderstanding and bitterness among all those countless sections of the country. Therefore, Ahmad cautioned that any state's "interference with these matters should be gradual and must progress with the advance of time".

Further, Ahmad firmly maintained that people are not yet ready for any sort of uniform laws. Therefore, "It will be difficult at this stage of our society to ask the people to give up their ideas of marriage" and other related issues associated with religious injunctions. In the near future, Ahmad was hopeful, "a stage would come when the civil law would be uniform". Until such a stage, Ahmed pleads the Assembly that it should proceed on UCC "not in haste but with caution, with experience, with statesmanship and with sympathy".

Highlights

> The Constituent Assembly of India debated the inclusion of a Uniform Civil Code (UCC) in the Constitution in 1948.
>
> Proponents argued the UCC would unify the country and eliminate discrimination, while opponents, particularly Muslim members, felt it would infringe on their religious freedom and minority rights.
>
> B.R. Ambedkar, chairman of the drafting committee, acknowledged minority concerns and suggested a gradual approach where minorities could opt into the UCC voluntarily.

Acknowledging concerns and finding common ground

The arguments of Muslim members were met with equally powerful arguments by the proponents of the UCC. Three members to join the debate were K.M. Munshi, Alladi Krishnaswamy Ayyar, and Dr B.R. Ambedkar. For the purpose of this article, I shall confine myself to the arguments of Munshi and Ambedkar here.

Munshi, who was elected to the Constituent Assembly from the Bombay constituency on the Congress ticket, took strong objections to the arguments forwarded by the opponents of the UCC. He began his argument by noting the two main objections placed by the opponents of the provision: first, the provision infringes Article 19, the fundamental right to religious freedom; and second, it is tyrannous to the minority. Taking up the first objection, Munshi cited Clauses 2(a) and (b) of Article 19, which reads, “Nothing in this article shall affect the operation of any existing law or preclude the State from making any law – (a) Regulating or restricting any economic, financial, political or other secular activity which may be associated with religious practice; (b) For social welfare and reform or for throwing open Hindu religious institutions of a public character to any class or section of Hindus.”

Munshi reminded the Assembly that it had already accepted Article 19. This meant that the Assembly had agreed upon the principle that Parliament is at liberty to make laws on any religious practice followed so far if such practice covers a secular activity or falls within the field of social reform or social welfare without infringing the fundamental right to religious freedom. This means Parliament, in principle, has every right to enact a common civil code that covers all the secular activities of all communities, including minorities.

To put this in Munshi's words: "The whole object of this article is that as and when the Parliament thinks proper or rather when the majority in the Parliament thinks proper an attempt may be made to unify the personal law of the country." Perhaps, what Munshi said is legally correct. But this is what the Muslim members who had spoken earlier against the UCC were afraid of. In the name of majoritarian support, the clauses of this Article and such other Articles will be used to trample the rights of minorities.

"While Muslim members opposed UCC in the name of a secular state, which allows each religious community to follow its respective religious practices, K.M. Munshi sought support of all the communities in favour of a UCC in order to engender secularism in the country."

Taking up the second ground of objection that a civil code would be tyrannical to minorities, Munshi advanced several points against it. First, taking the example of Turkey and Egypt, where no minority is permitted to have its own personal law, Munshi argued, "Nowhere in advanced Muslim countries the personal law of each minority has been recognised as so sacrosanct as to prevent the enactment of a civil code." He also informed the Assembly of how countries in Europe follow a certain civil code and how people from every nook and corner of the world who go there have to submit to that code. Such submission, Munshi emphasised "is not felt to be tyrannical to the minority".

Turning his head towards home turf, Munshi sought to jog the Assembly's memory on how the two Muslim communities, the Khojas and Cutchi Memons, vehemently objected to the Shariat Act during the British regime. Despite converting to Islam these communities follow certain Hindu customs and they did not want to conform to the Shariat Law. However, owing to the pressure put on the British government by certain Muslim members who felt that Shariat law should be enforced upon the whole Muslim community, the Khojas and Cutchi Memons, according to Munshi, had to submit to the Shariat Law most reluctantly.

Continuing the discussion, Munshi maintained that the main object of bringing a UCC is to consolidate the whole country as a community. Therefore, one should "take into consideration the benefit which may accrue to the whole community and not to the customs of a part of it". Such consolidation is possible only when people divorce or separate religion from personal laws. One could clearly see that unlike the Muslim members above, Munshi, in asking communities to divorce religion from personal law, does not think that marriage, inheritance and succession, and other related matters are part and parcel of the sacred domain.

In his opinion, they fall under the social relations and so the secular domain. A further point of difference between Muslim members and Munshi's position should also be noted here. While Muslim members opposed UCC in the name of a secular state, which allows each religious community to follow its respective religious practices, Munshi sought support of all the communities in favour of a UCC in order to engender secularism in the country. "The point however is this, whether we are going to consolidate and unify our personal laws in such a way that the way of life of the whole country may in course of time be unified and secular." Clearly, both parties seem to have a divergent understanding on the idea of secularism.

As a way of bringing strength to his arguments, Munshi pointed out that on account of the proposed provision it is not just the Muslim community that would be affected, the Hindu community too would be at a disadvantageous position. Hindus all over India, Munshi maintained, do not follow one law. They have separate laws for inheritance, succession, and other related matters. For instance, while the law of Mayukha is applicable in one part of India, the law of Mithakshara is in other parts, and in Bengal, it is the law of Dayabhaga.

All these laws are sacrosanct to their practitioners and the people do not want them to be touched. Munshi asked the Assembly, especially the Muslim members, whether these piecemeal laws should be allowed simply because they will be affected by the personal law of the country. He also opined that if demands of the practitioners of personal laws were to be entertained, then there was no way that one could eliminate discrimination from Indian society. Munshi buttressed his claim by pointing to the discrimination against women in Hindu society.

He claimed that Hindu law permits any amount of discrimination against women and if people were to argue that such discrimination is part of Hindu religion, then no Parliament can make even a single law that would elevate the position of Hindu women to that of men. Here, Munshi was making a highly valid and valuable point. However, one need not have a Uniform Civil Code to eliminate discrimination against women in Hindu society or similar issues in other religious communities in our society.

The full text of the new Constitution of the Indian Republic as passed by the Constituent Assembly of India is signed by Dr Rajendra Prasad, the President of the Constituent Assembly of India at the Constituent Assembly Hall in New Delhi, on November 29, 1949. | Photo Credit: THE HINDU PHOTO ARCHIVES

As argued by Naziruddin Ahmad, Clauses 1 and 2 of draft Article 19 in the name of public order, morality, health, social welfare, and social reform empower the state to take any necessary action to eliminate any forms of injustices and discrimination against anyone in society.

Munshi placed another argument around the idea of national unity. He thought that India's first and foremost problem was the lack of national unity. That could be fostered by restricting religion to spheres that legitimately belong to religion; and the rest of life, according to Munshi, "must be regulated, unified and modified in such a manner that we may evolve, as early as possible, a strong and consolidated nation". For some strange

reason, Munshi seemed to harbour some prejudice against the Muslim population, and that prejudice is reflected in his assumption of them having an isolationist outlook on life.

Munshi was unapologetic when he maintained: "I want my Muslim friends to realise this—that the sooner we forget this isolationist outlook on life, it will be better for the country." Munshi concluded his arguments by going back to his starting point, the argument by its opponents that the proposed provision is tyrannous to the minority. The provision is tyrannous not for the minority, Munshi claimed, but for the majority: "I hope our friends will not feel that this is an attempt to exercise tyranny over a minority; it is much more tyrannous to the majority."

The role of Ambedkar

Ambedkar, the Chairman of the Drafting Committee of the Constitution, the last person to speak on the issue, began by informing the Assembly that since his colleagues Munshi and Alladi, who were also members of the Drafting Committee, had dealt sufficiently with the merits of the question whether India should have a civil code or not, he did not want to speak on it further.

However, he expressed his wish to make two observations. First, he disagreed with the Muslim members' claim that the Muslim personal law was immutable and uniform throughout India. He justified his position by informing the Assembly that the Muslims of the North-West Frontier Province were not subjected to Shariat Law. Until 1935 they followed the Hindu law in the matter of succession. It was in 1939, with the initiation of the Central Legislature, that the application of the Hindu Law to Muslims of this province was abrogated and Shariat Law began to be applied. Ambedkar also mentioned that in various parts of the United Provinces, the Central Provinces, and Bombay, Muslims to a great extent were governed by Hindu law in the matter of succession.

But this had to change with the intervention of the Legislature. In 1937, to bring uniformity with other Muslims that observed Shariat Law, Ambedkar pointed out, the Legislature enacted a law applying the Shariat Law to the rest of India. Yet, that does not mean that every section of the Muslim community has been following the Shariat Law. Ambedkar, informed by C. Karunakara Menon (the second Editor of *The Hindu*), observed that both Hindus and Muslims in North Malabar follow the Marumakkathayam Law,

which is a matriarchal form of law. Through these examples of the common law between Hindus and Muslims, Ambedkar reprimanded the Muslim members: “It is therefore no use making a categorical statement that the Muslim law has been an immutable law which they have been following from ancient times.”

Taking up Hussain Imam’s misgiving that “whether it was possible and desirable to have a uniform code of laws for a country so vast as this…”, Ambedkar expressed his amazement at the very question itself. Calling it a “misplaced” one, he claimed that almost every aspect of human relationships in this country was being covered by a uniform code of laws.

To buttress his claim, Ambedkar mentioned a uniform and complete Criminal Code, which is contained in the Penal Code and the Criminal Procedure Code, the Law of Transfer of Property, which deals with property relations, the Negotiable Instruments Act, and so on. All these enactments are operating throughout the country. The fact of the existence of these enactments, Ambedkar argues, “prove that this country has practically a Civil Code, uniform in its content and applicable to the whole of the country”.

That being said, one sphere, which Ambedkar characterised as the “little corner”, that the civil law had not been able to enter was that of marriage and succession. It was the “intention” and “desire” of all those people seeking to have Article 35 as part of the Constitution, Ambedkar stated ardently, “to bring about that change”. Sooner or later that change was bound to happen and, therefore, Ambedkar opined, it was futile to ask the question whether a common code was possible, because the framers of the provision “have already done it”.

As a final point, Ambedkar turned towards the Muslim members and conveyed to them that he recognised their feelings. However, he thought that they were reading too much into the provision; for Article 35 “merely proposes that the State shall endeavour to secure a civil code for the citizens of the country. It does not say that after the Code is framed the State shall enforce it upon all citizens merely because they are citizens.” By referring to the proposed Article and clarifying the difference between the terms “endeavour” and “enforce”, Ambedkar was making a crucial departure from the earlier speakers, who spoke in favour of the UCC, particularly with Munshi, who categorically

argued that "when the Parliament thinks proper or rather when the majority in the Parliament thinks proper an attempt may be made to unify the personal law of the country."

Also Read | Uniform Civil Code Bill in Parliament a step forward for Sangh Parivar agenda

Unlike Munshi, Ambedkar was not at all referring to the will of the majority. He, on the other hand, was referring to the will of the minority. In this sense, he wanted Parliament to give the minorities the freedom to choose either to embrace a UCC or remain under their religious personal law.

To state this in the words of Ambedkar: "It is perfectly possible that the future Parliament may make a provision by way of making a beginning that the Code shall apply only to those who make a declaration that they are prepared to be bound by it, so that in the initial stage the application of the Code may be purely voluntary."

Ambedkar informed the Assembly that this method of allowing the minorities to exercise their choice was not a novel method. At the time of the application of the Shariat Act of 1937 to territories other than the North-West Frontier Province, the law categorically stated that the proposed Shariat Act shall be applied to those Muslims who wished that they should be bound by the Shariat Act. Such people were to make a declaration before an officer of the state that they were willing to be bound by the Shariat Law and following such declaration, the Shariat law would bind them and their successors.

As this kind of precedence was already in place, and if in the future Parliament decided to attempt to apply a common civil code, Ambedkar appeared to guarantee Muslims that it shall be in a similar manner to this case, wherein Muslims were completely at freedom to decide either to stay with the Shariat Law or bound by a UCC. With such freedom to decide, Ambedkar was confident that "the fear which my friends [Muslims members] have expressed here will be altogether nullified."[2]

To conclude, although at the end of the debate the proposed provision on the UCC in its original form was accepted and added to the Constitution, the manner in which the debate on the UCC was conducted in the Constituent Assembly should help us to

broaden our perspectives. Despite their committed stances about the UCC, both proponents and opponents ensured that they were not carried away by their passions.

Indeed, they argued their respective positions either in favour of or against the provision around the principles of democracy and secular state. Particularly, the points made by Mahboob Ali Baig, Naziruddin Ahmad, and Ambedkar on the importance of securing the consent of the affected people, and the responsibility of the majority in facilitating the will of the minority offer great lessons to current politicians and enthusiasts of democracy.

References

[1]*https://www.constitutionofindia.net/debates/23-nov-1948/ (Accessed on 01 Feb 2024. Until and unless mentioned specifically all the references cited in this essay on Constituent Assembly are drawn from here on this day).*

[2] *Matter in the brackets is supplied.*

Sambaiah Gundimeda is the author of Dalit Politics in Contemporary India. *He is an Associate Professor in the School of Interwoven Arts and Sciences (SIAS) at Krea University, Sri City, Andhra Pradesh.*

Related stories

Editor's Note: Let's not use Uniform Civil Code to wipe out differences

Empowerment or exploitation? How UCC will impact women's rights in India

'A misconception is that the UCC will interfere with the Shariat': Atif Rasheed

Uniform Civil Code: Tribal communities fear erosion of customary laws, cultural heritage