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APOCRYPHAL 'STATE':
Fragments on Theoretical Foundations, Constitution, Law, and their Mythical Unification

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[***Abstract**: The modern Indian conception of state, in philosophy and logical theory, is a product of juristic chaos, political anarchy and Constitutional indecisiveness. On the one hand, the practical legal concept, in India, is characterized by a definite methodology of doing law. A specific version of positivism symbolizes making and interpretation of law and the Constitution. On the other hand, that version is reinforced by the free commentary style of producing academic writings and teaching law, in universities and law schools. These two features dominate the idea of state under Article 12, of the Constitution, which in turn, is qualified by a third, the set of mightier principles, that underlay, the organization of the system of social order. The paper tries to show that, the modern social problems, for instance, Hunger, inequality, powerlessness of the vast citizenry, inability to access: justice, education, and health, decent sources of livelihood, to name a few, are inversely proportional to the theory and practice of the concept of state. Attempts have been made to develop, as opposed to liberal constitutional state, an ethical conception of state. The idea of ethics is located in historical facts and norms, whereas, the entire Western tradition of legal-political philosophy, is positioned on the modern individual. Accordingly, the author argues that the Hindu social and institutional ethics, determined, after a thorough historical investigation, of the indigenous legal practices, has potential, to supply the entire set of knowledge materials for solving and salvaging both, the state, individual, and the legal system.]*

I

General

The subject matter of this article is 'the idea of state'. The idea surrogates to that of power. Power in specific form: sovereignty and law.[1] The concept, hence, rheostat,

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[1] *See* Jonathan Sumption, *Law's Expanding Empire,* BBC REITH LECTURERS: LAW AND THE DECLINE OF POLITICS (May 25 2019, 07:15 PM). *Available at*: https://www.bbc.co.uk/programmes/m00057m8. (last visited 20 Dec., 2019). (Sumption, points out, two things which

minimally, all theoretical and empirical concepts that is social, political or economic.[2] The concept has psychological presence, in the minds of followers of other social science disciplines, humanities, and the laymen. In ancient Hindu *Sanskrit* literature, *rajyam* or *rajan*, was a limited conception[3] though, foundations of that limited conception were absolute and beyond subjects, open to 'public reason'.[4] A unique feature of the modern concepts in public law is that they are all concepts that originated in the medieval Western theology. Schmitt declares that, '[A]ll significant concepts of modern theory of the state are secularised theological concepts.'[5] But, meanings of those concepts have changed profoundly over the centuries. In contrast to what is found in Sanskrit literature, the linguistic and theoretical positions have got reversed. Under the liberal Indian legal system, foundations of the concept of state are limited, uncertain and indefensible but the resulting conception of state is unlimited, yet, formally, within

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have contributed to law's ('law' as opposed to 'customs') expanding empire: One of them is a growing moral and social absolutism which looks to law to produce conformity. The other is the constant quest for greater security and reduced risk in our daily lives). *Id*.

[2] Carl Schmitt, POLITICAL THEOLOGY: FOUR CHAPTERS ON THE CONCEPT OF SOVEREIGNTY 12 (George Schwab trans. 1985). (Schmitt asserts that, 'the existence of the state is undoubted proof of its superiority over the validity of the legal norm. The decision frees itself from all normative ties and becomes in the true sense absolute').

[3] *See* the subject, 'duties or functions of a king', Chapter VIII, THE SACRED BOOK OF THE EAST Vol. XXV THE LAWS OF MANU Ed. F. Max Muller, Trans. G Buhler, II 6-25 (Low Price Publication 2014); K. P. Jaiswal, HINDU POLITY: A CONSTITUTIONAL HISTORY OF INDIA IN HINDUS TIMES Chap. XXII (1919). One needs to see particularly theoretical basis for taxation, the relationship between king, people and the nature.

[4] *See*, Somedeva Suri, NITIVAKYAMRITAM, 1 (Sudhir Kumar Gupt trans. 1987, Originally written in 992 AD,), the very first verse declares, "Salutations to the state bearing the fruits of righteousness, wealth and desire", धर्मार्थकाममोक्षस्वरूपसर्वपुरुर्षार्थफलमिदं राज्यम। (धर्मार्थकामफलाय राज्याय नम:). *Id.* This most recent classical Hindu text on Arthasatra, provides basis for the kingship in a verse in the following manner, "[A] king is a great divine power. He does hot bow to anyone except preceptors and venerable persons', "राजा हि परमं दैवतम्। नासौ कस्मैचित् प्रणामति प्रन्यत्र गुरुजनेभ्य। *Id.* at 35; (Donald R. Davis Jr. THE SPIRIT OF HINDU LAW (2010). Davis holds the view that Dharmsastra as law had its primary unit in household and not king/state. Though, Dharmsastra is record of *ācāra* - a kind of ethnographic report, Dharmaśāstra was not written with the intention to produce a functional legal system. The practical implementation of law was left to communities of overlapping corporate groups and to political rulers. *Id.* at 33, 147.

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

public reason. For a layman, the three cognate categories, government, court and parliament or legislature, have immediate significance. The meaning is associated with law, legitimacy, power and validity with the adoption of discursive attitude of obedience. In that sense the conception of state retains its medieval character.

The modern Indian conception of state, in philosophy and logical theory, is a product of juristic chaos, political anarchy and Constitutional indecisiveness. On the one hand, the practice of the idea, in India, is characterised by a definite methodology of doing law. A specific version of positivism characterizes making and interpretation of law and the Constitution. On the other hand, that version is reinforced by free commentary style of producing academic writings[6] and teaching law in universities and law schools.[7] The un-critical outlook of legal academia has contributed enormously. The professionalization of legal education and careerism have caused impoverishment of imaginations.

These two features dominate the idea of state under Article 12, of the Constitution of India, which in turn, is qualified by a third, the set of mightier principles that underlay organisation of the system of social order, legal system, and from which important concepts of public law draw substance and trace their origin to, as well. The paper tries to show that, *the problem of studying the concept of state is the most important problem in the constitutional law and legal system of India. Hunger deaths, inequality, powerlessness of the vast citizenry, inability to access: justice, education, and health, decent sources of livelihood, for example, and many more, are inversely proportional to the theory and practice of the concept of state under the Constitution.*

In this paper, we shall expound the third (section-II) followed by discussions on the first assertion (section-III) and elaborate the second claim towards the end of the paper (section-IV). Under Section II, we shall attempt to develop the 'ethical' conception of 'state'. The humble aim of the paper consists in its theoretical endeavour to explain and if possible, remove mists that surrounds the general legal understanding. For principle-based analysis, reliance would be placed on writings of Carl Schmitt,[8] Giorgio Agamben[9], and reference to the primary and secondary works of Hindu philosophy shall be made. Attempts would be made to avoid ideological affiliations and study the subject along broad lines of 'biography of the concept' in its so-called 'constitutional

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[6] *See* Section-V, below.

[7] The Rules of Legal Education – 2008. The Bar Council of India does not prescribe even Indian Legal History, Indian legal philosophy, or History of Indian Freedom Struggle and its ideals to be part of courses either in compulsory or option courses. Further, it has done away with any effective study of Jurisprudence.

[8] Carl Schmitt, POLITICAL THEOLOGY: FOUR CHAPTERS ON THE CONCEPT OF SOVEREIGNTY 12 (George Schwab trans. 1985); Carl Schmitt, CONSTITUTIONAL THEORY (Jeffey Seitzer trans. 2008).

[9] Giorgio Agamben, HOMO SACER: *SOVEREIGN POWER AND BARE LIFE* (Daniel Heller Roazen trans. 1998).

logic'. A detailed analysis and, therefore, theorisation out of study of a series of Supreme Court Judgements would be necessary. Section-V is devoted to conclusions of the study.

II

Organising Principles

The law and legal system, particularly public law and philosophy, were received from Europe (Britain). In the United Kingdom, Westminster model of parliamentary system of governance developed as a product unique to cultural genus and historical-intellectual struggles over a period of eight Centuries, particularly the dominant philosophy of utilitarianism.[10] In the latter sense, the nineteenth Century Common Law imbibed many influences of the regenerated Roman Law and the natural law theories during previous two Centuries. The basis of politico-legal power was provided in the prescriptions of Blackstone, French Physiocrats, and ultimately formalised, by British Utilitarians, by developing and refining the concept of sovereignty. The generally accepted methods of explanation and understanding has no or little potential to penetrate and 'expose' these fundamental legal categories/principles. Because the liberal legal tradition of doing law represent itself, with ultimate belief in 'institutional fetishism', what Unger calls 'rationalizing legal analysis, to be innately progressive',[11] where there is no such thing as 'legal reasoning, whatever there are, there are merely 'historically located arrangements and historically located conversations.[12] In India, firstly, then these are history of the West and not that of its own. Secondly, medieval hierarchies and respective politico-economic entitlement and dis- entitlement, privileges and liabilities etc., are given new forms without altering their substance. And thirdly, the theoretical-empirical conception, of state, performs this most vital function. Obviously, the concept needs mightier foundations.

The theoretical foundations of the modern state and 'state law', the paradigmatic, are product of the genealogy, traced back to the eighteenth-century Europe. Contemporary French philosopher believed in the idea of '*societe reguliere*', the philosophy of subordination and domination,[13] a fundamental principle, which Blackstone claimed, was necessary for a good society:[14]

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[10] *See generally,* Eric Stokes, THE ENGLISH UTILITARIANS AND INDIA (1959).

[11] R.M. Unger, WHAT SHOULD LEGAL ANALYSIS BECOME? 35-36 (9196).

[12] *Id.*, at 36.

[13] Ranajit Guha, A RULE OF PROPERTY FOR BENGAL: AN ESSAY ON THE IDEA OF PERMANENT SETTLEMENT 140 (2016).

[14] BLACKSTONE'S COMMENTARIES ON THE LAWS OF ENGLAND at 104-108 Book IV, Chap. 8: *Of Praemunire* (The Avalon Project: Documents in Law, Legal History and Diplomacy, Yale Law School, Lillian Goldman Law Librari). *Available at: http://avalon.law.yale.edu/18th_century/blackstone_bk4ch8.asp* (last visited 20 Dec., 2019).

> 'The most stable foundation of legal and rational government is a due subordination of rank, and a gradual scale of authority; and tyranny also itself is most surely supported by a regular increase of despotism, rising from the slave to the sultan: with this difference however, that the measure of obedience in the one is grounded on the principles of society, and is extended no farther than reason and necessity will warrant; in the other it is limited only by absolute will and pleasure, without permitting the inferior to examine the title upon which it is founded.'

During the entire phenomenon of creation and sustenance of the domination and subordination of ranks, the 'nature', and usages of knowledge about nature, merely, form objects. The relation between nature and man acquires new dimensions with the increased human population and correspondingly, emergence of scarcity (of resources for survival and wellbeing). It is important to note that human art, science and capacity or mind cannot produce and add anything to the nature, for example: water, land, air etc., it can only master, use and waste them). Logically, then, the rationalizing legal theory, has no option, but to treat human beings and human capacities to be fragments of the nature and hence, progressively, forming part of the quantum of objects intended to be the field of formation of rank domination. Intuitively, it requires a conception of state so absolute that can control and recast (the nature of) all human beings, social institutions and their relations with the nature.

Schmitt, summarizes the long but definite manner of originating of concepts of public law, including state and sovereignty, in following terms:[15]

> 'Numerous dogmatic ideas of contemporary public law are still entirely rooted in the mid-nineteenth century, with its long-forgotten sense of serving social "integration." Integration refers to a simple factual situation. In the nineteenth century, when prominent definitions of statute and other important concepts originated, the concern was the integration of a certain social class, the educated and propertied bourgeoisie in particular, into a specific, then existing state, which was the monarchy that was more or less absolute.'

Theorizing Core Constituent Elements of the Concept

Schmitt's observations of creation of concepts of public law are not to be taken in static and phenomenal sense. This is a continuous process which is never complete. State law and policies, the judicial response to it, as well as, academic discourse on Article 12, of the Constitution of India, during the last seven decades, testify it. For example, the concept of state is so theoretically uncertain that it does not have even a fixed core.[16] If a core that can be identified, it exits in the form of monopoly of law and legally permitted power. There appears to be no logical necessity neither theoretical requirements why the sidea of core cannot be red into the modern concepts of law and sovereignty.

We shall argue, accordingly, that as opposed to liberal constitutional state, an ethical conception of state must have unchanging essential substance not confined to the

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[15] Carl Schmitt, CONSTITUTIONAL THEORY 54-55 (Jeffey Seitzer trans. 2008).

[16] *See* Section-III, of the paper below.

modern positive law. The expression, 'ethical' has, for us, a special meaning described below. To start with, every concept in public law must consist of the core and the penumbra. While the penumbra is flexible and alterable in accordance with the exigencies of particular circumstances at a time, the core of the concept must remain unchanging as human values of the civilization.

The core of any concepts can be seen consisting of three elements: *the form, the functions,* and *the limitations*. Though, these elements are not independent from the other and each signifies, certainly, essential substance of the other. The public law concept of state takes quite a different shape and substance when understood in the context of these three constituent elements.

The First Constituent Element: The Form

Let's take the idea of 'form of a concept', first. In the context of the concept of state and more importantly, democratic state, the number of members is the first crucial element. The totality of the numbers, the whole, has intimate relationship to the Nature: Earth. The propositions such as: क्षिति जल पावक गगन समीरा। पंच रचित इति अधम शरीरा॥[17] has meaning on the earth and not on other planets of the universe. A community of humans settling on the Mars or the Moon cannot connect to the nature or integrals of these planets as it does on the Earth. This can be seen as the nature of form as well as control of the nature. The earth or a territorial tract on the surface of the earth affords limitations for the form(s) of the human associations. The number is, then, not only relevant for the conception of the community but is also immediately and inherently connected to preservation or annihilation of the nature. The ancient Greek philosophers knew this reality. Plato and Aristotle, therefore, prescribed limitation on membership of a city state.[18] Emergence of large empires pushed this existential question for the sake of the 'dark thing: power'.[19] Yet neither, the liberal states nor their leading philosophers have considered the limits on numbers. Positive laws on natural resources, forest and forest resources, mines and minerals, river, water and other resources etc., are some of the examples, which unnaturally conceive and enforce limitations on the ways in which one or a section of the whole, may connect to the nature.

Giorgio Agamben, who carries out an excellent biography, in *Homo Sacer*, of the concept of sovereignty, focussed on *qualitative* changes, of the concepts and associated ideas such

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[17] The Sanskrit verse means, that the body (human) is made up of five elements: earth, water, fire, sky and air. It further implies that when these five constituent elements go back to or disappear into their respective sources amounts to end of the individual, that is, death.

[18] Aristotle, POLITICS, Books II & III, 52, 70, 104-5 (Ernest Barker trans. 1995). The discussion on limitation on number of citizens in a city state is based on the relationship of the group to that of nature, and required kind of relations amongst the members of the group for good life (in a state).

[19] Krishna Chandra Bhattacharya, *Swaraj in Ideas* in FOUR INDIAN CRITICAL ESSAYS 6 (Krishna Chandra Bhattacharya & Sisir Kumar Ghose eds., 1977).

as democracy, politics and rights,[20] and concludes the 'corrected' Foucauldian concept of 'biopolitics'. According to him *zoe,* (which, in Greek, expressed the simple fact of living common to all living beings) and *bios,* (which indicated the form or way of living proper to an individual or a group) formed starting point for Greek philosophers, but only to emerge as, afterwards, in the form of the concept of sovereignty. Agamben, on the subject of *zoe* and *bios* concludes: 'the fundamental activity of sovereign power is the production of bare life as originary political element and as threshold of articulation between nature and culture, *zoe* and *bios*'.[21] The concept of sovereignty, by way of making indistinction between the fact of natural or bare life and bios establishes itself into the Western paradigm of 'Camp': Biopolitics for legal/philosophical theory. Thus, the facts such as number, does not come in for consideration. He asserts:[22]

> '… that what characterizes modern politics is not so much the inclusion of *zoe* in the polis-which is, in itself, absolutely ancient-nor simply the fact that life as such becomes a principal object of the projections and calculations of State power. Instead the decisive fact is that, together with the process by which the exception everywhere becomes the rule, the realm of bare life-which is originally situated at the margins of the political order-gradually begins to coincide with the political realm, and exclusion and inclusion, outside and inside, *bios* and *zoe,* right and fact, enter into a zone of irreducible indistinction. At once excluding bare life from and capturing it within the political order, the state of exception actually constituted, in its very separateness, the hidden foundation on which the entire political system rested. When its borders begin to be blurred, the bare life that dwelt there frees itself in the city and becomes both subject and object of the conflicts of the political order, the one place for both the organization of State power and emancipation from it. Everything happens as if, along with the disciplinary process by which State power makes man as a living being into its own specific object, another process is set in motion that in large measure corresponds to the birth of modern democracy, in which man as a living being presents himself no longer as an *object* but as the *subject* of political power.'

The intuitive idea is that, had studies of Foucault and Agamben also factored quantum of, along with the 'power', the number of the whole and its impact, the studies might have led to some more devastating conclusions. The genealogical studies and what we can call biographical studies of a vital concept, for instance, that of 'sovereignty' by Agamben, are therefore focussed on 'epistemology' and language, capturing psychology of the subject. For example, sale of (drinking) water began at a particular point of time in modern history of capitalism or breathable air is available on demand for money and sovereign is always ready to facilitate similar arrangements in merchandise, through its positive law, cannot easily be explained through biography or genealogy of the idea of state or the concept of sovereignty. Perhaps, Saussure's theory of 'language sign', which he calls 'two-sided psychological entity', can explain the problem. "The two elements of linguistic sign: the concept and the sound image are

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[20] Giorgio Agamben, HOMO SACER: *SOVEREIGN POWER AND BARE LIFE* 181 (Daniel Heller Roazen trans. 1998).

[21] *Id.*

[22] *Id.* at 90.

intimately united, and each recalls the other. … that only the associations sanctioned by that language appear us to confirm to reality, and we disregard whatever (else) might be imagined".[23] Possibly, these are the reasons that Saussure denounces attempts to combine linguistics with ethnography, anthropology or sociology.[24]

The Second Constituent Element: The Functions

The *functions,* constituting the core of a concept has little to do with epistemology, logic or metaphysics. It is grounded in history and therefore is associated with ethics. Any concept, in public law, and that of state in particular, must represent culmination of not only nature or culture but achievements of non-linear events of history of the whole (the community). It is a sad commentary that legal studies have denounced and have got delinked from studies in history of the community, culture and concepts. When a legal concept is divorced in such ways from history, a very limited conception of rationality is required, to justify the resultant automated notion, whose sources lie, only, in an imagined techno-politico imagination of future. The latter has a very strong but absolute intrinsic attraction to the extent of enslaving consciousness. It is this kind of justifications that lay underneath endeavours of science: Artificial intelligence, astrophysics, cloning and bio-medical science etc., and inventions. Studies and researches, in them, do not have to refer back and are only futuristic in essence. These branches of knowledge involve 'knowing the given and using the known', and are, not necessarily concerned with 'good life'. The later forms the primary object of social sciences and humanities. Since, social sciences in general, and law in particular, do not deal, primarily, with 'given', and are concerned with creating its subject matter in the pursuit of study, law is, inherently, a dangerous human phenomenon.

The most important historical fact on the idea of *ethics,* one come across in the entire Western tradition of legal-political philosophy, consists in that, it is centred on the *individual.* Be it, Aristotelian or Kantian deontology or utilitarian consequentialism, and normative virtue ethics or applied/practical ethics, are exclusively occupied with, in finding and prescribing, 'right' course of conduct for the individual. There is little or no emphasis on the ethics of institution, state or sovereign (king). Wherever, kings or state responsibility, in the Western philosophy or political theory, comes for discussion, it is carried out, invariably by all thinkers of repute, in terms of power (and right) relationship between the state or state institutions and the individual.

Thus, the tradition of ethics, what in Hindu philosophy is called, *rajdharma,* (राजधर्म,) have been largely absent in the West. Where ethics starts and ends with the atomic conception of the individual. On the other hand, almost all sources of Hindu political theory discourses start with specifying immutable righteous (dharma) duties/functions of the state.[25] It is noteworthy that unlike the West, mention of (Bad state, despotism, or

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[23] Ferdinand de Saussure, COURSE IN GENERAL LINGUISTICS 66-67(Wade Baskin trans. 1959, 1987).

[24] *Id.* at 6.

[25] Chapter VIII, THE SACRED BOOK OF THE EAST Vol. XXV THE LAWS OF MANU Ed. F. Max Muller,

tyranny and dictatorship) as kinds of state/kingdom, is conspicuously absent in ancient Indian literature.[26] There is mention of un-righteous kings. The only reason that can possibly explain this feature is that of dichotomy between the king/state and the law. The first duty of the king was to enforce the law that pre-existed and predated the particular political state. The four sources of law identified are: Veda (*Sruti*), the tradition and virtuous conduct of those who know the Veda (*Smriti*), further, customs of holy men, and finally, self-satisfaction".[27] The state (read the dominant kind, the monarch) was enjoined to follow *rajdharma*, by having none or little power to create positive law. Ancient or medieval kings, therefore, could not transform the whole (character of the community) or that of the state by destroying its social and ethical characters.

Under the second constituent element, of the concept of state, we are dealing with not things given (in the sense of science), strictly, but social which cannot be understood legitimately away from their long history. Moreover, it also involves value dimensions, which find no place in techno-politico paradigms. For instance, whether relations between Parents and children are liable to be determined by positive law of some political authority on the earth? If the concepts of state or sovereignty are not technology but social, there are vital determinants of its social characteristics, which: it is in vain to search in the Western history. Thus, when we are talking of the concepts in India, it is the history of Indian people and institutions that can throw light.

The examples, when *drinking water, breathable air, health, education or access to justice* may be made liable to be distributed, under techno-politico paradigm, by rules of market, it contracts and attributes to the concept of state a specific character other than social and ethical. When, however, the history of India is to dictate, the state comes to be bound down with functions and responsibilities that can save it from being a techno-politico apparatus. The (bare) idea of efficiency or efficacy is a consequentialist idea and, therefore, belongs to the spheres of science or technology. It is regarded to be the main plank of Utilitarians. Let's take the curious unnoticed fact of public roads and express

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Trans. G Buhler, II 6-25 (Low Price Publication 2014); Somdev Suri, Nitivakyamrit Kautilya, Chapter-V 20-21 (Sudhir Kumar Gupt trans. 1987); Kautilya ARTHASASTRA, (The Vrajajivan Indological Studies No.50) Chapter-I (R. Samasastri trans. 2014).

[26] *See generally* K. P. Jaiswal, HINDU POLITY: A CONSTITUTIONAL HISTORU OF INDIA IN HINDUS TIMES Chap. XXII (1919); U. Ghoshal, A HISTORY OF HINDU POLITICAL THEORIES: FROM THE EARLIEST TIMES TO THE END OF THE FIRST QUARTER OF THE SEVENTEENTH CENTURY A. D. (1923); Ranajit Guha, A RULE OF PROPERTY FOR BENGAL: AN ESSAY ON THE IDEA OF PERMANENT SETTLEMENT 22 (1982), Guha traces and established that the term 'despotism', had not been used after Greek period till the seventeenth Century. The expression was reinvented with its pejorative meaning by new emerging colonial powers to designate the problem of power in the Easter societies. *Id.*

[27] "The whole Veda is the first source of the sacred law, next the tradition and virtuous conduct of those who know the Veda, further, customs of holy men, and finally, self-satisfaction". F. Max Muller (ed.), THE LAWS OF MANU, THE SACRED BOOKS OF THE EAST VOL XXV, II, 6. (G. Buhler trans. 1886).

highways built on PPP (public private partnership) models, where every private user has to pay for using public infrastructure. If we can have any recourse to history, such arrangements appear to be unthinkable. One may refer to two great emperors of India: Ashoka and Sher Shah Suri (ancient and medieval, respectively). Both are known for building public infrastructures including roads. Suri, built the GT (Grand Trunk) road stretching from Calcutta to Lahore. None of the emperors, charged payment of money or any valuable thing, for using the roads they had built.

The intuitive idea is that whatever conception, of state, is forged by Lawyers (the Court), the Parliament or popularised by the legal glossators such as writers of text books, it should not take the concept into techno-politico sphere but must retain the idea of state into the social. This can be ensured only when the idea is not divorced from people, history and culture. The Hindu philosophy may well supply entire substance for redeveloping the Indian social concept of sovereignty/state.[28] Carl Schmitt's observation on the origin of fundamental concepts of public law, then, has to be understood in this qualified sense. The loss of ethical qualities and characteristics of the concept is directly co-related to abandonment of essential functions by liberal state. In a trickledown effect manner, vitiated further by market, it is proportionately, loss of ethical members (whole): 'the form'.

The Third Constituent Element: The Limitations

The third constituent of the core of a concept, *limitations*, (*मर्यादा*), is to be carefully differentiated from the formal restrictions, particularly in the context of the theory of modern liberal state, that exists chiefly, in the form of liberal theory of rights (of people). It is conceived and theorised in ways in which it becomes insufficient, necessitating construction of theories of justice for distribution of goods[29], benefit produced by community life. Thus, concepts of justice such as developed by Rawls or that of Sen[30] are meant to be supplements. Rawlsian theory is applicable or is prescribed to be followed by the state and its institution and not for individuals primarily. For example, the theory of John Rawls, through his concept of the 'basic structure of society' (state and its institutions) distribute fundamental rights and duties and determine the division

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[28] See generally Chanchal Kumar Singh, State and Equality from Sadācār(a) to Bazaar: Searching Alternative Impressions in Light of the Sanskriti Litigation, Vol. 1 SML. L. REV. 7-47 (2018).

[29] John Rawls, A *THEORY OF JUSTICE* 6 (1999). He observes, 'the basic structure of society, or more exactly, the way in which the major social institutions distribute fundamental rights and duties and determine the division of advantages from social cooperation. *Id.* In 1993, Rawls specifically clarified that his theory was meant to be applicable on to (Western) constitutional democratic regimes. "...the principles of justice as fairness in *Theory* require a constitutional democratic regime…". *See* John Rawls, POLITICAL LIBERALISM xlii (1993). *See also,* John Rawls, THE LAWS OF PEOPLE 128 (1999).

[30] *See generally*, Amartya Sen, THE IDEA OF JUSTICE (2009).

of advantages from social cooperation. Amartya Sen's theory of removal of injustice[31] or that of capability approaches are, all prescriptions for state policy positively. None of them are talking of limitations on the concept of state. Perhaps in the tradition of academics they are trained, does not leave space for insights. The Judicial discourse, on the relevant provisions of the Constitution of India, is similarly caused by philistinism about the limits of the core concept of state entailing from Hindu tradition of political legal philosophy. It is noteworthy that greatest positivist of Common Law, John Austin, visualised limitations on the powers of sovereign in the form of 'foundational constitutional principles of society' (and not individual rights). That is, a law made by the sovereign in contravention of the constitutional principles of the society is invalid.[32]

Theories of justice, will find reduced attraction/relevance when limitations of the core of the concept is determined undoubtedly. Thus, if one clearly foresight the whole beneficial consequences (civilizational value/dividends of Hindu culture) of the preservation of drinking water, education, health, access to justice, and breathable air, to name a few, forming some of limitations for the concept of state, it raises existential questions on the relevance and working of the Constitutional Courts. It brings out the chaotic and doubtful nature of works of the latter (*see* Sections below).

The most urgent limitations are contained in the writings of Gandhi. The constituent assembly led by the Indian National Congress, however, paid lip service to them and, partially, constitutionalised the illimitations (*अमर्यादा*), by creating part IV of the constitution. Principles in this part of the Constitution, do, partially, reflect many of the *limitations* (and also *functions*) of the Indian concept of state, but are made a kind of virtual/soft constitution, by giving absolute discretion to the government of the day to respect or disown them. In the latter sense, it is a vast source for the opposite of what we have called limitations as a constituent element of the concept of state. Thus, main importance of the Directive Principles of Sate Policy (DPSP) is for the continued creation of *अमर्यादा.* This phenomenon inherently associated with DPSP can be understood by referring to 'swaraj in ideas' by Bhattacharya:[33]

> 'There is cultural subjection when one's traditional cast of ideas and sentiments is suppressed without comparison or competition by a new cast representing an alien culture which possesses one like a ghost. This subjection is slavery of the spirit: when a person can shake himself free from it, he feels as though the scales fell from his eyes. He experiences a rebirth and that is what I call Swaraj in Ideas.'

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[31] *Id.*

[32] Austin believed that there are certain fundamental principles or maxims which exist in the community or the majority of members of the society regard with feeling of approbation which the sovereign is bound to observe by moral sanction. If a 'law' or 'other conduct' of the sovereign conflicts with such a maxim, the law or other conduct may be called *unconstitutional,* though they cannot be called illegal, because it conflicts with *constitutional law* (*of the society*). John Austin, THE PROVINCE OF JURISPRUDENCE DETERMINED 257-258 (Indian Economic Reprint 2012).

[33] Krishna Chandra Bhattacharya, *Swaraj in Ideas* in FOUR INDIAN CRITICAL ESSAYS 13 (Krishna Chandra Bhattacharya & Sisirkumar Ghose eds., 1977).

The constitutional indecisiveness is constitutionalised in the form of strong libertarian legal regime under Part III and fragmentary egalitarian soft constitutional provisions under Part IV of the Constitution. The scheme has a strong bias in favour of rules and principles of the common law. Perhaps, the Constitution makers could not consider the nature of the latter and its incompatibility with Indian people, culture and history. Articles 12 and 13 bring out this import sufficiently.

III

Biography of the Concept: Judicial Enterprise

A brief account of the concept practiced in the United States, South Africa and India and their comparative analysis is useful for understanding the dominant role of the judiciary. Though, the theory of state is developed and practiced in the three jurisdictions with different names and slightly separate practical consequences, none of these concepts and their practices are capable of evolving into the social-ethical idea of state.

The United States

The doctrine of 'state action/responsibility', in the United States appears to have potential, to a limited extent, to grow and acquire features of the core concept discussed above. The American doctrine is based on textual provisions of its Constitution, equal 'protection clause'.[34] It has helped court to strike down discriminatory laws, for example, leading to the abolition of separate but equal doctrine, in American school system, which was statutorily mandated separation of the races.[35] However, in the name of private liberties, life and property, the doctrine has got restricted interpretations. The American Supreme Court has time and again held that the question is not 'whether a private group is serving a 'public function'. That, 'a private entity performs a function

[34] Section 1 of the Fourteenth Amendment provides: "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

[35] *Brown* v. *Board of Education*, 347 U.S. 483 (1954).

which serves the public does not make its acts, state action.'[36] The doctrine has, therefore, been subject matter of strong criticisms.[37]

The restricted potential of the American doctrine can easily be traced to the fact that it has no history beyond sixteenth Century when colonisers from different European countries and culture occupied the continent by inventing the 'theory of discovery'.[38] The United States has no history of social political institutions in the way in which India possesses. Obviously, two of the core constituent elements: functions and limitations cannot be discovered. The founding fathers of the US Constitution were left with the only recourse to abstract principles of modernity and enlightenment, which were taking shape during seventeenth-eighteenth Centuries. The so-called natural law right theory became basis for constructing social order with the modern liberal state at the apex of all social institutions. It is not surprising, that American society is one of the most vulnerable groups of individuals. Socio-economic interests/entitlements (socio-economic rights) enjoy a very precarious status and issues relating to it, is entirely left to players of the market.

South Africa

A special position is to be found under the Constitution of 1996 and jurisprudence developed by the Supreme Court of South Africa. The constitutional theory on the subject comprises of doctrines of vertical and horizontal application of the Bill of Rights[39] of the African Constitution. The application doctrine is supplemented by provisions of Sections 39 (2) and 8 (3), (developmental Clauses)[40] which require the Court to reform

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[36] *Rendell-Baker* v. *Kohn*, 457 U.S. 830, 842 (1982). *See also, Ex parte* Virginia, 100 U.S. 339, 346 (1880). "A State acts by its legislative, its executive, or its judicial authorities. It can act in no other way. The constitutional provision, therefore, must mean that no agency of the State, or of the officers or agents by whom its powers are exerted, shall deny to any person within its jurisdiction the equal protection of the laws. Whoever, by virtue of public position under a State government, deprives another of property, life, or liberty, without due process of law, or denies or takes away the equal protection of the laws, violates the constitutional inhibition; and as he acts in the name and for the State, and is clothed with the State's power, his act is that of the State."

[37] For a classic analysis of this theory, see, Charles L. Black Jr., The Supreme Court, 1966 Term -- Foreword: "State Action," Equal Protection, and California's Proposition 14 81 Harv. L. Rev. 69 (1967-1968). See also, Gary Peller & Mark Tushnet, State Action and a New Birth of Freedom 92 Geo. L.J. 779 (2003-2004).

[38] *See* opinion of Justice Marshall in *Johnson & Graham's Lessee* v. *McIntosh* U.S. 8 Wheat. 543 543 (1823).

[39] *See* Chapter-II, The Constitution of the Republic of South Africa, 1996.

[40] Section 8, The Constitution of the Republic of South Africa, 1996, Provides: "*Application* 8. (1) The Bill of Rights applies to all law, and binds the legislature, the executive, the judiciary and all organs of state. (2) A provision of the Bill of Rights binds a natural or a juristic person if, and to the extent that, it is applicable, taking into account the nature of the right and the nature of any duty imposed by the right. (3) When applying a provision of the Bill of Rights

existing Common Law in accordance with norms of the Constitution. The theory of horizontal application has two aspects: directs and indirect. The 'direct horizontal application means that the Bill of Rights operates on people, whereas in indirect horizontal application, the Bill of Rights steers private conduct by controlling the content of the common law'.[41] Section 8(2) makes Bill of Rights binding on private parties, 'taking into account the nature of the right and the nature of any duty imposed by the right', which is determined through balancing test. In addition to authorising the enactment of anti-discrimination statutes binding upon private parties, the Constitution through Section 9(4), especially without condition, makes the prohibition of unfair discrimination found in the Constitution, directly applicable to private parties.[42] Uniquely though, the South African, concepts are yet conceived and theorised within the liberal rights discourse, it mainly exhausts its energy in conceptualising the African state, in tension with the Common Law. An entire series of opportunity to develop the ethical state is lost.

India

The Constitution of India arranges a relationship of supremacy and subjection between so called libertarian and egalitarian sets of provisions: fundamental rights and DPSP. Articles 13 and 32 comprise of supremacy principle. The statement of horizontality of rights application or the most categorical statement of true state responsibility is to be found under DPSP. In the mid-1980s, prof. Chhatrapati Singh had asserted that Article 13 must be read as a charter of law reform (to be carried on by the Apex Court of the Country).[43] In its essence, in the context of practice of the idea of state, the entire discourse about the concept, is abstracted from its real substance by the liberal theory of right, and is grounded exclusively in the politics of latter (right), downing a perpetual curtain on the question of core elements of the concept. Perhaps, this is the reason, that

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to a natural or juristic person in terms of subsection (2), a court— (a) in order to give effect to a right in the Bill, must apply, or if necessary develop, the common law to the extent that legislation does not give effect to that right; and (b) may develop rules of the common law to limit the right, provided that the limitation is in accordance with section 36(1) …." . Section 39, reads: *Interpretation of Bill of Rights* (1) When interpreting the Bill of Rights, a court, tribunal or forum— (a) must promote the values that underlie an open and democratic society based on human dignity, equality and freedom; (b) must consider international law; and (c) may consider foreign law. (2) When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights. (3) The Bill of Rights does not deny the existence of any other rights or freedoms that are recognised or conferred by common law, customary law or legislation, to the extent that they are consistent with the Bill.

[41] Dennis M Davis & Karl Klare, TRANSFORMATIVE CONSTITUTIONALISM AND THE COMMON AND CUSTOMARY LAW 26 SAJHR 419 (2010).

[42] *Id*. at 420.

[43] Chhatrapati Singh, WATER RIGHTS AND PRINCIPLES OF WATER RESOURCES MANAGEMENTS 22-23 (1991).

suggestion similar to one, voiced by prof. Singh, has never been resonated well in the fraternity of lawyers and academicians alike or in the Indian constitutional law discourse.

It is interesting to note what is hidden. Since all three constitutions are based on modern theory of liberal 'rights', they are inherently antithetical to the three constituent elements of the core concept of 'state or (internal) sovereignty'. As a corollary, law making and interpretation go along. The liberal concept, then, is not to be understood what Schmitt calls power to exclude or include, and that what Agamben refers to as paradigm of 'camp'. But a deeper analysis of power-right, the primary foundation of the concept, signify increasing capacity for violations and destruction beyond *zoe* and *Bios*. Rights as the organizing principle of relations between the liberal state and the right holders, work in individualist manner. This is the greatest feature of provisions such as Articles 13 and 32. In Hohfeldian analysis, both of the processes, law making and enforcement by courts can be exercised for or between two parties, that is, binary nature.[44] The kind of litigations called social action litigation or public interest litigations, do not constitute exceptions. Thus, before a right dispute can legitimately be started in court, against an action or law of the state, it must be established beyond doubt that infringement of right(s) of some definite individual or group of individuals is involved.

The Order Hidden in Chaos

The state or its law, however, when destroys/violates some good which cannot be identified with the right of one (or group of) specific individual(s), excluding all others, does not fall into the net of constitutionally prohibited acts. In other words, in liberal legal philosophy, 'harm' is conceived very narrowly, and is of only, individualistic (concerned immediately with the body of the Individual) character. It is not social. Precariously, definitions of both, 'rights' and 'harm' decouple human beings from all that makes them social beings and raises them to the status of Aristotelian beasts. Rather to distinguish it from Aristotle and particularize, in the context of Bazaar, individuals are created into beasts of rights! Thus, where state makes an arrangement allowing or conceding that drinking water, education or health etc., can be sold and bought on the principles of market to achieve consequentialist object of efficiency or secure autonomy, the matter can be entirely left to economists; and legal philosophy, historians or anthropologists have nothing to do with it. The threshold of the liberal conception of

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[44] *See generally* Wesley N. Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning* in HOHFELD'S CONTRIBUTION TO THE SCIENCE OF LAW (WALTER WHEELER COOK TRANS. 1919).

state is not the ideas of exception,[45] ban or camp,[46] nor the abstraction of individual from his social circumstances,[47] but the annihilation of, progressively, all that can culturally and historically be counted to be social-human itself. The destruction, more often, than not, takes argumentative form of, liberal rights and justice or autonomy of individuals.

Another feature of the current version of positivism, for example, can be discovered from its established dogma that, what (including social) has not been incorporated in one of rights created by positive law or the law has chosen to protect, can be destroyed by law. For instance, whether human blood can be freely offered for sale by every individual? State/court does not have to look anywhere for answer but existing laws prohibiting it or positive rights permitting the same, even though, in history and culture such conducts may have been treated as sin (*Cf.* for example, in the United States, mother milk is sold). Thus, the current positivism starts with positivism and end with positivism. The doctrines developed by the Indian Supreme Court to operationalize the idea of state: 'state agency and instrumentality', and its further refined versions, are surrogate entities. Moreover, they represent identical agents of corrosion.

The three Constitutions, American, Indian, and South African, belong to three different historical epochs of the modern constitutionalism. The Constitution of United States (1787) being the first written one at a time when liberal legal philosophy was taking its concrete shape. The Indian Constitution (1950) is amongst the first, and so called, the most successful post-colonial and post war constitutions. And, the Constitution of South Africa was adopted in the post clash of civilization, post ideological age. Sadly, none of them, practices the theory, in a way in which it can regenerate and incorporate the core constituent elements.

Thus, the methodology of doing law' (see previous paragraphs) that characterizes 'the practice of the idea of state, is a very elusive but the most crucial one. It includes both,

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[45] *See* Schmitt, *supra* note 1 at 6. (Schmitt declares that, "Sovereign is he who decides on the exception." The latter is explained, 'who decides in a situation of conflict what constitutes the public interest or interest of the state, public safety and order, *le salut public,* and so on'. *Id*. "A crisis, according to him, is more interesting than the rule because it confirms not only the rule but also its existence, which derives only from the exception. He was quick to add, nevertheless, that because the exception is distinguishable from a juristic chaos, it must be construed as a juristic problem and as such made subject to juristic considerations. *See* George Schwab, *Introduction* to CARL SCHMITT, POLITICAL THEOLOGY: FOUR CHAPTERS ON THE CONCEPT OF SOVEREIGNTY xlii (George Schwab trans. 1985). Schwab further explains, 'in the context of Schmitt's work, a state of exception includes any kind of severe economic or political disturbance that requires the application of extraordinary measures. Whereas an exception presupposes a constitutional order that provides guidelines on how to confront crises in order to re-establish order and stability, a state of emergency need not have an existing order as a reference point because *necessitas non habet legem'. Id. at 6 n1.*

[46] *See* Agamben, *supra* note 9 at 166.

[47] *See,* Bhikhu Parekh, *The Modern Conception of Right and its Marxist Critique* 13/3-4 INDIA INT'L CENT Q. VOL. THE RIGHT TO BE HUMAN 7 (December 1986).

the elements of juristic chaos and political anarchy. Chaos is to be understood as the source of confusion and illusion while, anarchy, here, shows voidness of *functions* and *limitations,* we have discussed above. Law or policy making and their enforcement are not two separate set of processes capable of being decoupled. A unique feature, in reverse, frequently appears, where courts by their orders compel state to frame policies and make law. It is often given consecrated name, judicial activism. Both of them are afflicted with the vice of ignorance about the core constituent elements of the concept of state, which have to be reconstructed on the basis of the Hindu traditions of politico-legal philosophy.

In the following paragraphs of this section of the paper, we shall attempt to discover the true import of series of judicial decisions relating to the conception and practice of the 'state'. The Indian judicial enterprises, by interpreting Article 12, through a catena of decisions, appear to be erecting a system of disorder which can precisely be captured by the reference to Lorenz equation or magical image:[48]

> '[t]he famous magical image or equation by Lorenz … resembling an owl's mask or butterflies' wings. It revealed the fine structure hidden within a disorderly stream of data. Traditionally the changing values of anyone variable could be displayed in a so-called time series. To show the changing relationships among variables require a different technique. At any instant in time, three variables fix the location of a point in three-dimensional space as the system changes, the motion of the point represents continuous changing variable.'

The chaos, in judicial decision, weave up a system, an order. It is more easily discernible in the context of decisions of the Indian Judiciary. In this section, below, an analysis of exposing the hidden order, and the basis of such order is attempted to be discovered. The rationalized 'model of power-rights', provides that foundation.

In addition to liberal rights theory, there are some more features of the judicial management of the concept of state, the sources of which are to be found in the individual constitutional provisions, and need to be recorded here. The concept is developed, linguistically from provisions of Article 12, by interpreting that Article in self-isolation. It is established in the Blackstonian principle of rank domination in a way in which it comes into contact with individual as discrete entity and gets imposed upon them in their very that capacity. The effect of Part-III provisions goes further, by virtue of absence of guarantee of a set of social goods and ethical assets of the community, based on socio-historical determinants. Some of such social goods and ethical resources of the Indian society is referred, halfheartedly, in Part-IV, but they have proved to be beyond capacity of lawyers' to comprehension.[49] Interpretations of individual fundamental rights themselves control substance of Article 12 (this is a theme, I have

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[48] *See* James Gleick, CHAOS: MAKING A NEW SCIENCE 33-34 (1987).

[49] P.K. Tripathi, Directive Principles of the State Policy: Lawyers approach to them hitherto, parochial, Injurious and Unconstitutional in SPOTLIGHTS ON CONSTITUTIONAL INTERPRETATIONS 291-322 (1972).

explored elsewhere).[50] The constitutional theory of the Basic Structure doctrine, in the context of the main arguments of this paper, appears to be antithetical to the very idea of a true concept of state.

Discovering the Order Hidden in Chaos

The practical legal concept of state is developed by the Supreme Court in a series of cases starting with *Rajasthan Electricity Board*.[51] It was theorized in the form of state 'agency and instrumentality in *Sukhdev Singh*[52] and given final shape, by the Court, in cases such as *Airport Authority*[53]; *Ajay Hasia*[54] and in *Som Prakash Rekhi*[55] decisions. The theory was further renovated in *Pradeep Kumar Biswas*[56] and in *Zee Telefilm*[57] and reaffirmed in *BCCI* v. *Cricket Association of Bihar*.[58] Law on Article 12 has gone multiple revisions.

In *Mohan Lal*, while rejecting doctrine of *ejusdem generis*, the Court theorised the expression 'other authorities' with reference to 'sovereign function'. It laid down (Bhargava, J.,):

> '…every type of authority set up under a statute for the purpose of administering laws enacted by the Parliament or by the State including those vested with the duty to make decisions in order to implement those law.[59]

Shah J., in a separate opinion while agreeing with the conclusions of Bhargava, J., explained the expression, 'other authorities:

> authorities constitutional or statutory invested with power by law not sharing the sovereign power do not fall within the expression "State" as defined in Art. 12. Those authorities which are invested with sovereign power, i.e., power to make rules or regulations and to administer or enforce them to the detriment of citizens and others fall within the definition of "State" in Art. 12, and constitutional or statutory bodies which do not share that sovereign power of the State are not in my judgment, "State" within the meaning of Art. 12 of the Constitution.[60]

The opinion of Ray J., in *Sukhdev Singh* essentially followed ratio of *Mohan Lal*. Mathew J., however, took into account the changing nature of the concept of state, in political theory. He observed, 'today state cannot be conceived of simply as coercive machinery wielding the thunderbolt of authority. It has to be viewed mainly as a service corporation'. Thus, he challenged the previous views and positively explored, 'whether,

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[50] Chanchal Kumar Singh, State and Equality from Sadācār(a) to Bazaar: Searching Alternative Impressions in Light of the Sanskriti Litigation I SML. L. REV. 7-50 (2018).

[51] *Rajasthan Electricity Board* v. *Mohan Lal* A.I.R. 1967 S.C. 1857.

[52] *Sukhdev Singh* v. *Bhagatram* (1975) 1 S.C.C. 421.

[53] *Ramana Dayaram Shetty* v. *International Airport Authority of India,* A.I.R. 1979 S.C. 1628.

[54] *Ajay Hasia* v. *Khalid Mujib Sehravardi* A.I.R. 1981 S.C. 487.

[55] *Som Prakash Rekhi* v. *Union of India* A.I.R. 1981 S.C. 212: (1981) 1 S.C.C. 449.

[56] *Pradeep Kumar Biswas* v. *Indian Institute of Chemical Biology*, (2002) 5 S.C.C. 111.

[57] *Zee Telefilms* v. *Union of India*, (2005) 4 S.C.C. 649.

[58] *Board of Control for Cricket in India* v. *Cricket Association of Bihar*, (2015) 3 S.C.C. 251.

[59] *Supra* note 51, para 6.

[60] *Supra* note 51, para 12. As per Shah J.

where there are no provisions for issuing binding directions to third parties the disobedience of which is punishable, the corporations set up under statutes to carry on business of public importance or which is fundamental to the life of the people, can be considered as 'state' within the meaning of Article 12 of the Constitution? It appears that, Mathew J. extended the scope of the concept beyond corporations established by statute by asking the question of, separating vital government functions from non-government functions and contrasting governmental activities which are private and private activities which are governmental. The ultimate question which is relevant for our purpose is, 'whether such a corporation is an agency or instrumentality of the government for carrying on a business for the benefit of the public'.

The theory of state agency and instrumentality came up for further refinement in *Ajay Hasia*. By way of summarising the tests evolved in *Airport Authority of India*, Bhagwati J., laid down the famous six criteria on the cumulative assessment of which the theory of state agency and instrumentality could be applied:[61]

1. One thing is clear that if the entire share capital of the corporation is held by Government it would go a long way towards indicating that the corporation is an instrumentality or agency of Government.
2. Where the financial assistance of the State is so much as to meet almost entire expenditure of the corporation, it would afford some indication of the corporation being impregnated with governmental character.
3. It may also be a relevant factor… whether the corporation enjoys monopoly status which is the State conferred or State protected.
4. Existence of "deep and pervasive State control may afford an indication that the Corporation is a State agency or instrumentality.
5. If the functions of the corporation are of public importance and closely related to governmental functions, it would be a relevant factor in classifying the corporation as an instrumentality or agency of Government.
6. Specifically, if a department of Govt. is transferred to a corporation, it would be a strong factor supportive of this inference" of the corporation being an instrumentality or agency of Government.

The theory of agency and instrumentality went further refinements in *Pradeep Kumar Biswas*[62], in the year 2003. It is noteworthy that by the time about one decade of economic reforms; liberalisation, privatisation and globalisation (LPG), had lapsed. There was a silent political and economic demand that the theory of instrumentality needs new contents that serves the requirements of neo liberal global economic system. In *Pradeep* Court reinvented the theory of agency and instrumentality:[63]

> 'The picture that ultimately emerges is that the tests formulated in *Ajay Hasia,* are not a rigid set of principles so that if a body falls within any one of them it must, ex-hypothesi, be considered to be a State within the meaning of Article 12. The question in each case

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[61] *Supra* note 54, para 9.

[62] *Pradeep Kumar Biswas* v. *Indian Institute of Chemical Biology*, (2002) 5 S.C.C. 111.

[63] *Id*. at para 40.

> would be, whether in the light of the cumulative facts as established, *the body is financially, functionally and administratively dominated by or under the control of the Government*. Such control must be particular to the body in question and must be pervasive. If this is found then the body is a State within Article 12. On the other hand, when the control is merely regulatory whether under statute or otherwise, it would not serve to make the body a State (emphasis added).'

Zee Telefilm and *Cricket Association of Bihar* reaffirmed the demanded service rendered by *Pradeep* Court. The spirit in which judicial pronouncements are received symbolises exclusive importance of procedural fairness which is an ancillary but vital feature of the methodology of doing law. Sentiments of glory, nobleness, and his majesty, the lawyers carry along with them, in the common law tradition, mesmerise legal academicians. Their pronouncements constitute for the latter as the words of Manu, Moses and Prophet Mohamed, that needs to be recorded with reverence and in the archetype, they are declared! The kind of the concept of state, the Supreme Court has produced and the politico-legal systems practice, progressively, survives on hunger, inequality, in-access to: justice, education, and health and above all, powerlessness of the majority of citizens in their interface with the state itself. To the juristically conditioned mind that we possess, the revelations appear to be paradoxical. Yet, this has become more or less, in the present state of our nation, an existential question for anything that can be said to be fundamental or basic in the Constitution or the legal system, which must be studied and determined from authentic biographical studies of institutional ethics, Indian culture, and history of Hindu Philosophy.

The Indian academics of (comparative) public law must rise to the occasion, undertake larger investigations concerning the subject. The task is aggravated by the fact that in the post economic reform era modern market has not seen anything that can stop or slow down its pace of conquest.[64] Sadly, two examples of recent policies sufficiently verify this proposition: New Education policy 2019,[65] which is largely a manifesto for market place in education, and secondly Central Government policy of Aayush[66] and its full import clarified by the policy document NITI (National Instgitution for Transforming India) Ayog, proposing to sell all District and Block level Government Health Centres and hospitals to private players in the market.[67] Accordingly, it is

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[64] *See generally* Michael Sandel, WHAT MONEY CAN'T BUY: THE MORAL LIMITS OF MARKETS (2012).

[65] The Draft National Education Policy, 2019. Available at: *https://mhrd.gov.in/sites/upload_files/mhrd/files/Draft_NEP_2019_EN_Revised.pdf* (last visited 10 Jan., 2020).

[66] Presently the combined expenditure, on health, of Union and the States Governments together, is 1.13 per cent of GDP. *See,* NITI Ayog, HEALTH SYSTEM FOR A NEW INDIA: BUILDING BLOCKS, POTENTIAL PATHWAYS TO REFORM 3 (Nov., 2019).

[67] See, Draft Policy Document of NITI Ayog, Government of India, *Public Private Partnership for Non-Communicable Diseases (NCDs) in District Hospitals PPP Project Guidelines. Available at: https://niti.gov.in/writereaddata/files/document_publication/Draft%20Guidelines%20on%20PPP%20in%20NCDs_0.pdf* (last visited 10 Jan., 2020); Policy Guidelines of NITI Ayog, Government of India, *Public Private Partnership in Medical Education Concession Agreement: Guiding Principles*, (December 2019). *Available at: https://niti.gov.in/sites/default/files/2019-*

asserted here, that the legal academics ought to abandon its revered methods of analysing court judgements/lawyer's law, and government policies in the interest of the larger, true and neutral investigations of the subject which must begin with expositorial exercises.

A short of, therefore, hidden order is, clearly, concealed amongst series of Supreme Court's seemingly chaotic Judgements involving interpretations of the concept of state. A general survey of the juristic discourse on the constitutional provisions over the last seven decades shows, in succession, emergence, acceptance and dominance of the following arguments: Law and Justice argument,[68] Efficiency/Convenience argument,[69] and Rights/Autonomy argument in *TMA Pai*[70] *and Inamdar*.[71] These arguments use, explicitly or implicitly: 'sovereign function; welfare of people or public function; and free market, respectively, as legitimate, more or less, exclusive objects towards which the legal system must progress. The enterprise, however, remains myopic in character and selective in its attention to constitutional provisions, much less capable of thinking of the concept from the perspective of the core constituent elements of the theory. For instance, neither the lawyers nor the judges have taken a call as to what impact it entails for the idea of 'state' when they succeed in ascribing a particular content to a specific fundamental rights provision,[72] legalise an economic policy or acquiesces in affecting one of the values mandated by the core constituent elements.

Law and Justice Argument

Until beginning of the 1970s, the judicial reasoning[73] on expounding the law under Article 12, was dominated by requirements such as legal authority to make binding and enforce (do justice) law, and the power to take consequential actions. Any body and entity which were clothed with such power in law could be held to be state or part of

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12/ModelConcessionAgreement-forSetting-upMedical-Colleges-under-Public-private-Partnership-Draft-for-Comments.pdf (last visited 10 Jan., 2020). (it is interesting to note that this 250 pages Policy Guidelines proceeds on the assumption that, the proposed PPP model of privatization of Medical Education and that of Disttrict Hospitals, are to be, "*based on the international best practices, and similar PPP arrangements that are operative in the States of Gujarat and Karnataka. Under this envisioned model, the Concessionaire shall design, build, finance, operate and maintain the medical college and also upgrade, operate and maintain the associated District Hospital.*"). *Id. See also,* Maitri Porecha, *Niti Aayog frames PPP guidelines for district hospitals* (Oct., 17, 2018 THE HINDU BUSINESS LINE, *Delhi). Available at*: https://www.thehindubusinessline.com/economy/policy/niti-aayog-frames-ppp-guidelines-for-district-hospitals/article25249012.ece (last visited 10 Jan., 2020).

[68] *Rajasthan Electricity Board* v. *Mohan Lal* A.I.R. 1967 S.C. 1857.

[69] *See, Sukhdev Singh* v. *Bhagatram* (1975) 1 S.C.C. 421*; Som Prakash Rekhi* v. *Union of India* A.I.R. 1981 S.C. 212: (1981) 1 S.C.C. 449.

[70] *T.M.A. Pai Foundation* v. *State of Karnataka*, A.I.R. 2003 S.C. 355.

[71] *P.A. Inamdar* v. *State of Maharastra* A.I.R. 2005 S.C. 3226

[72] *Id*.

[73] *See supra* note 59 & 60.

the state.[74] These characteristics are traditionally supposed to be essential functions of legislative and executive wings of the state. The textual rationale for this view was found in the choice and arrangement of Article 12 terminologies. The Common Law way of articulation dubs it as 'sovereign function'. It is noteworthy that, except laws intended at land reforms,[75] the state was neither minimalist nor had embraced the expansionist ambitions, characteristic of political dispensations of 1970s and 1980s. Though, it did control the heights of economy and its means and resources.[76] The rights under part III had not received extended constructions by the Court. Sometime, rather, the Court belied the common understanding of them and stick to positivistic thinking.[77] The directive of part IV did not occupy a large portion of judicial and political imagination. The resultant matrix of state, law and people did not and could not be seen entailing much negative influences for the constituent core elements of state.

Efficiency or Convenience argument

The decades of 1970s and 1980s are known for passionate affections that the nation's political and judicial establishments developed for higher values of Part IV of the Constitution, Articles 38 and 39 of the Constitution.[78] This was also a reflection of developing world's voice in the international forum for a new international economic order, sovereignty over natural resources etc.[79] It is also, though, not less important that International Covenants on socio-economic and cultural rights came into existence

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[74] *See* majority opinion by Bhargava J., *supra* note 59.

[75] *See generally,* P.S. Appu, LAND REFORMS IN INDIA: A SURVEY OF POLICY, LEGISLATION AND IMPLEMENTATION (1996); *Chiranjit Lal Chaudhary* v. *Union of India,* A.I.R. 1951 S.C. 41; *See also Jugwant Kaur* v. *State of Maharastra,* A.I.R. 1952 Bom. 461; *Kameshwar Singh* v. *State*, A.I.R. 1951 Pat. 91; *Madhav Rao Scindia* v. *Union of India,* A.I.R. 1971 S.C. 530.

[76] *See,* Chanchal Kumar Singh, *Economic Policies and Political Processes in the Pursuit of Constitutional Goals* 53 JILI 347 (2011).

[77] The theory of mutual exclusivity of individual fundamental rights prevailed till 1970. For the first time in Bank Nation case, *Rustom Cavasjee Cooper* v. *UOI* A.I.R.1970 S.C. 654, the mutual exclusivity of rights was doubted and some possible relations amongst them visualised. Finally, in *E. P. Royappa* v. *State of T.N* A.I.R. 1974 S.C. 555, the link was established sufficiently and in *Maneka Gandhi* v. *UOI* A.I.R. 1978 S.C. 597 the entire consequences of reading more than one fundamental right together were spelt out. The way for reading implied liberal rights was opened.

[78] *See e.g.,* the Banking Companies (Acquisition and Transfer of Undertakings) Act of 1970; The Foreign Exchange Regulation Act, 1973; The Monopoly and Restrictive Trade Practices Act, 1969; The Urban Land Ceiling Act, 1976, etc. *See also*, 'literary importance' put on Directive Principles by the Court during the epoch: *Minaerva Mills* v. *Union of India* A.I.R. 1980 S.C. 1789 paras 59-62; *D. S. Nakara* v. *Union of India* A.I.R. 1983 S.C. 130 para 32.

[79] The United Nations General Assembly passed two resolutions: One, *the Declaration on the Establishment of a New International Economic Order*. See, *See,* G.A. Res. 3201 (S-VI). U.N. Doc. A/AC.166/L.47 (May 1, 1974. And, *the Programme of Action on the Establishment of a New International Economic Order*. See, *See,* G.A. Res. 3201 (S-VI). U.N. Doc. A/AC.166/L.48 (May 1, 1974).

during this time.[80] The rise of socialism rhetoric started from the democratic politics of the time[81] in which the Court found itself as equal upholder of the cause. The notion of sovereign function occupies a back seat and judicial soul was moved by the cries of hugely extended 'public function' which the state came to assume in pursuance to the new found responsibilities/cause. It was bound to pour in new content into the ideas under Article 12 provisions. The Supreme Court, however, must not be taken to be constructing or reconstructing a new theory of state. Much less the kind of theory based on indigenous cultural assets and historical-institutional ethics we have discussed above. The Court was merely responding to political demands, of the time, to humanise 'the state'.

The state took onto itself all sorts of responsibilities towards people, consequently. See for example the following observation of Iyer J., "[T]he constitutional philosophy of a democratic, socialist republic mandated to undertake a multitude of socio-economic operations inspired by Part IV and so we must envision the state entering the vast territory of industrial and commercial actively, completely or monopolistically, for ensuring the welfare of the people….Art. 12 is a special definition with a broader goal".[82] This line of juridical thinking started, on the idea of Indian state, with Mathew J., that the state is no longer merely coercive machinery but now is a 'service state'. "… institutions engaged in matters of high public interest or performing public functions are by virtue of the nature of the functions performed…". Activities which are too fundamental to the society are by definition too important not to be considered government function".[83] The following lines of Bhagwati J. are instructive, "[T]oday with tremendous expansion of welfare and social service functions, increasing control of material and economic resources and large scale assumption of industrial and commercial activities by the state, the power of the government to affect the rights of the people is steadily growing…".[84] What is intuitive to note that the increased functions and assumptions of incremental powers by 'state' compelled the Court to fashion legal sate in a 'civilised' cloche. The tools of 'state agency of instrumentality' became handy. This humanisation project is not easily detectible. Several such fragments, when, are fixed together in a scheme of study, surreptitious project emerges clearly. One such fragment is the right to legal aid and legal services. The Forty Second Amendment Act, in 1976, is of special importance for our study. It inserted Article 39A in the Constitution.[85] The Supreme Court enunciated and subscribed the idea of right to '*access*

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[80] *See, International Covenant on Economic, Social and Cultural Rights, 1966*. G.A. Res. 2200A (XXI). U.N. Doc. 14531 (Dec. 16, 1966). As per Article 27, the Covenant was opened for signature on Dec. 19 1966 and it came into force on Jan. 3, 1976.

[81] Ramachandra Guha, INDIA AFTER GANDHI - THE HISTORY OF THE WORLD'S LARGEST DEMOCRACY 438 (2007)

[82] *Supra* note 55, para 32.

[83] *Supra* note 68, para 102.

[84] *Supra* note 53, para 10.

[85] The Article reads: *39A. Equal justice and free legal aid:* 'The State shall secure that the operation of the legal system promotes justice, on a basis of equal opportunity, and shall, in particular,

to justice' theory. Before bringing the theory in practice two proponent Judges had indicated, the need for such a practice in two separate reports of commissions they chaired.[86] Free legal aid and services were declared by the Court to be fundamental right as part of rights guaranteed by Article 21 of the Constitution.[87] The only long term consequence of the exercise was to be the preservation of the original structure of the judicial system and the state. Viewed from our perspective, institutions such as legal aid and the craftsmen thereof have had proved, in the humanization cloche, to be one of the greatest disasters for the Indian state and legal System.

The efficiency and convenience argument came to rescue the state from the difficulties it would have faced in carrying out newly realised constitutional functions. Hence in the corporate personality/body, old contrivance in law, it found legitimacy as part of public law, in twentieth Century.[88] "Although corporate personality is not modern invention, its adaptation to embrace the wide range of industry and commerce has a modern flavour. Welfare state like ours called upon to execute many economic projects readily resort to this resourceful legal contrivance because of its practical advantages…".[89] Therefore, "[A] commercial undertaking may be better managed (by Government) with professional skills and on business principles, guided, of course by social goals, if it were administered with commercial flexibility and clarity free from

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provide free legal aid, by suitable legislation or schemes or in any other way, to ensure that opportunities for securing justice are not denied to any citizen by reason of economic or other disabilities'.

[86] *See, The Report of The Legal Aid Committee*, 1971, Chaired by P.N. Bhagwati J. appointed by State of Gujarat; *Report of Committee on national judicature: Equal Justice-Social Justice*, 1977, Chaired by Krishna Iyer J. appointed by government of India.

[87] *Hussainara Khatoon* v. *Home Secretary, State of Bihar,* A.I.R. 1979 S.C. 1369. We do not think it is possible to reach the benefits of the legal process to the poor, to protect them against injustice and to secure to them their constitutional and statutory rights unless there is a nationwide legal service programme to provide free legal services to them. It is now well settled, as a result of the decision of this Court in *Maneka Gandhi* v. *Union of India*, (1978) S.C.C. 248: (A.I.R. 1978 S.C. 597) that when Article 21 provides that no person shall be deprived of his life or liberty except in accordance with the procedure established by law, it is not enough that there should be some semblance of procedure provided by law, but the procedure under which a person may be deprived of his life or liberty should be 'reasonable, fair and just. Now, a procedure which does not make available legal services to an accused person who is too poor to afford a lawyer and who would, therefore, have to go through the trial without legal assistance, cannot possibly be regarded as 'reasonable. fair and just'. It is an essential ingredient of reasonable, fair and just procedure to a prisoner who is to seek his liberation through the court's process that he should have legal services available to him.

[88] *See generally*, Adolf A Berle, *Constitutional Limitations on Corporate Activity - Protection of Personal Rights from Invasion through Economic Power* 100 U. PA. L. REV. (1952); *See also,* Adolf A. Berle Jr. & Gardiner C. Means, THE MODERN CORPORATION AND PRIVATE PROPERTY (1932).

[89] *Supra* note 55, para 21-22.

departmental rigidity, slow motion procedures, (redtapism) and hierarchy of officers".[90] The establishment of this legitimate way of doing 'government' had immense effect on large number of fundamental rights. In other words, the Indian state incarnated itself into something, constitutional idea of India which would have drastic consequences for an ethical state in future. Not surprisingly, the seeds of political anarchy were sown during this time.

Rights and Autonomy Argument

The argument is susceptible to be misconstrued and has been so worked out by the Indian judiciary in the last nearly three decades, a proposition I will return to later. First, let's have a brief survey what this argument has meant for the government and the Court. It involves legitimate powers/responsibilities of the government and what the Court regards as legitimate rights of 'individual citizens. The interpretations of specific labour laws[91] in the post liberalisation era similarly reconstitute the dynamics of relationship amongst government, employer and the employees. The judicial decisions involving economic policies[92] of the government of the time leave enormous privileges with the later. Let's take up the issue of the fundamental right to education to argue the sub-theme.

In *TMA Pai*[93] the Court enunciates that, "[E]ven if there is any doubt about whether education is a profession or not, it does appear that education will fall within the meaning of the expression "occupation", Art. 19 (1) (g), … an activity of a person undertaken as a means of livelihood…". The individual right and autonomy in business, in education, was finally categorically established in *Inamdar*,[94] "[T]he right to establish an educational institution, for charity or for profit, being an occupation, is protected by Article 19(1) (g). Education, accepted as a useful activity, whether for charity or for profit, is an occupation."

The decision in *Unni Krishnan*[95] had 'established' that right to education is a fundamental right of 'all citizens', under Article 21, and consequently individual citizens does not have a right to business or profit from education. The resulting idea of state and responsibility of government entailed were different.

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[90] *Id.*

[91] *See,* on employment of contract labour, *Steel Authority of India* v. *National Union Water Front Workers* A.I.R. 2001 S.C. 3527; And, the holding that employment on contract or daily wages even for long period does not amount to forced labour, *see, Secretary, State of Karnataka* v. *Umadevi* A.I.R. 2006 S.C. 1806.

[92] *See e.g., Manohar Lal Sharma* v. *Principal Secretary,* (2014) 9 S.C.C. 516.

[93] An Eleven Judges Bench decision. *T. M. A. Pai Foundation* v. *State of Karnataka*, A.I.R. 2003 S.C. 355 paras 20, 25.

[94] A Seven judges bench Decision. *P. A. Inamdar* v. *State of Maharashtra,* A.I.R. 2005 S.C. 3226 paras 93-94.

[95] A Seven judges bench Decision. *Unni Krishnan, J.P.* v. *State of A.P.* A.I.R. 1993 S.C. 2178, para 63.

However, it is instructive to understand the reasoning of the majority judges in *Pai,* the way in which they overruled *Unni*. "While the conclusion (in *Unni*) that "occupation" comprehends the establishment of educational institutions is correct, the proviso in the aforesaid observation to the effect that, this is so, provided no recognition is sought from the State or affiliation from the concerned university is, erroneous,"(therefore, overruled).[96] The *Pai Court* went on to say in a separate Para containing only these words' 'In short, education is national wealth essential for the nation's progress and prosperity'.[97]

The dichotomy of the right to occupation in education and chances to get affiliation or recognition was abolished and merged into one: the right to education as occupation for profit. But the latter two Courts did something more, that education is wealth and source of prosperity. By way of being custodian of the later of the two rights, the government holds this wealth in the similar capacity as it holds other sources of prosperity and progress such as natural resources or right to grant contact, job, business, and licence etc., a field of the policy of largess.[98]

The social responsibility of government (*Cf. functions above)* to provide education (school or higher) comes to have limited meaning as there are numerous individuals (private) to share this burden!!

If it is the *functions* and responsibilities of the state which gives it or attaches a particular identity and substance, then that is, lost and are on offer to be acquired largely on the principles that apply in modern market. It is important to note that constitutionalised principles opposite of *functions* constitute aberrations of the element of, in most part, *limitations (मर्यादा).* The individuals (private entrepreneurs) have a right to provide education for exchange of money, though the right is regulated by the rules which regulate the distribution of governmental largess. Though every citizen has right to education but it is similar to the civil right to buy a car or bungalow, own a yacht or factory of socially and economically capable ones, the hand full of citizenry, and earn two breads every day or own a piece of cloth to cover the wretchedness by the less capable, the majority. Such institutions (run on business principles) are free to rob gullible citizenry, obviously with the aid of government and its law enforced by courts. It amounts to robbing of innocent citizens. One of the verses in *Manusmriti* prescribes:[99]

> 'That the king (read state) whose subjects are carried away by robbers from his kingdom, while they loudly call for help, and he and his servants are looking on, is a dead and not a living king.'

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[96] *Supra* note 92, para 23.

[97] *Id.*

[98] *See* Charles A. Reich, *The New Property* 73 YALE L. JOUR. 733 (1964).

[99] Chapter VIII, THE SACRED BOOK OF THE EAST Vol. XXV THE LAWS OF MANU Ed. F. Max Muller, Trans. G Buhler, Verse-143, Chapter-VIII (Low Price Publication 2014);

Thus, the provisions of Article 12 have been made to produce a dead concept of state. It entails multiple disastrous consequences which flows from opposite of *limitations* (illimitations), voidness of *functions* and *form,* the elements of the core concept.

It has devastating consequences for other fundamental rights too. The right to equality now substantially must draw its meaning from the principle of desert and what one has capacity to exchange for.[100] The right to life (with dignity) continue to exist, strange, even though one may be forced to live in ignorance due to lack of capacity to pay for knowledge or basic health care![101] The right against discrimination is reduced to hollow promises because dominant providers of education has a constitutional licence to discriminate primarily for money and secondly on other grounds. Equal opportunity claim of the constitution is profaned, in its spirit, in similar ways.[102]

Governments of the day evince a special attitude of reverence to the sacrosanct space of the entrepreneurs which should not be tempered with bull of public law. Thus, Central Education Institutions (reservation in Admission) Act, 2006, does not affect private educational institutions.[103] Even the Court does not question the enactment on the point as to haw the public may be made into the private.[104] On the other hand, judicial management of the 'Rights and Autonomy' reincarnation of 'state', in the post economic reforms age, is characterised by order of disorders.

The idea of 'public good or public function' survives as tools of humanisation exercise. Its essence is marketized through the technical tools of 'authority', 'public right' and 'public duty'. The feature of the ostensibly, current version of (constitutional) idea of state, for instance, ought to be construed amidst the present state of facts. Consider the following facts about higher educational institutions in the country. According to the UGC Annual Report (2017-2018), 'majority of the Colleges (78%) are privately managed, of which 64.7 per cent are private unaided and 13.3 per cent are private aided and the remaining (only) 22% are Government Colleges in the country. Of the total enrolment

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[100] The Constitutional principle of equality moves from John Rawls to Robert Nozick and F. A. Hayek. A fact is to be noticed that the Constitutional principle of equality was anchored on the distinction of 'having rights and having the requisite capacity to utilize rights and was inclined to favour the latter.

[101] The state funding of education, both, school and higher education has gone down in 2017-18, to 2.8 per cent of GDP. *See,* THE ECONOMIC SURVEY OF INDIA 2019-20, 275 (2020). The expenditure on health is 1.13 per cent of GDP. *See,* NITI Ayog, HEALTH SYSTEM FOR A NEW INDIA: BUILDING BLOCKS, POTENTIAL PATHWAYS TO REFORM 3 (Nov., 2019).

[102] Different state enactments on the right to Education, provide for 25% reservation for EWS (economically Weaker Sections). EWS category is different from OBCs, SCs or STs. In many cases they are taught, by the so called public (private) schools, in separate timings and class than general category kids. Practically, this sort of practice is importing "equal but separate" doctrine that once prevailed in the U.S. where it was declared unconstitutional, (*Oliver Brown* v. *Board of Education of Topeka* 16 (1953) 98 Law Ed 884: 347 US 497).

[103] The Central Educational Institutions (Reservation in Admission) Act, 2006 (Act 5 of 2007).

[104] *Ashoka Kumar Thakur* v. *Union of India* A.I.R. 2008 S.C. (Supp) 1.

of students, there are 47% in private-unaided collages, 21% in private-aided and only about 32% students were enrolled in the Government Colleges.[105] That is, 'two-third privilege' of the public function has already been allowed to private entities, which are beyond the bounds of the Writ jurisdiction of the high courts under article 226 of the Constitution,[106] much less within the concept of state. The Supreme Court made a half-hearted attempt in 2015, to bring private educational institutions closer to the concept of state, in *Jenet Jeyapaul* v. *SRM University.*[107] No amount of Common Law legal expertise can derive a correct *ratio* by reading the ten pages judgement that, 'the Court declared private universities to be state (agency and instrumentality) and therefore, covered under Article 12 of the Constitution, though the University was held to be liable to the jurisdiction of the High Court. Thus, in line with essential ratio of *Pai*[108] and *Inamdar,*[109] judgements, subsequent to *SRM University,* handed down by the Supreme Court have started holding such institutions or universities *not* to be state.[110]

IV

Textbook Writing and Teaching in Law Schools

Authors of textbooks on the Indian Constitution or constitutional law, form a society of comrades. The comradeship is to be found in the manner and methods in which books are written. Constitutions are epochal. Constitutions, when written, are indeed epochal. It implies emergence of and accomplishments by a decision-making power and will, in the way in which it never transpired in entire history. Written constitutions stand in opposition to customary laws,[111] what we have called historical institutional ethics. The job of comrades of the constitution is to fight and eliminate memories of such institutional ethics.

Memories, that hunger deaths are antithetical to customary understanding of the civilisation, has to give way to the 'rationalised' consequences that flow from procedure established by the Constitution. Constitutional procedure, then, is equal to Constitutional substance. The mainstream law textbook writing, obviously, has the feature that, for them procedure is fundamental, since the latter forecloses all possible

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[105] University Grants Commission, *Annual Report,* (2017-2018) *Available at:* https://www.ugc.ac.in/pdfnews/5595965_UGC-ANNUAL-REPORT-English-2017-18.pdf (last visited on, 10 Mar., 2020).

[106] *Trigun Chand Thakur* v. *State of Bihar* (2008) S.C.C. online Pat 994: (2008) 2 PLJR 718.

[107] (2015) 16 S.C.C. 350.

[108] *Supra* note 92.

[109] *Supra* note 93.

[110] *Trigun Chand Thakur* v. *State of Bihar* (2019) 7 S.C.C. 513. *See also, Rajbir Surajbhan Singh* v. *Chairman, Institute of Banking Personnel Selection* (2019) 14 S.C.C. 189.

[111] *Supra* note 15, at 69.

ways that could take readers to the memory lane and hence un-constitutionalise, what could alternately, be read fundamental in true sense of the term.

The most, crucial character of textbooks consist in that, they are written in free style commentary in the spirit of romanticism, as well as, (un)conscious obsequiousness to His Lordship's absolute and infallible skills of law. The subject of justice administration (by courts) and the role of those who know law (*Dharma/sastra*), are prescribed, in the *Naradasmrti*, in following verse:[112]

नानियुक्तेन वक्तव्यं व्यवहारे कथंचन। नियुक्तेन तु वक्तव्यमपक्षपतितं वचः।।

The verse is translated to mean, 'one should never speak in a trial unless he has been appointed to do so; one who has been appointed must speak without favouring either side. The translator and editor of the *Naradasmrti*, refers to a verse in *Mahabharata* (edited by V. S. Sukthankar *et. al.*). The *Mahabharata* verse is translated to mean, '*one who knows the sastra ought to speak whether or not he has been appointed. One who lives according to sastra speaks with divine authority'.*[113] It can be seen that there had been strong tradition of academic writing with diverse critical positions on a subject, in ancient Indian law books.

The modern textbook writings are not only, largely, devoid of critical and alternative positions, but, are also, free from the baggage of the past. Free from sociology, culture, literature, anthropology and indigenous philosophical traditions. The credit for romanticising the Indian Constitution can certainly be given to Granville Austin.[114] The same fantasy and idealisation is carried about the *qaum* of lawyers and profession of lawyering.

There are three types of textbooks produced on the Indian Constitution, authored by lawyers or academicians.[115] One, the category in which books are hardly written but compilation of select sentences, propositions, observations, and remarks, justified in the name of *ratio* from innumerable judgements of the Supreme Court and high courts; compiled on each and every individual constitutional provision.[116] Collections of observations are testified through footnotes of specific paragraphs of the judgement and page number of Law Reports, and rarely contains critical positions of the author or

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[112] Rechard W. Lariviere (trans. & ed.), THE NARADASMRTI Ch. 3, *VERSE*-1, 85, 269 (2003)

[113] *Id.*, at 269.

[114] *See generally,* Granville Austin, THE INDIAN CONSTITUTION: CORNERSTONE OF A NATION (1966).

[115] This classification is in no way exhaustive and comprehensive. Division of texts books in three categories is done merely for the purpose of examining nature of academic writing on constitutional law.

[116] The most popular book in this category is that of, M.P. Singh, V.N. SHUKLA'S CONSTITUTION OF INDIA (2017). *See also* Justice Sujata V. Manohar, T.K. TOPE`S CONSTITUTIONAL LAW OF INDIA (2010); Jasti Chelameswar & Justice Dama Seshadri Naidu (eds.), M.P. JAIN INDIAN CONSTITUTIONAL LAW (2018).

alternatives on the subject, articulated by the author of the book. Moreover, the language of the text evinces a special attitude of reverence, for holdings and colours of prodigies, somehow implicit in the judgements. Some of the books are too occupied with forming text by way of picking sentences from court decisions that they go in volumes in dozens of bounds.[117] The other category of books symbolise analysis of, but again court judgements, in a critical fashion, written within the specific version of positivism that characterizes making and interpretation of law or Constitution.[118] Both of them, more or less, denounce theoretical analysis and understanding of the Constitution.[119] Since the courts are not concerned with perspectives or different, socially and historically, possible understanding of the Constitution, the Indian academic habitude, as far as, textbook writing is concerned, have not been able to produce alternative perspectives on an individual principle or the idea of the concept of 'state'. Prof. Baxi does talk about, at least, eight different readings of the Constitution (in the context of justice and constitutionalism): 1. Constitution as Will to Stateness; 2. the Shahnai; 3. the Left Critique; 4. the Gandhian critique; 5. the Neo-Gandhian Critique; 6. the Hindutva Critique; 7. the *Matam* of First Nations, and; 8. Subaltern Critiques-Cornerstone as Tombstone.[120] The legal academics, however, hitherto has not been able to develop, a systematic text, within any of these perspectives.

The free commentary style of writing text books have another inherent limitation in that they cannot imagine and speak of things and in a manner, on any concept in constitution, which has not been brought before and decided by constitutional courts. A third set of writings are those produced, mostly collectively by several scholars and sporadically, individual scholarships which can be identified as theme-based texts.[121]

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[117] S.S. Subramani (ed.), D.D. Basu's Commentary on the Constitution of India (Vols.1-15, 2014-2019).

[118] H.M. Seervai, Constitutional Law of India (Vols. 1-3, 1991, 1993 & 1996).

[119] Seervai observes in the Preface to the First Edition, that reference to sociological, economic or political theories, while studying Indian Constitution is not required. The Constitution was, in the Constituent Assembly, product of a compromise between conflicting points of view for diverse reasons. 'In any event, a Constitution confers legislative, executive and judicial powers and imposes limitation on such power, … and the question whether the power thus conferred has been transgressed, or whether a constitutional limitation has been violated is wholly unconnected with the various theories supposed to underlie the grant or limitation of such power'. *Id.,* Vol-1 at XXIV.

[120] Upendra Baxi, *The (Im)possibility of Constitutional Justice: Seismographic Notes on Indian Constitutionalism* in INDIA'S LIVING CONSTITUTION: IDEAS, PRACTICES AND CONTROVERSIES 31-63 (Zoya Hasan *et. al.,* eds. 2002).

[121] Alice Jacob, Constitutional Developments Since Independence (1975); Mahendra Pal Singh, Comparative Constitutional Law: Festschrift in Honour of Professor P.K. Tripathi (1982, 2011); Zoya Hasan *et. al.,* (eds.), India's Living Constitution: Ideas, Practices and Controversies (2002); B. N. Kirpal *et. al.,* (eds.), Supreme But Not Infallible: Essays in Honour of the Supreme Court of India (2001); Upendra Baxi (ed.), K.K. Mathew on democracy, equality, and freedom (1978); Nanabhoy Palkhivala, We, the People: India, the Largest

This kind of texts hardly forms popular readings amongst law students. Perhaps, they are read more by students of other social sciences than law schools. Though, they are sometime able to motivate critical positions on some fundamental ideas in a spirit of revisionism, yet they lack faith and confidence in the core elements of the concept of state. And, are largely, written in the tradition of the Western positivism of social sciences.[122] Hence, failures are that of writings under the first two categories.

For instance, drinking water (including, water for usages of household) is needed for human beings, for survival, in the same manner other animals require. It is easily discernible, that water is part of the idea of *form*. In the habitude of academic writing, it is integrally concerned with the rights provisions of the Constitution. On the other hand, water is a natural resource, it also operates as a *limitation* on political and juridical powers of state, what the state and courts can take decisions with respect to management of water: for example, whether access to and distribution of water can be presaged on some principles of efficiency or on autonomy arguments? From the historical and cultural perspective, so called, access to water have had existed, in India, as social-natural entitlement to access to it (or, to the water source)[123] and the state, ancient or medieval king, did have duty to preserve that status of water. Preserving social ethical status of water involves multiple positive and negative *functions,* in the form of policy and law. That would include making of policies, laws, and juridical pronouncements actively preventing threats to, that status of water, from non-state entities as well.

Further, there is a distinction between preserving water or water sources, and preserving the particular status of water. The former may involve many sets of economic policies relating production and development, environmental science and law, and require them to be framed accordingly. The latter is, immediately and specifically, concern of legal policy, judicial decisions and the exposition of the Constitution: 'state'. When water is permitted to be sold and bought on principles of demand and supply, the traditional customary rule of access, is ousted from the community. It not only affects the tangible object of nature, but the social assets existing in human (moral) sentiments are annihilated along with it. The customary-moral sentiment and duty that, a thirsty person must be given water (contrary conduct is inhuman or immoral) is replaced with standards of market. The duty to offer water exist only where there is offer from the other side to pay for it, and a share of the transaction goes to the state. Positivism of law achieves its purpose! A similar analysis in cases, for example, building and operating express high ways on PPP models, can easily be visualised.

Democracy (1984); Sujit Choudhry *et. al.,* (eds.), The Oxford Handbook of the Indian Constitution 2016).

[122] *See generally,* A. J. Ayer, LANGUAGE, TRUTH AND LOGIC Ch. 3 & 4 (1936, 1946).

[123] *See generally,* Chhatrapati Singh, *supra* note 43.

Text Book writing is intimately connected with law teaching in law schools. These two have a symbiotic relationship and mutual existence. Formative grounds of a practical legal concept are prepared in the schools.

Law schools in India are unique spaces. Induction of students and formation of the course structure, for example, in respect of a first course at, under graduate or post graduate level, are motivated by the spirit of professionalism and careerism. The uniqueness consists in the way in which teaching and learning are aimed at production of truth(s). The former has immediate connection with the style of writing textbooks in law. Under humanities and disciplines of social sciences, law, is the first among them, which is involved, almost entirely, in re-begetting human beings into 'self-interested' individuals.

The latter, is an extraordinary kind, which forms and possesses, permanently, a determinate judgement about her own interests and entitlements; however, holds multiple, indeterminate opinions of all incidents happening, institutions existing, and things located beyond her own outer body limits (this can be seen, as the theoretical/moral bankruptcy in, theorists of, '*post truth*', 'post human', and 'post modernism'). Apart, the schools are engaged in producing professionals of the noble profession: judges, lawyers, and administrators; the law enforcers. None of these professions are possible in the absence of so-called rational rules of rights, that only can, it is believed, ensure legal and moral authenticity. In other words, this rationality consists, in essence, in the unknown, but knowable truths of rights. A specific kind of dualism exists *in* the individual, of which she is unaware because of her awareness about rights. It is important to note that, law courts' essential function, entirely, consists in pronouncing rights or its opposite, duties, of the parties.[124]

For understanding the essential character of teaching, in law schools or department of universities, one can take, 'the curricular institution of moot courts', as epitome of the whole leaning exercise. Moot court courses are, according to the rules of the Bar Council of India, compulsory for students. [125] Moot courts are organised, exactly on the lines of legal disputes carried on before a real court. The participant students are required to 'establish truth(s)' for 'both the opposite parties', given in the moot problem! The team of the student is declared winner, which has succeeded, relatively, in proving, both the truths; that is, the truth in favour of the petitioner/appellant, as well as, the truth in the favour of the defendant/respondent! The primary lessons for law students are, that the truth is merely a matter of right rules and, secondly, that of logical arguments about positive laws.[126] This, to an innocent person, obviously, appear to be a process of

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[124] *Supra* note 44.

[125] *See, Part II (B) Compulsory Clinical Courses, Rules* of Legal Education, 2008, *The* Bar Council of India.

[126] A similar analysis, of the practice of medicine and its development in the eighteenth and nineteenth Century, is established by Foucault. He observes, '…medicine, for the first time in nineteenth century, no longer consisted of group of traditions, observations, and heterogenous practices, but of a corpus of knowledge that presupposed the same way of

reconstituting a young mind, into an architype of falseness on the petitioner's side, as well as, falseness on the defendant's side, but never truthfulness in herself. *Nitivakyamritam*, in one of its verses, criticises similar practices by the state as well as by private professionals:[127]

> *स किं राजा वैद्यो वा यं स्वजीवनाय प्रजासु दोषमन्वेषयति?*
> *(What king or physician is he who searches for faults in the subjects, for his own livelihood?)*

Justice (legal/court procedure) are said to have two pathways. *Naradasmrti*, identifies; one, fact based, intended to establish and concerns for 'truth'. The other being, vitiated by error 'which disregards concerns for truth'. The importance of concerns for 'truth', is expressed:[128]

> भूतच्छलानुसारित्वाद् द्विगतिः स उदाहृतः। भूर्त तत्त्वार्थसयुक्तं प्रमादभिहितं छलम्।।
> तत्र शिष्टं छलं राजा मर्षयेद्धर्मसाधनः। भूतमेव प्रपद्येत धर्ममूला यतः श्रियः।।

(Justice, or legal procedure, is said to have two pathways because it proceeds according to fact or error. Fact means it is based on concerns for the truth, error means it is based on disregard for the truth. Since the King is responsible for implementing *dharma,* he should not put up with error however subtle it may be. The king should resort to fact alone since *dharma* is the root of his prosperity.)

But the progressiveness of positivism consists in something otherwise, we have discussed earlier. It appears that, this kind of teaching and learning create positions and also persons of relative authenticities, which marks the primary character of decisions of constitutional courts and the popular kind of textbook writings. It is important to note that, lawyers are officers of the court,[129] the final fountain of legality (legal validity)[130] and legitimation, though, it, itself has avoided the net of Article 12 provisions.

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looking at things, … The doctor has gradually ceased to be himself the locus of the registering and interpretation of information, and because, beside him, outside him, there have appeared masses of documentation, instruments of correlation and techniques of analysis, which, of course, he makes use of, but which modify his position as an observing subject in relation to the patient'. Michel Foucault, THE ARCHAEOLOGY OF KNOWLEDGE 36-37 (trans. A.M. Sheridan Smith, 1972).

[127] *Supra,* Somdeva Suri, note 4 at 62.

[128] *Supra,* Lariviere, note 112, Ch. 1, *verse 24-25* at 60 & 259.

[129] *See, R. Muthukrishnan* v. *Registrar General of the High Court of Judicature, Madras*, (2019) S.C.C. Online S.C. 105. "…Members of the legal profession under the Anglo-American system of justice have been entrusted with dual and conflicting loyalties. They must be simultaneously both loyal to their client's interests and faithful to the maintenance of the integrity and independence of *the courts of which they are officers*. The complex dualism inherent in being both an advocate and an officer of the Court requires that the lawyer have a unique independence, - a detachment from any excessive adherence to his client's interests as well as a freedom from being inordinately attached to the rulings and interests of the judicial system". *Id.* at para 36. (emphasis supplied).

[130] *See,* Article 141, the Constitution of India, 1950. It reads, Article 141, *Law declared by Supreme Court to be binding on all courts:* 'The law declared by the Supreme Court shall be binding on

The connection between law and legal administration, on the one hand, and that of socio- historical ethics and their importance for law, on the other hand, has been recognised in Hindu Sanskrit literature. Thus, there is, two very unique, prescriptions in the *Naradasmrti*[131] relating to the relations of the course of judicial process and applicable law. The first says that, 'if there is a disagreement between a text on *dharma* and a text on polity (A*rthasastra*), the text on polity should be ignored and the text on *dharma* should be followed. The other prescription enjoins that, where there is a contradiction between a *dharma* text and 'custom', it is right, to apply common sense, for custom prevails over *dharma*. It is intuitive to note that, nineteenth century, German philosophers of historical and sociological school of jurisprudence came to realize similar propositions. However, the intensification of globalization and adoption of neo liberal economic models, in the last quarter of twentieth and in the twenty first century, has only popularized, the so called, progressive and humanization studies,[132] pushing back, from academic agenda, the kind of substance, we have tried to argue about in this paper.

V

Conclusion

The concept of state has been the central point of attraction for social and legal philosophy, alike. In moral and political philosophy, the exercise forms a complex system of ideas. Within the modernism generated political philosophy, competing ideologies ascribe diverse structure and contents to the concept. The two great systems: liberalism and socialism have their economic models, namely, capitalism and collectivism.[133] During the last seven decades, that is, since the making of the Indian Constitution, the great systems have seen intense competition with each other.[134] As a result of self-reflection, and challenges posed, from each other, they have produced several versions of themselves and for that matter, multiple economic models and versions of the concept of state, but unified in essence and character.

The streams of the Western thinking, however, share vast territory in respect of methodology as well as substance. More or less, both of it conceive relations of the man and the nature in identical ways and consequences: master the nature. Further, A deep

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all courts within the territory of India'.

[131] *See supra,* note 112, Ch. 1, *verses-33, 34* at 62 &261.

[132] *See generally,* Roberto Mangabeira Unger, THE RELIGION OF THE FUTURE (2014).

[133] *See generally,* Bertrand Russell, HISTORY OF WESTERN PHILOSOPHY (2016); Andrew Heywood, POLITICAL IDEOLOGIES: AN INTRODUCTION (2012); Will Kymlicka, CONTEMPORARY POLITICAL PHILOSOPHY: AN INTRODUCTION (2014).

[134] *See generally*, Samuel P. Huntington, THE CLASH OF CIVILIZATIONS AND THE REMAKING OF WORLD ORDER (1996, 2011); Francis Fukuyama, THE END OF HISTORY AND THE LAST MAN (1992).

'faith' in the right and value distinction, is equally subscribed by them. The entire set of philosophizing is circumscribed by the overarching presence of the state and its power over human beings and social institutions. The analysis of the specific concepts clearly establishes the inbuilt conflicts and contradictions in them. In addition, they are product of cultural contingency and political expediency of their time.

The dominant legal theories associated with liberal thinking, positivism, are abstractions raised high as a canopy, universalizing technical and complex rank-subordination model constructed on the rationalized model of power-rights. This model can ultimately be traced for major sources of inherent problems that the contemporary concept of state carries with it. The analysis, in this paper, has shown that due to the unique public memory of history and social-institutional ethics, the present practical legal concept of state is bound to be counterproductive. And it has so proved.

The theory of the 'core concept of state', developed, fairly established that, in India, adherence to politico-legal theories of the West, has harmed more than what it has helped to accomplish. Neither, it is necessary, for finding solution to most of the pressing socio-legal problems, the Indian legal system faces today, to traverse the complex legal theories or technical juridical categories of the West. On the other hand, the Hindu social and institutional ethics, determined through a thorough historical investigation of the indigenous legal practices, have the potential to supply the entire set of knowledge materials for solving and salvaging both, the state, individual[135] and the community from the crisis of, what we can call, of crisis of modernism and (post) modernism.[136]

The judicial method, in higher courts has little potential to initiate such process of crucial transformation. Interpretations of texts, for example Article 12 of the Constitution, divorced from its real contexts, would only derogate the concept. Hence, the prevalent, lawyer's logic and lawyer's law cannot take the nation out from the order of disorders which survives on gullibility of the vast majority of population. The task, then, is befallen on academicians. But the legal academics cannot carry, any further, the task, in isolation from other relevant social sciences. This is an era of market triumphalism,[137] while it is also true that with every triumph of the market, the social-ethical state or its analogous aspects are lost.

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[135] *See* Akeel Bilgrami, SECULARISM, IDENTITY, AND ENCHANTMENT Ch. 4 & 5 (2014)

[136] *See generally* Boaventura de Sousa Santos, TOWARD A NEW LEGAL COMMON SENSE: LAW, GLOBALIZATION, AND EMANCIPATION (2nd edn. 2002).

[137] Michael J. Sandel, WHAT MONEY CAN'T BUY: THE MORAL LIMITS OF MARKETS 5 (2012).