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UNBURDENING THE CONSTITUTION: WHAT HAS THE INDIAN CONSTITUTION GOT TO DO WITH PRIVATE UNIVERSITIES, MODERNITY AND NATION-STATES?

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This article critically analyses the decision of the Indian Supreme Court in *Yashpal and another v. State of Chhattisgarh and others* holding the establishment of private universities as unconstitutional. Swayed by the overwhelmingly irresponsible character of the respondent universities, the Supreme Court innovated constitutional arguments to uphold the claims of the petitioners. While intuitively correct in the context of the immediate facts, the judgment, when analysed in the abstract, reveals the self-inflicted harm it has the potential to cause. The judgment is technologically regressive: it fails to account for the emerging trends in education, especially those related to the use of technology and in particular about the emergence of e-education. It is also unconstitutional: it purports to add grounds for judicial review of primary legislation that agreeably is a constituent rather than an adjudicative act. Finally, it is backward looking: it proposes to reintroduce a moralizing rhetoric in the conduct of education, thereby, paving way for poorer educational standards in India. Underlying these distinct inadequacies is a common inability of the Supreme Court to de-link the university as a "project of modernity" from its status as "the ideological apparatus of the nation-state." Universities, for the Indian Supreme Court, are still an embodiment of the "popular will" and, therefore, incapable of being appropriated.

I. INTRODUCTION

There is little, if not nothing, about the Indian life that has remained untouched by the sparkle of judicial razzmatazz paradigmatic of the Indian Supreme Court.[1] Educational issues, particularly in the last decade, became the site of contagious contestations and the Supreme Court gladly gleamed from the skies to "find" constitutional answers. *Mohini Jain v. State of Karnataka*[2] was perhaps the first spark; the Supreme Court declared right to education as a fundamental right under

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1 For a critical introduction see Upendra Baxi, "The Avatars of Indian Judicial Activism: Explorations in the Geographies of [In]Justice" in S. K. Verma & Kusum, eds., *Fifty Years of the Supreme Court of India: Its Grasp and Reach* (New Delhi: Oxford University Press, 2000) 156.

2 (1992) 3 SCC 666 [*Mohini Jain*]. Explaining the Court's rationale, Justice Kuldip Singh held at 690-691 that "'[r]ight to life' is the compendious expression for all those rights which the Courts must enforce because they are basic to the dignified enjoyment of life .... *The 'right to education', therefore, is concomitant to the fundamental rights enshrined under Part III of the Constitution.*" [emphasis added].

article 21.[3,4] It was in many ways the beginning of a long innings of judicial involvement that betrays no motions of abatement: the flurry of education-related petitions, on the contrary, have gathered pace. Education as a fundamental right,[5] commercialisation of education,[6] introduction of courses in universities,[7] authority of the state to start technical institutions,[8] politicisation of history textbooks[9] and even issues concerning fees charged in state-sponsored management institutions have muddled the dockets of the Supreme Court.[10] Minority concerns have also figured prominently in this expansive juridical canvass: many interventions involved perplexing explanations of the right to "establish and administer" minority educational institutions under article 30(1).[11] In short, there was nothing about education in India that the Supreme Court did not have to contend with.

This article critically analyses the decision of the Supreme Court in *Professor Yashpal and another v. State of Chhattisgarh and others*:[12] one of the many in recent times concerning educational issues The State of Chhattisgarh ("State") passed the *Chhattisgarh Niji Kshetra Vishwavidyalaya (Sthapana Aur Viniyaman) Adhiniyam*, 2002 (*Establishment of Self-financed Private Universities for Higher Education Act*, 2002), ('*Education Act*').[13] Called upon to adjudicate on the constitutionality of the *Education Act*,[14] the Supreme Court engages in a mindless exercise replete with

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3 *Constitution of India* [*Constitution*], art. 21: "No person shall be deprived of his right to life and personal liberty except according to procedure established by law." The right to education has subsequently been incorporated as a named fundamental right by the *Constitutional (Eighty-Sixth Amendment) Act*, 2002 inserting article 21A in the Constitution. See *Constitution*, art. 21A: "The State shall provide free and compulsory education to all children of the age of six to fourteen years in such manner as the State may, by law, determine."

4 For a reading on the "creative" phase of the Indian Supreme Court see Govind Das, *Supreme Court in Quest of Identity* (New Delhi: Eastern Book Company, 2000) at 131–199; Shubhankar Dam, "Lawmaking Beyond Lawmakers: Understanding the Little Right and the Great Wrong" 13 Tul. J. Int'l. & Comp. L. 109 at 114-121 (discussing the silent and unsatisfactory premises on which judicial law-making in India has proceeded).

5 See *Unnikrishnan J.P. v. State of Karnataka* (1993) 1 SCC 645 [*Unnikrishnan*].

6 See *Modern School and others v. Union of India and others* 2004 Indlaw SC 325; *T.M.A. Pai Foundation v. State of Karnataka* (2002) 8 SCC 481 [*T.M.A. Pai*].

7 See *P.M. Bhargava and others v. University Grants Commission and another* 2004 (6) SCC 661.

8 See *State of Tamil Nadu and another v. Adhiyaman Educational and Research Institute and others* 1995 (4) SCC 104.

9 See *Ms. Aruna Roy and others v. Union of India and others* 2002 (7) SCC 368.

10 A petition on the presence of student unions affiliated to mainstream political parties is currently pending before the Supreme Court. The Court has constituted a committee under the chairmanship of former Chief Election Commissioner J. M. Lyngdoh. The Committee has been asked to make recommend a code for the conduct of elections in universities and colleges.

11 *Constitution,* art 30(1): "All minorities, whether based on religion or language, shall have the right to establish and administer educational institutions of their choice." For cases involving the interpretation of art. 30(1) see *e.g. P.A. Inamdar and Others v. State of Maharashtra and Others* 2005 Indlaw SC 463, *Islamic Academy of Education and Another v. State of Karnataka and Others* 2003 (6) SCC 697; *T.M.A. Pai*, *supra* note 6; *Ahmedabad St. Xavier's College Society v. State of Gujarat* AIR 1974 SC 1389; *St. Stephen's College v. University of Delhi* AIR 1992 SC 1630; *D.A.V. College v. State of Punjab* AIR 1971 SC 1737.

12 2005 (5) SCC 420 [*Yashpal*].

13 Act 2 of 2002.

14 In particular sections 5 and 6 of the Act were challenged as constitutionally invalid. Section 5 provided that "(1) the State Government may by notification in the Gazette establish a University by such name and with such jurisdiction and location of campus as may be specified therein having regard to – (a) the desirability to establish a University; (b) recognition or authorization as may be required under any other

assumptions and inferences that have little or no constitutional basis. Declaring the impugned Act unconstitutional, the Supreme Court produces a judgment that is astounding for the sheer volume of contradictions that pervade it. I make three principal arguments. First, that the judgment reflects a complete non-understanding of emerging trends in education, especially those related to the use of technology and in particular about the emergence of e-education. This non-understanding has been abetted by its tendency to appreciate meanings of words and phrases from archaic, though authoritative, sources: a process that does not augur well for an otherwise "dynamic" Indian Supreme Court. Secondly, that the Court erred in declaring sections 5 and 6 of the impugned Act unconstitutional. Whether the Legislature has jurisdiction to enact a piece of legislation providing for the establishment of private universities is a question wholly different and unrelated to whether the private universities under a given legislation were properly established. While the former is an issue of legislative competence, the latter pertains to the lawful exercise of executive discretion. This is a distinction the Supreme Court was unable to make or as I would argue, chose not to make. Thirdly, that by invalidating the legislation and reintroducing its moralizing rhetoric in the conduct of education, the Supreme Court has effectively paved way for poorer educational standards in India. Underlying this landscape of arguments is the fundamental inability of the Supreme Court to delink the university as a "project of modernity"[15] from its status as "the ideological apparatus of the nation-state."[16] Universities, for the Supreme Court, are still an embodiment of the "popular will"[17] and, therefore, incapable of being appropriated. *Yashpal* provided a rare moment of introspection into the existential purposes of universities in contemporary times: the Indian Supreme Court exemplified its lazy ways in its failure to seize the significance of the moment.

II. Averments and Counter Averments: Facts of *Yashpal* in Perspective

This writ petition was filed by Professor Yashpal, an eminent scientist and former chairman of the University Grants Commission of India, under article 32 of the *Constitution*.[18] He was joined in his enthusiastic efforts by a "resident of the state of Chhattisgarh concerned about the quality of education in his state."[19] The writ petitions made substantially similar submissions and the Court decided to hear the petitioners jointly. They made three core submissions. First it was argued that

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law for the time being in force to conduct the syllabus and to grant degrees or diplomas or awards. (2) Every notification issued under sub-section (1) shall be laid on the table of the Legislative Assembly." Section 6 of the Act provided that "(1) every University established under sub-section (1) of section 5 shall be a body corporate by the name notified under the said section having perpetual succession and a common seal, and may sue and be sued by the said name. (2) The University established under sub-section (1) of section 5 may, with the prior approval of the State Government, affiliate any College or other institution or set up more than one campus."

15 See Jurgen Habermas, "Modernity and postmodernism" (1981) 22 New German Critique 3.

16 See Kevin Robins & Frank Webster, "The Virtual University?" in Kevin Robins & Frank Webster eds., *The Virtual University?: Knowledge, Markets and Management* (Oxford: Oxford University Press, 2002) [Robins & Webster, *Virtual University*] 3 at 5.

17 See B. Readings, *The University in Ruins* (Cambridge, Mass.: Harvard University Press, 1996) at 14.

18 *Constitution,* art 32(1): "The right to move the Supreme Court by appropriate proceedings for the enforcement of the rights conferred by this Part is guaranteed." *Supra* note 12 at para. 1.

19 *Supra* note 12 at para. 1.

the discretion granted to the State executive under the *Education Act* had not been properly exercised.[20] "The State Government has been," the petitioners submitted, "simply by issuing notifications in the Gazette, establishing universities in an indiscriminate and mechanical manner without having slightest regard to the availability of any infrastructure, teaching facility or their financial resources." So much so that "in a short span of about one year as many as 112 universities [had been] established" and notifications were made in a stereotyped manner.[21] Secondly, the petitioners argued that the *Education Act* had been enacted in a manner that did away with "any kind of control of the University Grants Commission ('UGC') over these private universities."[22] The guidelines issued by UGC on the courses being taught and award of academic degrees had been given a complete go-by.[23] Similarly, it was alleged that the universities had not sought permission from regulatory bodies such as All India Council of Technical Education ('AICTE'),[24] Medical Council of India ('MCI')[25] and the Dental Council of India ('DCI').[26] And consequently, the degrees and diplomas awarded by these universities would not be recognised by professional bodies.[27] Thirdly, and most crucially it was submitted that none of these universities had any facility to impart education, much less quality education and that gullible students were being drained of their money, mind and effort. The universities had publicised for varied courses leading to degrees for which it clearly did not have the requisite infrastructure. Universities were, the petitioners claimed, befooling students to apply for admission to wholly unknown and unheard of technical, medical and other professional courses that had not been recognised by any statutory authority. Photographic evidence also was adduced before the Court "showing a signboard mentioning the name of the University put over small room or shop on first or second floor in some congested market area."[28] To put it in short, the petitioners alleged that the establishment of private universities without proper verification by the State executive and without control of regulatory bodies including the UGC was constitutionally impermissible. The so-called universities were interested in mere money-making and had no capacity to contribute to the higher education of the State. And in such circumstances, students were being led into a trap by advertisement publicising attractive degrees having neither recognition from professional bodies nor any market value.

These are undoubtedly important and relevant considerations, both for an educationist of the stature of Professor Yashpal and of the resident of Chhattisgarh "concerned about the quality of education in his state." Interestingly, the resident co-petitioner whom the Court chose to refer as someone "concerned about the quality of education in his state" was in fact concerned about his financial dealings rather than the quality of education in the State. The co-petitioner had entered into a commercial agreement with one of the private universities only to subsequently find out

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[20] *Ibid* at para. 2.
[21] *Ibid*. For examples of such stereotype notifications see *ibid.* at para. 5.
[22] *Ibid*.
[23] *Ibid.* at para. 2.
[24] *All India Council For Technical Education Act*, 1987 (Act 52 of 1987).
[25] *Indian Medical Council Act*, 1956 (Act 102 of 1956).
[26] *The Dentists Act*, 1948 (Act 16 of 1948).
[27] *Supra* note 12 at para. 2.
[28] *Ibid.* at para. 3.

that he had been defrauded of fifty thousand rupees.[29] Only after having suffered commercial loss did the petitioner become "concerned about the quality of education in his state." And it was at this stage that the resident decided to invoke the jurisdiction of the Supreme Court under article 32. Clearly, the petition while acting in so-called "public interest" was motivated by pecuniary interests: it was his financial interests that brought him to the Court rather than any concern about the quality of education. While the application of criminal law and/or tort law is understandable in cases of fraud between private parties; it is difficult to see the role of public law in such an analysis. The inability of the Supreme Court to see through the motivations of the second petitioner is perplexing at best and crafty at worst.

Disregarding the pecuniary interests of one of the petitioners for the moment and even assuming that the concerns raises by the writ petitions were relevant and important, it is difficult to see how the petitions raised questions of public law. To emphasize, lest it be forgotten, mere relevance and importance does not qualify the concerns as one calling for judicial attention under article 32. Jurisdiction under article 32 is for the limited purpose of enforcing fundamental rights guaranteed under Part III of the *Constitution*.[30] Interestingly, the judgment did not involve any discussion on the standing of the petitioners to approach the Court.[31] Which fundamental right was the Supreme Court seeking to enforce when it entertained the averments of the petitioners? Given that the Court convincingly assumes the existence of jurisdiction in the matter, one can only conclude that it had impliedly preferred to read a fundamental right to higher education within the right to life and personal liberty under article 21. In that event, *Yashpal* may be seen as an important departure from the earlier position articulated by the Supreme Court. Right to education, following *Mohini Jain*, *Unnikrishnan* and others has been consistently understood as referring to a right to primary education. *Yashpal* may now be said to have provided a new dimension to the right altogether.

But an implied recognition of a right to higher education does not resolve the matter: rather it leads to a whole set of issues that I shall not explore in this article. It may not, however, be irrelevant to highlight some of them even if only in an interrogative form. What does the right to higher education guarantee: a right of admission to an institution of higher learning or a reasonable opportunity of admission to such institutions? On whom does the burden lie to discharge the obligation of reasonable opportunity—the state or everyone involved in the administration of higher education? If the burden is on the former, *i.e*. the state, is lack of expertise or financial resources a reasonable excuse for its inability to guarantee the right to higher education? On the other hand, if the burden is on the latter, *i.e*. everyone involved with the

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[29] *Ibid.* at para. 4. ("The writ petitioner, not knowing the correct facts, responded for opening up a study centre and he was asked to deposit Rs. 50,000/- which he did by two Demand Drafts.")

[30] *Constitution,* art. 32(1): "The right to move the Supreme Court by appropriate proceedings for the enforcement of the rights *conferred by this Part* is guaranteed." [emphasis added].

[31] *Supra* note 12 at para. 1. The Court merely said, "Professor Yashpal, an eminent Scientist and former Chairman of University Grants Commission, has filed Writ Petition No. 19 of 2004 under Article 32 of the Constitution by way of public interest litigation for declaring certain provisions of *The Chhattisgarh Niji Kshetra Vishwavidyalaya (Sthapana Aur Viniyaman) Adhiniyam*, 2002 as *ultra vires* and for quashing of the notifications issued by State of Chhattisgarh in the purported exercise of power conferred by s. 5 of the said *Adhiniyam* for establishing various universities." Thereafter, it does not in any way explain the jurisdiction of the Court under art. 32.

administration of higher education including private investors, how does one explain the discourse of fundamental rights with respect to non-state actors? These interrogations are merely illustrative: but even these elementary interrogations highlight ways in which the expansive discourse of rights under the Indian *Constitution* may be problematised. What does it mean to say that a right is guaranteed as a fundamental right? What makes a right—"fundamental"? Current juridical conceptualisation of fundamental rights and their substance in Indian constitutional law is remarkably sketchy and, at times, unintelligible.[32] The rights discourse under the Indian constitution is principally one of rhetoric: an indictment that cannot be dismissed without a more coherent reconstruction of the law relating to fundamental rights.[33]

It is, however, not without interest to point out that issues of jurisdiction under article 32 have become largely redundant in practice: writ jurisdiction for the enforcement of fundamental rights has been silently transformed into a jurisdiction concerning public administration.[34] For the Supreme Court, a writ has acquired an alchemic property: it can transform any existential crisis into a constitutional (or legal) conundrum.[35] This transformation apart, a writ, for the Supreme Court also carries an ameliorative property: the Court could (or so it believed) "legally" redress any existential crisis by issuing a writ. This dramatic metamorphosis in the character and application of writs broadly coincided with the development of social action litigation in India.[36] The writ jurisdiction increasingly became detached from the rights discourse, that it was intended to support, and converted into a regulatory instrument. Writs, in this sense, developed a *sui generis* character: in its current conceptualisation writs are constitutional weapons usually against abusive state (and on occasions non-state) practices rather than for the specific (and limited) purpose of enforcing guaranteed fundamental rights.[37]

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[32] For a critical, though general, introduction to some of these issues see U. Baxi, *The Future of Human Rights* (New Delhi: Oxford University Press, 2002).

[33] See S.P. Sathe, *Judicial Activism in India: Transgressing Borders and Enforcing Limits* (New Delhi: Oxford University Press, 2003) at 118-120.

[34] For some issue arising out of this silent transformation see Shubhankar Dam, "'A court of law and not justice—Is the Indian Supreme Court beyond the Indian Constitution?" [2005] P.L. 239.

[35] For an explanation of the alchemist argument specifically in the context of environmental jurisprudence in India see Shubhankar Dam & Vivek Tewary, "Polluting Environment, Polluting Constitution: Is a 'Polluted' Environment worse than a Polluted Environment?" (2005) 17 J. Envtl. L. 383.

[36] Though formally inaugurated in *S.P. Gupta v. Union of India* AIR 1982 SC 149, the genealogy of social action litigation may be traced though four specific cases—*Maneka Gandhi v. Union of India* AIR 1978 SC 597; *Hussainara Khatoon (I) v. Home Sec'y, State of Bihar* (1979) 3 S.C.R. 169; *Sunil Batra v. Delhi Administration* (1980) 3 SCC 488; *Minerva Mills v. Union of India* (1981) 1 S.C.R. 206. See Clark D. Cunningham, "Most Powerful Court: Finding the Roots of India's Public Interest Litigation" in S.P. Sathe *et al.*, *Liberty, Equality and Justice: Struggles for a New Social Order* (Lucknow: Eastern Book Company, 2003) at 83 for an elaborate discussion of the case that is widely regarded as the beginning of the new order. See also Upendra Baxi, *The Supreme Court Under Trial: Undertrials and the Supreme Court*, (1980) 1 S.C.C. (Jour) 35; Upendra Baxi, *The Indian Supreme Court and Politics* (Lucknow: Eastern Book Company, 1980).

[37] All fundamental rights are not necessarily against the State. See *Constitution,* art. 17: "Untouchablity" is abolished and its practice is forbidden. The enforcement of any disability arsing out of "untouchability" shall be an offence punishable in accordance with law."; art. 23(1): "Traffic in human beings and *begar* and other similar forms of forced labour are prohibited and any contravention of this provision shall be an offence punishable in accordance with law."; art. 24: "No child below the age of fourteen years shall be employed to work in any factory or mine or engaged in any other hazardous employment."

The State of Chhattisgarh filed brief but almost identical replies to the two petitions. The State's reply is important: it is a valuable source in understanding the policy motivations that guided the enactment of the *Education Act*. While I limit myself to the submissions of the State here, I shall later use these sources to critically evaluate the policy preferences of the Supreme Court vis-à-vis that of the State. The main plea taken by the State was that of legislative competence—it argued that in view of entry 32 of List II of the Seventh Schedule to the *Constitution*, the State of Chhattisgarh was legislatively competent to enact a piece of legislation providing for the incorporation of universities.[38] Explaining the policy motivations underlying the law, counsel for the State argued that it sought to "facilitate establishment of private Universities with a view to create supplementary resources for assisting the State Government in providing quality higher education." The submission is vital. On one hand, it is a confession of the State's insufficient financial and intellectual capital to promote institutions of higher learning and on the other, highlights its affable approach towards private investment in education.

The State also argued that notifications establishing universities under the *Education Act* were issued with the expectation "that the Universities would make the requisite infrastructure including campus, building, etc. and recruit qualified staff so as to provide higher education in order to achieve the object for which the Universities were established."[39] However, it made no bones that the "functioning . . . was dismal and completely belied the expectations which the State Government had in that behalf, raising serious concern about the academic interests of the students seeking admission therein."[40] Accordingly, the State brought an amendment in 2004 to the *Education Act* providing that additional conditions be met before a notification could be made declaring the incorporation of a university.[41] The State, acting under the *Amendment Act*, 2004, de-notified universities established earlier for their failure to comply with additional conditions.[42] These submissions, apart from highlighting the State's approach towards private investment in education, also emphasize its sincerity towards quality education. The amendment to the *Education Act* and the subsequent de-notification of as many as 59 universities suggests that the State was well alive to the real ground conditions and acting to the best of its abilities. I shall argue subsequently that the decision of the Supreme Court completely fails to take into account this obvious sincerity on the part of the State and the integrity of its purpose. The Court, as we shall see later, pursues a determined, at times dismissive approach, without giving adequate consideration to the submissions of the respondent State.

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[38] Entry 32 of List II contains the following entry: "Incorporation, regulation and winding up of corporations, other than those specified in List I, and universities; unincorporated trading, literary, scientific, religious and other societies and associations; co-operative societies." For a brief reference to the scheme of legislative entries, see *infra* note 43.

[39] *Supra* note 12 at para. 7.

[40] *Ibid*.

[41] These conditions included proof of having established an endowment fund of rupees two crores; proof of being in possession of certain acres of land and other tangible infrastructure and also created a Regulatory Commission to oversee the implementation of the Act.

[42] *Supra* note 12 at para. 7.

III. A Critique of Substantive Sources: Can "University" have an Indian Meaning?

Following a brief reference to the relevant legislative entries on university in the Seventh Schedule,[43] the Supreme Court pursues an expansive discussion on methodology. What should be the approach in interpreting the meaning of university? And in interpreting university it employs principles and interpretations—some highly suspicious and others wholly redundant. It refers to decisions of the United States Supreme Court,[44] Court of Appeal and the Privy Council in the United Kingdom,[45] and also approvingly recites India's most celebrated author on constitutional law, H.M. Seervai.[46] The relevance of these sporadic (and contradictory) references on interpretation of legislative power is difficult to appreciate. While the citations of the U.S. Supreme Court emphasize the "original" meaning of the words used, *i.e.*, having regard to the understanding of what the framers of the *Constitution* expected the scope of legislative powers to be, decisions of the Court of Appeal and the Privy Council suggest that in determining the scope of legislative power regard must be had to what is ordinarily treated as embraced within that topic in legislative practice. In other words, while the interpretation of the U.S. Supreme Court would suggest that university in the Seventh Schedule must be interpreted to mean what the framers meant it to be, according to their counterparts in the U.K., the extent of legislative power regarding university must be interpreted having regard to the ordinary meaning of the word used. To make matters worse, the Supreme Court in its profound wisdom also quoted with approval Seervai's observation that "the golden rule of interpretation is that words should be read in their ordinary, natural and grammatical meaning subject to the rider that in construing words in a Constitution conferring legislative power the most liberal construction should be put upon the words so that they may have effect in their widest amplitude. This is subject to certain exceptions and a restricted meaning may be given to words if it is necessary to prevent a conflict between two exclusive entries.[47]

These principles are in clear contradiction: Seervai rejects the originalist emphasis of the U.S. Supreme Court and agrees only in part with the Privy Council. It is difficult, indeed perplexing, to understand how all three principles may be quoted with approval at the same time. One may have understood if the aim was to refer to these possible ways of interpretation and then reason why one of them was a better

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[43] Seventh Schedule to the Indian Constitution lists various entries over which Parliament and state Legislatures have competence to enact laws. The Schedule contains three lists—Union List (List I); State List (List II) and Concurrent List (List III). Parliament has exclusive jurisdiction to make laws in relation to entries contained in List I. Similarly, subject to certain exceptions, state Legislatures have exclusive jurisdiction to make laws in relation to entries contained in List II. Both Parliament and state Legislatures have jurisdiction to make laws in respect of entries contained in List III. However, in case of conflict between a Union law and a law passed by a state Legislature, the former shall prevail unless certain conditions are satisfied, in which case the State law continues to remain in force. In the instant case, the State of Chhattisgarh contended that it had jurisdiction to make laws relating to the establishment of private universities by virtue of entry 32 of List II.

[44] *South Carolina v. United States* (1905) 199 U.S. 437; *Ex parte Grossman* (1925) 267 U.S. 87.

[45] *Croft v. Dunphy* 1933 AC 156; *Wallace Brothers and Co. Ltd.* v. *Commissioner of Income-tax Bombay* AIR 1948 PC 118.

[46] H.M. Seervai, (I) *Constitutional Law of India*, 3d. ed., (Bombay: M.N. Tripathi, 1991) at 179-180.

[47] *Ibid*.

alternative. Or it could have at least explained why it chose to refer to these citations except to say that they are "well-known decisions."[48] Not unexpectedly, the Court did neither. Supreme Court judgments have increasingly ceased to make any sense except that they contain some aimless bantering and *Yashpal* is a convincing example of that.[49]

In applying these principles to the interpretation of university, the Court makes the following assertion:

> The framers of the [Indian] Constitution having adopted (with some modification) the legislative entries on Universities from the Government of India Act, 1935 made by the British Parliament, the full content and amplitude of the entry can be comprehended by examining how a University is understood and what is its concept in U.K. and U.S.A. whose pattern was followed in several matters and which the founding fathers had in their mind.[50]

The statement may be understood only as an approval of the position articulated by the U.S. Supreme Court—*i.e.*, in interpreting the scope and extent of legislative power we must place ourselves in the position of the men who framed and adopted the *Constitution*, and inquire what they must have understood to be the meaning.[51] It implies that the framers' understanding of university in 1948-50 should still be the guiding force in ascertaining its meaning today. This position, to say the least, raises immediate problems. Why should what some learned men and women did in 1950 be relevant to the understanding of the Indian *Constitution* nearly six decades later? Are words and phrases, like law, a dynamic category? Do there meanings evolve over time and space? Do contemporary social constructs and technological developments affect possible interpretations of words and phrases? The Supreme Court introduces the originalist principle but provides no explanation for doing so. It extensively reproduces the meaning and description of university from Halsbury's Laws. For the limited purposes of this critique, I reproduce below only certain parts from the quoted text:

> A university is the whole body of teachers and scholars engaged, *at a particular place*, in giving and receiving instruction in the higher branches of learning; *such persons associated together as a society or corporate body, with definite organization* and acknowledged powers and privileges (especially that of conferring degrees)...[52]

Thereafter, the Court diligently recites the meaning of university as provided in American jurisprudence:

> Properly speaking, a "university" is an aggregation or union of colleges.... The term "college" may also be used *to indicate a building, or group of buildings,*

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48 *Supra* note 12 at para. 10.

49 This charge of an alarming decline in the quality of judgment is not novel. H.M. Seervai made this remark with a far greater degree of critical value. See Seervai, *supra* note 46 at lxviii. Commenting on the decision of the Supreme Court in *A.R. Antulay v. R S. Nayak* AIR 1988 SC 1531 as a "mockery in judicial administration", he argues that "never has the respect for the Supreme Court plummeted as in Antulay's case when the labour of years was wiped out and must be undertaken all over again.")

50 *Supra* note 12 at para. 12.

51 *Supra* note 44.

52 *Supra* note 12 at para. 13 [emphasis added].

> *in which scholars are housed, fed, instructed, and governed while qualifying for university degrees*, whether the university includes a number of colleges or a single college. In a broad sense, the terms "college" and "university" convey the same idea, differing only in grade, with each indicating an institution of learning consisting of trustees, teachers, and scholars as making up its membership and representing its active work, or *an institution engaged in imparting knowledge to resident students and possessing the right to confer degrees*.[53]

While one may not find fault with the Supreme Court for having referred to these scholarly volumes, the persistent effort of the Court in using these references as the defining basis of its decision is disappointing. The Court's obsession with foreign authorities as explanation of legislative practices, words and phrases is plain but difficult to understand. Apart from a strange confidence in the slavish imitation of India's colonial past, the tendency reflects a lack of commitment to develop a jurisprudence suited for its current need and times. Halsbury's Laws or American jurisprudence may be authoritative sources. It does not follow from the authoritative character of these references that courts in India must regard themselves as being bound by explications contained therein. Is there anything that binds the Supreme Court to the exposition of meanings articulated in these sources? Can "university" not have meaning outside what has been said in these authoritative sources?

It would be improper to read this critique of foreign authorities as a xenophobic call to avoid scholarship of "outsiders". On the contrary, my effort is to highlight the disconcerting confidence of the Supreme Court in its belief that the meaning of words and phrases used in the Indian *Constitution* must necessarily partake its contents from explanations provided in Halsbury's Laws or American jurisprudence (in the limited context of this case). A call to shun foreign scholarship is characteristically different from an invitation to develop the faculty of critical and indigenous thinking; my efforts are directed towards the latter. To say that "the meaning of the word 'university' in the Seventh Schedule must be that which is provided in Halsbury's Laws or American jurisprudence" is significantly different than to say that "we think, in the given current circumstances it is wise to incorporate the meaning provide in Halsbury's Laws or American jurisprudence as the meaning of 'university' in the Indian Constitution." In the next section, I shall show that in failing to think in the current circumstances, the Supreme Court failed to provide an appropriate meaning to the word university in the Indian *Constitution*.

IV. E-EDUCATION: THE NEW AGE UNIVERSITY

Having slavishly extracted the meaning of university from Halsbury's Laws and American jurisprudence, the Supreme Court proceeded to highlight some of the distinguishing features of a university in the constitutional sense. "University", the

[53] *Supra* note 12 at para. 13 [emphasis added]. The Court also recited the decision of the federal circuit court decision in *Branch v. Federal Trade Commission* 141 F.2d. 31 (7th Cir. 1994) wherein the Court declared "a school offering correspondence courses in professional and other educational subjects, sending students textbooks and lessons to study, giving examinations based thereon, and awarding diplomas or degrees, but having no entrance requirements, resident students, library, laboratory, or faculty, [as] not a university."

Supreme Court tells us:

> [Is] a whole body of teachers and scholars engaged *at a particular place* . . . and such persons associated together as a society or corporate body, with definite organization and acknowledged powers and privileges and forming an institution for promotion of education in higher or more important branches of learning and *also the colleges, building and other property belonging to such body*. Other necessary attributes of University are plurality of teachers teaching more than one higher faculties and other facilities for imparting instructions and research, *provision for residence*. . ."[54]

"It pre-supposes," according to the Supreme Court, "*existence of a campus, classrooms, lecture theatres, libraries, laboratories, offices, besides some playgrounds and also sport facility for overall development of personality of the students*."[55] In others words, no university can be a university in the constitutional sense if it does not satisfy these preconditions. And because the impugned *Education Act* did not stipulate these pre-conditions, the Supreme Court triumphantly concluded that the Act had not even established "universities" to begin with. Irrespective of the merits of the arguments in the instant case, it is important to consider the judicial formulation of what counts as a "university" in the wider context. And once we situate these conditions in the current technological and cultural context, I hope it will be obvious as to why a slavish extraction of Halsbury's Laws was not only unfortunate but also potentially mischievous.

Let us reconsider some of these conditions without which a university cannot be established in a constitutional sense. According to the Court, a university must be "in a particular place," must have "definite organization and acknowledged powers and privileges . . . and colleges, building and other property," "provisions for residence," and "campus, classrooms, lecture theatres, libraries, laboratories, offices. . . ." In other words, institutions purporting to impart higher education without satisfying these requirements cannot be regarded as universities under the *Constitution*. They are, for the Supreme Court, constitutional conditions for the existence of a university in India. If the Supreme Court genuinely considers these as constitutional requirements for the existence of a university, to my mind there are only two possible inferences that may be drawn. Either the Supreme Court is impeccably oblivious of technological advancements or that it did not even remotely apply its mind in writing the judgment. Of course, both may be true and my intuition suggests that may indeed have been the case.

"The most dramatic new development in the field of non-traditional education," writes Derek Bok, the former President of Harvard University, has been "the growth of distance learning using the Internet."[56] With the Internet, lectures can be transmitted anywhere in the world, while giving students a chance to ask questions and get rapid answers by e-mail.[57] Often, not only can students watch lectures, they can also engage in seminar discussions though teleconferencing with other participants residing in widely scattered locations.[58] According to Peter Drucker, "[a]lready we

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[54] *Supra* note 12 at para. 28 [emphasis added].

[55] *Ibid.* [emphasis added].

[56] See Derek Bok, *Universities in the Market Place: The Commercialization of Higher Education* (Princeton: Princeton University Press, 2003) at 86.

[57] *Ibid.*

[58] *Ibid.* at 87.

are beginning to deliver more lectures and classes off campus via satellite or two-way video at a fraction of the cost. The college won't survive as a *residential institution*. Today's buildings are hopelessly unsuited and *totally unneeded*."[59] Stuart Cunningham and his collaborators, following the Drucker's wisdom, summarised the vision of an e-university in the following way: "picture a future in which students never meet a lecturer face to face in a class room, never physically visit the on-campus library; in fact, never set foot on the campus or into an institutional lecture-room or learning centre. Such is the future proposed by the virtual university scenario."[60] Cunningham's futuristic characterisation of a university in the new millennium has proved almost prophetic. The defining feature of a virtual university is, in the image of Cornford and Pollock, "principally an absence": it is the lack of physical co-presence that characterises it.[61] Indeed as Bok argues, "the internet may actually be superior to a regular seminar because it can elicit more considered responses and wider participation, especially by students reluctant to express themselves in a classroom before their peers."[62] In certain classes, such as those involving complex lab experiments, new technology can allow students to familiarize themselves with equipment in advance or observe and manipulate stimulated material in ways more effective than normal teaching methods allow.[63]

Whatever, the Internet's impact turns out to be, it clearly offers important educational opportunities to countless working people, young housebound mothers, and other individuals who cannot readily come to campus. Already, little-known universities, such as Liberty and Golden Gate, offer on-line courses to students throughout the world.[64] The University of Phoenix, similarly, managed to enrol 110,000 students by 2001, many of them online. Many universities have responded along expected lines.[65] Duke University, University of Maryland, Stanford and MIT, are among the better-known universities that offer a wide range of online opportunities.[66] These instances provide glimpses into the massive changes that information and communication technologies have brought about in the field of education. What must be emphasized is the virtual undoing of processes and structures that in preceding decades have been considered intrinsically linked to education. University education in the Internet age does not need to be "in a particular place," does not need "colleges and buildings" or "provisions for residence." Neither does it need "campus, classrooms, lecture theatres, libraries, laboratories and offices." On the contrary, as guru Peter Drucker reminds us, they are "hopeless unsuited and totally unneeded." Education through Internet promises to rediscover learning opportunities in radical ways.

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59 See Robert Lenzer & Stephen S. Jhonson, "Seeing Things as They Really Are" *Forbes* (10 March 1997) 122 quoted in *ibid.* at 87 [emphasis added].

60 See S. Cunningham *et al.*, *New Media and Borderless Education: A Review of the Convergence between Global Media Networks and Higher Education Provision* 179 Australian Government, Department of Employment, Education, training and Youth Affairs, Evaluations and Investigations Programme, Higher Education Division (http://www.deetya.gov.au/highered/eipubs/eip97-22/eip9722.pdf)

61 See James Cornford & Neil Pollock, "Working though the Work of Making Work Mobile" in Robins & Webster, *Virtual University*, *supra* note 16 at 89.

62 *Supra* note 56 at 88.

63 *Ibid*.

64 *Ibid.* at 91.

65 *Ibid*.

66 *Ibid*.

But if the Indian Supreme Court is correct in its formulation of a university in a constitutional sense; these are not gains that Indians may expect to benefit from. None of these online universities satisfy any of the conditions that Court thought was essential to a university. These universities do not have classrooms, playgrounds, building, laboratories, residential accommodation or any tangible property for that matter except may be for nominal office work. They exist in the virtual world but impart real education. Is there any reason to believe that the Indian *Constitution* has an anathema to real education in the virtual world? Is there anything in the Indian *Constitution* that requires university to satisfy any preconceived conditions? They are, on the contrary, a product of an irresponsible judicial interpretation. The Supreme Court's formulation of a university, like that of Halsbury's Laws, is frozen in the interstices of historical moments but unlike Halsbury's Laws mirrors a shameful non-application of mind.

So long as the current formulation of a university is understood as establishing a valid precedent; Indians stand to considerably lose out on the benefits of technology. Technological advancements and market demands will inexorably lead to a gradual shift towards online learning in ways that will make higher education (or at least a substantial part thereof) in the physical world wholly redundant. The formulation, as it currently stands, is technologically regressive: it is a price that the Supreme Court paid for its slavish references to Halsbury's Laws. Because the Court referred to the conditions as constitutional requirements, in the sense that the conditions are required by an interpretation of university under the *Constitution*, no legislation can establish and define a university without these requirements. Such a law would be obviously *ultra vires*; it being contrary to constitutional conditions. It follows, therefore, that so long as these requirements of university remain valid law, e-universities cannot function in India. There is an impelling need to reconsider this formulation and suggest an alternative without insisting on the physical or real attributes as definitive of "university" education.

It is not my argument that all is well with the current model of "placeless education": indeed many issues have not yet been fully considered.[67] Professor David Nobel's disappointment is not unimportant:

> [I]dentified with a revolution in technology, distance education has assumed the aura of innovation and the appearance of a revolution itself, a bold departure from tradition, a signal step toward a preordained and radically transformed higher educational future. In the face of such a seemingly inexorable technology-driven destiny and the seductive enchantment of technological transcendence, sceptics are silenced and all questions are begged. But we pay a price for this technological fetishism, which so dominates and delimits discussion. For it prevents us from perceiving the more fundamental significance of today's drive for distance education, which, at bottom, is not really about technology, nor is it anything new.[68]

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[67] See *e.g*. John Seely Brown & Paul Duguid, "Universities in the Digital Age" *Change* (July 1996) 11; Timothy W. Luke, "Digital Discourses, Online Classes, Electronic Documents: Developing New University Technocultures" in Robins & Webster, *Virtual University*, *supra* note 16 at 249-281.

[68] David Nobel, "Rehearsal for the Revolution" in Robins & Webster, *Virtual University*, *supra* note 16 at 282-300.

In such technologically driven patterns of educational practices, lectures are widely regarded as an endangered species that can easily be replaced by video or interactive multimedia and the faculty, effectively reduced to teaching assistants who tutor students on the material in the video.[69] In essence, therefore, "the current mania for distance education is about the commodification of higher education, of which computer technology is merely the latest medium..."[70] Professor Nobel's critic of technologically driven distance education may have merits: the critic, however, presupposes technological possibilities. The willingness to recognise, if not celebrate, these technological possibilities may itself be a point of departure. And to the extent that the possibilities of such universities remain and the current judicial formulation refuses to account for such possibilities, it must be changed.

The Supreme Court invalidated the *Education Act* principally on three grounds. First, the Act did not establish a university properly called; not at least in the sense it was used in the *Constitution*. Secondly, it was struck down on the ground that the Chhattisgarh State Assembly did not have legislative competence to enact the same. And finally, that the *Education Act* was *ultra vires*: it had the effect of nullifying the *University Grants Commission Act*, 1956, a legislation of the Union Parliament.[71] I have already argued that the Court's analysis of the "constitutional" conditions for establishing a university was itself flawed. There is nothing in the *Constitution* that requires universities to satisfy specific conditions; not at least the ones that the Court said were constitutive of a university. Such a brick and mortar characterisation of university is technologically regressive and socially delimiting. In the next section, I shall argue that the Court's analysis of the competence of the State of Chhattisgarh to enact the *Education Act* was guided by erroneous principles: the Court asked wrong questions and, not surprisingly, found wrong answers. And in the section thereafter, I shall argue that the logic of a state legislation stultifying the effect of a Union Parliament was grossly insufficient and in fact constitutionally untenable.

V. Legislative Competence: Who is Empowered to Establish Universities?

I shall argue that the Supreme Court did not interpret the scope of legislative entries correctly and consequently erred in concluding that the State of Chhattisgarh did not have legislative competence to enact a law providing for the establishment of private

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[69] See David Nobel, "Digital diploma mills: the automation of higher education" (1998) 49(9) Monthly Review 38 at 38-52.

[70] *Supra* note 67.

[71] The legislative scheme under the Indian Constitution has been constructed in a way so as to give primacy to the Parliament in cases of conflict between legislations by the former and various State Legislatures. In the words, even though State Legislatures are sovereign within the field of entries listed in the "State List" (List II); legislations cannot be enacted in a way that impinges on the scope of entries in the "Union List" (List I). In still simpler words, if a State legislation that a Legislature is authorised to validly enact has the effect of nullifying an enactment that Parliament has jurisdiction to make, the latter shall prevail over the former. The Court's held that the *Education Act* was also unconstitutional because it had the effect of nullifying a law (the *University Grants Commission Act*, 1956) that Parliament had validly enacted.

universities. Entries 63,[72] 64,[73] 65[74] and 66[75] of List I, 32[76] of List II and 25 of List III[77] refer to universities in its terminology. For our purposes, it is sufficient to understand the conflict that arises between entry 66 of List I and 32 of List II. The former confers jurisdiction on the Indian Parliament to enact legislations regarding the "co-ordination and determination of standards in institutions for higher education or research and scientific and technical education" while entry 32 appearing in List II allows state legislatures to make laws regarding the "incorporation, regulation and winding up of corporations, other than those specified in List I, and universities; unincorporated trading, literary, scientific, religious and other societies and associations; co-operative societies." To reiterate the distinction between List I and List II, entries in List I are the exclusive preserve of the Union Parliament while List II is exclusive to the state Legislatures except in certain exceptional cases.

Given that a university is also commonly understood as an institution of higher learning, a plain reading of the entries would suggest that while the establishment of a university is within the competence of state Legislatures, the determination of standards regarding admissions, teaching, quality of education being imparted, curriculum, standard of examination and evaluation is within the exclusive domain of the Union Parliament.[78] In other words, while a state Legislature may enact a piece of legislation setting up a university; its academic standards and practices remain subject to legislations that the Indian Parliament may enact in pursuance of entry 66 of List I. The Court reaches a similar conclusion[79]—after a rather protracted (and unnecessary) reference to a long line of precedents that raised similar questions.[80] In *Gujarat University v. Shri Krishna,*[81] the Supreme Court had explained the possible

[72] Entry 63 contains the following entry: The institutions known at the commencement of this Constitution as the National Library, the Indian Museum, the Imperial War Museum, the Victoria Memorial and the Indian War Memorial, and any other like institution financed by the Government of India wholly or in part and declared by Parliament by law to be an institution of national importance.

[73] Entry 64 of List I contains the following entry: Institutions for scientific or technical education financed by the Government of India wholly or in part and declared by Parliament by law to be institutions of national importance.

[74] Entry 65 of List I contains the following entry: Union agencies and institutions for—(a) professional, vocational or technical training, including the training of police officers; or (b) the promotion of special studies or research; or (c) scientific or technical assistance in the investigation or detection of crime.

[75] Entry 66 of List I contains the following entry: Co-ordination and determination of standards in institutions for higher education or research and scientific and technical institutions.

[76] Entry 32 of List II contains the following entry: Incorporation, regulation and winding up of corporations, other than those specified in List I, and universities; unincorporated trading, literary, scientific, religious and other societies and associations; co-operative societies.

[77] Entry 25 of List III contains the following entry: Education, including technical education, medical education and universities, subject to the provisions of entries 63, 64, 65 and 66 of List I; vocational and technical training of labour.

[78] The Union Parliament enacted the University Grants Commission Act, 1956 to "make provision for the co-ordination and determination of standards in Universities and for that purpose, to establish a University Grants Commission."

[79] *Supra* note 12 at para. 20.

[80] *Gujarat University v. Shri Krishna* AIR 1963 SC 703; *State of Tamil Nadu and another v. Adhiyaman Educational and Research Institute* 1995 (4) SCC 104; *Osmania University Teachers Association v. State of Andhra Pradesh and another* 1987 (4) SCC 671; *Dr. Preeti Srivastava and another v. State of M.P. and others* 1999 (7) SCC 120.

[81] AIR 1963 SC 703.

conflict in the following terms:

> [T]he validity of State legislation would depend upon whether it prejudicially affects co-ordination and determination of standards, . . . If there be Union legislation in respect of co-ordination and determination of standards, that would have paramountcy over the State law by virtue of the first part of Art.254 (1); . . .[82]

Similarly in *State of Tamil Nadu and another v. Adhiyaman Educational and Research Institute*,[83] the Court held that the expression "coordination" used in Entry 66 of the Union List:

> [M]eans harmonisation with a view to forge a uniform pattern for a concerted action according to a certain design, scheme or plan of development. It, therefore, includes action not only for removal of disparities in standards but also for preventing the occurrence of such disparities. . . . This power is absolute and unconditional and in the absence of the valid compelling reasons, it must be given its full effect according to its plain and express intention.[84]

Keeping in mind these principles for the resolution of potential conflicts between legislative entries, the Court revisits the scheme of the *Education Act* with emphasis on the impugned provisions of law. Under section 4, an application containing a project report for the establishment of a university may be submitted to the State Government. The report must contain details, *inter alia*, regarding (a) the objects of the University along with the details of the Sponsoring Body; (b) the extent and the status of the University and the availability of land; (c) the nature and the type of programmes of study and research to be undertaken in the University during a period not less than the next five years; (d) the nature of faculties, courses of study and research proposed to be started; (e) the campus development such as building, equipment and structural amenities; (f) the phased outlays of capital expenditure for a period not less than the next five years; . . . (j) the details of expenditure on unit cost and the extent of concessions or rebates in fee or freeship and scholarship for students belonging to the Scheduled Tribes and Scheduled Castes, belonging to economically weaker sections. . . , and (k) the years of experience and expertise in the concerned disciplines at the command of the Sponsoring Body as well as the financial resources. The State Government, under section 4 is required to make such enquiry as it deems necessary and subject to its satisfaction, accord sanction for the same. Under section 5, the State Government may by notification establish a University subject to ". . . recognition or authorization as may be required under any other law for the time being in force to conduct the syllabus and to grant degrees or diplomas or awards." Section 9, it may be added, proscribes universities established under the Act from receiving "any grant or other financial assistance from the Central Government, State Government or any other authority except for meeting any amount towards the fee payable by students belonging to socially disadvantaged or weaker

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82 *Ibid.* at para. 24.

83 1995 (4) SCC 104.

84 *Ibid.* at para. 41. It followed from this "absolute and unconditional" power that "to the extent that the State legislation is in conflict with the Central legislation though the former is purported to have been made under Entry 25 of the Concurrent List but in effect encroaches upon legislation including subordinate legislation made by the Centre under Entry 25 of the Concurrent List or to give effect to Entry 66 of the Union List, it would be void and inoperative."

sections of society or for conducting any study for research purposes..." Do these provisions of law conflict with the principles referred to earlier?

VI. Indiscreet Discretion: Does Improper Exercise of Discretion Render Discretionary Power Unlawful?

Reviewing the scheme of the Act and its principal provisions, the Supreme Court concludes that the "effect of these provisions is that a Project Report on paper only, which will merely be a proposal or a scheme for doing something in future, will be notified as a University by issuing a notification to that effect in the Gazette."[85] The judgment betrays a sense of uneasiness about the possibility of a university being established merely on the basis of a "Project Report" submitted for the subjective satisfaction of the State Government. It reiterates its earlier misguided understanding of the characteristics of a university including the "... existence of a campus, class-rooms, lecture theatres, libraries, laboratories, offices, besides some playgrounds and also sport facility for overall development of personality of the students" and points out the absence of these requirements in reality under the present scheme. With these limitations in mind, the Court concludes:

> [A]ny Act providing for establishment of the University must make such provisions that only an institution in the sense of University as it is generally understood with all the infrastructural facilities, where teaching and research on wide range of subjects and of a particular level are actually done, acquires the status of a University. *The impugned Act does not at all establish a University*.... The manner in which a University is notified by issuance of a Gazette notification under Section 5 and conferment of a juristic personality under Section 6 of the Act is clearly contrary to the constitutional scheme and is not contemplated by Article 246 of the Constitution.[86]

The Court's logic may be restated as thus: (a) "University" has a definite meaning under the Indian *Constitution*; (b) Any university established by law without satisfying these requirements cannot be said to be a university in the constitutional sense; (c) To the extent that the *Education Act* establishes universities without having regard to these requirements, they must be held as unconstitutional. But these seemingly logical derivates do not adequately capture the fallacy of its reasoning. Its assertion that "an enactment which simply clothes a proposal submitted by a sponsoring body or the sponsoring body itself with the juristic personality ... [with] the right of conferring or granting academic degrees but without having any infrastructure or teaching facility for higher studies or facility for research is ... wholly *ultra vires* being a fraud on the Constitution"[87] leaves much to be desired. Identifying these fallacies then becomes important: it highlights the doubtful ways in which judges reason. The conclusions, in my respectful submission, are both illogical and contrary to law. It is illogical: it presumes facts in a way for which no rational justification exists. It is also contrary to law: it proposes to rewrite the text of the Indian *Constitution* in ways

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85 *Supra* note 12 at para. 26.

86 *Supra* note 12 at para. 28 [emphasis added].

87 *Supra* note 12 at para. 32.

that extend beyond the scope of the judicial function. In the following paragraphs, I seek to establish these claims.

The Project Report submitted under section 4 of the Act is an expression of intent—*i.e.*, intent to establish a "university" in compliance with the conditions submitted in the Report. Understandably, when the Report is submitted for consideration by the State Government, conditions mentioned therein do not exist in reality. It is neither logical nor feasible to provide that facilities and conditions must exist prior to the submission of a Report. In other words, it is wholly illogical to require that land and building to house the proposed university, recruited faculty, facilities for prospective students, syllabi *etc.* must exist prior to the submission of a Project Report. When the State Government decides to accord sanction to the Report and a "university" is notified under section 5, the State Government exercises its discretion on the assumption that the conditions approved in the Report would be duly implemented by the Sponsoring Body. It may be pertinent to add that if the Sponsoring Body does implement the clauses of the Report, a "university" in the constitutional sense *will* come into existence.[88] On the other hand, if the Sponsoring Body decides not to implement the Report in real terms, a "university" may exist in paper without having satisfied constitutional conditions of a university. Therefore, the establishment of a university in reality with adequate provisions and teaching faculty after it has been notified as such is dependent on the integrity and the intention of the Sponsoring Agency: there is nothing about the *Education Act* that it is *per se* "contrary to the constitutional scheme" or remotely "constitutionally fraudulent" about it. The discretion that the State Government exercises under section 4(3) of the Act is in many ways a discretion regarding the honest motives of a prospective investor.

By emphasizing on the simple requirement of a Project Report, the Court in *Yashpal* highlights the possibility of setting up universities under the provisions of the *Education Act* even when there are no adequate facilities exists, *i.e.*, investors with dishonest motives may seek to claim the status of "university" without the intention of establishing one in reality. But that is merely half the story. What the Supreme Court completely fails (or rather chooses not) to take into account is the possibility of setting up universities under the same provisions of law that satisfy all constitutional requirements. An investor with honest motive may establish a "university" acting under the same provisions of law. This is, therefore, a case of good investors and bad investors, honest motives and dishonest motives. What happens in reality would substantially depend on the nature of discretion that the State Government exercises under section 4(3) of the Act. If the State Government exercises its discretion in a manner that allows investors with dishonest intention to establish universities and confer degrees (as it appears in the instant case), it is at best a case of improper (or *mala fide*) exercise of discretion. Improper exercise of discretion, however, cannot be the basis of declaring a piece of legislation *ultra vires.* The constitutionality of discretionary power, as the Court has consistently laid down, lies in whether there

[88] It is important to note that the conditions that must be specified in the Project Report under s. 4 of the *Education Act* are almost identical, if not an *improvement* on the requirements of a "university" in the constitutional sense that the Supreme Court suggested in its judgment.

exists sufficient legislative guidance in directing the proper exercise of discretion.[89] The Court may strike down the exercise of discretion in a given instance but cannot strike down a piece of legislation on the mere possibility of dishonest investors also laying claim to establish universities in the State of Chhattisgarh.

That 112 universities were established by issuing notifications in a mechanical manner and without application of mind may be evidence of improper exercise of discretionary power under section of the Act.[90] Rather than strike down the improper exercise of discretion in *these* cases, the Supreme Court chose to pursue a non-existent alternative. It avoided any discussion on the discretionary power of executive authorities and preferred to strike down the Act as "contrary to the constitutional scheme and ... not contemplated by Article 246 of the Constitution."[91] In choosing not to make this obvious (and well-known) distinction in administrative law jurisprudence, the judgement of the Court, one would suspect, was coloured by the dishonest character of the majority of the respondent universities established under the Act.

This hesitant attitude towards investors, in my submission, was the cumulative effect of two not unrelated positions. Many so-called universities under the Act had challenged the constitutionality of the *Amendment Act*, 2004 that required additional conditions to be satisfied including a deposit of two crores (twenty million) and possession of land.[92] It was challenged as being violative of equality guarantee under the Indian *Constitution*, the conditions being arbitrary and onerous.[93] Not surprisingly, the Court found no substance in the challenge.[94] Unfortunately, the Court used this challenge to the constitutionality of the *Amendment Act*, 2004 by many universities to measure the index of honesty of all universities established under the Act. It assumed that all existing sponsoring bodies having established universities and prospective investors with interest in the same have dishonest intentions. It assumed that no Sponsoring Agency, current or prospective, would take efforts to translate the approved Project Report into reality. It makes no distinction between good investors and bad investors, honest motives and dishonest motives. For the Supreme Court, there are only bad investors and dishonest motives. The Court's logic in this sense is presumptive: it presumes particular facts (that there are only bad investors) and a certain manner of its application (that discretion shall always be improperly exercised) and uses that as a basis to declare a law unconstitutional. It is not surprising, therefore, that the Court concluded sections 5 and 6 of the *Education Act* as sources of immense mischief rather than a move designed to improve the quality of higher education in the State of Chhattisgarh. The Court says:

> The *possibility* that such Universities which award degrees without having any teaching facility and without imparting any education will do so *only for the purpose of making money is writ large*. The fact that the amendments made in

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[89] See *Ram Krishna Dalmia v. Justice Tendolkar* AIR 1958 SC 538; *State of West Bengal v. Anwar Ali Sarkar* AIR 1952 SC 75; *In re Special Courts Bill,* 1978 (1979) 1 SCC 380; *Satwant Singh v. Assistant Passport Officer* AIR 1967 SC 1836.

[90] *Supra* note 12 at para. 2.

[91] *Supra* note 12 at para. 28.

[92] These provisions, as I mentioned earlier, was the product of a realization that not all sponsoring bodies had satisfied the conditions of the Project Report in real terms and that additional conditions.

[93] *Supra* note 12 at para. 42.

[94] *Ibid.*

> the Act in 2004 . . . making it mandatory to create an endowment fund of Rs. 2 crores and having provision of 15 acres of land have been challenged by many Universities speaks volumes of their intention. Preparing a Project Report on paper is not a difficult job and any number of sponsoring bodies can be created or formed in order to take advantage of the easy opportunity made available by the impugned Act. Persons with absolutely no knowledge in the subject may be awarded high degrees . . . . This is bound to create havoc with the system of higher education in the country. . .[95]

The Court added the following: "Shri Amarendra Sharan, learned Additional Solicitor General, has submitted that the UGC had conducted an inquiry and it was found that most of the Universities were non-existent, but the report was not placed before the Court as the complete exercise had not been done."[96] The assertion makes two aspects clear on its face: the inquiry by the UGC was not complete and secondly, the Supreme Court had not seen the copy of the report. If both of these aspects are true, as they must be, then it is impossible to resist the conclusion that the decision of the Supreme Court in *Yashpal* was based on mere presumption of facts in the way I have explained earlier. The counsel for the universities, however, seriously disputed the claim of non-functional universities and "submitted that the Universities [were] functioning." The Court makes a shocking response to the counsel's claim: "we have *not* gone into this question as it is purely factual." The response, for want of a better expression, is obnoxiously oxymoronic. The unconstitutionality of the *Education Act* was premised on the condition that "universities" in the constitutional sense had not been established: this conclusion is impossible unless a factual evaluation of the character of existing universities is undertaken. And if it did consider the factual aspects of the claims (as it surely did); its assertion of not having gone into purely factual question was plainly incorrect. More importantly, if it did not go into the purely factual aspects of the matter (as it claims not to have done), it leads us to the irresistible conclusion that the decision was based on mere presumptions. The argument of presumption of facts, either way, is irrefutable. The judgment is a piece of perverted logic and its internal inconsistencies must be shameful even to persons with elementary legal knowledge.

VII. Implied Powers of Judicial Review: Are There Limits to Constitutional "Innovations"?

The decision is not merely a piece of perverted logic. It is, in fact, much worse. The decision is also contrary to law, rather contrary to the constitutional text. This argument builds on my earlier claim that the Court assumed a pattern of facts without sufficient justification, *i.e*. the pattern of facts represented by its implied assertion of "all bad investors and only dishonest motives." In striking down the *Education Act*, the Supreme Court may be said to have impliedly added a new ground for judicial review of primary legislations, at least new to Indian constitutional law. The principle may thus be stated—empirical evidence (or presumption?) of sustained improper (or *mala fide*) use of discretionary power may be the basis

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[95] *Ibid.* [emphasis added].

[96] *Ibid*.

for judicial review of the source of the power itself rather than the use of discretion power in specific instances. Applied to the facts of this case, it meant, given that 112 "universities" had been established in a span on just one year and that many of these universities had improper motives in running universities, the provision of law that confers power to establish such universities is itself unconstitutional. In my respectful submission, this ground for judicial review based on empirical evidence is both novel and unconstitutional. It is novel for the simple reason that it purports to add grounds to what the Supreme Court has consistently held.[97] It is unconstitutional because it is contrary to the provisions of the *Constitution*.

The grounds for review of constitutionality of legislations are expressly provided for in articles 245 and 246 of the *Constitution*. Article 245(1) provides the substantive ground for review—"Subject to provisions of this Constitution, Parliament may make law. . ."[98] In other words, any law maybe validly made only if it is subject to or not contrary to the provisions of the *Constitution*. There is nothing in the text of the *Constitution* that confers jurisdiction on the courts to invalidate a piece of legislation on evidence of sustained improper exercise of discretion. Even if that were a ground for exercising the power of review, it can only be exercised on evidence and not mere presumptions as the Court did in the instant case. Article 246(1), similarly, provides the second ground for review—Parliament and state Legislatures are competent to make laws only in accordance with the distribution of legislative entries in the Seventh Schedule.[99] In other words, Parliament may not make law on an area exclusively marked for Parliament and vice versa, subject to certain exceptions. Any addition to these express grounds for judicial review by courts of law is unconstitutional, whether characterised as judicial legislation, lawmaking or anything else.

Entry 32 of List II, in clear and cogent terms, confers competence to the State Legislature to enact laws for the establishment of universities. To suggest that a law enacted in pursuance of this competence is unconstitutional on the grounds of improper exercise of discretion under the law is in itself a wholesale rewriting of the provisions of the *Constitution*. And for judges to indulge in such an endeavour is to inflict a serious "fraud on the Constitution."[100] Whether acceptable in other jurisdictions or not, it is clear that empirical evidence of sustained abuse of discretion cannot be an additional basis of judicial review of primary legislations that grants the discretionary power. Courts may review the improper exercise of discretion in given instances, but a general review of the law itself is impermissible. Therefore, the Court's conclusion that "section 5 and 6 of the impugned enactment are wholly

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[97] Indeed as Seervai in *supra* note 46 above argues "no presumption of a limited grant of power can be made by a court, because to limit the *grant of legislative power is a constituent act and not a judicial function*: as observed in *R v. Burah* (1878) 5 I.A. 178, it is not for the Court to enlarge constructively the express conditions or restrictions contained in the grant of legislative power." [emphasis added].

[98] *Constitution,* art 245(1): "Subject to the provisions of this Constitution, Parliament may make laws for the whole or any part of the territory of India, and the Legislature of a State may make laws for the whole or any part of the State."

[99] *Constitution,* art. 246(1): "Notwithstanding anything in clauses (2) and (3), Parliament has exclusive power to make laws with respect to any of the matters enumerated in List I in the Seventh Schedule (in this Constitution referred to as the 'Union List'."

[100] *Supra* note 12 at para. 32.

ultra vires being a fraud on the Constitution,"[101] I submit, is neither logical nor constitutional.

VIII. University Grants Commission: Who does it Co-ordinate?

The Supreme Court in striking down the *Education Act* also relied on the provisions and purposes of the *University Grants Commission Act*, 1956 ('*UGC Act*') which in many ways was the third strand of its reasoning. The UGC was informally established in 1952 when the Union Government decided that all cases pertaining to the allocation of grants-in-aid from public funds to the Central Universities and other Universities and institutions of higher learning might be referred to the University Grants Commission. The UGC, however, was formally established in November 1956 as a statutory body through an Act of Parliament for the coordination, determination and maintenance of standards of university education in India.[102] The Statement of Objects and Reasons of *UGC Act inter alia* declares that:

> It is obvious that neither co-ordination nor determination of standards is possible unless the Central Government has some voice in the determination of standards of teaching and examination in Universities, both old and new. It is also necessary to ensure that the available resources are utilized to the best possible effect. The problem has become more acute recently on account of the tendency to multiply Universities. The need for a properly constituted Commission for determining and allocating to Universities funds made available by the Central Government has also become more urgent on this account.

Section 2(f) of the Act explains a "university" as "a University established or incorporated by or under a Central Act, a Provincial Act or a State Act, and includes any such institution as may, in consultation with the University concerned, be recognised by the Commission in accordance with the regulations made in this behalf under this Act." Section 12 lays down an exhaustive list of duties for the Commission under the Act. *Inter alia*, the Commission has the duty to:

> (a) inquire into the financial needs of Universities, allocate and disburse, out of the Fund of the Commission, grants to Universities established or incorporated by or under a Central Act, . . . (d) or . . . to other Universities, (e) recommend to any University the measures necessary for the improvement of University education and (f) require a University to furnish it with such information as may be needed relating to the financial position of the University or the studies in the various branches of learning undertaken in that University.

It is interesting to note that under section 14 "if any University . . . fails within a reasonable time to comply with any recommendation made by the Commission under section 12 . . . the Commission, after taking into consideration the cause, if any, shown by the University for such failure or contraventions may withhold from the University the grants proposed to be made out of the Fund of the Commission." It may also be added that section 22 of the Act monopolizes "the right of conferring

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[101] *Ibid.*

[102] Act 3 of 1956.

or granting degrees to universities defined in section 3."[103] Two observations must be made at this stage regarding the jurisdiction of the UGC. The UGC is essentially a grant-awarding body as its functions listed under section 12 reveal though it also performs an appreciable amount of work dedicated to co-ordination of educational standards. Indeed, the name University Grants Commission itself suggests that it is a body for disbursement of funds, the same being constituted primarily out of the contributions made by the Central Government.[104] Secondly, the only consequence flowing from a refusal to implement the recommendations of the Commission, under section 14 is the withholding of grants to be awarded to errant universities. To put it in other words, any university that does not accept grants from the UGC is under no compulsion to implement its recommendations or directives.

Keeping these two aspects of the *UGC Act* in mind, let us now turn to the Court's use of the Act in striking down the *Education Act*. The Court begins it discussion by pointing out that the *UGC Act* was enacted specifically with reference to competence under entry 66 of List I in order "to determine and coordinate the standard of teaching curriculum and also level of examination in various Universities in the country."[105] Explaining its importance, the Court says that:

> [T]he role of UGC comes at the threshold. The course of study, its nature and volume, has to be ascertained and determined before the commencement of academic session. Proper standard of teaching cannot be achieved unless there are adequate infrastructural facilities in the campus like classrooms, libraries, laboratories, well-equipped teaching staff of requisite calibre and a proper student-teacher ratio. . .[106]

Given these objectives and functions of the UGC, the Court found numerous difficulties with the provisions of the *Education Act*. It explained its conclusion with regard to the difficulties in the following manner. I have extensively quoted from the text of the judgment, not because they provide for an illuminating read but only to highlight the irresponsible character of its conclusions. Following a reference to the objectives and duties of the UGC and to the provisions of the *Education Act*, the Court concludes the following:

> The impugned Act which enables a proposal on paper only to be notified as a University and thereby conferring the power upon such University under Section 22 of the UGC Act to confer degrees has the *effect of completely stultifying the functioning of the University Grants Commission* in so far as these Universities are concerned. Such incorporation of a University *makes it impossible for the UGC*

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[103] *UGC Act*, s. 22 (1): "The right of conferring or granting degrees shall be exercised only by a University established or incorporated by or under a Central Act, a Provincial Act or a State Act or an institution deemed to be a University under section 3 or an institution specially empowered by an Act of Parliament to confer or grant degrees."

[104] *UGC Act*, s. 16(1) of the Act creates the Fund: "The Commission shall have its own Fund; and all sums which may, from time to time, be paid to it by the Central Government and all the receipts of the Commission (including any sum which any State Government or any other authority or person may hand over to the Commission) shall be carried to the Fund and all payments by the Commission shall be made therefrom."

[105] *Supra* note 12 at para. 30.

[106] *Ibid*.

> *to perform its duties and responsibilities* of ensuring co-ordination and determination of standards. In absence of any campus and other infrastructural facilities, the UGC cannot take any measures whatsoever to ensure a proper syllabus, level of teaching, standard of examination and evaluation of academic achievement of the students or even to ensure that the students have undergone the course of study for the prescribed period before the degree is awarded to them.[107]

The Court's reasoning may be reconstructed as thus: (a) UGC has been entrusted to act as the central body for co-ordination of standards of higher education in India by a law made by the Indian Parliament; (b) The Education Act, enacted by the State of Chhattisgarh, has the effect of completely stultifying the functioning of the University Grants Commission; (c) And to the extent that any State legislation stultifies or sets at naught an enactment validly made by Parliament would be wholly *ultra vires*. It referred to its decision in *R. Chitralekha v. State of Mysore*[108] where the jurisdiction of state Legislatures to make laws establishing universities was called into question. Judge Subba Rao (as he then was) observed: "if the import of the State law providing for such standards on entry 66 of List I is so heavy or devastating as to wipe out or appreciably abridge the central field, it may be struck down."[109] In other words, no state could enact a law in such a way that it makes the application of the Union law a literal impossibility. In this case, 112 universities had been set up within a short span of one year on the basis of mere proposals, with many or most of them having almost zero-infrastructural facilities.[110] And this, according to the Court, clearly showed that the relevant provisions of the *Education Act* had "completely stultified the power of the Parliament under Entry 66 to make provision for co-ordination and determination of standards in institutions for higher education like Universities, the provisions of the *UGC Act* and also the functioning of University Grants Commission." For this reason too, "sections 5 and 6 of the impugned Act were, therefore, wholly *ultra vires* the Constitution of India and are liable to be struck down."[111]

I have already shown earlier that the only consequence that follows under section 14 from a non-compliance of the UGC's recommendations under section 12 is the withholding of grants that the Commission may award to universities for developmental purposes broadly construed. In other words, a university that does not seek to avail the benefit of UGC grants is under no legal obligation to comply with the recommendations of the Commission. It may choose to implement the recommendations if it so desires, but is clearly under no legal obligation to do so. For such universities, recommendations under section 12 are exactly what they are, namely recommendations. Under section 9 of the *Education Act*, a university is not only entitled to but also debarred from receiving "any grant or other financial assistance from the Central Government, State Government or any other authority except for meeting any amount towards the fee payable by students belonging to socially disadvantaged or weaker sections of society or for conducting any study for research purposes. . ."

[107] *Supra* note 12 at para. 30 [emphasis added].
[108] 1964 (6) SCR 368.
[109] *Ibid* at para. 9.
[110] *Supra* note 12 at para. 32. note that this is a purely factual claim that the Court denies having at all made in the judgment.
[111] *Ibid.*

For one thing, as the title of the *Education Act* itself suggests, these were intended to be self-financing universities, *i.e.*, universities that fund themselves. A cumulative reading of section 9 of the *Education Act* and section 14 of the *UGC Act* unerringly points to one conclusion—the *UGC Act* is plainly inapplicable to private universities proposed to be established under the *Education Act*. And in such circumstances, it is not only oxymoronic but indeed outrageous to suggest that the latter may be struck down because it has the effect of completely stultifying the provisions of the former. Did the judges read the provisions of the *Education Act* and *UGC Act* with sufficient attention to its details? I can only reassert my earlier statement that the decisions of the Supreme Court have increasingly ceased to make any sense except that they contain some aimless bantering and *Yashpal* is a convincing example of that. I would not be surprised if readers find the statement too mild in its tenor to capture the contemporary quality of Supreme Court decisions.

This aspect of the decision brings to light a minor, though not irrelevant, matter pertaining to the facts that gave rise to this litigation. I shall discuss the same in greater detail later, but suffice it to say here that the Supreme Court was clearly unable to appreciate the true import of recent developments. In 1952, when the UGC was informally set up and subsequently made into a statutory body in 1956, it was almost unthinkable that a university could exist without state funding. In other words, not only were universities creatures of legislations but equally financially dependent on various states for their survival. The close nexus between its establishment and financial dependency led the Supreme Court to declare "universities" as instrumentalities of the State under Article 12 with the consequence that writs would lie against such bodies for violation of rights guaranteed under Part III of the *Constitution*.[112] From this perspective, it was both appropriate and logical for the UGC to expect that such "state" universities be required to comply with its recommendations: as the principal grant awarding body, UGC had a right to impose conditions for its grants and expect that they be reasonably complied with.

Private universities, on the other hand, are a relatively novel idea in India.[113] They are private in the sense and to the extent that they do not depend on state aid for their survival. Or rather, it is unlawful for them to seek state aid except for limited purposes, as was provided in section 9 of the *Education Act*. Given that these universities do not depend on state aid for their functioning, it is not unreasonable to suggest that they be allowed greater autonomy about ways in which they address issues pertaining to administrative and academic matters. It does not follow from this that there should be no control over the functioning of these self-financed institutions: the suggestion is that the UGC need not be seen as the only institution capable of performing this sentinel role. Apart from the centrality of the UGC in the management of universities in India, the Court's insistence on the legislative creation of every university is no less disconcerting. The *Education Act* was an umbrella legislation that granted

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[112] See *Ajay Hasia and Others v. Khalid Mujib Sehravardi and Others* 1981 (1) SCC 722; *Ramana Dayaram Shetty v. International Airport Authority of India and Others* 1979 (3) SCC 489; *Sabhajit Tewary v. Union of India and Others* 1975 (1) SCC 485; *Sukhdev Singh and Others v. Bagatram Sardar Singh Raghuvanshi and Another* 1975 (1) SCC 421.

[113] For empirical data relating to the emergence of private capital in the education sector and an analysis thereof see Devesh Kapur & Pratap Bhanu Mehta, "Indian Higher Education Reform: From Half-Baked Socialism to Half-Baked Capitalism" CID Working Paper No. 108, September 2004, online at Harvard University <http://www.cid.harvard.edu/cidwp/pdf/108.pdf>.

discretion to the State executive to establish universities by issuing notifications under the Act. Rejecting this model of creating universities by notifications, the Court reiterated its earlier assertion that every university must be established by a separate legislation.[114] In other words, every university must owe its existence to a distinct and not to umbrella legislation like the *Education Act*. I shall return to this aspect later while discussing the Court's determination to construct university as "projects of modernity" in ways that cannot be de-linked from its status as "the ideological apparatus of the nation-state."

IX. The Amended *Education Act*: Did the Supreme Court See Less Than What Was Obvious?

In striking down the *Education Act* as unconstitutional, the Court also dismissed the State's plea that the amendments introduced in 2004 adequately accounted for the concerns the petitioners had raised during the course of submissions. Counsel for the State did not hesitate to concede that the functioning of the universities notified under the *Education Act* left much too be desired and in many respects had belied the expectations of the respondent. The *Amendment Act* proposed to establish a Regulatory Commission ('Commission') and all applications containing Project Reports had to be directed to the Commission.[115] The Project Report under the amended provisions had to be submitted at least one year prior to the proposed commencement of the university[116] along with proof of having established an endowment fund of rupees two crores[117] and proof of being in possession of 15 or 25 acres of land depending on whether the university was to be within the limits of the municipal corporation of the capital or outside it.[118]

These provisions were introduced to precisely account for the possible vices that the Court anticipated in its decision. It sought to dissuade investors who lacked serious interest in educational pursuits but wanted to use the provisions of law as an easy method to establish "universities" in paper only. The objective was clear: the State sought to impose sufficiently burdensome criteria as entry requirements so as to do away with the possibility of bad investors with dishonest intentions. Indeed, after the *Amendment Act* came into force, the State acting under the new provisions of law de-notified as many as 59 universities on account of their failure to comply with the new requirements.[119] It is difficult to think of more cogent actions that the State could have plausibly taken to ensure quality education. And yet, the Supreme Court was not satisfied with the integrity of the actions of the State. The Court struck down the Amendment Act on almost identical grounds as the parent statute. It is nonetheless important to highlight its interpretation because it does explain the devious ways of its reasoning.

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[114] See *Prem Chand Jain v. R.K. Chhabra* 1984 (2) SCR 883.
[115] See *Education Act*, s. 2(j) as amended by *Amendment Act*, 2004.
[116] See *Education Act*, s. 4(1) as amended by *Amendment Act*, 2004.
[117] *Ibid.*
[118] *Ibid.*
[119] *Supra* note 12 at para. 42.

The Court pointed out that the sum of rupees two crores was too meagre as an initial fund for the establishment of a university. Similarly, it pointed out its disappointment with the requirement of possession of land as opposed to its ownership by the Sponsoring Agency.[120] Given that the requirement under law was that of mere possession, the Court concluded that no inference could be drawn regarding the possible initiation of construction activities on these lands.[121] Nor did it consider the endowment fund of two crores sufficient as an initial investment.[122] And, therefore, the earlier vice of a university in paper only remained a distinct possibility. In such circumstances, it reiterated that the amended sections 5 and 6 did not alter the position of the *Education Act* being unconstitutional. The earlier criticisms regarding the Court's reasoning hold good in the case too. The Court struck down the unamended sections 5 and 6 on presumptive grounds, as I chose to call it. It presumed the universality of bad investors with bad intentions and concluded that the *Education Act* raised a distinct possibility of creating universities in paper only. In the case of the *Amendment Act*, the Court commits a double error: it not only relies on presumptions but also on the inadequacy of the substantive character of the legislation.

The Court considered a sum of two crores grossly inadequate for the establishment of a university and speculates unnecessarily about the consequences of "possession of land" as opposed to ownership. If the State in its wisdom regarded a sum of two crores as adequate for the establishment of a university, then there is no reason to believe that the judges have authority (or expertise) to reassess the soundness of the wisdom. While it is true that *Maneka Gandhi v. Union of India*[123] has had the effect of introducing "substantive due process" in the *Constitution*, it must not be forgotten that the same is not a blank cheque to indulge in judicial despotism. What is the true scope of a "due process" standard of review? Does institutional responsibility restrain the nature of interpretation judges may place on relatively determinate words and phrases? Or does it unshackle judges from every limitation, institutional or otherwise, while reviewing the constitutionality of legislations? Judges are not angels; nor are they immune from the standards of reasonable conduct expected of public officials. If judges find such standards burdensome, it is difficult to appreciate the normative premises that justify a "due process" authority to the Court. And if judges falter in living up to these standards with flattering regularity, it may not be inappropriate to suggest that the justifications for this judicially conferred power of due process under the *Constitution* be reconsidered.

If "principle" grounds as the basis of the decision are to be rejected, what explains the Court's conclusions? Having arrived at the "all bad investors' bad intention" syndrome, the Court had only one end to achieve—declare the law unconstitutional. The conclusion had already been reached: the judgment was a laborious effort to justify the same. The judgment is an abortive (and on many occasions an outrageous) piece of judicial reasoning to rationalise why the *Education Act* was unconstitutional. In the process, the Supreme Court sought to rewrite Indian constitutional law in unintelligible ways. The *Amendment Act*, 2004 clearly had the effect of addressing

[120] *Supra* note 12 at para. 35.
[121] *Ibid.*
[122] *Supra* note 12 at para. 42.
[123] 1978 (2) SCR 621.

the earlier, valid or otherwise concerns of the petitioners. By not giving due deference to the position articulated by the State, the Court highlights its partisan approach in the adjudicatory scheme. It is, in this sense, that I had suggested earlier that the Court *chose* not to make the well-known distinction between legislative competence to enact a law and improper (or *mala fide*) exercise of discretion under an otherwise valid law. Given that a designated conclusion had to be arrived at, its only option was to choose the former course of reasoning pretending as if no distinction between the two alternatives existed in law. It was not merely a wrong judgment: the conclusions defied constitutional text, provisions of legislations and most importantly, common sense. But the pragmatic consequences that follow from the quiet interstices of its reasoning raises larger questions about university and ways in which we situate its role in contemporary times. This is a theme I follow up on in the next section.

X. "Project of Modernity": A Historical Reconstruction

Modernity itself is a site of tensions and contradictions: yet it is undeniable that cultural rationalization, nation-state formation, industrialisation and democratisation featured prominently as part of the modern agenda.[124] In this section, my effort is to map out a historiography of the university and locate its role in shaping the modern agenda. I rehearse arguments about the linkages between the university and the nation-state and situate the judgement of the Supreme Court within this framework highlighting the silent assumptions that judges happily made with the consequent effect of outlawing private universities. The genesis of the modern university (in ways it is contemporarily understood) may be traced to around 1800: there was a need to fill the need for knowledge production as Europe and the United States prepared for expansion overseas.[125] The modern nation-state demanded construction, information and dissemination of a national identity by inculcating common language and centralizing history, culture, literature and geography.[126] The university was, to borrow Readings' phraseology, "the primary institution of national culture in the modern nation-state."[127] It was, then, a historically specific agency, concerned with the reproduction of national knowledge and national culture.[128] But in its commitment to nationalization of culture and knowledge, it was pre-eminently concerned with high or official culture.[129] National knowledge had internal and external demands: the internal project required the construction of a national identity while the external emphasised on the superior image of the internal construction during colonizing/expansion missions. The relevance of knowledge was dominantly utilitarian nationism but strains of anti-utilitarian inquiry were not totally alien to the project either.[130] Utilitarian nationism was, however, projected as objective and

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[124] See Gerard Delanty, "The University and Modernity: A History of the Present" in Robins & Webster, *Virtual University*, *supra* note 16 at 39.

[125] See Masao Miyoshi, "The University in the 'Global Economy"' in Robins & Webster, *Virtual University*, *supra* note 16 at 52.

[126] *Ibid*.

[127] *Supra* note 17 at 12.

[128] *Supra* note 16 at 5.

[129] *Ibid*.

[130] *Supra* note 125 at 52. As Masao Miyoshi puts it, "The modern university as envisioned by Jonathan Gottlieb Fichte, Humboldt, Newman, Charles Elliot, T.H. Huxley, Matthew Arnold, Daniel Coit Gilman,

universal: the university was a moral centre protected from the prejudices of sectarian religious and political interests as well as from the intrumentalisation by a technocratic government and a capitalist economy.[131] But this objectivity was a veneer rather than descriptive: in reality, its aspiration was decisively modern, *i.e.* dominated by values of rational culturalisation and expansion of colonial markets.[132] The university, in this sense, was an ideological apparatus of the nation state: it did not exist without and beyond the nation-state. It was created by and for the purposes of the nation-state.[133]

The ideology of the nation-state in this framework, though dominant, was neither uniform nor homogenous. As modernity shaped and reshaped its agenda, the university site underwent changes in ways not wholly unrelated to the modernisation process itself. For Gerard Delanty, there are four revolutions that mirrors the major ruptures in modernity: the Germanic academic revolution of the idealist philosophers, which inaugurated the liberal, humanistic university of the nineteenth century, the so-called Humboldtian university, the American model of "civic university", the mass university of the twentieth century and finally the coming global revolution of the twenty-first century—the post-modern era—when the university dissolves disciplinarity, institutionalises market values and enters the post-industrial information age.[134] The German model served two distinct functions. On one hand, it represented the attempt of the Enlightenment to bring about the rationalization of culture, through secularisation, intellectualisation, the advancement and professionalisation of science, the reproduction of universalistic values and on the other hand, the leaders of the university saw their task to be the reproduction of cultural traditions which might provide the nascent national state with a cultural identity.[135] Unlike the German model where the fate of the university was inextricably linked to the destiny of the state; the American universities were more diffuse in their utility, more social than cultural.[136] Influenced by the philosophical movement of pragmatism, associated with the work of Dewey, Pierce, and James, the American university sought to make the university serve the civic community rather than the state: training for new agricultural and industrial profession propelled its drive for knowledge.[137] In contrast, the model of mass universities was, in Delanty's image, "genuinely international academic revolution that while beginning in North America,

Thorstien Veblen, Hutchins, and Jacques Barzun contained such contradiction and negotiation of utilitarian nationism and anti-utilitarian inquiry."

[131] David Pan, "The Crisis of the Humanities and the End of the University" (1998) 111 Telos 69 at 70.

[132] See *ibid*.

[133] This cultural construction of the university is not to deny the possibility of counter—aspirations based on normative and universal values, *supra* note 16 at 8:

> But we should also recognise that academics and intellectuals at their best have always aspired to produce knowledge that transcended local and particular interests. For those with more progressive aspirations, that has been a crucial aspect of their personal and professional self-image. We should recall that according to Newman's Catholic principles, universities deal in universal knowledge. Bryan Turner refers to a historical "tension between national and cosmopolitan standards", arguing that the "university has been, since its mediaeval foundations, fractured around a contradiction between nationalistic particularity and a commitment to more universalistic standards."

[134] *Supra* note 124 at 32.

[135] *Ibid.* at 33.

[136] *Ibid.* at 36.

[137] *Ibid.* at 37.

quickly spread to all advanced societies and became an important part of the revolutionary upheaval in the developing world."[138] The social project of organised modernity created the conditions for mass university; ironically it also became one of the most important sites of resistance to modernization.[139] It played a central role in shaping feminism, multiculturalism, democratic and anti-authoritarian values while advancing the cause of human rights.[140] Universities became valuable sites for public critique.[141] Knowledge thus became a matter of critical dialogue with the wider society, ceasing to be pre-political as in the Humboldtian ideal.[142] The fourth revolution, however, marks a radical withdrawal of the state: the state is no more the exclusive provider and forms of knowledge are linked to its economic utility in the market place.[143] Universities are more appropriately multiversities relying on multiple resources including profitable research contracts with industry, student fees and donations.[144] No longer tied to the cultural project of the nation state, the university evolved in the course of the twentieth century in a more multicultural identity by becoming attached to the transformative project.[145] And it is the fourth revolution that has been caught in a storm: while critics such as Bill Readings[146] see only the demise of the university, others such as Manuel Castells[147] and Howard Newby[148] see a resilient institution becoming a major actor in the global economy.

We shall immediately consider some of the salient features of the fourth revolution and its interactions with technology, management and markets. But a comment on Delanty's historical sociology may not be out of place. Delanty's historiography is interesting: it highlights the gradual shift in the status of the university vis-à-vis the modern state. And yet it is remarkably silent about higher education in post-colonial societies prior to colonization. Third World societies do not feature in the historiography until the third revolution establishing the mass university.[149] The historiography, without explicitly spelling it out, rationalises knowledge as the monopoly of former colonial powers: the colonies while on colonising expeditions enlightened the "barbaric" masses and universities acted as instruments for generating requisite knowledge. Delanty's construction is, in the least, incomplete: much more needs to be said about centres of learning in Third World countries in their pre-colonial variety before the historiography can be claimed as universal rather than western. I shall not explore here the linkages between the centres of learning in Third World societies with the states in which they existed. Rather I shall concentrate on the fourth revolution in Delanty's construction and explore some of the significant changes it has introduced in our understanding of the university. It shall be my argument that by

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[138] *Ibid.* at 39.
[139] *Ibid.*
[140] *Ibid.*
[141] *Ibid.*
[142] *Ibid.* at 40.
[143] *Ibid.* at 42.
[144] *Ibid.* at 43.
[145] *Ibid.*
[146] *Supra* note 15.
[147] Howard Newby, "Higher education in the twenty-first century", online: Southampton University <http://www.soton.ac.uk/~newrep/vol16/no14future.html>.
[148] Manuel Castells, *The Rise of the Network Society* (Cambridge, Mass: Blackwell Publishers Inc., 2000).
[149] *Supra* note 124 at 39.

invalidating the *Education Act* the Indian Supreme Court has effectively foreclosed a critical review of the role universities in India especially in ways it can interact with technology, management and the market.

The chief feature of the fourth revolution, according to Delanty, "is the emergence of new technologies of communication, which are presenting the spectre of a 'virtual university.'"[150] But technology is neither the chief nor the only factor. Three factors, in my opinion, characterise the fourth revolution: influence of the market forces, adoption of corporate ethos and technological uses in teaching and research. By "influence of the market forces", I mean, in the words of E.P. Thompson, a "symbiotic relationship with the aims and ethos of industrial capitalism."[151] Rather than the nation-state, it is the market that has assumed centrality: the university agenda including curriculum, course-work, and investment in research is constantly invented and reinvented to satisfy the demands of the market. Knowledge is instrumental. Economic utility defines its relevance. And, therefore, whatever has demand is "produced" and "supplied"—a transformation that Les Levidow referred to as "academic capitalism."[152] The symbiosis with the market is neither novel nor exclusive: American universities, in particular, have been influenced by the market since the early twentieth century.[153] Neither is the engagement of the market with the university site exclusive: "commercialised" universities is a small aspect of the canvass that has affected most other aspects of life and culture including health care, museums, public schools and religion.[154] The sheer scale and extent of the symbiosis, however, is undoubtedly novel. Professor Bok gives us an exotic glimpse of the pervasiveness of the symbiosis.

Universities learned that they could sell the right to use their scientific discoveries to industry and find corporations willing to pay a tidy sum to sponsor courses delivered by Internet or cable television. Apparel firms offered money to have colleges place the corporate logo on their athletic uniforms or, conversely, to put the university's name on caps and sweatshirts sold to the public. Faculty members began to wear titles as Yahoo Professor of Computer Science or K-Mart Professor of Marketing. The University of Tennessee, in a coup of sorts, reportedly sold its school colour to a paint company hoping to find customers wishing to share in the magic of the college's football team by daubing their homes with "Tennessee Orange". One enterprising university even succeeded in finding advertisers willing to pay for the right to place their signs above the urinal in its men's room.[155]

Professor Bok continues his imaginative description in the following words:

> The growth of money-making possibilities extended well beyond universities as institutions. Individual faculty members, especially in the best universities, found new ways to supplement their incomes with lucrative activities on the side. As biotechnology boomed, life scientists not only started to seek patents

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[150] *Ibid.* at 42.

[151] E.P. Thomposon, *Warwick University Ltd.* (Harmondsworth: Penguin, 1970).

[152] See Les Levidow, "Marketizing Higher Education: Neoliberal Strategies and Counter-Strategies" in Robins & Webster, *Virtual University*, *supra* note 16 at 228.

[153] For early twentieth century examples of the symbiosis see *supra* note 56 at 2.

[154] See Robert Klutter, *Everything for Sale: The Virtues and Limits of Markets* (Chicago: The University of Chicago Press, 1999).

[155] *Supra* note 56 at 2.

> on their discoveries and take attractive consulting assignments; they also began to receive stock from new firms eager for their help and even to found new companies based on their own discoveries. Outside the sciences, business school professors travelled to corporations willing to pay substantial sums for days spent consulting or teaching their executive. Legal scholars began to collect large fees for advising law firms or their corporate clients. Economists, political scientists, psychologists, and many others discovered that their counsel was worth a tidy sum to companies, consulting firms, and other private organizations.[156]

Professor Bok's vivid representation of the symbiosis highlights the pervasiveness of the market forces into the university site. While there is considerable consensus with the description, its causes and consequences have produced considerable differences of opinion. The developments will make most pause and wonder: is everything up for sale if the price is right? Must we then reconcile to the view that education is just another form of trade? Or does education have a soul that cannot be appropriated, whether by the cultural project of the state or the insatiable forces of demand and supply?

The introduction of corporate ethos is an equally important feature of the fourth revolution. Management of universities is based on efficiency parameters: administrative decisions are premised on cost-effective formulas.[157] The old style Principal has now given way to the CEO, working with a "central management team", according to the "business plan", and with established "targets" and "performance criteria".[158] Universities have sought to reduce labour costs by resorting to more and more contract work while information technology has allowed expansion of distance learning.[159] University administration is conducted within a terminological framework that is dominantly corporate: it has led a critic to underscore the gradual "General Motorisation" of universities.[160] The introduction of corporate style managerialism is not limited to administration; it cuts through the whole university system. The teacher-student relationship is reified as a relationship between consumer and provider of things. And it has inevitably changed the role of students—students are now consumers of instructional commodities.[161] The university has itself undergone an image makeover: it is no more an institution of learning. Rather, it is an institution that practices profitable learning; learning must lead to profits for the university. Particularly in North America, universities not only acted as business partners, but also became business in themselves.[162] Partnerships with industry are becoming more important in techno-science and similar areas; enabling universities to increase their revenue.[163] The introduction of business models and the quest for profitable practices make universities precisely what many don't want it to be, namely, a business. The introduction of information and communication technology

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156 *Ibid.* at 13.
157 *Supra* note 16 at 10.
158 *Supra* note 16 at 12.
159 *Supra* note 124 at 43.
160 *Supra* note 56 at 20.
161 *Supra* note 152 at 237.
162 See R. Overtz, "Turning resistance into rebellion: student struggles and the global entrepreneurialization of the university" (1996) 58 Capital & Class 113.
163 *Supra* note 124 at 43.

('ICT'), similarly, has far-reaching consequences with references to ways in which the experience of university learning and research is shaped and reshaped. I have already referred to some of the technological developments earlier in the article and shall refrain from forcing a repetition here.

So what has the fourth revolution done to the university? Two broad positions are noteworthy. The "good news scenario" is one that sees these changes as creating "socially responsible and engaged, participatory action-oriented, democratic universities" sufficiently powerful to "contribute to the worldwide democratisation of cosmopolitan communities and societies committed to the worldwide abolition of poverty and racism."[164] The "bad news scenario" materialises a radically different outcome. The changes reflect the Commodification-of-Everything Century in which the irrepressible ICT revolution powerfully broadens, deepens, and accelerates the commodification of universities.[165] Having sketched out these two possible world-views, Benson and Harkavy argue that "on balance, developments, particularly since the 1980s and 1990s, have powerfully accelerated the worldwide tendency towards university commodification."[166] Masao Miyoshi's provocative imagery is similarly aligned towards a "commodified" conclusion: "No longer far from the madding crowd, the university is built increasingly among shopping malls, and shopping malls amidst the university. It is no longer selling out; it has already been sold out and brought."[167] Are there only negatives to be learnt from the fourth revolution? Is there really nothing that markets can contribute to the university? Are all business models necessarily baneful?

Clearly Professor Bok thinks otherwise. Restrained and cautious in his advocacy of business models and corporate style managerialism, he does see some gains. While conceding that the pursuit of "cost savings in teaching and research is a hazardous undertaking that can do more harm than good", Professor Bok does not discount it has totally irrelevant: "every major university spends hundreds of millions of dollars each year on such business like functions as food service, building maintenance, construction, and personnel. In these domains, certainly, corporate practice and experience may have valuable lessons to teach."[168] Also, left to itself, the contemporary research university does not contain sufficient incentives to elicit all of the behaviours that society has a right to expect.[169] For those who claim to be inspired by nobler motivations in pursuing research, must bear in mind that they have proved less effective than their business counterparts and may have some lessons to learn from corporate broad rooms too.[170] While Bok is admittedly more positive in his analysis than Benson, Harkavy and Miyoshi, the debate itself is evidence of the drastic changes in the very idea of a university. There is change, indeed rapid change and the university is being continuously shaped and reshaped by this dialogue.

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164 Lee Benson & Ira Harkavy, "Saving the Soul of the University: What Is To Be Done?" in Robins & Webster, *Virtual University*, *supra* note 16 at 170.

165 *Ibid.*

166 *Ibid.* at 172.

167 *Supra* note 124 at 78.

168 *Supra* note 56 at 25.

169 *Supra* note 56 at 28.

170 *Ibid.*

Unfortunately, this dialogue holds little relevance for Indian educationists and educational investors. Education is still, for the Indian Supreme Court, a non-profit making venture. As forces of globalisation, markets and technology continue to decisively influence the very idea of a university, the Supreme Court remains a prisoner of its own rhetoric. The university in India, notwithstanding these dramatic developments, remains tied to the cultural project of the nation-state. By providing a constitutional rationale in striking down the *Education Act*, the Court forecloses the possibility of debating the beneficial character of contemporary changes. For the Supreme Court, it is no commercialisation, no commodification, no technocratisation. To put it in short, the fourth revolution is simply absent from the Supreme Court historiographical canvass of universities. Presumably, like the ultra-leftist Marxist, the Supreme Court also does not like the impressions of the fourth revolution: it is obscene to its sensibilities and corrupting to its moral rhetoric. Rather than confront it, the Supreme Court sweeps it under the carpet: "I don't like it, so it doesn't exist." On one hand, it denies the existence the fourth revolution and on the other, labours to constitutionalise the first revolution in the university's historiographical account. But it does so by a logic of silence. *Yashpal* consistently assumes the first revolution as the only revolution and employs it as its defining rationale. Understanding the silence may then be our only way to understand its speech (the judgment) and the perversity that pervades it.

XI. Spelling Out the Unspelt: Locating Speech in the Supreme Court's Silence

These debates about the commercialisation, commodification or "technocratisation" of universities, as I have said, are plainly irrelevant for the Indian Supreme Court. Ironically, these concerns are irrelevant from the Court's perspective not because they are irrelevant but because they do not exist in its worldview of universities. As I have argued earlier, historically the idea of university was inseparable from that of the nation-state: the nation-state created and was (partially) created by the modern university. The burden of this historical impression is consistent throughout the decision and yet remains unspelt. Universities, even in contemporary times, for the Supreme Court, remain frozen in time and, therefore, ideologically linked to the nation-state. This was a linkage founded in history for its peculiar set of reasons. To sustain it in the contemporary era requires novel justifications and the Indian Supreme Court is willing to provide us with none. For one thing, the Court does not even consider the question. Not surprisingly, no answer is forthcoming either. The unspelt historical impression may be less than obvious but is both deep and pervasive and reveals itself in four distinct ways.

First, it bares itself in the Court's approving references to the 1948 Radhakrishnan Commission Report. Shortly after independence, the Government of India appointed a high profile committee under the chairmanship of Dr. S. Radhakrishanan, one of India's foremost educationists and later Vice-President of India, to suggest reforms in university education. The Committee comprised of some of India's greatest thinkers including Dr. Tara Chand, former Vice-Chancellor, Allahabad University, Dr. Zakir Hussain, then Vice-Chancellor, Aligarh Muslim University, Dr. A. Lakshmanaswami Mudaliar, then Vice-Chancellor, Madras University, Dr. Meghnad Saha, then Dean,

Faculty of Science, Calcutta University.[171] The selective references to the Radhakrishanan Committee Report, in my submission, highlight the unspelt historical impression that consistently runs throughout the judgment.

> If *India* is to confront the confusion of our time, she must turn for guidance, not to those who are lost in the mere exigencies of the passing hour, but to her men of letters, and men of science, to her poets and artists, to her discoverers and inventors. These intellectual pioneers of civilization are to be found and trained in the universities, which are *the sanctuaries of the inner life of the nation*.[172]

For the Supreme Court, as it was for the Radhakrishnan Committee, the destiny of the nation is intrinsically linked to "her men of letters, and men of science, to her poets and artists, to her discoverers and inventors." And they are to be cultivated in universities which are "the sanctuaries of the inner life of the nation." University education, in this construction, is clearly utilitarian: it must serve the nation's interest and her quest for identity and development. It not surprising then that the Commission concluded, "If our universities are to be the makers of future leaders of thought and action in the country, as they should be, our degrees must connote a high standard of scholarly achievement in our graduates."[173] Nation assumes centrality in interpreting the purposes of the university and the Supreme Court, unlike the Radhakrishanan Committee, is unjustifiably unable to sever this national link. The Committee's assignment of centrality to the nation in its evaluating the existential purposes of the university is understandable: writing in 1948, immediately in the aftermath of independence and a disastrous civil war, construction of a national identity was justifiably central to the Commission's worldview. Very few universities in India, the Committee noted, could be favourably compared with the best of British and American universities.[174] Emphasising the need for world-class universities, the Committee added—"Our universities should maintain the academic character of their work on a level recognised as adequate by the universities of other countries. Universities are our national institutions, and to keep up our national prestige, our degrees must be such as to command international recognition..."[175] Clearly, the Committee's motivations were not just world-class universities but Indian universities: India's destiny was irrevocably linked to the universities she nurtured. These uncritical recitations from the Radhakrishnan Report highlight the unspelt historical impression and the ways in which it dominated the Court's interpretation of private universities. However, unlike the Committee, the Supreme Court's emphasis on the national character of universities and their linkages to nation-states is plainly inexplicable: neither is nation building the immediate nor the most pressing crisis in contemporary India. The Radhakrishnan Report abetted the Court's historical impression and significantly contributed to its devalued interpretation of the role of private universities.

Secondly, the imprints of the historical impression may be found in the Court's approving reference to the position articulated in *Prem Chand's* case. In *Prem Chand*

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171 *Supra* note 12 at para. 14.
172 *Ibid.* [emphasis added].
173 *Ibid*.
174 *Ibid*.
175 *Ibid*. [emphasis added].

Jain v. R.K. Chhabra,[176] the Supreme Court, interpreting the provisions of the *UGC Act*, ruled that a University established by special legislation alone can have the right to confer degrees. Drawing from illustrations in history, the Court noted:

> Several universities in this country have been either established or incorporated under special statutes, such as the Delhi University Act, the Banaras Hindu University Act, the Allahabad University Act etc. In these cases, there is a special Act either of the Central or the Provincial or the State legislature establishing and incorporating the particular universities. There is also another pattern—where under one compendious Act several universities are either established or incorporated—for instance, the Madhya Pradesh Universities Act, 1973.[177]

This construction emphasises, once again, the prominence of the state in university project: legislations and legislations only can establish universities. But legislations must not only be legislations but also primary legislations: universities are direct creatures of the legislative organ of the State. And it followed from this; universities established by notifications under a general law of incorporation were not really universities and consequently could not confer degrees.[178] Universities, therefore, not only had an intrinsic but also a direct relation with the state: only legislatures as delegates of the popular will could enter into a dialogue with the university. The executive, in this view, is an illegitimate surrogate and does not carry a mandate to establish universities.

The *Education Act* was an umbrella legislation: it empowered the executive to establish universities by issuing notifications. By striking down the Act as unconstitutional, the Court in *Yashpal* reasserts the unspelt historical impression but with added vigour: universities are intrinsically and directly linked to the state. The Court assumes and asserts this linkage but does not pose the obvious question. Is there anything intrinsic to higher education that calls for such appalling levels of (usually incompetent) state intervention? What distinguishes an institution of higher or specialised learning (such as universities) from a primary or secondary educational institution? Is anything in higher education *qua* higher education that can explain this historical linkage within a constitutional framework? While anyone may establish and run schools, primary or secondary, what is it about higher learning that makes a similar level of social participation unfaithful to the *Constitution*? To be sure, there is nothing in the Indian *Constitution* that necessitates the establishment of universities by primary and primary legislations only. The *Constitution* merely authorises the making of legislations relating to universities: it does not prescribe any model for its establishment. That a university may be validly established by legislation and legislation only is a judicially imposed interpretation. The interpretation may draw our attention to the historical linkages as its source but the source does not legitimise the interpretation. It remains for the Supreme Court to tell us why this historical interpretation must be the constitutional interpretation.

Thirdly, the unspelt historical impression finds a sublime expression in the Court's mocking references to the money-making aspirations of many investors. Rejecting the claim of the universities that the *Amendment Act*, 2004 had established onerous

[176] 1984 (2) SCR 883.

[177] *Ibid.* at para. 8.

[178] *Supra* note 12 at para. 38.

condition by providing for an initial fund of the rupees two crores, the Supreme Court noted, "The fact that many of the private Universities have challenged the provisions of the amending Act itself shows their intention and purpose that they do not want to create any infrastructure but want to have the right of conferring degrees and earn money thereby."[179] Universities are expressions of popular will, they have intrinsic ties with the State and it logically followed that they are incapable of being appropriated, especially for purposes of profiteering. University education, in the Court's canvas, has a national character and a profit motive unmistakably stains the purity of the purpose. For the Court, "private" is "profit" and because "profit" in education was obscene, logically "private" was also obscene. In other words, whatever is "private" is, both profit making and obscene. To be sure, this fanatical fetishism against profiteering in university education is not new: the disparaging remarks follow established patterns. In *St. Stephens v. University of Delhi*[180] discussing the scope of the rights of minorities to establish and administer educational institutions, the Court noted, "educational institutions are not business houses; they do not generate wealth."[181] This was constitutionalised in *Mohini Jain*[182] when the Court read the right to education as included within the right to life and personal liberty but added: "the concept of 'teaching shops' is contrary to the constitutional scheme and is *wholly abhorrent* to the Indian culture and heritage."[183] Expectedly, the Supreme Court has consistently refused to interpret educational ventures either as trade, business or profession guaranteed as fundamental right in article 19(1)(g).[184] Capitation fee as part of admission policy was declared immoral and unconstitutional and state authorities, consequently, had jurisdiction to regulate the charging of fees in these institutions. But this abhorrence towards profits and private enterprise was part of a larger moralizing rhetoric. Lulled by a sense of romantic morality, the Court experienced something about profits that was diminutive of pedagogy: while in primary and secondary education the moralizing rhetoric had a latent appeal to religious ethos and iconography, at the university level the rhetoric was quintessentially nationalistic. In other words, while religious practices (primarily Hindu idolatry) legitimised the obscene construction of profits in primary and secondary education, it was appeal to "national character" and "national development" that lent credibility to the Court's assessment of profits in higher education.

The interference with profiteering was, however, considerably toned down, if not discarded, in *T.M.A. Pai*.[185] While formally upholding "the principle that there should not be capitation fee or profiteering as correct" the Court ruled that "reasonable surplus to meet the cost of expansion and augmentation of facilities, does not however, amount to profiteering."[186] The decision has been subject to interpretation and reinterpretation and it is difficult to map out the law relating to rights of minority educational institutions given the deep and pervasive confusions replete in the text

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179 *Supra* note 12 at para. 42.
180 AIR 1992 SC 1630.
181 *Ibid.* at para. 48.
182 *Supra* note 6.
183 *Ibid.* at para. 14 [emphasis added].
184 *Constitution,* art 19(1)(g): "All citizens shall have the right to practise any profession, or to carry on any occupation, trade or business."
185 *Supra* note 6.
186 *Ibid.* at para. 57.

of the judgements.[187] Whatever the law on minority educational institutions is, it is undeniable that *T.M.A. Pai* was an important point of departure: there was a radical transformation in the construction of the "private". The construction was, in the least, significantly charitable. For Chief Justice Kirpal and his fellow judges, the private enterprise in education was "one of the most dynamic and fastest growing segments of post-secondary education for which 'a combination of circumstances and the inability or unwillingness of government to provide the necessary support' were responsible."[188] It referred to "the logic of economics and the ideology of privatisation" while extolling their contributions in shaping the future of education.[189] Like the *Yashpal* Court, the Court in *T.M.A. Pai* also referred to the Radhakrishnan Report but unlike the former, used it on this occasion as a caveat against state control and pervasiveness in decision making. It cautioned against the exclusive control of education as a recipe for "totalitarian tyrannies" and warned against "bureaucratic or government interference" that could undermine the independence of all private unaided institutions.[190]

Yashpal significantly erodes the pragmatic approach of the *T.M.A. Pai* and endangers the construction of education and related activities as de-linked from the concerns of the State. It fuels the possibility of reintroducing "national" concerns in the university project and as a corollary, the independence of private investors in shaping their agenda for learning and research. By working within the precincts of the unspelt historical impression, the *Yashpal* Court reopens the "profitable private as obscene" worldview. That a university must not partake in profiteering is a judicially imposed interpretation. The interpretation may draw our attention to the historical linkages between the university as a project of the nation state and its "national character" as its source. The source, however, does not legitimise the interpretation. As in the earlier argument, it remains for the Supreme Court to tell us why this historical interpretation must be the constitutional interpretation.

And finally, the unspelt historical impression is evident in the way it foreshadows any references to the student community and their interests in pursuing education in these "profit making" institutions of higher learning. The construction of a university is, for the Supreme Court, a dialogue between the university as an agency of the state and the state itself. Because the university is a state apparatus, the dialogue is internal to the state and, in this sense, opinions of "outsiders" or "peripheral" stakeholders did not matter. Evidently, students are "outsiders" who do not feature in this constructive dialogue, for if they did, it is plainly impossible to understand the absence of any effort to solicit their views about the "profiteering" universities. Notwithstanding its avowed concern about the abysmal quality of teaching and the ways in which the process may endanger the future of students, the Court never poses a simple question—if the quality of education is in fact as abysmal as the petitioners have claimed, why are the petitioners not the students? Agreeably, poor teaching and possibility of bleak futures must have haunted students more than the "eminent scientist" or his co-petitioner supposedly "concerned about the quality

[187] See *P.A. Inamdar and Others v. State of Maharashtra and Others* 2005 Indlaw SC 463; *Islamic Academy of Education and Another v. State of Karnataka and Others* 2003 (6) SCC 697.
[188] *Supra* note 185 at para. 48.
[189] *Ibid.* at para. 49.
[190] *Ibid.* at para. 51.

of education in the State of Chhattisgarh." Because of the historical impressions that tie the university to the state, considered opinion of other stakeholders was plainly irrelevant in interpreting it. Arguably the decision is *non est:* it purports to detrimentally affect the rights of students without having heard them. In *R.C. Cooper v. Union of India*,[191] the Supreme Court struck down *Banking Companies (Acquisition and Transfer of Undertakings) Act*,[192] *inter alia*, on the reasoning that the Act did not provide for hearing of parties whose properties had been compulsorily acquired under the Act.[193] An opportunity of hearing to parties constitutes the core of natural justice and legislations may not do away with the necessity of hearing without compelling reasons.[194] Admittedly, the decision profoundly affects students, adversely or otherwise: striking down the *Education Act* without hearing parties for whose benefit it was enacted constitutes a gross violation of natural justice. By the Court's own logic the decision must be unconstitutional.[195]

These four instances highlight the Supreme Court's logic in rationalizing the historical linkages between the university as a project of modernity and the nation-state with a constitutional temper. It shows why silence often illumines speech and why an understanding of silence, in many ways, must precede the understanding of speech. Without a critical understanding of what the Court does not say (in the sense that it assumes it), it may be difficult, if not impossible, for us to interpret what it does say. The consistent but silent historical linkage that runs throughout the judgment exemplifies this assertion. For the Supreme Court, the fate of a university is intrinsically linked with that of the state, even if it does not say so. And this silence necessarily forces us to forego a pragmatic debate about the various ways in which the university site is being shaped and constructed in its interaction with the global economy, technology, and modernity.

XII. Conclusion

Why do universities exist? We have already rehearsed the extreme positions: universities may exist either as state institutions dominated and driven by national ideology or as factories that slavishly serve the needs of an insatiable market, whether constructed as "technological universities"[196] or through any other imagery. Knowledge, in the former conception of universities, is presented as neutral and objective: underlying this claim to neutrality and objectivity is the cultural project that dominates the agenda of these institutions. As ideological apparatuses of nation states, these

[191] 1970 (1) SCC 248.

[192] Act 22 of 1969.

[193] *Ibid.* at para. 51: "For instance if a tribunal is authorised by the Act to determine compensation for property compulsorily acquired, without hearing the owner of the property, the Act would be liable to be struck down under Article 19(1)(f)."

[194] This doctrine of reading natural justice into the legislative scheme was fully developed in *Maneka Gandhi v. Union of Indian and Another* 1978 (1) SCC 248.

[195] Realising the ways in which the judgment may jeopardise the careers of thousands of students, the Court made the following order: "In order to protect the interests of the students who may be actually studying in the institutions established by such private Universities, it is directed that the State Government may take appropriate measures to have such institutions affiliated to the already existing State Universities in Chhattisgarh." That their rights were seriously involved is even accepted by the Court. It remains for the Supreme Court to tell us why the students were not heard before disposing of the matter.

[196] *Supra* note 17 at 14.

institutions do not transcend the cultural mission: they remain institutions by and for states. In its corporate avatar, knowledge is not intrinsic but instrumental: knowledge may be found in knowledge factories where learning and research is conceived, processed, shaped and sold for profit. Knowledge is instrumental: its value is assessed by its contribution in generating material resources rather than its intrinsic worth. Whatever has consumptive demand is supplied. But unlike it cultural counterpart, the corporate model does not present a veneer of objectivity and neutrality. Knowledge, in the latter model, is commodity: it does not invoke a veil to mask the unpleasant presentation. But these extreme models are what they claim to be, namely, extremes. It is not difficult to conceive of an alternative middle way that reconciles at least some of the elements of both models even if at the cost of some obfuscation. Universities may exist to serve and even shape the forces of demand and supply but in ways that the moral character of the institution (of universities) is not lost. Paradoxically, one cannot explore the contours of an alternative middle way unless we acknowledge the possibility (and reality) of the two extremes. Without extremes, there can be no middle way.

Yashpal provided us with a rare moment of introspection: it presented us with an opportunity to revisit the university site and reinterpret its existential purposes. By refusing to recognise the possibility of extreme existence, the Supreme Court paradoxically forecloses an alternative exploration. Universities may exist for purposes that integrate the nation-state project with its material tendencies without compromising romantic conceptions of self-inspired learning and research. But the exploration of this alternative cannot begin unless one acknowledges the "deviant" extremes. *Yashpal* was probably one of those deviant extremes. Even if the Indian Supreme Court was not incorrect in saying what it did, *Yashpal* remains unerringly incorrect for what it forecloses us from saying. The brick and mortar university as a cultural project of the nation-state is, to invoke the dramatic imagery of Ronald Barnett, "dead".[197] "We have lost any clear sense as to what a university is for in the modern age."[198] Barnett tells us, "We need a new vocabulary and a new sense of purpose. We need to reconstruct the university if it is to match the challenges before it."[199] It is a telling lesson that the Indian Supreme Court must not only learn but also learn quickly.

[197] Ronald Barnett, *Realizing the University* (London: Institute of Education, 1997) at 1.
[198] *Ibid.*
[199] *Ibid.*