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THE UNIFORM CIVIL CODE DEBATE IN INDIA: Conceptual Predicaments, Historical Legitimacy, and Challenges to Pluralism

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THE UNIFORM CIVIL CODE DEBATE IN INDIA: Conceptual Predicaments, Historical Legitimacy, and Challenges to Pluralism

Chanchal Kumar Singh [*] ***& Mritunjay Kumar*** [**]

[Abstract: *The issue of Uniform Civil Code (UCC) is an old one. In a globalised world it raises the question of resolving conflicts and antagonisms between the law as a product of social science knowledge (singularity) and the law as celebrations of 'life as it is' (plurality). This is a universal predicaments of lawyers in the pursuit of finding a solution. Legal codes act as the mode of mediation between the two meanings of law. The law as a singularity, therefore, is negation of laws. A code is a closed system of rules and infuses character of transcendence to law with a kind of infinite social potential! The quest for UCC has been one of the main schema of reform, amidst the plurality of cultural values, for the lawyers, leaders, and the academicians. In a globalised world, the uniformalization of personal laws raises the question of supplanting the living plurality of life worlds shared by communities since antiquity. The life of antagonism with respect to UCC is visible in the dichotomy of fact and value. This study critically investigates, therefore, the relationship between plurality and uniformity in terms of conceptual understanding. Accordingly, the paper attempts an in-depth analysis of certain core categories traceable in the Constitution and ideas of unity, uniformity, democracy, secularism, and pluralism, etc. The study concludes that there is definite reproach and admonition emanating from history, sociology, culture, and the aspects of modernity itself, which are essential to take into account if any project of reform is to be legitimate and successful. There is inherent danger of stupendous arrogation and infinite regression in the proposals of law codes such as UCC. Accordingly, we pose and examine the questions as to what extent, a reform based on codification, can be sustainable with reference to the diversities of social orders facilitated by the pluralities of personal laws. Whether any change that may qualify in law, on the basis of the Constitution, must only be incremental in nature? Whether and what an agenda of reform can recreate?*]

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I

Introduction

Reformation and restoration have been the two competing imaginations that shaped formation of the Indian nation during its freedom movement.[1] The history of Constitution making, post-colonial law, and democratic politics is a complex accounts of this dialectics.[2] The post-colonial societies are the products of the intermediation and management of the two opposite quests, constantly cancelling out and remaking each-other. Imaginations of reform and restoration exist in a dialectical tension to the extent of mutual negation and recreation. Life of law on the one hand and culture and morals on the other hand, all that contemporary India has acclimatized, in the Seventy five years of independence, are outcomes of such oppositions.[3] The accommodative accomplishment of reform with traditions may be discerned from an epistemology of law and methods that shape the nature, character, and spirit of this struggle between the reformation for future and the restoration from the past.[4] The antagonism and intermediation are subtly but pervasively inscribed in the texts of the Constitution which is further compounded with the march of logic of democratic politics.

Contemporary Indian politics is deeply polarized on the question of dwelling on a golden past or imagining a utopian future of progressiveness. The legal-political scenarios portend to pursue both the agenda of reformation in the form of proposal of *Uniform Civil Code* (UCC) for all cultural and religious groups in the matter of personal law, One Nation One Election, a new National Education Policy, restoration of Indian Traditions of Knowledge (ITK) as well as law and cultural practices of ancient India. The urge for reform, for instance the quest for UCC and

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1 *See generally,* Sunil Khilnani, THE IDEA OF INDIA (1997); Abhijit Sengupta, THE QUEEN OF ALL NATIONS: A BRIEF VIEW OF MODERN INDIA FOR YOUNG INDIANS 1857 TO 2020 (2023); Ramachandra Guha , MAKERS OF MODERN INDIA (2013); Bipan Chandra, THE MAKING OF MODERN INDIA: FROM MARX TO GANDHI (2018); Sumit Sarkar, MODERN INDIA (2014); V.D. Savarkar, ESSENTIALS OF HINDUTVA (1921); Irfan Habib, NATIONALISM IN INDIA: PAST AND PRESENT (2023), Arthur. Berriedale Keith, A CONSTITUTIONAL HISTORY OF INDIA, 1600-1935 (1936); B.R. Ambedkar, The Annihilation of Caste (1936); Louis Doumont, HOMO HIERARCHICUS: CASTE SYSTEM AND ITS IMPLICATIONS (1981).

2 *See generally,* Granville Austin, THE INDIAN CONSTITUTION CORNERSTONE OF A NATION (1966); Gerald James Larson, RELIGION AND PERSONAL LAW IN SECULAR INDIA: A CALL TO JUDGMENT (2001).

3 Ramachandra Guha , INDIA AFTER GANDHI: A HISTORY (3rd edn., 2023); *See also*, Upendra Baxi, TOWARDS A SOCIOLOGY OF INDIAN LAW (1985); Marc Galanter, LAW AND SOCIETY IN MODERN INDIA (Rajeev Dhavan *ed.*, 1989); J.D.M. Derrett, RELIGION, LAW AND THE STATE IN INDIA (1968);

4 Marc Galanter, *Id.*

One Nation One Election, may be seen to be the only escape route from the predicaments of personal laws or the vices that beset the democratic polity of India.

In modern Europe, for example in Germany, the antagonism between the old Roman law and proposed German Code, in the late eighteenth and early nineteenth centuries, reshaped the modern German law and legal system.[5] The modern common law of the United Kingdom is still developing out of the said dialectics.[6] On the other hand, for American society, its history and legal system carry little aspiration for any kind of restoration of the past, rather it has adopted a future based reform approach and has witnessed many transformative changes in its post-colonial life. Transformation, in America, is premised on two distinct but interrelated facts and suppositions: that the possibilities of restoration are non-existent in view of the absence of long-established culture and 'history of people'. Secondly, progressiveness presupposes movement towards the future by developing philosophical categories and new conceptual entities. The resultant is an omnipotent technocracy which transcends the boundaries of all kinds of knowledge: natural and social sciences, arts, law, and religion. Thus, the American law, though belonging to the family of the common law, has the essential character of futuristic imaginations.[7] And the American scholars claim that they have developed the ultimate universal postulates, precepts, and categories for all: arts, sciences, and the humanities.[8]

East Asian countries have walked cautiously and slowly.[9] Many South Asian, African, and Arabian societies have presaged uncritical restoration over reform leading to catastrophic scenarios for themselves and for others globally.[10]

The very genesis of reform signifies certain forgone conclusions: that the existing system or the thing is defective and suffers from *vices*, and it is necessary to prevent decadence. That the vices can be removed and decadence must be stopped by the application of the new knowledge and technologies developed by sciences.

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[5] *See,* Luis Kutner, *Legal Philosophers, Savigny: German Lawgiver* 55 MARQUETTE LAW REVIEW 280 (1972); A.J. Wulf, *Insights from the German Codification Debate between Thibaut and Savigny for a Uniform Indian Civil Code* 60 (2) JILI 121 (2018).

[6] Some of the salient feature are, absence of Code, unwritten Constitution, institution of monarch etc.

[7] *See generally,* Alduos Huxley, THE BRAVE NEW WORLD (1932).

[8] Roscoe Pound, THE SPIRIT OF THE COMMON LAW (1921); John Rawls, A THEORY OF JUSTICE (1999); John Rawls, POLITICAL LIBERALISM (1993); David Lempert, *Foreword: The Death of Social Sciences in an Era of Multicultural Corporatism ('Neo-Liberalism'): With Efforts at Resuscitation* 8 (1) CATALYST: A SOCIAL JUSTICE FORUM (2018).

[9] Masaji Chiba, ASIAN INDIGENOUS LAW: AN INTERACTION WITH RECEIVED LAW Chap. 1 (1986).

[10] The working of the post-war constitutions and their modern history in Pakistan, Afghanistan, Bangladesh, Iran, and several African countries furnish valuable insights.

Additionally, the project of futuristic reforms are also rooted in the discovery about the law of nature and the 'nature' that is further subjugated and commodified. Same attitude is adopted in the matter of social life of human beings. Thus, be it personal behaviour, lifestyle, education, economy, or the natural resources, all necessarily are the subject matters of reforms. The same is applicable to legal reform, whereas an imaginative future of society is assumed as a goal to achieve without developing any deeper understanding of the history and culture.

The early post-colonial project of reform in India was envisioned dispiritedly and has been pursued dejectedly with respect to the agenda of revival of the indigenous law and justice administration, especially the revival ghost was rejected without paying any due attention.[11] The modern masters of the Indian republic failed to appreciate the immediate colonial history of British India. The transformation of Indian laws in the colonial period may be traced from the enactment of the Regulating Act, 1773, and establishment of the Supreme Court at Calcutta. This first modern legislation can be seen as the product of political necessity and economic contingency of the British Parliament. The phase of codification of criminal laws, property-business laws, and the laws relating to mining and natural resources, such as forest, coal, and other petroleum products, etc., in the mid-19th Century were logical culmination of the political necessity. It is important to note that British policies relating to education and transformation of its rule into mercantilism took place during the same period. The reform in education was guided by a Baconian imagination to master nature and control every change as per human needs and desires. Social sciences were invented as new tools and applied to pursue the agenda of re-form as anthropocentric age demanded from the human sciences. The crowned knowledge of human sciences was propagated with religiosity to create a mythical character of science, a beacon of new age and a tool of making everything new at the cost of destroying the roots on which the human society stands. Jurisprudence couldn't escape from the reformative zeal. The founders of legal positivism embraced scientific techniques to establish a new jurisprudence of interests and welfare. The new jurisprudence was founded on the suspicion of history and traditional wisdom. The antinomy of revival and futuristic reformation, a dialectical cycle of past and future, has remained the formal structure of a new jurisprudence, which functions through the epistemology of Western social sciences and their rationality of creating new categories, therefore, new realities.

In this paper, we argue that the present agenda of reforms in personal law is unaware of itself. The constitutional imaginations for future social order and citizens' plural life do not ask to codify once of all the personal laws of all Indians.

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[11] Marc Galanter, *The Aborted Restoration of 'Indigenous' Law in India* 14 (1) COMPARATIVE STUDIES IN SOCIETY AND HISTORY 52 (1972).

The current debate on UCC is nothing but superficially rhetorical and ill-informed in the sense of the historical and conceptual understanding. The quest of UCC in personal law, as advocated by opinionated discourses, is nothing but a desire of an idealist to reach at a perfect Elysium, devoid of any sorrow, pain, or conflict. Such a utopian dream is not a new phenomenon in the history of legal systems around the world.

The debate signifies the phenomenon of irreversible loss of the social imagination that goes unfelt with the accompanying loss of public memory *vis-a-vis* historical and cultural roots of India, which have been plurality sensitive since ancient ages. Views asserted either for or against the proposal of the UCC epitomize the deeper problem with the knowledge achievements of social science represented in formal legal theories. Jacques Derrida has warned that understanding the true nature of a thing or rather deconstruction requires to be inside and not outside the structure of the language.[12] Therefore, any abstract arguments without understanding the inner code of Indian cultures and history would be futile for advancing a constructive solution for the contemporary challenges in personal law. Further, statesmen, social scientists, and legal scholars in India are, it appears, in the grip of *doxa,* which Pierre Bourdieu conceptualized as misrecognition of forms of social arbitrariness that engenders the unformulated.[13]

The Central and some of the State Governments have taken keen interest in revival of the discourse on UCC. The 22nd Law Commission of India solicited opinions from the general public and recognized religious organizations about the formulation of UCC. There is an intense debate amongst partisan politicians, religious stakeholders, and legal scholars without raising the fundamental questions associated with it. The discourse, however, lacks a systematic exploration of the existing legal norms and cultural values. The contemporary debate is premised on the insufficient and inchoate understanding of social structure and legal theories.

A systematic treatment of the subject requires examination of the very ideas of codes and codification and their true history in the land where these categories are believed to have originated and spread throughout the world with the modern age. The general beliefs of people, including elites, about the formulation of UCC, in India, are premised on a utopian future whose correlation with Indian history and culture is required to be understood. The *second* section of the paper, therefore, is devoted to unravelling the genealogy of the concept and institution of code in the Eurocentric legal systems. Section *three* explores the interface of the modern social sciences in popularisation and legitimacy of law as codes given by the official apparatuses of state. A code, in a legal system, is a closed system of rules. Legal codes are meant for bringing 'exclusivity' to law. Certainty, systematisation, and

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[12] Jacques Derrida, OF GRAMMATOLOGY 24 (Gayatri Chakravorty Spivak *trans.*, 1976, 1997).

[13] Pierre Bourdieu, *OUTLINE OF A THEORY OF PRACTICE* 159 (Reichard Nice *trans.*, 1972).

simplicity are its hallmarks. Law as the product of human will in top-down hierarchical frame is best suggested by legal sciences which have imitated the *techne* of social sciences. Reproach and admonition of history, sociology, psychology, and economics are inferred from the provisions of Part III and Part IV of the Constitution for progressive projects of legal reform on the agenda of formal legal categories. Rationality of modernity has become the compulsive forces for the legislatures and courts' enchantments with the idea of codes. Section *four* investigates the relationship of unity and uniformity with reference to the ontology of form, and to what extent the modern idea of uniformity resonates with the Pre-Socratic and Greek philosophy? Section *five* explores the idea of pluralism in context of the Indian Constitution and the constitutional aspirations to bring social reforms. Lastly, section *six* of the essay concludes the analysis with appropriate questions and suggestions with reference to conceptualizing a UCC for personal laws in India.

II

Code, Codification, and Colonialism

'Code', in a more precise sense of what we call 'legal code', is traced back to ancient Romans. It comes from the Latin *codex* which means a set of wooden tablets used for writing and preserving scholarly ideas. Associated terms are 'law' and 'legislation'. The word 'legislation' originated from the Latin expression, '*leges'*,and the plural of '*Lex'*. It connotes rules instituted by one of the popular assemblies, consisting of the dominant class of *Populus,* as distinct from *Plebs*, in ancient Rome: the two major segments of the citizenry. Rules approved by the assembly of *plebeians* were called *Plebicita.* It was only after a few centuries that the distinction between two laws were abolished by the authority of the emperor and they became law of the land as part of Roman Codes. The word 'law' comes to English from the Old Norwegian language '*Lag or Lagu (plural)'*, which means something laid down or placed as fixed.

An interesting consequences of the tradition of codification in Rome was that 'the knowledge of them as well as the right of interpreting the Twelve Tables, was for nearly a century confined to the college of priests (*collegium pontificum*), as a privilege or prerogative of their order and it was deemed a mystery or craft not to be communicated to the people'.[14] The legacy which is strengthened in modern centuries with the unique character of development of the common law. Thus, there is debate, in India, on access to justice preceded by the problem of access to law.[15]

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[14] William Forsyth, HISTORY OF LAWYERS: ANCIENT AND MODERN Chap-III (1875).

[15] *See,* Chanchal Kumar Singh *et. al., Decolonising the Language of Law,* INDIA LEGAL 28 (Jan., 16, 2023).

One of the greatest analytical positivists, Jeremy Bentham, laboured hard to emancipate positive law from the 'lawyer's craft'.[16]

It would be interesting to note that the celebrated Roman codes were an assemblage of rules emanating from diverse sources. In addition to *leges* and *plebicita,* it included other kinds of laws: *Responsa Prudentum* (*Jus Civile*), *Jus Honorarium, Legis Actiones, Consuectudo, or custom.*[17] The body of *jus civile* consisted of interpretations of written laws by persons who had attained high qualifications by education. *Jus Honorarium* consisted of edicts or executive orders issued by Roman *Praetors*. The object of such orders was to ease the strict rules of *jus civile* by tempering it with equity and principles of justice and supplied for the deficiencies of existing law. The exclusivity of propriety of the business of law continued for quite some centuries. 'The *consuetudines* or *customs* were the large body of unwritten law not to be found in statutes or edicts. It depended upon immemorial usage which the Romans, like old British, gave a binding and legal effect'.[18] Thus, in no sense the Roman codes represented homogeneous sources and set of rules or principles. It is discernible that Roman codes starting with the Twelve Table were not premised on law givers, *i.e.*, the Emperor. Neither law was a monopolistic business of an exclusive set of people in the community. *Plebicita* and *Consuctudo* formed major part of the codes.[19]

Modern Codification

During the dark and early middle ages, the tradition of Roman Code was lost in Europe. The religious and political scenario of the middle ages did not augur well for the development of civil codes. It is proved from the modern history of Europe that the so-called great legal codes are born under a specific, stable, and strong political order. Strong political order is cognate to that of autarchy and dictatorial legal systems. Prospect of any such order was shattered by the rise of Christianity and order of papacy which itself was an extreme manifestation of the latter. The absence of a powerful political unit allowed local laws and customary practices to

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[16] Bentham often referred to this as 'lawyer craft', and continually returns to a comparison between the mysteries of the priest and lawyer craft. he artifices of lawyer craft have been not less numerous, not less successful, not less wicked. *First* there was lawyer's language: jargon and jargonization. *Secondly*, it was also an instrument of depredation, since its complexities enormously multiplied lawyers' business and lawyers' fees. *Thirdly*, it created an atmosphere of awe around the lawyer, which intimidated the critic and fostered the impression that human faculties are not really equal to the task of law reform. *See, H.L.A. Hart, H.L.A. Hart, Bentham and the Demystification of the Law,* 36 *MOD. L. REV.* 8-9 (1973).

[17] *Id*., at 14.

[18] *Id*.

[19] *Id*.

flourish. The state of law in continental Europe is well summarised in the following passage:

> [THE] situation on the continent in the eighteenth century was rather similar to that in England. In most jurisdictions the basis of the legal system was custom, which, together with Roman law, constituted the law of the country. The northern part of France could-be divided- into 60 jurisdictions, each of which had its own customs called *coutume generale*. Local customs, *coutume locale*, were applicable to smaller areas, their number amounting to 300. Thus, the situation seemed to be not less intricate than in England, where customs were the basis of the judge-made law,' although it may be asserted that before receiving judicial sanction customs in England could be considered as a basis for human behaviour and that the role of the judges in the formation of common law was more important than repeated acts of the population.[20]

The Napoleonic code of 1804 is regarded to be the most famous code in the modern history of Europe. However, the code of 1804 was preceded by several other lesser known codes. For example, the notable one is the Code of Prussian Emperor, Frederick the Great, at the end of the eighteenth century, promulgated in 1794. This code was, however, not based on grand theories, which were to be born later. It codified the local customs and incorporated some of the old Roman legal principles.

It is important to note that a legal system is not based entirely on a strict and closed system of codes. In fact, the judicial interpretation is based on the induction and deduction by judges in the common law system. In the absence of empirical meta-principles and theories, judges are free and bound to give effect to the social practices and obliged to interpret them. They are, effectively, law makers. The French and Prussian system, in the Middle Ages, witnessed exactly the same.

In the early middle ages, the discovery of the ancient Justinian Code at Bologna (Italy) attracted scholars from all over Europe. It is said that in the eleventh century, after the discovery of the Code of Justinian, (*Codex Justinianus* or *Corpus Juris Civilis*), Bologna hosted more than 10000 scholars from the different legal systems of Europe.[21] The historical and comparative study of the newly discovered Code, it is believed, helped Europe usher into the age of enlightenment and modernity. The major legal systems of the continental Europe and the United Kingdoms were rebuilt thereafter.[22]

In the seventeenth century, revolution of sciences by René Descartes established that world and all things that exist therein can be known. The Cartesian paradigm of the

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[20] Wencelas J. Wagner, *Codification of Law in Europe and the Codification Movement in the Middle of the Nineteenth Century in the United States*, ARTICLES BY MAURER FACULTY no. 2324, 339-340 (1953).

[21] Frederick Pollock & F.W. Maitland, THE HISTORY OF ENGLISH LAW BEFORE EDWARD I (1898).

[22] *See*, Martin Laughlin, FOUNDATIONS OF PUBLIC LAW 1-17 (2010).

world founded the path of human rationality. Human knowledge of the world can be rationally utilised for understanding and constructing a rational system in which a better social order can be created discarding the faith or belief based previous social orders. He can be traced as the father of modern philosophy when he declares, 'I am, I exist, is necessarily true each time that I pronounce it, or that I mentally conceive it.'[23] The beginning of the new social science is also traceable which produced the modern European law.

Modern Codification: Rousseau & Montesquieu

The social contract theorists simultaneously exhibited the importance of individuality and individual will. Their philosophy required equal and identical treatment of all individuals and their wills which gave rise to the problem of 'political obligation' in the modern sense. They expounded and exaggerated the importance and dignity of written law. For example, Rousseau thought that a statute is the expression of the general will dealing with a general problem, and it has a limitless power to command and should obtain an unconditional and unlimited obedience. One of the great supporters and advocates of codification of law, Jeremy Bentham, in that sense, was an unconscious follower of Rousseau's idea of general will.

France witnessed development of some enduring theories/concepts of political science in the eighteenth century. Jean Bodin, the founder of the modern concept of sovereignty, believed that the order of society was established by an absolute prince (sovereign). A definite sense of modernity, reason and the worth of the new individual are visible in his writings. But, the most important theory was 'separation of power' propounded by the Great Montesquieu. The crucial consequences of which was that the role of the courts is not to make law. The law is given in the law books. The doctrine enunciated and settled the principle that the courts are to apply the law and not to make it. This principle came to be the basis of article 5 of the French (Napoleonic) Civil Code which prohibits the judges from deciding cases by way of enunciating general principles and rules. The doctrine applied to its extreme that the lower courts, in France, are not bound by the judicial precedent of the Supreme Court even in the cases which were remanded to them.

Codification in Colonies: Bentham, Mill, and Maine

The history of world colonialism provides useful insights for understanding the contagious spread of the culture of codification throughout the globe. The term 'codification' (of laws) was, it is believed, coined by Jeremy Bentham in the early

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[23] René Descartes, MEDITATIONS ON FIRST PHILOSOPHY 1-9 (1941), *available at:* https://yale.learningu.org/download/041e9642-df02-4eed-a895-70e472df2ca4/H2665_Descartes%27%20Meditations.pdf (last visited, 28 Jan., 2023).

nineteenth century.[24] Bentham saw common law in the state of utter decadence and wanted to salvage it from the medieval parochialism, uncertainty, and irrationality. Positive law is a product of human will and, therefore, can be systematized into a rational whole on the basis of empirical principles of utilitarianism. Bentham was convinced of the need to replace the existing approach to law with a codified system. Many argue that utilitarians, led by Jeremy Bentham, supported despotic rule in colonies. British conventional utilitarians regarded that analytical potential of the English language coupled with empirical actualities manifested in principles of utility can bring rationality to law and take the place of the common law. The project of Jeremy Bentham, consisted of his draft code, *Pannomion,* which found little favour in his homeland and in other European countries. Naturally, they needed to push the project of codification and introduction of bureaucracy in colonies, where favour for such law to be implemented was an obvious choice for the colonial rulers. He legendarily declared that I will be the dead legislator and Mill will be the living executive for India.[25]

Authoritarianism and enlightened despotism derived from Hobbes was an essential character of Bentham's philosophy. His conception of political power sprung from leviathan. When Bentham turned to representative democracy, its character was bound to remain the same. For Bentham, sovereign or state was a great machine, and as with a machine, its virtue lay in speed, efficiency, economy, regularity, and uniformity.[26] He did not believe in the separation of power and was of the view that the cloud of general will can be removed by the form of command of an indivisible sovereign.

Phases of Codification in India

Written law, in the modern European sense, commenced in India with the British colonial rule. Broadly there have been three such periods. The second half of the nineteenth century can be regarded to be the first phase of codification. The laws of this phase were a product of political necessity and economic exigencies of the *Raj*.[27]

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[24] It was Jeremy Bentham who coined the word *'codification'.* The meaning he attached to codification is found in his '*General View of a Complete Code of Laws'* published in 1802. *See,* BLACK'S LAW DICTIONARY, (10th *edn.,* 2009). According to the OXFORD ENGLISH DICTIONARY, Vol. III (2nd *edn.*, 1989), Jeremy Bentham used the term in a paper titled, *Papers Relative to Codification and Public Instruction*, where he argued that 'no other than codification can bring the reform here prayed for be carried into effect.

[25] Eric Stokes, THE ENGLISH UTILITARIANS AND INDIA 68 (1959).

[26] *Id*., at 72.

[27] The British common law has had different experience in the United States. Though devoid of its own legal and cultural history, the American administration and academics transformed common law and polity to the extent that it is now known as the 'American Common Law'.

The beginning can be seen in the form of laws enacted to implement permanent settlement of land. The laws and policy were intended to create a market of land which could best serve the interest and give highest revenue to the Company Government.[28] The laws enacted in the period chiefly aimed at consolidating the control and power of the foreign government on natural and economic resources, criminal laws, property, banking, trade and business. Important legislations included: the Permanent Settlement of 1793;[29] The Indian Forest Act of 1878; The Indian Penal Code 1860; Indian Evidence Act 1872; The Code of Criminal Procedure 1898; Transfer of Property Act, 1882; Negotiable Instruments Act, 1881; Indian Contract Act, 1872; Indian Treasure Trove Act, 1878 etc., to name a few.

Charter for Codes and the Living Law

The mid twentieth century witnessed the second phase of codification and formal legislations in India. The phase is deeply connected to the emotive objectives of justice caused by nationalistic sentiments of freedom struggle that transcended all political considerations. For example, the land reform laws[30] intended to abolish the European system of market in land and system of rent in India, and to restore lands to the ownership of tillers. The adoption of the Constitution also signified a charter and mandate for codification addressed to the legislatures.[31] At the same time, numerous provisions of the Constitution preserved large part of social and individual life, outside the bounds of such charter,[32] to be the *sanctum of living law* of the people. No code or constitution can mandate to annihilate the sanctum of living law completely.

In 1950s, the proposal for reforms,[33] in the matter of personal laws of different communities, could not materialised, for the reasons that the subject matter, located by the Constitution, was beyond the ambit of the codification. Personal laws were intimately connected with the public sentiments. There are several instances of laws/codifications which have failed in appealing the masses to abide by it.

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[28] *See generally,* Ranjeet Guha, A RULE OF PROPERTY FOR BENGAL: AN ESSAY ON THE IDEA OF PERMANENT SETTLEMENT (1996).

[29] Bengal Regulation 8 of 1793 (The Bengal Decennial Settlement Regulation, 1793, *available at*:https://www.indiacode.nic.in/bitstream/123456789/15516/1/the_bengal_decennial_settlement_regulation%2C_1793.pdf (last visited, Aug., 20, 2023).

[30] *See,* N.C. Behera, LAND REFORM LEGISLATION IN INDIA (1997).

[31] *See,* Articles 13 and 246 of the Constitution of India, 1950.

[32] *See,* Articles 372, 371A-371F, Schedule V and VI to the Constitution of India, 1950.

[33] John A. Banningam, *The Hindu Code Bill* 21(17) FAR EASTERN SURVEY 173 (1952); DR. BABASAHEB WRITINGS AND SPEECHES Vol. 14, Part One, Sections I To III (Vasant Moon *ed*., 2013), *available at:* https://www.mea.gov.in/Images/attach/amb/Volume_14_01.pdf (last visited, Aug., 22, 2023).

However, it can be seen from the seventy five years history of the working of the Constitution that there are several vital aspects of social and economic life which are regulated by *norms* originating neither from codes nor conventions. Extra-constitutional agencies and an informal set of rules laid down by them, such as the Planning Commission (now abolished), Law Commission of India, etc., are some examples, which are vigorously shaping the social life of the Nation. The recent proposals to bring UCC in personal laws and one nation one election are some of the examples of a unique method of 'governmentality',[34] (*government plus rationality*) and a quirky technique tailored in a top-down approach without exploring the demand side of law rooted in the living law of a particular social order.[35] This method of 'governing' was described by Roscoe Pound as '*the rise of executive justice*'.[36] Most of these policies are developed in the requirement of political expediency without reflecting on the fundamental principles and their realization through normative procedures and constitutional institutions.

The present phase (of codification) may be regarded as a major ground for legal fertility. The Indian polity, in the last about three decades have got new laws of economic reforms. In case of criminal laws which consisted of and codified 'common law offences' developed by British courts over a long period of time, Indian dominion was the most successful laboratory for codified common law criminal rules which was replicated in other Asian and African colonies. Off late, the Union government has focused on Judicial System and Law Reforms which has witnessed (re)codification in several areas, including Labour Code, Social Security code, Wage Code, Companies Act, Insolvency Code, etc., and the proposal for three criminal laws are the latest additions. The proposal to codify all personal laws into one national UCC is following the same chain of rationality. But when it comes to personal law, the effectiveness of code abstractly conceived and imposed from above is hardly visible. These lines of arguments influenced Karl Von Savigny of Germany in opposing the German National plan of codification on the lines of French Napoleonic Codes of 1804. But the potency of codification is unquestionable when people readily own it like their own cultural fruit. However, the way codification as a technology is invented to pursue the arbitrary goal of social sciences to create new categories of future, it faces challenges with respect to acceptance by the people. The modern social science approach to law, a paradigm of abstract rationalization, is certainly into deep crisis and faces the challenge of legitimacy *vis-a-vis* a well-established social orders.

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[34] Michel Foucault, 'THE BIRTH OF BIOPOLITICS' 37 (Graham Burchell trans. 1978–79).

[35] *Cf.* The unique argument expounded by professor Upendra Baxi raising the question whether the legal system can afford to citizens '*a right to have law*? *See,* Upendra Baxi, *From Human Rights to the Right to be Human: Some Heresies* 13 (3/4) INDIA INTERNATIONAL CENTRE QUARTERLY 185-200 (1986).

[36] Roscoe Pound, 'THE SPIRIT OF THE COMMON LAW' 7 (1921).

III

Law as Triumph of Social Science

Law in the twenty-first century is rife with clashes and contradictions. The claim of the state is that the government has competence and mandate to legislate on all matters and redesign the Indian communities and innumerable tribes irrespective of the norms by which they have lived since millennia. The Constitution and the courts become contentious cites for the clash. The assertion of statist scholarship and lawyers aim towards the objectives of uniformity in law. Their mind is trained to identify law only in the uniform social behaviours. Untrained awareness of teeming congeries of communities are attached to 'practices' found in harmony. The latter do not repose in the training of modern sciences, so far as it is concerned with the idea of law, in several matters of individual and social life. The existential essence of their contentions is derived from the principles of nature that disallow uniformity: the contrast between a jungle and a cropping. Individuality, the foremost category, the product of modernity, receives, therefore, resistance from the congeries of communities. In other words, the legitimate authority of modern knowledge to control human and social life is challenged. This is the chief controversy with respect to the proposals of UCC in India engendered by the triumph of the social sciences as an *episteme* of technology.

The Greek '*Logos*' carrying the meaning of discourse or reason, or '*Lego*', which means 'I Say', or 'I Lay Down', are cognate terms to that of Latin '*Lex*'. The development of law and knowledge, in the West, has been under the overarching umbrella of political authority-king, emperor, or State. The latter has a preoccupation with the order, therefore, knowledge cannot exist outside of its political, legal, and cultural jurisdictions. Thus, it is the idea of power that characterises the ruling knowledge and the law of European civilisations.[37] The development of social sciences in the modern age was crucial for the development of rationalized modern European legal systems on the premise of exclusion of living law found in the *demos*.

Absence of self-doubt characterises the contemporary social sciences. Scepticism is a prerequisite condition for *knowledge* as established by Rene Descartes. The production of knowledge has replaced wisdom itself. It is the logical consequence, and end of the Cartesian paradigm of epistemology, manifested in the philosophy of Hegel and logical positivists. In their activist scholarship, the natural and social sciences have obliterated the boundary drawn by Immanuel Kant between *noumena* and *phenomenon.* The world of knowledge is no less mythical than a moral sphere of autonomy and freedom of will. Within the dominant philosophy of modern

[37] Michel Foucault, ARCHAEOLOGY OF KNOWLEDGE 156 (1972).

liberalism, limitations have been identified with respect to the possibility of human knowledge *vis-a-vis* natural and social phenomena. If this view is subscribed, the project of uniformity and universalization engendered by social sciences comes under the shadow of doubt if it can overcome the uncertain history of the future. Secondly, as opposed to the progress of sciences, the historical practices and norms give imperative insights. At least, conservatism which opposes the wholesale transformations in practical laws is guided by the truth of experience. Such a research project can help the imaginative and progressive social sciences to move firmly in an uncertain road of a future. Therefore, a third way is practically suitable in a moral sphere where extreme paths of past and future converge. It is a golden mean for Aristotle and *Madhyam Marga* of Buddha.

Liberal Thesis

The masters of the order of science believed that the human capacity of understanding the world is unlimited. The scientific revolution began through the work of Rene Descartes in 1641 with his 'Meditations on First Philosophy'. The unbound growth of the concepts of 'reason' and 'will' was expedited by speculative naturalists of the seventeenth and eighteenth centuries manifested in Hobbes, Locke, and Rousseau. Subsequently, logical and analytical positivists established the modern jurisprudence in its present form. Little do we know that many liberals, and the greatest of all of them, Immanuel Kant, conceived the limitations of positivism in knowing the 'world in itself' or the development of practical rationality through scientific exploration. Many believe that he favoured coercive authority of state for enlarging individual freedom, for in the absence of authority, there is a little possibility for freedom.[38] These interpretations omit the crucial division of law that Kant prescribed. Kant looked at law as two-fold legislation: the *subjective legislation* and the *objective legislation.* The division, Kant meant, operates and delineates the proper domains of the law or legal codes for the modern legal systems. Chhatrapati Singh beautifully explains the two-fold division of law in the following words:

> A rule concerning human action may either regulate the behaviour of a particular individual or a group. A rule that necessitates the performance or avoidance of some act or acts is a duty. Such a necessitation may be imposed upon the individual by his own will. Such as when the individual's understanding of morality makes his reason compel him to undertake certain actions, although his inclinations may be otherwise. In contrast to such duties, there are those necessitations which are imposed on all in the jurisdictions by the will of the socially authorised officials. Kant calls the first type of necessitation inner or subjective legislation, and the

[38] Edwin W. Tucker, *Kant: The Metaphysical Elements of Justice* 65 (2) MICHIGAN LAW REVIEW 5 (1966).

> second type external or objective legislation. While inner legislation forms the subject matter of *ethics,* those of external legislation of *positive* law.[39]

In other words, for Kant, negative freedom of the person was equally important as that of positive freedom. He was against any project of the 'mainstream liberals' for externally sourced reform or revolution. It is no business of the state, or for that matter, of other individuals, to try to make people moral. Only individuals can do that for themselves. Acts permitted otherwise would be a contradiction of the 'autonomy' of the individual. Kant's notion of freedom as the moral autonomy of the person is premised on absence of externality, that is, the fallacious claims of social sciences and their tentative accomplishments:

> [Kant] did not believe that it is the business of the philosophers to discover new principles of conduct, for he thought that every- one knows 'in his heart' what is right and what is wrong. Politicians, however, and others in authority are usually blinded by their greed for power; they need to be 'reminded' that they, as much as others, are subject to the moral law, and that they must not choose fallacious maxims that lead to iniquitous modes of conduct. [40]

Kant intended to preserve the vast realm of human action free from claims of knowledge of science and philosophy, whose truth can only be temporarily tenable and analytically existent what he claimed 'analytic *a priori* knowledge'. For example, the Indian Constitution recognises free access to justice[41] by courts to all citizens. As an analytic statement, the idea is acceptable by everyone based on the concept of corrective justice and its desirability. However, as a social fact, *a posteriori, everyone* accepts that article 39A of the Constitution has proved to be an illusion for the republic. The intellectual fallacy can be further exemplified with the legal rules, which require students to attend classes to qualify to appear in the examinations;[42] as if the physical presence in the classroom is equal and proportionate to learning. Alternatively, one can also analyse the laws relating to caring for and maintenance of parents by the children; as if the letters of law would achieve the ends.[43] *The rules and principles on which it is based represent the ultimate reductionism in social sciences*. It belies all sense of human understanding of *ethics, care*, and *morals*. Thus, any project of reform through *codification* needs to be self-aware of these limitations.

The limitations are identifiable in the provisions of the Constitution. Article 13 speaks about objective legislation. It has a two-fold mandate. In the first place, it is

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[39] Chhatrapati Singh, *The Inadequacy of Hohfeld's Scheme: Towards more Fundamental Analysis of Jural Relations* 27 JILI 117 (1985).

[40] Immanuel Kant, METAPHYSICAL ELEMENTS OF JUSTICE PART-I OF THE METAPHYSICS OF MORALS xvii (John Ladd *trans.*, 2nd *edn.,* 1797).

[41] *See,* Articles 39A and 21 of the Constitution of India, 1950.

[42] *See,* Relevant Regulations of UGC and Bar Council of India Legal Education Rules.

[43] The Maintenance and Welfare of Parents and Senior Citizens Act, 2007.

a charter of reform to transform the received common laws.[44] Because, the motivations and ends of the colonial laws were different from that of the true objective legislations.

The instances of subjective legislations may be traced in Part-IV and Part IV-A of the Constitution, the Directive Principles of the State Policy and Fundamental Duties. Particularly, the Article 51-A has the direct bearing on the internal legislation of the individuals.[45] It may, further, be argued that Articles 37 to 50 of the Constitution were drafted without understanding the limitations of law.

The subjective character of legislation with respect to 'fundamental duties' was well depicted by the Supreme Court of India in *Hon'ble Shri Ranganath Mishra* v. *Union Of India,* where the Court expressed the incompetence of legislation:

> The desired enforceability can be better achieved by providing not merely for legal sanctions but also combining it with social sanctions and to facilitate the performance of the task through exemplar role models. The element of compulsion in legal sanction when combined with the natural urge for obedience of the norms to attract social approbation would make the citizens willing participants in the exercise.[46]

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[44] Chhatrapati Singh, WATER RIGHTS AND PRINCIPLES OF WATER RESOURCE MANAGEMENT 22 (1991).

[45] [Part IVA : Fundamental Duties : Article 51A- It shall be the duty of every citizen of India:
(a) to abide by the Constitution and respect its ideals and institutions, the National Flag and the National Anthem;
(b) to cherish and follow the noble ideals which inspired our national struggle for freedom;
(c) to uphold and protect the sovereignty, unity and integrity of India;
(d) to defend the country and render national service when called upon to do so;
(e) to promote harmony and the spirit of common brotherhood amongst all the people of India transcending religious, linguistic and regional or sectional diversities; to renounce practices derogatory to the dignity of women;
(f) to value and preserve the rich heritage of our composite culture;
(g) to protect and improve the natural environment including forests, lakes, rivers and wild life, and to have compassion for living creatures;
(h) to develop the scientific temper, humanism and the spirit of inquiry and reform;
(i) to safeguard public property and to abjure violence;
(j) to strive towards excellence in all spheres of individual and collective activity so that the nation constantly rises to higher levels of endeavour and achievement;
(k) who is a parent or guardian to provide opportunities for education to his child or, as the case may be, ward between the age of six and fourteen years.
For an excellent analysis of the provisions of Part IV of the Constitution, *See,* Upendra Baxi, *Directive Principles and Sociology of Indian Law: A Reply to Dr. Jagat Narain* 11 (3) JILI (1969); T. Devidas, *Directive Principles: Sentiment or Sense*? 17 (3) JILI 478 (1975).

[46] 2003 (7) S.C.C. 133.

By these kinds of interpretations of the Constitution and its spirit, the first conclusion can, legitimately, be derived: that the Constitution has the immanent character which, therefore, is, as a corollary, rendered to all laws and the legal system of India. It is said to be the fundamental set of principles developed within people through people. At least, all would agree that the history of its making is, the history of the immanent legal spirit. The story of the history of social spirit is a story in multitude.

It was an inherent necessity to draft the Constitution taking into account the ideals which inspired the freedom struggle. Therefore, the spirit of the Constitution is different from the colonial legislation and codifications. The former enables the citizenry virtues through providing the limitations of the positivized character of law and expects from the citizens to cultivate good virtues for the common good, while the latter vision was inspired by the view of social sciences that everything can be moulded in different shapes and forms through coercive powers of state. The liberal thesis believes in the anarchic freedom enabled by a social science perspective to create and make everything obedient to certain standards of truth and ideals. UCC, as a panacea to mould the deviances into a certain pattern, is exemplifying the same vision that a romanticist artist believed in a heroic creation of new values at the cost of negating the actual experience of history and culture.

The social fact the individual ends conflict with one another and the collective ends conflict with the individual ones. Thus, everyone become party to it including the social scientists. This is resolved by the modern law giving it certain characters and raising it to the status of divinity and socio-political sacredness, the very ideas against which the modern law was a movement (see below).

Conservative Thesis

Conservationists' view about the modern knowledge system of social science is based on the deep roots of intellectual anarchism. They believe that liberal sciences flourish due to their reliance on 'epistemic anarchism'. Jeremy Bentham in *Anarchical Fallacies* writes:

> 'Cruel is the judge', says Lord Bacon, 'who, in order to enable himself to torture men, applies torture to the law'. Still more cruel is the anarchist, who, for the purpose of effecting the subversion of the laws themselves, as well as the massacre of the legislators, tortures not only the words of the law, but the very vitals of the language.[47]

The project of social science necessitates an *authority* which is found in the conception of *reason.* It is different from the authority of *conscience,* which was found to be incapable of reigning. There are two important fundamental poles of this anarchism. First, there are categories of the law, 'as a unified system of belief'

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[47] THE WORKS OF JEREMY BENTHAM, Vol. 2, 910 (John Bowring, *ed*., 1838-1843).

engendered by the social sciences. The primary characteristics, such as unification and unity of entities are requirements of the pantheon, because modernity is always in the need of, what Nietzsche calls, a limited and simplified world.[48] And, the second, that these objectives are unattainable in the nature of things if they are not based by the pantheon on a 'belief system', which must take the things to be true. The origin of the belief and the idea of truth lies in scholars themselves:

> *Towards the critique of big words:* I am suspicious and ill disposed towards the so called 'ideals'; my pessimism lies in recognising the extent to which 'lofty sentiments' are a source of mischief. *I.e.,* things which disgrace and diminish us. We are very much mistaken if we expect any 'progress' to be made by pursuing and ideal; the triumph of an ideal has so far inevitably been a retrograde movement. Christianity, revolution, abolition of slavery, equality, philanthropy, pacifism, justice and truth-all these big words bear but little relation with reality; they are but little worth except as battle cries and banners, as grand words for something quite different, indeed, for their opposites![49]

Thus, the social sciences have annexed the subject of law and have created laws' mythological edifice. The so-called achievements of the social sciences enables the lawyers and lawmakers to bring, progressively, each and every aspect of social and individual spaces for 'a more penetrating regulation'.[50] It is a threatening position amounting to what Jeremy Bentham, though a positivist, had warned against the project of naturalists by calling it the 'subversion of law' and 'the massacre of the legislators'.[51]

The annexation or colonisation of law by the social science[52] is achieved firstly by the use of language, but certainly by the means of metaphor and resemblance of ideas. The entire project and public debate of UCC is carried out in a metaphorical method, which has played a decisive role in the Western philosophy of what Derrida calls 'White Mythology'.[53] The conception of *Logos* is historically and methodologically an outgrowth of the Indo-European *Mythos.* It is made up of *allegories, figures, fables, parables* and *myths.* 'He describes the abstract knowledge system of the West as, 'A white mythology which assembles and reflects Western culture: the white man takes his own mythology, his logos, that is, the mythos of his idiom, for the universal form of that which it is still his inescapable desire to call

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[48] Friedrich Nietzsche, THE WILL TO POWER: SELECTIONS FROM THE NOTEBOOKS OF 1880S 21 (R. Kevin Hill & A. Scarpitti *trans.*, 2017).

[49] *Id*., at 58.

[50] Sarat Austin, *Leading Law into the Abyss: What (If Anything) Has Sociology Done to Law?* LAW & SOC. INQUIRY 609 (1994).

[51] *Supra* note 47, Jeremy Bentham.

[52] Marianne Constable, *Genealogy and Jurisprudence: Nietzsche, Nihilism, and the Social Scientification of Law* 19 LAW & SOC. INQUIRY 551 (1994).

[53] Jacques Derrida & F.C.T. Moore, *White Mythology: Metaphor in the Text of Philosophy* 6 (1) NEW LITERARY HISTORY 11 (1974).

Reasonas'. A myth is conceived as an illusion which becomes the foundation of the existence of law by way of advancement of reason, that is, self-conscious reflections. Carl Schmitt declares about the state; which along with law, legislation, and codes, is one of our reference points in this work; that all significant concepts of the modern theory of the state are secularised theological concepts.[54]

The *mythos* are present and replete the scheme and the provisions of the Constitution. The Constitutional idea of an individual right, or liberty, to take a few examples. But the greatest of all categories, *justice,* in the corrective sense, represents the highest figure of speech: *the allegory of the Constitution*. The constitutional justice and an allegory is a product of the Western *words* and *methods*. Curiously, as Article 44, the provisions related to socio-economic justice are also contained in Part IV of the Constitution: the Directive Principles of the State Policy. The language used, it appears, is mandatory: 'the State shall secure that the operation of the legal system promotes justice, on a basis of equal opportunity,'....[55] The consequent law produced by the legislature *mystified* justice and access to justice forever. It established a nationwide network of government institutions to *'aid'* and *'assist'*. It is, perhaps, in line with the recognition of the mythical character of the justice dispensation system of the modern State. An intuitive idea is that the consequent law adopted a benevolent, what in theology is called 'duties of beneficence' approach. Why may a similar method not be desirable for the subject matter of the UCC?

The answer lies, again, in the problems of social science and its claims of human achievements and wisdom, which is the result of renouncement and denial to the *diachronic* character of all human knowledge and cultural attainments. This is accomplished by way of the law as a development of an autonomous and unified system established by the studies in the sciences. This view requires that law must be seen to be a transcendent, mythical but autonomous entity.

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[54] Carl Schmitt, POLITICAL THEOLOGY: FOUR CHAPTERS ON THE CONCEPT OF SOVEREIGNTY 89 (George Schwab *trans*., 1985, 1922), (Schmitt asserts that, '[A]ll significant concepts of the modern theory of the state are secularized theological concepts not only because of their historical development- in which they were transferred from theology to the theory of the state, whereby, for example, the omnipotent God became the omnipotent lawgiver- but also because of their systematic structure, the recognition of which is necessary for a sociological consideration of these concepts. The exception in jurisprudence is analogous to the miracle in theology. Only by being aware of this analogy can we appreciate the manner in which the philosophical ideas of the state developed in the last centuries). *Id.*

[55] Article 39A: The State shall secure that the operation of the legal system promotes justice, on a basis of equal opportunity, and shall, in particular, provide free legal aid, by suitable legislation or schemes or in any other way, to ensure that opportunities for securing justice are not denied to any citizen by reason of economic or other disabilities.

Here, it is necessary to enlist the general characteristics of the modern law as far as it is the primary product of European modernity and so called *claims* of social sciences. These include:

(a) The law has the primary function of conflict resolution.
(b) It developed against all myths and superstitions of history.
(c) The law has an autonomous being and is a unified entity.
(d) It is transcendent and territorial, both, at the same time.
(e) There is a certain kind of acknowledgement about the universality and know-ability of law.
(f) It is an expression of the authority of reason as an advancement in its mode of being over the conscience.
(g) Law is epistemic, and less ontological, but not empirical.
(h) It is a closed system which takes the man *in* and keeps him outside perpetually.

These are some of the inner attributes and properties which are identifiable as a preliminary to any view of social critique of law. It is noticeable that the characteristics listed above do not, conspicuously, contain the attributes claimed by the modern lawyers: state, sovereignty, power, sanction, principles, interpretative exercises, idea of rule, and morality, etc. The reason is offered by the subject matter of this work and the requirement of substantive legal research. Thus far, it is our hope and confidence, that the readers must have realised that *there is nothing legal about the law*. Law has only an epistemic entity than an empirical fact.[56] Levi Strauss denied that there are different modes of primitive thought and modern scientific thought.[57] The law has a certain purpose. Which translates into designation of its core functions. The purpose of the law is held to be the regulation and the control of human behaviour what its predecessor, myth, would do. The latter had certain divinity about it and therefore was believed to be transcendent in existence. It is the anterior intensions of sciences that are reflected into assumed scientific thought in the law. Modern law developed in negation to the myths and thus, its essence was to be found in the rejection of transcendence.

However, the requirement of universalisation and uniformity necessitates that the law must acquire a new character of transcendence. That is, law emanates from the

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[56] *Cf.* Pierre Bourdieu, HOMO ACADEMICUS 23-24 (1988). (Where Bourdieu discusses the philosophers as an epistemic individual).

[57] Claude Levi Strauss, STRUCTURAL ANTHROPOLOGY 230 (Claire Jacobson & Brooke Grundfest Schoepf *trans.*, 1963), (Strauss observes that the prevalent attempts to explain alleged differences between the so-called primitive mind and scientific thought have resorted to qualitative differences between the working processes of the mind in both cases, while assuming that the entities which they were studying remained very much the same. If our interpretation is correct, we are led toward a completely different view: namely, *that the kind of logic in mythical thought is as rigorous as that of modern science, and that the difference lies, not in the quality of the intellectual process, but in the nature of the things to which it is applied* (emphasis added).

society, and yet transcends the *social*, thereby engendering the popular belief that law mandates that there must not be social limits to it. This essential nature of law depicts the 'boundless arrogance of modernity'. Society was explained and understood through its myths. It was the main medium of mediation between the real world and the other, the transcendent world. The real world, therefore, had multiple meanings. Peter Fitzpatrick has brilliantly shown:

> The programme of enlightenment was the disenchantment of the world: the dissolution of myths and the substitution of knowledge for fancy. The newly created world confronted a mythic realm of closed yet multiple meaning, a realm of transcendent location of origin and identity. With Enlightenment the transcendent was brought to the earth. Man was to be the measure of man. There was no need of mediation between the real and the transcendent. Meaning was now unified. … Man stood alone daring to know and in boundless thought, bringing unified reason and knowledge. … When this process reaches the limits of its appropriation of the worlds, enlightenment creates the very monsters against which it was so assiduously set itself.[58]

Man is recreated with certain attributes historically and mythically perceived of divinity in the face of the total negation of myths. Reason becomes his universal attribute. There was nothing ontologically prior to him. The task of providing meaning to things was taken over by the social sciences. Law, in the form of codes, becomes the principal mediator between the legal and the social. Paradoxically, law is *his* and *he* is of the law. Thus, myths were absorbed into the Western tradition of the progressive story. Peter Fitzpatrick observes:

> There are indeed qualities of law which are also those of a god, at least one of the Christian persuasion. Law operates in a social world yet exists separate from and dominant above it. …. [Law] far from resolving conflict, will often provide modes and occasions for its creation, expression and perpetuation, for sustaining one *sphere* of life in enduring conflict with another.[59]

Everything existing in the society, even diachronically, but not in line with the epistemic scheme of the law, must be abolished as the modern vision of legisprudence indicates. The UCC proposal is a recent example of it. *The prospects of codification intend to take every man inside itself in their entirety, but exclude forever from the world of meaning, things which are, and thus far have been of the man.* The man is constrained to live in perpetual myths.

Religious Thesis

Lawyers, and for that matter, social scientists, whose business is with law, are accustomed to inhabit a particular *universe*. The universe comprises rules of statutes and laws derived from the judgments declared by the various courts. Teaching law

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[58] Peter Fitzpatrick, THE MYTHOLOGY OF MODERN LAW 51 (1992).

[59] *Id.*, at 7-10.

in law schools and research can succeed only within this approach. The exercise bestows upon the law the as so-called internal coherence and unified identity.

These characters and the self-claimed features are questioned by many groups, including those where 'non-state legal system' (NSLS) is practiced. The supporters of NSLS, include indigenous, religious, subaltern, customary, and feminist groups. They see modern liberal law, state legal system (SLS), as the failed project of modernity.[60] The post-modern critiques supply the crucial legal materials for questioning the law and legal system, by all those who did not find expression of their voices into the law. One of the major failures of modernity was its overreliance on abstract reason and generalized metanarratives, which are not true to the experiences of multicultural groups. The inherent contradictions in the project of modernity perpetuated and aggravated the very set of problems for the resolution of which it was conceived by enlightenment thinkers, poets, and artists.

Postmodernism as a movement started with the aim to expose the inherent contradictions in the ideals and practices rooted in modernity. Postmodernism, however, has only proved to be a twin sister of modernity, which cannot transcend the epistemic field established by the thinkers of modernity.[61]

The basic distinction between modernity and postmodernity lies in the ideas of uniformity and uniqueness, respectively, or to say so, transcendence and difference. The latter challenged the claims of validity of truth, morals, and aesthetics on the premise of the absence of relevant social experience at large. Its resistance, however, has proved either too trivial or too abstract to pose any serious challenge to law as singularity. The project of modernity had its highest goal of establishing the idea of 'the objective reason' and tried to identify the knowledge system with authenticity. The critical pursuit of post-modernity is to expose the politics of objective reason. However, the post-modernists failed to keep themselves away from the idea of abstract reason what they criticize intensely. In that sense, the two schools of thinking hardly differ in their structural and pragmatic approaches. Modernity as an epoch developed a consciousness to bring uniform changes in the socio-cultural sphere through state centric rationalized law. Postmodernism has remained confined to the sociological and anthropological romanticized form of academic pursuit and the state legal systems (SLS) have established their hegemonic character vis-a-vis legal norms. The non-state legal system (NSLS), norms, and practices are available at the altars of the two equally! Personal laws in India have remained as an integral part of NSLS, signifying the living legal pluralism, which is functional in 'semi-autonomous social fields'.[62]

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[60] Roberto M. Unger, RELIGION OF THE FUTURE 210 (2014).

[61] Boaventura de Sousa Santos, TOWARD A NEW LEGAL COMMON SENSE: LAW, GLOBALIZATION, AND EMANCIPATION XXIII, 1-20 (2020).

[62] Sally Engle Merry, *Legal Pluralism* 22 (5) LAW & SOCIETY REVIEW 878 (1988).

The demand for universality of a secular culture and uniformity of a bureaucratic law emanated from the quest of certainty. Post-modernity emerged as a resistance against uniformity of ideals and practices, and argues for protection and respect of plurality. The paradox has unfortunately found its emergence in recent years in the constitutional jurisprudence of India as well. However, the dissenting opinion in *Sabarimala*[63] judgment, Justice Indu Malhotra questioned the attempt of reconciliation between the Constitutional designs of pluralism along with the judicial intervention of the Supreme Court into the internal religious affairs of the communities.

A Hindu Undivided Family, like any other traditional institution, is a system of status emanating from a common lineage. The status of a person is closely knitted with her past, present, and future. Individuals in the traditional institution are connected through social sentiments, clan identity, and common memories. The person never stands in a solitary position to take the significant decisions in one's life. On the other hand, the individual, a creation of modern-day consciousness of right, with all her freedoms, swims against all odds of life alone. Such an individual with an anarchic soul lives a rootless life. Therefore, it is a significant question to ask if the purpose of UCC is to alienate individuals from the family life, so that their wretchedness will compel them to leave the organic life of community and to become an atomic individual. Such individuals would have no other option but to imitate the set standards established by society or state, and lastly to conform to every external stimuli. This conformity will be the brutal excessive of social sciences, sans the *social*.

IV

Unity, Uniformity, and Conformity

Unity is the profound language of nature, but it encompasses diversities in everything living and thriving in the cosmos. Man is an earth bound creature. Law is not an otherworldly discipline. Human laws are especially embedded in psychic structures and functions of human beings. The profound insecurities emanated from

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[63] *Indian Young Lawyers Association* v. *State of Kerala* (2019) 11 S.C.C. 1, para 481: ('The concept of Constitutional Morality refers to the moral values underpinning the text of the Constitution, which are instructive in ascertaining the true meaning of the Constitution, and achieve the objects contemplated therein. …. Constitutional Morality in a pluralistic society and secular polity would reflect that the followers of various sects have the freedom to practise their faith in accordance with the tenets of their religion. It is irrelevant whether the practise is rational or logical. Notions of rationality cannot be invoked in matters of religion by courts').

'possessive individualism'[64] has compelled human societies to demand sameness or uniformity of identity and experience. Anything different is looked down with suspicion and is condemned to be unworthy. Human mind seeks continuity in past experiences.

Uniformity for Production and Domination

Uniformity is revered as a language in a culture of production and domination. The former is concerned with reproducing the same product, service, or experience; eliminating even iota of strangeness to make every experience familiar; moulding every product, service, or experience into one pattern, a best suitable method to create and modify an 'objectified, uniformalised, and consumerised self'; an apparatus of production and consumption, a fit machine in an unfamiliar world.[65] The latter is concerned with the disciplinary techniques to correct the deviance of an ever-creating subject. The culture of domination effectively reproduces the 'technology of fear',[66] as a grammar to lynch idiosyncrasy, as a governmental algorithm to create and modify soul on the fulcrum of one standard of truth and value. The 'one track thinking'[67] embraced by so called human civilizations has only produced one life as the center of the Universe, one value as the language of morality, one method as the practice of science, one taste as the lingua of justice.

What is so special about uniformity? Its language is even secretly used by schools, universities, factories, armies, sports, government and corporate offices, and the film and media industries, etc. What is so wrong if Indian laws are aspiring to speak one language of truth and value for Indians? This question requires meditation on the genealogy of 'form' and 'uni-form' in the philosophy of antiquity and in modern philosophy to understand the urgent need of bringing UCC in the personal laws for Indians.

Genealogy of Form

Substance and *form,* in pre-Socratic meditations, were the central problems of philosophy. In particular, Parmenides and Heraclitus had demonstrated the profound reflection on the idea of form, which was conceived not just an outward shape or pattern. Form was quintessential for the idea of being and becoming. The

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[64] Crawford Brough Macpherson, THE POLITICAL THEORY OF POSSESSIVE INDIVIDUALISM: HOBBES TO LOCKE 61 (1962).

[65] Michel Foucault, *Foucault: Truth and Subjectivity, Lecture,* SOCIOPHILOSOPHY 1-10, (Aug., 06, 2011), *available at*: https://youtu.be/V0URrVbpjW0?feature=shared (last visited 10 July, 2022).

[66] Jiddu Krishnamurti, *The Real Revolution-3: Freedom from fear*, J. KRISHNAMURTI-OFFICIAL CHANNEL (Dec., 15, 2015), *available at*: https://youtu.be/K5E9gS4RZOo?feature=shared (last visited 10 Jul., 2022).

[67] Martin Heidegger, WHAT IS CALLED THINKING? 26 (1952).

concept of form signified the essence of a being which may be discerned through senses and reason. Being was not simply understood as an empty or abstract being. Its existence was contemplated as '*einai*', which means 'to be'.[68] Being as the essence denoted not simply an abstract being devoid of space and time. It exists as a transient phenomenon, whose essence is always in flux. As Heraclitus declared everything is in flux. He rightly enunciated, 'Into the same rivers we step and do not step, we are and are not'.[69] In the words of Plutarch, 'It is not possible to step twice into the same river according to Heraclitus, or to come into contact twice with a mortal being in the same state'.[70] He was of the considered opinion that two opposites are not identical but united. Beings' unity is found amidst all the dialectical unfolding of being and non-being, existence and non-existence. In his words, 'Collections: wholes and not wholes; brought together, pulled apart; sung in unison, sung in conflict; from all things one and from one all things'.[71] What does it means to say, 'from all things one', and 'from one all things'? These words signify the unity composed out of opposite shades of manifestations; a dialectical confluence which produces the being out of non-being. The unity indicated by Heraclitus is not an imposed one from abstract reason or divine appeal. Unity cannot be mistaken as uniformity in Heraclitus' insight to nature and its logos. In fact, there are many forms of being manifest, each one is unique and different; from the one cellular creature to all the complex forms of life on the Planet, diversity is a language of nature; its multifarious dimensions are conflicting or dialectical, but at the same time, the whole process establishes the unity of being.

Parmenides identified the form of being as *einai*, which signifies 'to be', which became the central philosophical quest for Aristotle when he contemplated the idea of what it means to be. It is usually believed that Parmenides was a monist who relied on reason over senses to discover the unity of the being. But this interpretation was rejected by many philosophers including Martin Heidegger, who claimed that the words of Parmenides and Heraclitus were indicating the same Logos as the law and truth manifesting in everything and everywhere.[72]

'Form' in Pre-Socratic meditations was understood not merely as an empty pattern or shape rather a dynamic convergence of being and becoming, being and nothingness, and hidden truth (logos) and manifested reality (physis). Form was

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[68] Martin Heidegger, AN INTRODUCTION TO METAPHYSICS 68 (Ralph Manheim *trans.*, 1959, 2005).

[69] Daniel W. Graham, *Heraclitus*, THE STANFORD ENCYCLOPEDIA OF PHILOSOPHY, (Edward N. Zalta & Uri Nodelman *eds.*, 2023), *available at*: https://plato.stanford.edu/archives/win2023/entries/heraclitus/ (last visited 12 July, 2022).

[70] Daniel W. Graham, *Id.*

[71] Daniel W. Graham, *Id.*

[72] Martin Heidegger, AN INTRODUCTION TO METAPHYSICS 110-145 (Ralph Manheim *trans.*, 1959, 2005).

also contemplated as a dialectics of matter and spirit, their harmonious conflicts and convergences. All the meditations, though plural in ways to indicate the same reality, indicated a unity (Logos, Tao, Rita, or Dharma) underneath all the unique blooming of beings. That unity was not dropped from the sky as the divine will or the supreme 'artificial reason' of sovereignty. The unity was conceived not transcendental rather immanent in the existence and manifestation of all the forms of life. The unity of all the forms is governed by an 'immanent order' (logos) indicated by Parmenides and Heraclitus. The 'concept of Form' was explained by Martin Heidegger, 'it derives its essence from an emerging placing-itself-in-the-limit'[73].

In the Platonic idea of form, however, a rationalistic approach was adopted to deduce the purity of form out of the shadows. This purity is all about non-adulteration of the ideas transcending time and space. The conception of form was akin to the substance or essence of being, as 'archetypal principles', without which the existence of a being cannot be determined. Those principles may be understood through questions, such as, what is so 'horsely' about a horse? Likewise, what is so 'manly' about a man? The basic essence which determines the identity of a being and separates it from other beings is the organizing principles of a being. That basic essence of a being was indicated by Plato as 'form'. The platonic idea of form was revised by Aristotle through exploring the four basic causes; formal, substantive, efficient or moving, and teleological. All these causes were conceived as interdependent principles, and his conception of form was related to the idea of becoming, flourishing, and realizing the potentiality of a particular being. Form for Aristotle was not a purely transcendental spirit contemplated in the thought as an 'ideal archetype'. It is rather the 'internal harmony of being'[74] which makes the life and flourishing of a being possible. The form, further, cannot be divorced from the potentiality to be or not to be; rather its existence was conceived as interdependent to the teleological cause of a being. Aristotle was not essentially an abstract contemplator; rather he was deeply interested in the question of the purpose or functionality of all natural phenomena. The identity of a being, for him, was not simply a question of substance or form but also the activities or purposes pursued by all the beings.

The primary concern in the ancient Greek thought was to contemplate on the question; what it means to be? What is form and what is substance? What makes being possible and for what purpose being exists? Plato was the first philosopher who built a rationalistic system of philosophy and crafted the 'concept of concept'.

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[73] Martin Heidegger, *Id.*, at 60.

[74] Bryan Magee and Martha Nussbaum, *Bryan Magee and Martha Nussbaum on Aristotle*, ROBERTO RUIZ (Aug., 2, 2021), *available at*: https://youtu.be/iKmEehADLPs?feature=shared (last visited 15 Jul., 2022).

His concept of *Eidos* (idea) may be defined as 'emergence of its essence'[75] In the words of Martin Heidegger, the Platonic idea or form denoted that 'the thing has a face, it can let itself be seen, it stands'.[76] Platonic conceptualisation of form indicated the 'arche-typical ideals or principles,'[77] the universal categories, which inhere in every 'mode and attribute'[78] of Being and 'particulars participate'[79] in the Universal categories. The conceptualisation of form signified a normative entity, a non-material reality, such as the idea of soul, numbers, or geometrical figures.[80] Form may also be understood as a psychological or a spiritual entity, whose existence is the pre-condition to perceive or conceive various entities in its materiality. The ability to perceive the form of everyone and everything is innate in every human being by birth, the idea or form is imprinted in the soul of a being from birth, which is discovered through cleansing the clouds of ignorance. This answer is advanced to a question that how can one perceive the identity of a being? The material manifestations appear to the senses of the creatures, but no matter exists without the ground in which the materiality exists, persists, grows, and loses its essence.

The platonic contemplation is also known for his idea of the 'purity of form' in transcendental sense, whose shadows are in transience, taking birth, growing, decaying, and dying. A particular horse may die, but the 'horseness' as the 'ideal archetype' is eternal and pure as per Plato. The material substance of a horse is subject to the law of atrophy, but its formal character is beyond time and space. This division was radicalized further by Immanuel Kant as *noumena* (things in itself) and *phenomena* (things appear to us). However, the perfect world or a pure world of idea or form was questioned by Aristotle, who revised the separation thesis advanced by Plato between a 'pure form' and 'impure shadows' reflecting through matter in the worldly experience. Aristotle advanced the thesis 'that every sensible object consists of both matter and form, neither of which can exist without the other'.[81] Before Aristotle, there were many pre-Socratic philosophers who reduced reality as matter or a mixture of various material elements. There are a few who indicated about the existence as not merely a matter or mixture of matter but there is a mind (*nous*)

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[75] Martin Heidegger, AN INTRODUCTION TO METAPHYSICS 60-61 (Ralph Manheim *trans.*, 1959, 2005).

[76] Martin Heidegger, *Id.*, at 60.

[77] Arthur Holmes, *Plato's Theory of Forms*, A HISTORY OF PHILOSOPHY (Apr., 8, 2015), *available at*: https://youtu.be/CClQSBvRszI?feature=shared (last visited 15 Jul., 2022).

[78] Benedictus de Spinoza, ETHICS: PROVED IN GEOMETRICAL ORDER 47 (1677, 2018).

[79] Arthur Holmes, *Plato's Theory of Forms*, A HISTORY OF PHILOSOPHY (Apr., 8, 2015), *available at*: https://youtu.be/CClQSBvRszI?feature=shared (last visited 15 Jul., 2022).

[80] Arthur Holmes, *Id.*

[81] Britannica, The Editors of Encyclopaedia, *Form*, ENCYCLOPEDIA BRITANNICA, May 22, 2020, *available at*: https://www.britannica.com/topic/form-philosophy (last visited on Jul., 27, 2022).

which manifests in the matter,[82] or love and strife are the causes for the mixture and separation of various elements in the cosmos.[83]

Plato, on the other hand, conceived the idea or form in the abstract realm, a world of pure ideas. Aristotle was a man of senses and he established his metaphysics premised on empiricism. He visualised the concept of form as immanent harmony in the being, without which an entity cannot exist. That harmony is established through an internal configuration which makes a being a harmonious entity which exists and functions as per teleological cause. He believed that 'time is the measure of motions'[84] and the material stuffs of all the entities change in time to actualize the potentiality and the formal cause is the basic essence which keeps the existence of a being possible. One aspect, which is common in Platonic and Aristotelian metaphysics, is that form is the essence of a being, which creates and limits its identity.

However, Aristotelian metaphysics indicates its existence as a temporal and spatial reality immanent in the being itself. This doctrine is known as 'hylo-morphism'[85] (a combination of material and formal causes in all beings). In Metaphysics, Aristotle 'argues that form is what unifies some matter into a single object'.[86] He similarly makes an analogy in Politics 'that a constitution is the form of a polis and the citizens its matter, partly on the ground that the constitution serves to unify the body politic'.[87] In Aristotelian metaphysics, in words of Thomas Ainsworth:

> We need to know what the thing is made of, and the answer to this question is matter…. Next we need to know what the thing is…, and the answer to this is the thing's form or essence. We also need to know what made the thing come into existence, and this is the thing's efficient or moving Cause. Lastly, we need to know what the thing is for, its purpose or function is- the final cause.[88]

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[82] As per Anaxagoras, 'nous (intellect or mind) was the motive cause of the cosmos'; See Patricia Curd, *Anaxagoras*, Edward N. Zalta *(ed.)*, THE STANFORD ENCYCLOPEDIA OF PHILOSOPHY (2019), *available at*: https://plato.stanford.edu/archives/win2019/entries/anaxagoras (last visited 10 Jul., 2022).

[83] K.S. Kingsley, *Empedocles*, THE STANFORD ENCYCLOPEDIA OF PHILOSOPHY (2020), *available at*: https://plato.stanford.edu/entries/empedocles/ (last visited 10 Jul., 2022).

[84] Arthur Holmes, *Aristotle's Metaphysics*, A HISTORY OF PHILOSOPHY (Apr., 8, 2015), *available at*: https://youtu.be/kLKHpSPoNKI?feature=shared (last visited 15 July, 2022).

[85] Thomas Ainsworth, *Form vs. Matter*, THE STANFORD ENCYCLOPEDIA OF PHILOSOPHY, (Edward N. Zalta & Uri Nodelman *eds.*, 2016), *available at*: https://plato.stanford.edu/archives/fall2024/entries/form-matter/ (last visited 16 Jul., 2022).

[86] Thomas Ainsworth, *Id.*

[87] Thomas Ainsworth, *Id.*

[88] Thomas Ainsworth, *Id.*

To conclude, the Greeks contemplated the 'form' as the 'essence of a being' or 'being of the essence'. The etymological root of being in Sanskrit is 'esmi, esi, esti, asmi'.[89] In Greek, 'eimi and einai'[90], and in Latin, 'esum and esse'[91]. The meaning of these words, as explained by Martin Heidegger, is being 'which emerges into the light, to shine, to give light and therefore to appear'.[92]

Behind every mode of the appearance of being, a rational order (logos) was indicated by Greeks. However, in modern thought, logos is understood merely as an external aid to man to speak or to have discourse. Logos has been reduced merely as the organizing principle of language and discourse since the medieval age. This fall was anticipated by Heraclitus, 'Men have hearing, they hear words, but in this hearing, they cannot 'heed', *i.e.,* follow what is not audible like words, what is not a discourse, a speaking, but indeed the logos'.[93] Logos in this sentence signifies the unity behind the appearance which is usually ignored or unheeded. In place of it, words and sentences are exchanged. In the words of Heraclitus, 'for everything becomes essent in accordance with this logos'.[94] Heraclitus, therefore, suggested that 'therefore it is necessary to follow it, i.e., to adhere to togetherness in the essent; but though the logos is this togetherness in the essent, the many live as though each had his own understanding (opinion)'.[95] The humans' habitude to live with opinions and within opinions make them strange. In words of Sophocles, 'There is much that is strange, but nothing that surpasses man in strangeness'.[96]

The degeneration of logos as discourse happened when it was treated in Jewish philosophy of religion as a 'function of *mesites*', the mediator'.[97] 'In the Greek translation of the Old Testament logos signifies…command and commandment'.[98] As per Martin Heidegger:

> Thus logos signifies the *keryx*, the *angelos*, the herald, the messenger, who hands down commands and commandments; *logos tou staurou* is the word of the cross. The proclamation of the cross is Christ himself; he is the logos of redemption, of eternal life, *logos zoes*'.[99]

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[89] Martin Heidegger, AN INTRODUCTION TO METAPHYSICS 71 (Ralph Manheim *trans.*, 1959, 2005).

[90] Martin Heidegger, *Id.*

[91] Martin Heidegger, *Id.*

[92] Martin Heidegger, *Id.*

[93] Martin Heidegger, *Id.* at 129.

[94] Martin Heidegger, *Id.* at 127.

[95] Martin Heidegger, *Id.*

[96] Martin Heidegger, *Id.* at 146.

[97] Martin Heidegger, AN INTRODUCTION TO METAPHYSICS 134 (Ralph Manheim *trans.*, 1959, 2005). 134.

[98] Martin Heidegger, *Id.*

[99] Martin Heidegger, *Id.,* at 134-135.

Thus logos, as the logic for truth, the rational law of thought, the grammar of discourse, a tool of crafting the languages and meanings, the substratum of all too opined and opinionated world, is nothing more than a fundamental degeneration from the unity exemplified through '*tao, rita, dharma, or logos*' in various social systems around the world. The art of codifying law, fixing words as truth or the standard of prescription to live a good life has its beginning in the commandment as a codified law signifying the 'divine will' for the believers in the Abrahamic religions, which became the highest source of law and prescription of punishment for the deviance. The culture of writing and reducing the law as a codified reality was related to the idea of disciplining masses as per the certain standard institutionalised in the legal language. In modern culture, codification became the chief tool to the statecraft which limited the understanding of law; from the aspiration of making the citizens virtuous to disciplining them as per the power of State. In the early modern period, the model of contract replaced transcendental legitimacy and transformed the subject into citizenship, as a new paradigm of justifying state power and the recognition of the rights of the citizens. Codified law proved as the chief apparatus to govern the people and modify their behaviours, so as to make them conform to the uniformalised character of law.

Uniformalisation of Self

For millennia, the character of law remained customary. In the oral traditions, the rules were memorised and followed; especially the purpose of law was not exclusively to check deviance, instead establishing a social order on the basis of sacrifices and mutual obligations. Since, the laws had immanent nature and their source was the people, therefore the institutionalisation of law for bringing uniformity and conformity was not a desired goal in ancient societies, in particular, the village communities of East and the various indigenous communities. The emergence of positivized and rationalized law and legal systems pre-supposed the irrational nature of human beings, therefore, the external influence such as rewards and punishments were institutionalized to establish law and order. The pre-supposition was untested from the actual experience of various cultures and history; in fact, it was based on the parochial experience, which culminated into a society based on mutual mistrust and suspicion. Codification of law was taken as a progressive realization of the jurisprudence on the touchstone of reason and rationality. This process affected the possibility to live like a free monad, as an autonomous legislator of the law. The idiosyncratic or 'autonomous social fields' were considered an antinomy to the 'uniformal life' of the state power. Therefore, the commandment from the above, either through 'divine will' or the power of sovereign, was the only method to change the autonomous character of law.

This process may be termed as 'uniformalisation of self' through codification and hermeneutical procedures, *i.e.,* to make the strange familiar through super-imposition of 'uniformal will', nowadays used in rhetorical sense as UCC. The

strangeness of man, a 'womb syndrome', originates in the ground of randomness and uncertainty. The search of the absolute values in law or a technology of prediction is deeply rooted in the human's psyche, whose preoccupation with 'father symbol' is all about familiarising the unfamiliarised; estranging the strange. The strangeness inheres in the human's will to change everything either to quench the insatiable past or to reach at an imagined utopia. The strangeness is compensated or sought to be compensated by manufacturing the self through certain technology advanced by the codification of law. Michel Foucault rightly suggested in his lectures that the self we take for granted is created and modified by certain technologies. For example, the practice of confession and penance in Christianity, the public spectacle to confess the sin and to do penance were the technologies adopted by Christianity to create and modify self.[100] The hermeneutics to discover the self, the constant examination of thought, the 'tribunalization of conscience', the medicalization and recovery of pure self are some of those techniques which were successfully imported in the modern legal systems.[101] The disciplinary techniques and dynamic normalization are the twin brothers which uniformalise the self and the life-worlds as per the rational techniques immanent in the commandments of state law, to make them conform to the parochial truth and normative prescriptions, whose deviance attract the activation of the whole legal and pedagogical systems.

It is not a secret that every modern institution prescribes certain uniform set of standards of behaviours; language, thought, food, cloth, mannerism, and relationship such as friendship and marriage, etc., and their violation attracts the disciplinary powers, deployed to create the self as a docile mind and soul; an object of constant surveillance, a subject who is required to discipline the thought and behaviours so as to conform the standard of truth prescribed by the uniformalised nature of law and education. The quest of UCC in personal law is an exemplification of 'uniformalisation of self', to be codified as per certain abstract rational standards. What is so peculiar about the one-dimensional existence of a being is that human beings have been estranged from the latent harmony, the logos. They are truly opined and opinionated to the core and their life has an instrumental purpose of production and to become a consumable product. In words of Douglas Kellner:

> For Marcuse, the distinguishing features of a human being are free and creative subjectivity. If in one's economic and social life one is administered by a technical labour apparatus and conforms to dominant social norms, one is losing one's potentialities of self-determination and individuality. Alienated from the powers of

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[100] Michel Foucault, *Foucault: Truth and Subjectivity, Lecture,* SOCIOPHILOSOPHY 1-10 (Aug., 06, 2011), *available at*: https://youtu.be/V0URrVbpjW0?feature=shared (last visited 10 Jul., 2022).

[101] Michel Foucault, *Id.*

> being-a-self, one-dimensional man thus becomes an object of administration and conformity.[102]

In contemporary India, the discursive hypnotization vis-à-vis UCC in personal law by media and judicial discourse, all too ordinary talks in its favour and opposition, the 'doxated habitus'[103] of legal and pedagogical systems for unity and conformity are indicating a future to establish once for all the Elysium of a 'consumer society'[104]. In words of Herbert Marcuse:

> One-dimensional thought is systematically promoted by the makers of politics and their purveyors of mass information. Their universe of discourse is populated by self-validating hypotheses which, incessantly and monopolistically repeated, become hypnotic definitions of dictations.[105]

The way forward to this discourse is the awakening of the sensitivity towards the plurality thriving in India. The UCC is not an enigma to be resolved in isolation. Its quest may be understood in the structural context of modern society. The colonial India produced laws as artefacts produced in the factories to bring uniformity and conformity, and through those steps, they hijacked the 'idyllic soul' of India, *i.e.*, multidimensional life-worlds. If post-colonial India aspires to be more uniformalised than what the British did to Indians, it will only affect the thriving plurality of blossoming India.

V

Uniform Civil Code: Constitutional Critique

The Constituent Assembly had extensively deliberated to bring UCC in the matter of Personal Laws, but due to opposition of a few members from the minority community, and the tumultuous history of contemporary India, the Assembly resolved to make a directive principle of the state policy. Jawaharlal Nehru was also sceptical about the implementation of UCC at that time. As per his opinion, India was not prepared for that transformative change:

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[102] Douglas Kellner, *Introduction to the Second Edition* in Herbert Marcuse, ONE-DIMENSIONAL MAN xxviii-xxix (1964, 1991).

[103] Jeremy F. Lane, PIERRE BOURDIEU: A CRITICAL INTRODUCTION 94 (2000).

[104] 'Consumer Society' signifies the institutions and relationships, existing and self-perpetuating for incessant consumption and to facilitate the ecology of creating demands and supplies of consumptions. The 'uniformalised self' produced through disciplinary techniques are the more suitable objects for instilling in them the desire of constant consumption to tackle with the immanent boredom germinated in all too uniform set of thoughts and practices.

[105] Herbert Marcuse, ONE-DIMENSIONAL MAN 16 (1964, 1991).

> The honourable member is perfectly entitled to his view on the subject. If he or anyone else brings a Civil Code Bill, it will have my extreme sympathy. But I confess, I do not think that at the present moment the time is ripe in India for me to try to push it through. I want to prepare the ground for it and this kind of thing is one method of preparing the ground.[106]

Pandit Nehru was mentioning about the introduction of Hindu Code Bill, as the thing which may prepare the ground for the UCC for all the Indians in the matter of Personal law. The demand for the UCC in the personal law was made to achieve the process of secularization that happened in Europe much earlier *i.e.*, to separate law from religion. This view was advanced by L.M. Singhvi. He wrote:

> In my view, the evolution and emergence of a UCC is a part of the process of secularization; it is part of our quest for a new and integrated national identity based on the composite culture of India and on enlightened rationalism. This is a vital area for our nation building and social development. [107]

There had been a long debate about Indian laws that their character was not secular in nature. L.M. Singhvi, therefore, emphasized on the aspiration to divorce religion from the personal law in these words, 'We want to divorce religion from Personal Law, from what may be called social relations or from the rights of parties as regards inheritance or succession'. [108] The telos of the UCC was manifestly clear to demarcate the line between religious ethics and civil morality. This view was also subscribed by Justice P.B. Gajendragadkar, a former Chief Justice of the Supreme Court of India. As per his opinion:

> Whether or not polygamy should be allowed, what should be the line of succession, what should be the shares of different heirs, what should be the law of divorce, are matters which should be determined not by scriptural injunctions, but by rational considerations. These are matters 'secular' in character and are outside the legitimate domain of 'religion' as contemplated by Articles 25 and 26 of the Constitution of India.[109]

However, the ideal of UCC was made a directive principle of state policy, a non-justiciable constitutional provision, a postulate to be achieved in future. The immediate reason for its non-justiciability was the recent partition of India, therefore, any tinkering of the personal laws of minorities might have given a signal of the superimposition of the Hindu Law of majority over the minorities. To allay the fears, in particular to the Muslim Community, they deliberately made it a

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[106] Robert Baird, *Adjusting to the Sacred as Secular* in Robert Baird *ed.*, RELIGION AND LAW IN INDEPENDENT INDIA 22 (1993, 2005).

[107] Tahir Mahmood, AN INDIAN CIVIL CODE AND ISLAMIC LAW xi (1976). *See also*, Robert Baird, *Id.*, at 22.

[108] Robert Baird, *Id.*, at 21.

[109] P.B. Gajendragadkar, SECULARISM AND THE CONSTITUTION OF INDIA 125-126 (1971).

guiding principle for the governance of the country and to organize one of the basic units of the society, i.e., family.

But they had to start the process from somewhere, and the reform of Hindu Law was considered as the agenda to pursue the goal enshrined under Article 44 of the Constitution. Since, the Hindu Communities were organized on the rules prescribed by the sacred texts, such as *Dharamasastras* and customary practices, which sanctioned certain unfair and discriminatory practices against certain castes and genders. Therefore, the first step was taken by the interim Government to draft and introduce a comprehensive Hindu Code Bill, as the preparatory ground for the universal coverage of the UCC. [110]

On January 2, 1944, the Hindu Law Committee, under the chairmanship of B.N. Rau was appointed to draft the Code for Hindu Law. They made extensive hearings across India, but most of the people opposed such an initiative on the ground that it would interfere with the religion of Hindu.[111] The Bill was introduced in the old Central Assembly in 1947, but it was temporarily withdrawn due to severe opposition. It was again introduced and debated before the Constituent Assembly (legislative), but it was dropped again due to opposition. [112]

Since, the first general election was nearer, therefore, the interim government withdrew the Bill, which was one of the immediate reasons for the resignation of Dr. B.R. Ambedkar from the position of Law Minister, who was very keen to bring such reforms to pursue the goal of social and gender justice. In his words:

> The Hindu Code was the greatest social reform measure ever undertaken by the Legislature in this country. No law passed by the Indian Legislature in the past or likely to be passed in the future can be compared to it in point of its significance. To leave inequality between class and class, between sex and sex which is the soul of Hindu Society untouched and to go on passing legislation relating to economic problems is to make a farce of our Constitution and to build a palace on a dung heap. This is the significance I attached to the Hindu Code.[113]

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[110] J.D.M. Derrett, HINDU LAW, PAST AND PRESENT v (1957): ('the secret of the respective Bills' success in the admittedly radical Parliament of 1952-56 was the genius for compromise which was unquestionably given ample scope….And secondly, however repellent the '(Hindu) Code' may seem at first sight, it is the path to the goal, viz., a (Uniform) Civil Code').

[111] Robert Baird, *Adjusting to the Sacred as Secular* in Robert Baird *ed.*, RELIGION AND LAW IN INDEPENDENT INDIA 22 (1993, 2005).

[112] Robert Baird, *Id.*, at 22-23.

[113] Team Ambedkarite Today, *Resignation of Dr. Ambedkar from the cabinet (Law Minister) in 1951*, THE AMBEDKARITE TODAY, *available at*: https://www.ambedkaritetoday.com/2019/09/resignation-of-dr-ambedkar-from-cabinet.html (last visited on 28 Jul., 2022).

Once a new Parliament came into existence after the first general election, the Hindu Code Bill was divided into four parts, and they were passed separately and incrementally. [114]

But the personal law reforms with respect to other minority communities have remained a project of the future, though many incremental changes have happened either through the initiative of Parliament or by judicial craftsmanship. But the question of UCC came many times before the Supreme Court of India.

In *Mohd. Ahmad Khan* v. *Shah Bano Begum*[115], the Supreme Court of India interpreted Article 44 in such a way that it was considered as a means of national integration through elimination of conflicting ideals behind the personal laws of various communities. In the words of the Supreme Court of India, 'a Common Civil Code will help the cause of national integration by removing disparate loyalties to laws which have conflicting ideologies'.[116] Further, the Court writes in *Shah Bano*:

> We understand the difficulties involved in bringing persons of different faiths and persuasions on a common platform, but a beginning has to be made if the constitution is to have any meaning. Inevitably, the role of the reformer has to be assumed by the courts, because it is beyond the endurance of sensitive minds to allow injustice to be suffered when it is so palpable. But piecemeal attempts of courts to bridge the gap between personal laws cannot take place of a Common Civil Code. Justice to all is a far more satisfactory way of dispensing justice than justice from case to case.[117]

Interestingly, in *Shah Bano*, the Supreme Court read Article 44 as a one-time solution to all the conflicts emanating from the plurality of religious values, especially attached to the personal laws of various communities. Historically, however, India already took the first step into the direction of UCC with respect to family law when the Indian Parliament passed the various bills related to Hindu law reforms. Same method was also adopted in the matter of Muslim law in the post *Shah Bano* judgment. The evolutionary changes are still in the process, meanwhile the hope of revolutionary changes is always ignited by the political leaders and the courts to bring once for all the change which may redefine the basic unit of our society once for all.

In *Smt. Sarla Mudgal* v. *Union of India* (1995), Justice Kuldip Singh emphasized that it must be implemented in the country. In words of Justice Kuldip Singh, 'when more than 80% of the citizens have already been brought under the codified Personal Law there is no justification whatsoever to keep it in abeyance, any more,

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[114] Robert Baird, *Id.*, at 23.
[115] *Mohd. Ahmad Khan* v. *Shah Bano Begum*, 1985 (2) SCC 556.
[116] *Id.*, at para 32.
[117] *Id.*

the introduction of UCC for all citizens in the territory of India'.[118] Justice R.M. Sahai was sceptical about the view that marriage, inheritance, divorce, and conversion are secular in nature. In his view:

> Marriage, inheritance, divorce, conversion are as much religious in nature and content as any other belief or faith. Going round the fire seven rounds or giving consent before *Qazi* are as much a matter of faith and conscience as the worship itself. Some of these practices observed by members of one religion may appear to be excessive and even violative of human rights to members of another. But these are matters of faith. Reason and logic have little role to play.[119]

However, he voiced his support in favour of UCC only for the future. As per him, 'When the social climate is properly built up by the elite of the society, statesmen amongst leaders who instead of gaining personal mileage rise above and awaken the masses to accept the change'.[120] From a Constitutional perspective, the question of bringing UCC in matter of personal law can be thought, and answers may be advanced from the perspective of four theses: (a) Legitimacy thesis, (b) Plurality Thesis, (c) Democratic Thesis, and (d) Secularization Thesis.

Legitimacy Thesis:

Article 44 of the Indian Constitution prescribes that 'The State shall endeavour to secure for the citizens a UCC throughout the territory of India'.[121] This article does not differentiate between various types of Civil Codes. India has already got many Civil Codes; for example, Civil Procedure Code. The word 'Civil' originated from 'Civis' and 'Civilis', which means 'Citizens' or 'relating to citizens'.[122] Every law which organizes or establishes the relationship among the citizens is civil in nature. India, in this sense, has got many uniform codes for all the citizens in order to regulate and organize their life and relationships. Only the laws related to family were not consolidated once for all either in colonial or postcolonial India, rather it was left to be developed on an 'equitable basis'. The early development, of Roman law, continental law, and common law, signifies the similar evolutionary pattern, which happened to be the most useful and appropriate way for the legal development and law reforms, as informed by the experience of history and various cultures.[123] Equitable development of law led the way of codification only at the mature stage,[124] when the equitable principles are too many to resolve a particular

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[118] *Smt. Sarla Mudgal* v. *Union of India,* (1995) 3 SCC 635, para 1.

[119] *Id.*, at para 44.

[120] *Id.*

[121] Article 44, The Constitution of India, 1950.

[122] *See*, Merriam-Webster Dictionary.

[123] *See generally*, Frederick Pollock and Frederic William Maitland, THE HISTORY OF ENGLISH LAW BEFORE THE TIME OF EDWARD I, Vol. I & II (1895).

[124] Friedrich Von Savigny, SYSTEM OF MODERN ROMAN LAW in Michael Freeman, LLYOD'S

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problem or which may be ambiguous in bringing the conclusive answer to a particular problem. The development of codification did not restrict the *aequitas*, rather it allowed the evolutionary growth of law either undertaken by people through customs, legislature through legislations, or judges through judgments. The piecemeal evolution of law through trial and error has proved as more stable and adaptive as per the need of history and culture.

The founding fathers of India chose to make it a directive principle of state policy, since such a measure, like uniform civil code, is not manufactured as a consumable good in one day. Such principles are best suited when they are progressively realized as per the needs of the society. The very nature of social change makes the modern positivized law a subject matter of experimentation and adaptation as per the context in which law reform is warranted. The word 'endeavour' under Article 44 signifies the basic intent of the founding fathers to codify the law relating to personal law in piecemeal or incremental manner. Most of the principles are directive in nature under the Constitution are prescribed to realize what Lon Fuller calls, 'Morality of Aspirations'[125]. These aspirations are the backbone of the democratic life of India. Such aspirations are required to be felt and realized on an equitable basis. The big revolutionary changes have miserably failed in the history of humankind. One of the biggest examples can be advanced, such as the French Revolution. In the words of K.M. Panikkar:

> The question therefore arises, how far a social revolution of this character can be accomplished through legislative process. History, both ancient and modern, bears witness to the limits of legislative competence when it comes to inherited social traditions. [126]

In this respect, the Constituent Assembly provided the aspirational postulate of UCC as a non-justiciable principle, which was considered as the guiding light for the 'Constitutional Reason'[127] to unfold in due course of time. Reason cannot be a static category which was used by the founding fathers, especially under Article 25 of the Constitution. It symbolizes the reformative aspiration into the direction of social and gender justice. The word 'endeavour' signifies 'to put oneself in duty'.[128]

INTRODUCTION TO JURISPRUDENCE 931 (9th *edn.*, 2014): ('Lastly, into the history of every people, enter stages of development and conditions which are no longer propitious to the creation of law by the general consciousness of a people. In this case this activity, in all cases indispensable, will in great measure of itself devolve upon legislation….').

[125] Lon L. Fuller, THE MORALITY OF LAW 5 (1964, 1969).

[126] K.M. Panikkar, HINDU SOCIETY AT CROSS ROADS 61 (1955).

[127] The term 'constitutional reason' signifies a desire to test the historical and cultural experience on the abstract scale of reason enshrined in the Constitution. There is hardly a right guaranteed in the Indian Constitution which may escape the scrutiny of reason. It is equally true that the idea of reason itself symbolizes a deep-seated cultural value emanated from, what Jacques Derrida calls, logocentric tradition of western philosophy.

[128] *See*, Merriam-Webster Dictionary.

The duty under Article 44 is, what Immanuel Kant called, 'imperfect obligation'[129], which cannot be enforced, but it can guide or motivate the policy makers to bring social reforms and gender justice.

The legitimate way of bringing UCC is neither consolidating some abstract principle of law transcending the experiences of various communities, nor bringing a consolidation of the common postulates of all, which is an extraordinary task in a country of immense and conflicting ideals and aspirations. The mandate of Indian Constitution is to move incrementally towards achieving a new height of justice as per *Desh*, *Kaal*, and *Paristhiti* in terms of Rishi Parashara, a great jurist of India.[130] In a way, the country has been successful since independence in, what Werner Menski calls, 'requiring the Indian State to intervene in gendered imbalances and to construct a more effective social welfare net that does not require monetary input from the state but realizes social and moral normative order to provide remedies'. [131] Menski believes that 'these recent Indian legal innovations contain important lessons for the world as a whole on how to manage cultural diversity through legal intervention'. [132] He admires the way Indian lawmakers set the agenda of legal reforms without thinking of a radical or utopian ideal to achieve from a certain standpoint. In his words:

> This Indian method of operating a uniform law without having a codified UCC has gradually developed under our very noses over several decades. But most Indians, and also most academic observers, have not noticed this and the Indian state has had its own agenda for not telling people clearly what it was doing. Still, these are not accidental haphazard developments. The Indian state has apparently acted purposefully, albeit silently and surreptitiously, cautiously and gradually harmonizing the various Indian personal laws along similar lines without challenging their status as separate personal laws. The Indian experience shows that this development does not require the admittedly dangerous radical step of a newly implemented uniform enactment in family law for all citizens. Rather, India has devised a strategy of carefully planned minor changes over a long span of time, actually an intricate interplay between judicial activism and parliamentary intervention, which has left the various bodies of personal law as separate entities.[133]

The reformist approach towards UCC may be discerned from the changed approach of Pandit Nehru who rightly believed that 'in order for law reforms to be effective

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[129] Immanuel Kant, GROUNDWORK OF THE METAPHYSICS OF MORALS 31 (Mary Gregor *ed.*, 1994).

[130] *See*, Upendra Baxi, *Lecture on Legal Pluralism*, CCPL, SHIMLA (Jul., 27, 2022), *available at*: https://www.youtube.com/live/OUgbtYC8Eo8?si=yNfwlcGvDByXihl4 (last visited on 20 Jul., 2022).

[131] Werner Menski, *The Uniform Civil Code Debate in Indian Law: New Developments and Changing Agenda* 9(3) GERMAN LAW JOURNAL 214 (2008).

[132] Werner Menski, *Id.*, at 215.

[133] Werner Menski, *Id.*, at 218.

in society, people themselves would have to change their ways of doing things'. [134] The modern temptation to think about law as a static concept, an uniformalized set of rules commanded by the State is parochial, but this imagination of law is not truthful to the legal plurality, which is a reality hardly to be ignored even in a modern world of 'uniformal rationality'.[135] The modern debate for UCC in personal law in India suffers from inchoate understanding about law reforms and social change. The Code may be progressive enough to achieve the greater height of gender parity and equitable advancement of all the castes and classes, but such aspirations have been realized incrementally in the postcolonial India, when the legislature and judiciary have adopted and an equity-based approach of law reforms in all domains of life including in personal law, and have ignored a utopian approach that a code once brought would bring the divine justice in earthly incarnation. The Hindu Law reforms have already achieved many of these aspirations, but there are new sets of challenges which may be resolved through trial and error basis and equity based approach of legal reforms. This is genuinely the most effective and legitimate way to achieve social, economic, and political justice and to promote liberty, equality and fraternity among every Indian citizen.

Plurality Thesis

Plurality is not a desire of an abstract mind, or merely a speculative hypothesis. It is a fact perceived through our senses, which pervades everywhere and in everything. Obviously, the sources of plurality are the variations or differences into the dimensions of time and space, or to say so, in social sense, history and culture. It appears to our senses that each mode of existence is unique and different from others. Behind the vibrating appearance of plurality, unity of the 'primary matter'[136] may be intuitively thought, though the primary matter or 'extended substance'[137] cannot be perceived in an abstract sense; it always appears with a certain form. Each such form makes every being a unique life form. But the perception of everything outside senses becomes experience through reason which interprets the data of

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[134] Werner Menski, *Id.*, at 222.

[135] 'Uniformal Rationality' signifies the modern idea of standardization of everything on the scale of uniform set of ideals and practices. Uniformity is religiously celebrated as a criterion for achieving objectivity in terms of human's epistemic practices. Another instance may be taken from the pedagogical and research activities which are standardized for achieving objectivity of outcome at the cost of compromising idiosyncrasy. For more details see, Paul Feyerabend, AGAINST METHOD 9 (1975, 1993): ('that anarchism, while perhaps not the most attractive political philosophy, is certainly excellent medicine for epistemology, and for philosophy of science').

[136] John F. Wippel, *Thomas Aquinas and the Unity of Substantial Form*, PHILOSOPHY AND THEOLOGY IN THE LONG MIDDLE AGES 117-154 (2011).

[137] René Descartes, MEDITATIONS ON FIRST PHILOSOPHY 41-52 (Andrew Bailey *ed.*, Ian Johnston *trans.*, 1641, 2013).

sense perception and provides meaning as per certain value. Therefore, the value inherent in our intellectual potentiality determines the unity behind the plurality of life forms.

Initially, the human species remained rooted in the wisdom of nature, used to listen to its music and silences, and used to deduce its organizing laws, which is the reason for unity of everything. But, with the beginning of a modern culture, the alienation of human species from the natural world in terms of organization of a social world paralleling artificial and symbolic reality and the mythological projection of meanings about the natural ecosystems have culminated into uniformal systems of rules and conduct. The symbolic power of human species[138] has made them a demigod, whose communities have become bigger after the passage of time. In such big communities, plurality of values and rules of conduct are incompatible with the governing vision of the central power.[139] Such communities can be efficiently governed through a uniform set of laws and cultural practices.[140] Therefore, the language of the Constitution was developed and crafted to assimilate the constant struggle of uniformity and plurality.

Indian founding mothers and fathers were conscious about the plurality of India in terms of faiths and religious practices, languages, races, climatic differences, food habits, clothing, etiquettes, and social and political institutions for social and public order. Therefore, they chose to imagine the Indian Constitution as an 'essay of plurality', as remarked by Justice D.Y. Chandrachud, the Chief Justice of India.[141] The Constitution was drafted and adopted to maintain the unity of India without converting it into a uniform nation state. The plurality consciousness under the Indian Constitution reflects the vision of the framers of the Constitution, who were inspired by the plurality of India, and which were cultivated during the Independence movement. The preamble of the Indian Constitution provides the aspirations of the Indian Republic; i.e., Freedom of thought, belief, expression, and

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[138] Aldous Huxley, *Foreword* in Jiddu Krishnamurti, THE FIRST AND THE LAST FREEDOM xi (1954, 2013): ('Man is an amphibian who lives simultaneously in two worlds-the given and home-made, the world of matter, life and consciousness and the world of symbols….Without such symbol-systems we should have no art, no science, no law, no philosophy, no so much as the rudiments of civilization: in other words, we should be animals').

[139] Murray Bookchin, *Anarchy and Progress* (1975), BIOPHILY2 (Jan., 23, 2018), *available at*: https://youtu.be/0yG3v1kQjsc?feature=shared (last visited on 25 Jul., 2022).

[140] Murray Bookchin, *Id.*

[141] D.Y. Chandrachud, *State has no Business in Personal Matters': Justice DY Chandrachud's Conclusion in 377 Case*, SCROLL.IN (Sep 06, 2018, 08:18 P.M.), *available at*: https://scroll.in/article/893434/state-has-no-business-in-personal-matters-justice-dy-chandrachuds-conclusion-in-377-case (last visited on 25 Jul., 2022): ('Our Constitution, above all, is an essay in the acceptance of diversity. It is founded on a vision of an inclusive society which accommodates plural ways of life').

conscience under the rubric of fraternity.[142] Such ideas have been constitutionalized as the fundamental rights of the people and Indian citizens in Articles 19 to 30 of the Constitution. Article 19 guarantees the right to freedoms of speech and expression, for peaceful assembly, to form associations or unions, to move freely throughout the country, to reside and settle in any part of the territory of India, and to practice any profession, occupation, trade or business for all the citizens. Such freedoms mentioned above are the foundational norms for facilitating the plurality of thoughts and knowledge systems, plurality of assemblies and associations, and most importantly, allowing the intermingling of the diverse cultures through moving and residing in any part of the Indian territory.[143] Article 21 is the *grundnorm* of all forms of liberty, including personal liberty, which facilitates the plurality of life visions and freedom of will or choice.[144] Article 25 facilitates the right to freedom of conscience, to profess, practice and propagate religion for all the persons, including foreigners. This freedom enables a world of religious and moral pluralism and syncretism of various moral values emanating from diverse religious traditions.[145] Article 26 enables the religious denominations or any section of such religious domination the right to establish and maintain religious and charitable institutions, to manage the affairs relating to religion, to own and acquire movable and immovable properties for such purposes, and to administer them.[146] Article 29 guarantees a special right for the minority to conserve a distinct language, script, or culture.[147] The last word signifies the noblest vision of the framers of the Constitution to conserve the plurality of cultures of India. In order to protect the cultures and languages of minorities, the Indian Constitution provides a special right to minorities, here the word 'minorities' has a broader meaning, encompassing all sorts of minorities including religious and linguistic minorities, to establish and administer educational institutions of their choice without any discrimination.[148] The three tiers system of governance under Indian Constitution signifies the plural dimensions of governance in India, which is further complemented by Article 371 and Articles 371-A to 371-J of the Constitution, which provide the special provisions for certain states for the protection of their cultural and economic interests.[149] Further, Schedule V of the Constitution provides the provisions as to administration and control of Scheduled Areas and Scheduled Tribes, and Schedule VI, in

[142] Preamble, The Constitution of India, 1950.
[143] Article 19, The Constitution of India, 1950.
[144] Article 21, The Constitution of India, 1950.
[145] Article 25, The Constitution of India, 1950.
[146] Article 26, The Constitution of India, 1950.
[147] Article 29, The Constitution of India, 1950.
[148] Article 30, The Constitution of India, 1950.
[149] Article 371, 371-A to 371-J, The Constitution of India, 1950.

particular, provides the provisions as to the administration of Tribal Areas in particular states, such as Assam, Meghalaya, Tripura, and Mizoram.[150]

All these constitutional provisions signify the profound commitments of the framers of the Constitution to facilitate the plurality of India. They were really a plurality conscious people whose vision was to assimilate the quest of unity with plurality. This assimilation began to be shaking once the various amendments brought through 'Constitutional Reason' and in view of the 'exigencies of social and public order' as unifying scale to curtail the plurality of life worlds facilitated by the foundational vision of the Indian Constitution. As suggested by Giorgio Agamben, the real source of power in the modern constitutions no longer exists in the idea of sovereignty but governance.[151] This latter art carves out a 'practical domain of governance' and suspends the original intentions of the framers of the Constitution for the practical exigencies and political expediencies. The art of governance asks for uniformity and conformity, therefore, the pluralistic postulates remain a noumenal vision, a suspended desire of the past, a hanging quest for future. UCC in personal law is a quest to fulfil the political expediency, whose real outcome would suspend the plurality of India, unless Indian Parliament adopts a means of equity-based law reform, which has been an arche-typical policy of the policy makers in the post-colonial India, or if Indian Parliament choses a secular and uniform and secular code for all the personal laws, it must make a harmony between plurality and unity of Indian cultures and traditions. Such harmony is possible only if the law making process is not taken as quantitative productions of laws without adequate reflections on the principles, as well as their conflicting zones and the possibility of harmony. Such a code in a harmonious sense is a possibility which may be realised through open and transparent communication by those who envision and draft such a code and also the *demos* whose personal law is intimately connected to them, from birth to death.

Democratic Thesis

Legal reforms must listen to even the whispers of demos. That whispers and silences can be heard only in a society organized through 'communicative rationality'. [152] Such rationality allows the people to freely participate in the political discourse and establishes the discursive ethics for legal reforms. Communicative rationality is the backbone of the contract base model of political structure and justifications. Only effective communication can resolve the differences and may establish the

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[150] Schedules V & VI, The Constitution of India, 1950.

[151] Giorgio Agamben, *The Power and the Glory lecture*, LIFEARTBIOPOLITICS (Feb., 14, 2012), *available at*: https://youtube.com/playlist?list=PLD2EDB60B9D860026&feature=shared (last visited on 26 Jul., 2022).

[152] Jurgen Habermas, THE THEORY OF COMMUNICATIVE ACTION, Vol. I, 10 (Thomas McCarthy *trans.*, 1984).

consensus out of the pluralities of moral and political choices. True and effective communication can also heal the fragmented society and can lead it towards the actualization of an ideal of fraternity. In a small community, however, communication is freer and more open, since information is less distorted and more accessible. But the modern nation state and its political structure function like a big bureaucratic machine whose parts (citizens) are treated as less significant components in comparison to the gigantic machinery of the state. Citizens, in particular, are asked to conform or they are warranted to obey the uniform set of ideals and myths established and propagated by the people who share the political powers in a state's machinery. Under these circumstances, the law reforms suffer from 'Objectivating Attitude'. [153] This attitude symbolizes a way of looking at the cultural phenomenon from a distance, neutralizing the value judgement of the observer for the sake of gathering data. But when it comes to their interpretation, data is interpreted only in context of the value of observers. The legislative process in India does not take into account the social facts. Social problems and challenges are inferred from a distance and their solutions are dropped from about like a grace from the transcendental authority. Citizens are not properly heard or their voices are selectively chosen to justify the uniformal ideals culminated from the above. Jurgen Habermas believes that legitimate law and democratic rule 'are compatible only if the latter has internal relation to the search for the truth: public discourse must meditate between reason and will, between the opinion-formation of all and the majoritarian will-formation of the representatives'.[154] Jurgen Habermas is of the considered opinion that 'only those laws can claim legitimate validity if they meet with the agreement of all legal consociates in a discursive law-making procedure that has in turn been legally constituted'.[155]

Indian Parliament over the years has enacted the law, nowadays, produces the enormous corpus of statutes in no time, only at the cost of producing the ambiguities. Often such laws do not appeal to the understanding of the bureaucratic apparatuses or ordinary masses who live in their own world of social ordering. The chasm between what laws are enacted from the above and what is actually required in a social order is never mitigated, since the supply side of law, i.e., legislation, often provides the medicines for a disease which is not diagnosed through a systematic exploration. The demand side of law is not properly understood in terms of social facts or social values. But their demand is assumed from the above and

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[153] Jurgen Habermas, *Id.*, at 111: ('One who, in the role of a third person, observes something in the world or makes a statement about something in the world or makes a statement about something in the world adopts an objectivating attitude').

[154] Nicholas Zavediuk, *Consensus between Discourse Ethics and Democracy: Habermas on Compromise*, A THESIS PRESENTED IN THE DEPARTMENT OF PHILOSOPHY, CONCORDIA UNIVERSITY 2 (2005).

[155] Jurgen Habermas, BETWEEN FACTS AND NORMS: CONTRIBUTION TO A DISCOURSE THEORY OF LAW AND DEMOCRACY 110 (William Rehg *trans.*, 1996).

objectified from the perspective of a distant observer. This attitude can hardly be compatible with the art of codification and legislation, which requires not only a scientific understanding of social facts but also empathy driven values to heal a social problem. This attitude is conceptualized by Jurgen Habermas as a 'performative attitude'.[156] In words of Jurgen Habermas:

> Questions regarding the ideal validity of norms, whether for the theoretician or for those involved themselves, can be posed only in the performative attitude of an actor (or of a participant in discourse), whereas questions concerning the social 'validity' or currency of norms, questions of whether norms and values are or are not actually recognized within a group, have to be dealt with in the objectivating attitude of a third person. Corresponding to this at the semantic level is the distinction between value judgments and judgments of fact.[157]

Performative attitude enables the policy makers to participate in the social stage as an actor and observer. In this process, they are able to access and interpret the social value warranted by the community. As Jurgen Habermas writes, 'Rational interpretations are undertaken in a performative attitude, since the interpreter presupposes a basis for judgment that is shared by all parties, including the actors'.[158]

This attitude may enable the democratic machineries to mitigate the chasm between the demand and supply of law; the constant supply of official laws from the above only diverts the actual quest of society in terms of social order. UCC is one of the projected policies in India which is hardly understood through scientific exploration. Its necessity is projected from above in anticipation of a future too polymorphous and diverse in terms of the idea of individual, family, and changing dimensions of demography in the country. Such necessity is introjected from an anxious question of what would happen that day when nearly every social relationship would be unfamiliar and strange with reference to caste and religion. This anxiousness is grounded in the imagination of a few and hardly grounded in social fact. The quest of UCC is actually produced in anticipation of an uncertain future, whose security is arranged beforehand. Technocratic democracy and managerial law making, in fact, relies on technology of information. The opinion-oriented discourses through electronic and print media do not go deeper into the question of uniform civil code, rather most of the questions and answers float on the surface level.

The desire of bringing UCC requires a reflective attitude on the part of policy makers to understand its nuances in a holistic sense and to provide solutions to all the challenges vis-a-vis uniformalizing the psyche of individuals and family law. To

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[156] Jurgen Habermas, THE THEORY OF COMMUNICATIVE ACTION, Vol. I, 191 (Thomas McCarthy *trans.*, 1984).

[157] Jurgen Habermas, *Id.*

[158] Jurgen Habermas, *Id.*, at 103.

what extent the voice of demos is being heard in the national discourses on uniform civil code? How far is the Indian Parliament taking care of the voice coming from the grassroots level of India in such a policy decision which may have profound effects on the social life of the country? These questions are significant from a democratic point view whose answers would be stepping stones for climbing in an unknown territory of UCC for personal laws.

Secularization Thesis

The project of codification of law brought by British Rule was not inspired by a zeal to discover and reconnect to the ancient ideals and practices of India, rather the British Utilitarians were guided by their commitment to experiment with the hedonistic calculus in a traditional society like India. The experiment was also needed to firmly root the British Rule through changing the soul and spirit of Indian societies. What else was more beneficial than bringing uniformity in laws through codification and transforming the nature and functionality of law as a centralized apparatus to enable the machineries of securities like police and army system, and to bring instrumental ideals and practices in securing the institution of private property through uniform legal judicial system? Their earthly desire guided by empirical rationality originated from the protestant ethics, the biggest source of law reforms in the country; for codification as a project was embraced as one of the significant means to positivize and secularize Indian laws and to institutionalize the utilitarian ideals and practices, which were considered as the greatest civilizing gift for Indians. In the words of James Mill, who wrote in *The History of British India*:

> As I believe that India stands more in need in Code than any other country in the world, I believe also that there is no country on which that great benefit can more easily be conferred. A code is almost the only bracing- perhaps it is the only blessing- which obligate governments are better fitted to confer on a nation than popular governments.[159]

This statement makes it clear that codification was designated as a blessing to India, which was bestowed upon Indians by an enlightened power to emancipate Indians from their occupation with the traditional-Asiatic mode of production and governance. It was believed by utilitarians, like Jeremy Bentham, that the ideas of natural law such as inherent right to life, liberty, or property is chimerical, instead a state and its laws are the main source of enabling security and protecting the institution of private property.[160] To the contrary, Indian societies in ancient and medieval ages never allowed the political state to dominate the life worlds, which were regulated and governed by the local village community through customary

[159] James Mill, THE HISTORY OF BRITISH INDIA 479 (1817, 1820).
[160] *See generally*, Jeremy Bentham, ANARCHICAL FALLACIES (1843).

practices and *sadacara*.[161] The vision of British Rule was succinctly explained by Stephens who drafted law of evidence:

> The establishment of a system of law which regulates the most important part of daily life of the people constitutes in itself a moral conquest more striking, more durable, and far more solid, than the physical conquest which rendered it possible. It exercises influences over the minds of the people in many ways comparable to that of a few new religion…. Our law is in fact the sum and substance of what we have to teach them. It is, so to us speak, the gospel of the English, and it is a compulsory gospel which admits of no dissent and no disobedience.[162]

Two words are very significant indications of the attitude from which and by which British Rule brought the codification of all the spheres of the life of Indians. These words are 'gospel of English' and 'compulsory gospel without any dissent'. They wanted to superimpose their life world religiously inspired by industrial revolution to establish a uniform market of ideas and consumable goods, and any other ideal of life was treated with utmost hostility to secure the British Rule, not only by a uniform machinery of laws but also through utilitarian principle/system of education. To what extent is modern India inspired by ancient plurality in terms of schools of thoughts and life practices? To what degree India is replicating the ethics of utilitarianism in the realization of an 'uniformalized sense of security' and 'conformalized sense of gratifying the pleasures'? These questions require deeper mediations when we are heading towards the uniformity of the personal laws.

Secularization thesis may also be understood in terms of, what K.C. Bhattacharya calls, 'cultural subjection'.[163] Its history suggests that secularization was required in a particular cultural context, when one dimensional religious postulate became dogmatic in European societies and subjected the freedom of inquiry through pre-established dogmas of religious authorities. Science for them was another authority, which was used to replace religious life. In constitutional sense, secularization was nothing more than the replacement of God and divine grace with subjective will and reason, both were constituted like divine concepts; their dogmatic assertion and aggressive crusade for their incorporation have only proved that secularization was a symbolic process, which has changed the monotheistic God as the primary authority of morality and has placed 'atomic individual' as a new God, responsible for its wretchedness and richness. The new God, a governor of a finite providence, has in him, the trinity of liberty, equality, and property, whose symbiotic conflicts signify the governance of self, an authoritarian dialectics, within self for

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[161] Robert Lingat, THE CLASSICAL LAW OF INDIA 3-14 (1973).

[162] W.W. Hunter, A LIFE OF THE EARL OF MAYO Vol. I, 169 (1875). *See also*, Chhatrapati Singh, *The Ideological Roots of Legal Paternalism in India* 24 (1) JILI 98 (1982).

[163] K.C. Bhattacharya, *Swaraj in Ideas* in Nalini Bhushan & Jay J. Garfield *eds.*, INDIAN PHILOSOPHY IN ENGLISH: FROM RENAISSANCE TO INDEPENDENCE 101-112 (2011).

individuation of a persona and for regulating the conflicts between one mask and another.

'Kantian Trinity' is discovered through categorical imperatives, such as 'universalizability and autonomy', 'human dignity', and man as 'legislator for the possible kingdom of ends', an image and likeness of God, whose rational power makes him truly a legislator like God has established a kingdom of ends for everything in the cosmos. The category of human dignity is premised on the categorical imperative, 'Act in such a way that you treat humanity, whether in your own person or in the person of any other, never merely as a means to an end, but always at the same time as an end'.[164]

In this maxim, Immanuel Kant brings 'humanity as intrinsic value'[165] in the Aristotelian sense. It does not have to be conceived externally as merely a means to certain ends desire, or to say so, and its conception is not merely instrumental for the calculation of if and but, or cause and effect. Man as a rational being can transcend the deterministic world of cause and effect and plurality in everything through respecting 'one humanity in him and in all human beings'. The humanity here signifies *a priori* postulate as a necessary condition for all the moral judgements, including the question of justice and human rights. Human species as an imperfect image of God is rationally capable of becoming the legislator of the kingdom of ends (God). This conception of human dignity has only replaced one hypothetical God with another one, Man, an atomic individual. This conception of human dignity has nothing to do with the actuality of a being in terms of living standard, socio-economic conditions or mental capacity. It is assumed as *a priori* concept, whose conception is inspired from the idea that man as a rational being is an imperfect image of God.

The first categorical imperative indicates the universalizability of moral ideas, which is as follows, 'Act only according to that maxim whereby you can at the same time will that it should become a universal law'.[166] This categorical imperative is a correlative to the third one, which is as follows, 'Thus the third practical principle follows [from the first two] as the ultimate condition of their harmony with practical reason: the idea of *the will of every rational being as a universally legislating will*'.[167]

Immanuel Kant, through these two imperatives, established the rational foundation of morality in terms of autonomy and its universalizability. What Isaac Newton

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[164] Immanuel Kant, GROUNDWORK OF THE METAPHYSICS OF MORALS 36 (James W. Ellington *ed.*, 1785, 1993).

[165] Aristotle categorized value in two different senses: (a) Intrinsic Value; and (b) Instrumental Value.

[166] Immanuel Kant, GROUNDWORK OF THE METAPHYSICS OF MORALS 30 (James W. Ellington *ed.*, 1785, 1993).

[167] Immanuel Kant, *Id.*, at 43.

attempted in the world of Physics that Immanuel Kant attempted to make compatible the idea of freedom or free will with the deterministic character of the law of nature. Everything in the cosmos follows the law of cause and effect and its appearance is bound in the dimensions of time and space, but a moral law legislated through autonomous will transcends the law of causality or time and space; its moral appeal is universal like our cosmos is governed by a fixed set of laws. Human's rationality is capable of transcending the laws of nature and it can choose certain actions without thinking about the consequences. This approach of Kant only produced a set of technological formulas to uniformalize the question of morality. What may be the reason that Kant chose this project for moral law, if not his devotion to the religious ideals which shaped his thought and moral attitude? Any rational human being deduces the principles of right and wrong only from the first premise, assumed beforehand. Such an assumption has no rational source rather its appearance is related to the life world and culture in which one is trained and nurtured. Immanuel Kant was also a man of his time, whose moral philosophy was an endeavour to bring uniformity in the conflicting and often plural world of moral ideals, whose main source was religious postulates and practices.

As a Christian, the idea of one God, the only Being which is the super-cause of all causes and effects, the highest power of rationality, and the exclusive source of morality, shaped his thoughts and practices. The categories of ideals emanated from his writings became the chief ideals of natural law and human rights philosophy, which have been constitutionalised around the world. His moral language is progressively referred to by the courts and tribunals, and those moral ideals are nothing less than the global constitution in the contemporary world of constitutionalism.

Therefore, the secularization thesis indicates that the uniformalized language of modern constitutions is nothing but the symbolization of religious postulates, whose one dimensionality is antithesis to the religious plurality, which has been the hallmark of ancient and medieval worlds. In particular, India as an ocean of plurality in terms of moral ideals, either coming through religious practices or philosophical explorations, are bound to be culturally subjugated in a secularized process. UCC would achieve nothing less than secularizing and uniformalising the plural world of religious practices and personal laws in India at the cost of affecting the cultural code of India: unity in diversity.

VI

Conclusion

In the this study we have tried to challenge the basic assumptions on which a legal system conceives and implements agenda of reforms by making new laws. The core assumption and genesis of reform includes forgone conclusions: that the existing system or the thing is defective and suffers from *vices*, and it is necessary to prevent decadence. That the vices can be removed and decadence must be stopped by the application of the new knowledge and technologies developed by (social) sciences. As far as the problem of UCC is concerned, the present agenda of reforms in personal law is unaware of itself. The constitutional imaginations for future social order and citizens' plural life do not necessitate codification once for the personal laws of all Indians.

The imaginative method of legislation in the form of a massive code of law, on any aspect of the life of the society, is a product of myths popularised by the Western epistemic community and perpetuated by the European colonial dispensations which were consciously written in the project of modernity. There is little or nothing neutral nor continuous element of historicity in the favour of the concept of code. The institution and the idea of codes come to the third world from the epistemic authoritarian culture of the West. The direct consequences of this social science tradition, for law and legal system, have been the conferment of unlimited power on the state over '*life as it is*'. However, this cognitive project is a psychological politics of *homo academicus* for transforming old myths into infinite regressive organising categories of rationality, reason, and individuality.

Accordingly, we have argued that the requirement of 'uniformity' as 'unity', in the sense of in which modernity proliferated the cultures and aspirations, belie the truth of history of cultures. The Greeks and Romans traced the roots and origin of unity in the nature in sense of *Logos* and *Physis.* The same is paralleled with the ancient Chines concept of *Tao* and Indian principles of *Rita* and *Dharma*. The idea of instrumental rationality has only produced the uniform ideals and practices and culminated into '*uniformal rationality*' for law and culture. The inescapable result is the production of 'dead life' which signifies the loss of moral sentiments, human emotions, empathy and compassion and the individual is reduced to the status of consumptive cells.

The production of constitutions and legal hermeneutics are 'fulcrumized' on limited and insular set of categories, such as democracy, secularism, constitutional legitimacy, and pedantic view of pluralism, etc. The findings of the critical study establishes that the Constitution of India has accommodated these categories in an open texture and spirit in which they are found inscribed in the mind and soul of Indian communities. Therefore, they cannot be allowed to be cribbed into

doctrinaire form and substance for legal glossators. The debate and the proposal of UCC, at the present form and tenor, signify acts of violence against cultural, religious and epistemic practices of the diverse congeries of communities.

Personal law is too intimately connected to the demos that it is the basic cultural code of a particular life world, which shapes the thoughts, sentiments, and practices of each member of that community.

Its plural character has made India a country of immense diversities in terms of faith and religious practices, languages, food habits, clothing, music and cinemas, and other forms of arts, etc. This plurality is required to be protected or, at least, it must be balanced with reference to the quest to bring certain uniform standards for establishing social and public order through 'constitutional reason'.[168] Such a balancing act summons one to pay attention to the law making or art of codification. The legislative process in India requires transformative changes in bringing qualitative improvements in terms of discovery of the actual social and cultural challenges to be addressed, giving sufficient time for deliberations and reflections, drafting legal languages with clarity and brevity. Such tasks are significant in facilitating the balance between, what Sally Moore calls, 'semi-autonomous social fields'[169] and uniform standard of law for governance and development.

Second significant challenge in conceptualising a UCC for personal laws is the interconnectedness of religious practices with personal laws. Many of the rituals and even proprietary interests are determined by the religious texts or customary practices followed since antiquities. To what extent, the Indian Parliament can make a balance between the secular and religious aspects of personal laws? This question is significant for conceptualizing and bringing UCC for marriage, succession, and divorce, etc.

Third challenge comes from the question of finding a common civil code out of diversified religious practices. Such common code may be developed out of multiple principles and practices prevalent among the various communities. Especially for the tribal communities, their life world is totally different from the modern life embraced by people of scientific temperament and technological

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[168] *Sabrimala* and *Triple Talaq* cases are some of the recent instances in which the Supreme Court of India preferred 'Constitutional Morality' as a standard to review the old-age customary practices. Such Constitutional categories are innovated to establish Constitution as the highest 'constituted reason' of the people, which is the yardstick to evaluate and legitimize the moral standards of all the social orderings within a political community.

[169] Sally Falk Moore, *Law and Social Change: The Semi-Autonomous Social Field as an Appropriate Subject of Study* 7 (4) LAW AND SOCIETY REVIEW 721 (1973): ('that an inspection of semi-autonomous social fields strongly suggests that the various processes that make internally generated rules effective are often also immediate forces that dictate the mode of compliance or noncompliance to state-made legal rules').

innovations. To what extent, the commonality of principles and practices may be discovered when many of those principles and religious practices are conflicting and sometimes contradictory to each-other? The fourth challenge is connected to the secularisation thesis, i.e., whether secularisation of personal law is a step ahead in the transformation of religiously sanctioned morality to civic morality? Whether the secularisation of European cultures is free from religious values, therefore India can safely embrace it as an antidote to mysticism or is it a way of scientific progress? The deep chasm between the religious attitude of Indian citizens and a secular quest of uniform law are nothing less than an intimate tension, whose synthesis requires the profound meditation at least by the policy makers of India.

The Indian Constitution has constitutionalized a fine balance between unity and plurality. Unity is the profound language and universal substance of nature. Uniformity may well be requirements of knowledge and advancements in social sciences. In the age of globalization, uniformity is taken to the status of universality. For a legal system, uniformity is envisioned to ensure and promote easy conformity and compliance. For lawmakers and the enforcement agencies, including the judiciary, uniformity is equal to conformity. Moreover, codification, as the master pursuit of will, confers unlimited power on the lawmakers to shape an imaginative future of a nation state. The acquisition and appropriation of bureaucratic power and existence of life in the natural and social order as the dialectics of history, culture, and conventions create a deep gulf in which human beings are trapped. The idea of code is not only about preserving the past, but also creating a future connected to the history and culture of a particular society. A future which cannot be envisioned from the present; its openness is its true character which is tried to be arrested by a conservative mind on a certain maxim and formula. Any project of reform of personal laws in India must aim at the unity of intra-personal laws related to the believers and non-believers of all religions. Bringing a uniform personal law once for all from above for all diversified cultures will be against the constitutional spirit, social theories, and cultural experiences of the pluralistic Indian societies.