



PROPERTY OR PROPRIETY? A PARADOX BEFORE THE ACADEMIA

*Prof. (Dr.) Debasis Poddar**

ABSTRACT

In the wake of neoliberalism, institutional governance of modern university poses a concern- if not crisis- since the same emerged a millennium ago. The political economy always plays a critical qualifier toward gradual institutional rise of university across the world. By courtesy colonialism, the Occidental institutional cult was followed by all other regions; albeit, exceptions apart. With the rise of neoliberal political economy around, university governance struggles with a critical threshold; more so vis-à-vis social studies faculty resource governance by means of intellectual property (hereafter IP). While natural science research involves instrumentation and, therefore, involves material cost, social studies research is by and large devoid of material cost. Besides, unlike the way natural science research does, social studies hardly showcase tangible deliverable output to attract commercial entrepreneurship to fund research project. Versatility vis-à-vis resource governance in poles apart knowledge domains needs reasonable classification to patron mutually exclusive research mindscapes by default. Default commercial resource governance with IP mark © on the count of legality- upon whatever product created by social studies research in the institutional academia named university- stands contested on the count of its institutional legitimacy since import of individual property discourse undermines the stake of collective propriety discourse available in university since time immemorial. The Author hereby unfolds a conundrum of choice for university to get the institution and its sui generis resource characterized by poles apart political economy either way.

I. Neoliberalism: A Gamechanger in Higher Education

There was a time when academia was society's refuge for the eccentric, brilliant, and impractical. No longer. It is now the domain of professional self-marketers. As for the eccentric, brilliant, and impractical: it would seem society now has no place for them at all.

-David Graeber.¹

* Professor of Law, National Law University and Judicial Academy, Assam.

¹ Quoted in Ivan Franceschini, *The Work of Culture: Of Barons, Dark Academia, and the corruption of Language in the Neoliberal University*, Made in China Journal, Article, available at: <https://madeinchinajournal.com/2021/07/20/the-work-of-culture/> (last visited on Dec. 10, 2023).

Intellectual property (IP) commercialization in higher education institutions (HEIs) and public research institutions (PRIs) receives patronage of the neoliberal state-sponsored regulatory agencies in India. IP governance in the HEIs appears a distant dream and sporadic lip services- such as advisory extended by University Grants Commission- cannot change the writings of the wall. Even advisory appears problematic by default since the same is hardly relevant to the social studies scholarship. Whether and how far hitherto intended IP regime brings in good governance vis-à-vis academic creativity poses a moot point. This effort is meant to generate a literature vis-à-vis public policy with focus upon the social studies discipline; thereby prompt the regulatory agencies proceed for case-sensitive policy regime in higher education.

While patent and copyright comprise the core corpus of hardcore IP regime, copyright and not patent is relevant to the social studies discipline at large. The recent advisory- issued by the Commission- suffers from want of case-sensitive IP governance in HEIs since the same has equalized these otherwise unequal disciplines. While the IP verticals diversified to such extent that they often than not stand poles apart, they are applicable to diversified variables. The scientific and technological inventions are patentable and the advisory appears unproblematic since the same may get fit into the natural science discipline. Indeed, creativity in the social studies scholarship is a subject of copyright, research output in humanities and social studies but belongs to different genus and, therefore, deserves altogether different genre of governance; anything but the IP regime. In final count, both of them merge into creativity of mind. A scientific invention needs to be patented since the same may and does involve phenomenal cost and, therefore, the same needs direct financial investment of funding agencies to accomplish research and development to get the product prepared. On the contrary, a human wisdom needs no copyright since no direct financial investment is involved anyway. If copyrighted, the same ought to defect very object of the IP jurisprudence to get the balance optimized between public good and private gain since © barricades public access to knowledge without *bona fide* reasoning due to want of direct financial investment for the product. In a nutshell, the regulatory agency treats dissimilar domains with similar means² and here lies space to improve the public policy regime; thereby prove the HEI governance case-sensitive. While patented products to the credit of HEIs enrich institutional legacy through revenue generation, copyrighted products impoverish institutional legitimacy;

² Correspondence of the Secretary, University Grants Commission, New Delhi, to the Vice-Chancellors of all Universities, D.O.No.1-1/2016(Secy), dated 15th July, 2016, available at: https://www.ugc.ac.in/pdfnews/4866021_IPR.pdf (last visited on Dec. 10, 2023).

so far as etymology of its nomenclature is concerned. As a nomenclature, 'University' cannot be justified by economics alone, but by politics alike,³ through its service toward universal public good and there lies its litmus test as a 'University'.

Before entry to operative part of this effort, another inquiry vis-à-vis faculty incentive for additional drive toward creativity deserves befitting response. A faculty position in HEIs resembles a seat of trust reposed upon the person by default. Such a position is unlike other sundry occupations. Minimal class hours, work hours, work days, etc., throughout the secure service career- albeit, such privileges get increasingly decreased nowadays- corroborate the statement by default. The cadre engaged in faculty position receives maximal payment for minimal services out of unwritten fiduciary agreement- not a contract in technical sense of the term- that they will stay committed to return best gesture to the community during the service career. Academic social responsibility, therefore, constitutes *sine qua non* for members of the faculty during their tenure; more so while the underprivileged struggles to survive odious poverty line, the gentry pays tax through the nose and the Inc. is compelled to spend resource for the society; out of corporate social responsibility. Consequently, either jointly or severally, faculty needs no pecuniary incentive by means of the given copyright regime since they remain incentivized by default; irrespective of creativity. To be more candid, incentive is paid in advance, also, on the basis of assumption in good faith irrespective of the delivery of goods and/or services; as the case may be. Therefore, while they deliver through research in social studies, they return to the community what they are required to do as per reasonable expectation. Therefore, if at all, claim for copyright may be justified on the ground of recognition. A member of the faculty cannot claim copyright to gain individual pecuniary advantage since the same resembles unjust enrichment; albeit, not in technical sense of the term under the law of direct taxation. A copyright claim for revenue generation of members of the faculty, therefore, lacks logic. The policy paradox but deserves public discussion elsewhere.

A subsequent engagement of the author with copyright advocacy for HEIs is charged with *pro-bono* reasoning and the same is driven by arguendo pleading for recognition of the creator(s) since the same contains non-pecuniary interests; rather than pleading for their pecuniary (read commercial) interests out of copyright. The statutory rights of the faculty are

³ Albeit, ill-defined, to Aristotle, politics resembles household management. For details, refer to http://files.libertyfund.org/files/819/0033-02_Bk_SM.pdf(last visited on Dec. 10, 2023).

thereby divided by the author in two clusters: (i) pecuniary interests and (ii) non-pecuniary interests. The author extends legal arguments to get the latter (non-pecuniary interest) fortified on the count of propriety; thereby claims recognition for the institution and its individuals alike. Whatever earned by the former (pecuniary interest) may be shared between the institution and its individuals on equitable basis; so far as consultancy, project, etc., are concerned. The benefit sharing arrangement is driven by a prudent argument advanced of the IP jurisprudence that pecuniary incentive is often than not a default locomotive for creativity. Pecuniary benefit out of generation of academic literature, authored by individual academic enterprise, deserves to be left to faculty concerned. While patent out of creativity in the natural science discipline is primarily meant to earn the revenue, copyright out of creativity in the social studies discipline is but primarily meant to earn recognition. Taken together, creativity creates ‘University’ in its letters and spirit. While patent resembles the hardware, copyright but resembles the software of knowledge profession. Both complement and supplement one another to sync revenue and reputation. In course of commercial IP management, HEIs need to engage a case-sensitive approach since- much more than commerce- creativity constitutes a core concern of the given IP regime. Products patented and copyrighted deserve altogether different treatment since they differ vis-à-vis jurisprudence behind. Copyrightability apart, the dominant IP discourse- that whatever may be copyrighted ought to be copyrighted even if it is devoid of commercial character- stands contested; followed by corollary innuendo toward alternative discourse vis-à-vis faculty resource management beyond the commonplace mercantile discourse; as if the copyrightability of faculty resource is meant to gain the pecuniary advantage irrespective of character of the faculty position getting incentivized by default with reasonable expectation that those in office are pledged to the community to attain public good without further gain. Here lies a core focus of the IP governance.

II. University: A Social Enterprise toward Public Good

The legal status apart, few- too few- institutions with the nomenclature of ‘University’ could justify themselves befitting to the status of ‘University’ after public perception since University of Bologna; the eldest surviving university of the world since 1088. What turns a seat of education worthy enough to be named as ‘University’? Rather than legal status, what matters is quality assurance; reflected in human resource, followed by generation of academic resource through creation and dissemination of cutting-edge unprejudiced knowledge to serve public good. Here lies difference between industry and institution: the former is economic

enterprise while the latter is social enterprise. In the age of New International Economic Order (read neoliberal world order), after the withdrawal of minimalist state from patronage to knowledge practice, institutions are required to attain economic sovereignty and university is no exception to this end. Therefore, products out of scientific creativity get patented by HEIs and PRIs toward revenue generation since the same have had commercial potential in market economy. Unlike these scientific products, products out of academic creativity in social studies scholarship lack commercial potential since: (i) they are not required by the industry; (ii) they are required by individuals or groups who lack capability to purchase products out of social entrepreneurship. Unlike patented products, therefore, academic products cannot earn revenue for the university. However, if copyrighted, they earn reputation (read goodwill) for the university and the same is no less critical to build a university. At times, the soft potential of academic propriety copyrighted exceeds the actual value of industrial property patented. Goodwill has had stake of its own in the IP discourse; something with potential of the gamechanger. Had telescope been patented to Galileo, he would not have been immortal to the posterity. Same is the case for Wright brothers sans aviation technology patented to their credit. Even without institutional affiliation with university, these inventors have got elevated to professors of mankind. Despite getting the world revolutionized with his invention, the world remembers Bill Gates more for his charity foundation; meant to spend his fortune democratizing public access to cyberspace across the world. Indeed, neoliberal world order has reversed the trend to turn faculty another fortune-seeker and university another Inc. Knowledge practice has thereby turned knowledge business and university an industry to serve the market. Individual virtue is sacrosanct, institutional virtue is but defunct.

Historical background reflects somewhat secular politics behind rise of the university. How the university was born in the Occident? Indeed, the University was established by few clergymen in Bologna, an intention behind its establishment was independence from mundane ecclesiasticism omnipresent within the then seats of public education.⁴ Not without reason that DNA of its institutional ecosystem reflects freedom of thought and expression by default. There lies identity of the university since time immemorial. Global best practices, therefore, leave individual credit for research and development- followed by faculty publication- to authors themselves. The IP management, however, differs while faculty

⁴ 1088 is widely considered the date in which free teaching began in Bologna, independently from the ecclesiastic schools, *available at*: <https://www.unibo.it/en/university/who-we-are/our-history/university-from-12th-to-20th-century> (last visited on Dec. 10, 2023).

engages research and development with institutional affiliation, e.g., output of funded research through consultancy, project, and the like. In such cases, fund stands divided between individual and institution with wide variety; after policy of the given time and space. In a nutshell, myriad issues are involved in the university IP regime; followed by several variables operative to leave the policymakers clueless of means and methods to get the balance between creativity and commerce optimized.⁵ In the South-Asian scenario, while multi-disciplinary HEIs run parallel disciplines alike, revenue-generation and reputation-generation must be shared by natural sciences and social studies respectively. The arguendo is meant to advance functional division; rather than watertight compartment. So far as the institutional IP policy is concerned, authorship is another moot point and hyperlinked to authenticity of the policy regime. Who owns the largest stake in HEIs? Students spend years while faculty spend decades and possess more potential to leave lasting impact upon the ecosystem. Voice of faculty in the policymaking process, therefore, carry critical edge toward fruition of the policy into democratic praxis in the premises.⁶ Here lies reasoning behind fiduciary relations between faculty and the community. Faculty with regular tenure and service security- with reasonable rest and leisure including semester vacation- alone may and does credit HEIs with creativity. Democratic institutional governance has had a higher likelihood to accelerate individual creativity than authoritarian rule.

⁵ Intellectual property issues in higher education are many, and they are often more complex than in other settings. Five factors largely make this so. First, colleges and universities are at once major suppliers and consumers of intellectual property. Faculty perform research, scholarship, and other creative work and then consume research and other creative work in their teaching, service and administrative tasks. Second, the intellectual property created in colleges and universities is often the product of multiple creators who share other important relationships (such as graduate student and supervisor). Third, both the creation and use of intellectual property within the academy are carried out by a diverse array of individuals- including faculty, administrators, librarians, staff and students. Fourth, creative activity within colleges and universities is supported by a variety of sources, including direct government investment, and private funds from endowments, alumni, foundations and business. Fifth, and perhaps most important, the creation and use of intellectual property within colleges and universities are intrinsically related to the core activities of these institutions- teaching, research, scholarship and service- and to the values essential to those activities. Academic freedom of faculty and the preservation and interpretation of our cultural heritage are among the most important of these values. Finally, the rapid and far-reaching proliferation of powerful information technologies complicates and intensifies intellectual property issues in education and elsewhere. Fred H. Cate *et al*, "Copyright Issues in Colleges and Universities", 84(3) *Academe* 39 (May-June, 1998), also available at: <https://www.jstor.org/stable/40251265?seq=1> (last visited on Dec. 10, 2023).

⁶ The real concern is not who adopts the policy, although that can obviously be significant, but rather who is involved and what issues drive the adoption or revision (of IP policymaking) process. It is critical that faculty play an integral role in the policy process, and that the process not focus exclusively on, or be driven primarily by, ownership, commercialization, and revenue issues. A policy developed without faculty involvement, or one that fails to address other significant issues or to take into account values more central to the academy than mere fundraising, is certain to be inadequate. *Id.* at 45.

Here lies reasoning behind the failure of contemporary HEIs owned by profiteering private players to generate the IP since they ignore the threshold of faculty resource utilization; thereby indulges in resource exploitation to push the IP potential to peril. Whether private property serves public good poses a moot point in itself; Visva-Bharati apart. Indeed, Visva-Bharati appears exception to this end. While commercialization constitutes a birthmark of pseudo HEIs, the IP generation falls short since creativity is subject to germination in the fertile human mind and the same needs rest and leisure toward fruition of ideas; worthy enough to be patented or copyrighted. Human mind differs from machine and turns functional with altogether different algorithm behind. In profiteering HEIs, by courtesy want of service security in technical sense of the term, faculty cadre often than not find themselves trapped to every sundry non-intellectual exercise for shops and establishments around. What concerns more, trade of education stands legitimized by erroneous construction of the outcome-based pedagogy (intended to improve technical education),⁷ nowadays imposed upon the social studies discipline, under the aegis of regulatory agencies since the minimalist state withdraws patronage from public education; more from the HEIs. Lesser fiscal resource allocation for HEIs and larger land resource allocation to profiteering establishments with their legal status of universities taken together, a systemic design appears on its rise to gross detriment of higher education. With its given trend, double jeopardy ought to leave educational institution and institutional education directionless in time ahead.

Consequently, outcome-based learning paradigm followed by the HEIs and consequent incentive by standard-setting agencies, such as National Assessment and Accreditation Council (NAAC) as an advisor to institutional authorities for minute micro-management in the HEIs taken together, state intervention in disguise with the indigenous pedagogy of social studies discipline in the South-Asian subcontinent constitutes part of larger macro-systemic project to penetrate into the liberal pedagogy in vogue and to bring in posterity customized to the neoliberal political economy of education with a core focus on livelihood alone. While profiteering HEIs face the challenge of commercialization, public HEIs face the challenge in politicization of High Offices; followed by travesty of higher education, by getting succumbed to such a macro-systemic design otherwise. In either case, the plausibility of engagement with creativity turns into a distant dream to the faculty. The IP management

⁷ For details, refer to International Engineering Alliance Secretariat, *Washington Accord 25 Years (1989-2014): Celebrating International engineering standards and recognition*, Washington, 2014, available at: <https://www.ieagreements.org/assets/Uploads/Documents/History/25YearsWashingtonAccord-A5booklet-FINAL.pdf> (last visited on Dec. 10, 2023).

attracts attention of the faculty toward productivity while creativity often than not stands set aside. Due to want of conducive ecosystem, creativity ought to get reduced to naught; followed by corollary syndrome, e.g., want of concern for the IP management in HEIs since creativity will be reduced to fiction. In university, faculty is meant to drive for production of newer knowledge, much more than commonplace collegiate role to drive for dissemination of the given knowledge; thereby contribute to public good. In the wake of information revolution, production of newer knowledge needs quality academic time while faculty is getting overloaded with otherwise reasonable administrative assignments; due to severe shortage of staff. Consequently, cognitive faculty stands exhausted by mundane repetitive assignments- befitting to staff- to gross detriment of the potential of individual and institution alike. The HEI ecosystem thereby suffers phenomenal loss vis-à-vis faculty talent and time, followed by resignation of faculty; something to be read as reflection of the negation by these inseparable stakeholders to systemic anarchy indulged in by neoliberal state. If unattended, the impugned policy in HEIs ought to succumb to the governance failure in time ahead. State patronage is a proven locomotive of HEIs since time immemorial. Withdrawal of state patronage amounts to withdrawal of sustainability without fault. While getting placed to the threshold of knowledge economy, the vacuum- if not void-in HEIs ought to hit the emerging economy of India hard in time ahead.

III. Goodwill: A Teleological End of Educational Enterprise

Let us explore another otherwise least explored genre of the IP discourse nowadays and the same is goodwill. Albeit, not apparent, goodwill may and does generate dividend far-reaching in the long run, more than all regular IP variants (e.g., patent, copyright, and the like) since goodwill knows no end vis-à-vis time limit; unlike these variants. For economic enterprise, the value named goodwill turns quantified during its sunset.⁸ For university, a social enterprise, goodwill is quantifiable within its lifetime. As it is apparent out of its nomenclature, university earns universal relevance by the goodwill earned so far. Thus, goodwill of HEIs, cannot stand limited to territorial jurisdiction. The Second Circuit Court in

⁸ A going business has a value over and above the aggregate value of the tangible property employed in it. Such excess of value is nothing more than the recognition that, used in an established business that has won the favor of its customers, the tangibles may be expected to earn in the future as they have in the past. The owner's privilege of so using them, and his privilege of continuing to deal with customers attracted by the established business, are property of value. This latter privilege is known as good will. *Haberle Crystal Springs Brewing Co. v. Clarke, Collector of Internal Revenue*. No. 89. Circuit Court of Appeals, Second Circuit. January 14, 1929, *available at*: <https://law.justia.com/cases/federal/appellate-courts/F2/30/219/1473859/> (last visited on Dec. 10, 2023).

USA once held that even the plaintiff possesses priority issued under the federal registration in the entire country, the plaintiff could not show likelihood of confusion unless he could show likelihood of its entry into the territory of subsequent enterprise.⁹ In recent times, however, the Dawn Donut rule was set aside with another reasoning that the reputation of trademark has had potential to get spread even without the use of trademark; by courtesy, modern means of communication run by electronic gazettes with internet. These courts have recognized that a(ny) trademark should be protected where it has established goodwill among consumers, not within an artificially created boundary alone.¹⁰ For HEIs, the position is more appropriate since goodwill constitutes a core capital of social enterprise; even long after the same ceases to exist. For instance, the very goodwill of *Nalanda* in ancient Indian antiquity has rekindled imagination of contemporary experiment even in the present millennium. Unlike economic enterprise, social enterprises like university possess unique potential to slingshot its goodwill faraway (read far ahead) vis-à-vis its given time and space. With resurrection of the legacy of *Nalanda* long after decline of the ancient institution so named, *Murry* ratio,¹¹ that the value of goodwill in a non-profitable social enterprise is nominal, stands contested by the recent development in India; with reestablishment of Nalanda University at *Rajgir* toward revival of the ancient legacy once again,¹² also, sited in proximity

⁹ Even prior to the passage of the Lanham Act the courts held that the second user of a mark was not entitled to exclude the registered owner of the mark from using it in a territory which the latter would probably reach in the normal expansion of his business.

Dawn Donuts, Co. v. Hart's Food Stores (1959), available at: <https://casetext.com/case/dawn-donut-company-v-hart39s-food-stores>
inc#:~:text=In%20Dawn%20Donut%20Co.,mark%20exclusively%20in%20that%20market (last visited on Dec. 10, 2023).

¹⁰ Maxim Grinberg, "The WIPO Joint Recommendation Protecting Well-known Marks and the Forgotten Goodwill", 5 *Chicago-Kent Journal of Intellectual Property* 5 (2005), available at: https://studentorgs.kentlaw.iit.edu/ckjip/wp-content/uploads/sites/4/2013/06/01_5JIntellProp12005-2006.pdf (last visited on Dec. 10, 2023).

¹¹ A business may have goodwill for legal purposes even though its trading losses are such that its sale value would be no greater than its "break-up" value. Once the courts rejected patronage as the touchstone of goodwill in favour of the "added value" concept, it might seem impossible for a business to have goodwill for legal purposes when its value as a going concern does not exceed the value of the identifiable assets of the business. But the attraction of custom still remains central to the legal concept of goodwill. Courts will protect this source or element of goodwill irrespective of the profitability or value of the business.

For details, refer to *FC of T v. MURRY*, High Court of Australia, 16 June 1998, available at: <https://iknow.cch.com.au/document/atagUio539109sl16708085/fc-of-t-v-murry> (last visited on Dec. 12, 2023).

¹² The establishment of ancient Nalanda as an undisputed seat of learning was a historical consequence of its context. ... Historical sources indicate that the University had a long and illustrious life which lasted almost continually for 800 years from the fifth to the twelfth century CE. ... The profound knowledge of Nalanda's teachers attracted scholars from places as distant as China, Korea, Japan, Tibet, Mongolia, Turkey, Sri Lanka, and South East Asia. ... When the former President of India, the Hon'ble Dr. A.P.J. Abdul Kalam mooted the idea of reviving the ancient Nalanda University while addressing the Bihar State Legislative Assembly in March 2006, the first step towards realizing the dream of reinventing the old Nalanda had been taken. Almost simultaneously, the Singapore government presented the "Nalanda Proposal" to the

of the original seat of *Nalanda*. The Murry ratio may get contested by traditional juridical discourse as well; albeit, through circuitous route. For instance, due to its indefinite life, goodwill is not taken into account in course of amortization.¹³ Besides, as per prior literature, goodwill constitutes a *sui generis* intangible property and deserves soft law regime for those with stake in propriety; rather than cognizance of goodwill as another conventional intangible property under the regular IP regime.¹⁴ A similar jurisprudence is available in the Indian legal regime vis-à-vis direct taxation with rationale that goodwill has had no default depreciation out of regular use.¹⁵ Rather, on the contrary, goodwill often than not delivers dividends with the passage of time. To get candid, despite its befitting characteristic, intangibility cannot *ipso facto* turn a property subjected to the IP regime by default; similar to the reasoning behind faith in Almighty not getting subjected to the IP regime despite the same carrying potential to get construed as an intangible spiritual property. *Amen!*

Besides, the Indian legal regime vis-à-vis commercial law leaves all respective cases of valuation of goodwill to contract between parties concerned in time of dissolution of the business.¹⁶ Even a recent IP regime provides for means and methods of valuation of goodwill in a manner similar to commercial law regime; quite unlike an IP regime.¹⁷ Thus, diversified laws, e.g., taxation law, commercial law, IP law, etc., taken together, the lesson learnt lies in advisory toward treatment of goodwill as a poles apart genre; more so while the same is meant to spread brand value of an institutionalized academia named university. A social enterprise by default, university serves larger public good. Even if the same is owned by private proprietor, the same is expected to serve public in final count; irrespective of extent of

Government of India suggesting the re-establishment of ancient Nalanda to make it as the focal point of Asia once again. About Nalanda University: History and Revival, *available at*:

<https://nalandauniv.edu.in/about-nalanda/history-and-revival/> (last visited on Dec. 10, 2023).

¹³ Amortization. In accounting, the allocation (and charge to expense) of the cost or other basis of an intangible asset over its estimated useful life. Intangible assets which have an indefinite life (e.g., goodwill) are not amortizable. Black's Law Dictionary 83 (West Publishing Co., St. Paul, Minn, 6th edition, 1990), *available at*:

<https://karnatakajudiciary.kar.nic.in/hcklibrary/PDF/Blacks%20Law%206th%20Edition%20-%20SecA.pdf>

¹⁴ Goodwill is more status-neutral, ... and it is that broader meaning which I intend. A formal definition of my subject might be the sentiments of friendship and the sense of diffuse personal obligation which accrue between individuals engaged in recurring contractual economic exchange. Ronald Dore, "Goodwill and the Spirit of market Capitalism", 34(4) *The British Journal of Sociology* 460 (December 1983), *available at*: <https://www.jstor.org/stable/590932?seq=1> (last visited on Dec. 10, 2023).

¹⁵ In this Act, unless the context otherwise requires,

"block of assets" means a group of assets falling within a class of assets comprising-

(a) tangible assets, being buildings, machinery, plant or furniture;

(b) intangible assets, being know-how, patents, copyrights, trade-marks, licences, franchises or any other business or commercial rights of similar nature, *not being goodwill of a business or profession*, in respect of which the same percentage of depreciation is prescribed. S. 2(11) of the Income Tax Act, 1961.

¹⁶ *Vide* s. 55 of the Indian Partnership Act, 1932.

¹⁷ *Vide* ss. 38, 39 and 42 of the Trade Marks Act, 1999.

services. Resort to monopoly upon knowledge through the IP regime ought to hit institutional legitimacy hard since university is meant to do reverse. Here lies difference between industry and institution. While the former struggles for earning, the latter struggles for learning. Therefore, property is priority to the former while propriety is priority to the latter. With the passage of time, goodwill is born and grown to turn propriety into property in itself, by means of its indefinite life; thereby enrich institution beyond industrial reach out. There are plenty of institutions on the run for several centuries, few for millennium. No industry but survives likewise since the market may and does turn upside down by a decade or two.

IV. Social Studies Scholarship: Conscience of Academia

Political economy apart, social studies scholarship deserves patronage of “the State”¹⁸ from transcendental approach. Justice Marshall emphasized upon stake of the judiciary to determine law of the land.¹⁹ Likewise, academia ought to put emphasis upon its stake to dream what should be law of the land; thereby develop a discourse between realism and idealism, of existing law- *de lege lata*- on one side, and public policy advocacy vis-à-vis what law ought to be- *de lege ferenda*- on the other. In larger public interest, therefore, both judiciary and academia need to get their judgments issued to the public. While a judgment issued by judiciary has had legality out of judicial cloak to its credit, a judgment articulated by academia ought to attain legitimacy by judicious character of the same. Not legal academia alone, but the social studies scholarship in its entirety has had stake to add value to this end; albeit, with a caveat or two vis-à-vis propriety. (i) As a relevant institutional peer, academia must be versed to procedural nitty-gritty; thereby advance arguendo toward pragmatic end of the matter pending before court. (ii) As a responsible institutional peer, academia needs to reach reasonable expectation of “the State” with constructive spirit toward progressive development of the society. Subject to these two qualifiers, academia add value to dialogue on law and governance. There lies rationale behind state patronage toward academics.

Despite otherwise accomplished competence, academia in India meets neither of these two qualifiers, e.g., basic juridical awareness on one side and systemic responsibility on the other. Except a few, too few, social studies academia lacks ability and agility to develop basic juridical awareness. Consequently, empty vessels often than not sound nonsense; thereby

¹⁸ *Vide* definition clause under Art. 12, read with Art. 36, of the Constitution of India.

¹⁹ It is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret that rule. *William Marbury v. James Madison*, US Supreme Court (1803).

reduce the credibility to naught. A larger problem but lies in lack of propriety as institutional peer of the State itself. With acceptance of fiscal patronage from the state, university is an emissary of “the State” under the Constitution of India. Getting funded by the state exchequer, toxic criticism by professors against the state- often than not unadulterated activism to foment anti-establishment ideologue schism in the disguise of academics- amounts to disowning themselves and academia alike. In recent times, they subverted their own cause; thereby fortified argumentative castle of authoritarian governance to tame themselves with realpolitik they use to blackmail statecraft since long back. Subject to fair use of the freedom of speech and expression, social studies scholarship has had potential to emerge as the conscience of academia and the messiah of public life in time ahead. For disaster management, academia must bridge the given gap between university and statecraft with constructive contribution toward good governance. A need of the hour lies in joining systemic role for academia to bring in social transformation through state-funded project, consultancy, and the like. In democratic governance, those elected run statecraft and those in academia- more so while paid by public exchequer- engage research to facilitate elected representatives run good governance; something ignored by academia so far. The earlier academia does away with colonial non-cooperation appears better to India.

In recent times, another distance- if not difference- has shot through the roof; between academia and judiciary in general. The criminal contempt case against Arundhati Roy²⁰ is a classic illustration of hostile miscommunication between academia and judiciary; mutually damaging one another. The following passage reflects her distrust in judiciary:

“In India over the last ten years the fight against the Sardar Sarovar Dam has come to represent far more than the fight for one river. This has been its strength as well as its weakness. Some years ago, it became a debate that captured the popular imagination. That's what raised the stakes and changed the complexion of the battle. From being a fight over the fate of a river valley it began to raise doubts about an entire political system. What is at issue now is the very nature of our democracy. Who owns this land? Who owns its rivers? Its forests? Its fish? These are huge questions. They are being taken hugely seriously by the State. They are being answered in one voice by every institution at its command - the army,

²⁰ *In re: Arundhati Roy, Contemner*, Contempt Petition (Criminal) 10 of 2001; judgment delivered on 06/03/2002, available at: <https://main.sci.gov.in/judgment/judis/18299.pdf> (last visited on Dec. 10, 2023).

the police, the bureaucracy, the courts. And not just answered, but answered unambiguously, in bitter, brutal ways.”²¹

A guardian of the Constitution, the judiciary is expected to guard the people of India. Ms. Roy but went devoid of coverage by constitutional safeguards since she left the priests of justice unhappy (sic.):

“We are unhappy at the way the leaders of NBA (Narmada Bachao Andolan) and Ms. Arundhati Roy have attempted to undermine the dignity of the Court. We expected better behaviour from them.”²²

The rhetoric ought to remind the readership of the draconian law of sedition in India where incitement to disaffection went criminalized; followed by severe retribution.²³ Also, in technical count, contempt of court offends natural justice principle since court plays plaintiff and usurp as judge in the same trial proceedings. What went apparent is want of restraint in either side. With due stake in democratic governance, academia and judiciary should offer better gesture to other.

Last yet not least, inhouse regime of the HEIs in India deserves minute introspection. After express pronouncement under the Constitution, “the State” is obliged to strive for a social order in which justice shall inform all the institutions of national life;²⁴ including university. The inhouse ecosystem of the HEIs, therefore, deserves freedom of speech and expression, along with other tributaries, to secure democratic governance. A lucid illustration may be cited from lived experience of a state-of-the-art university:

*The central purposes of a University are the pursuit of truth, the discovery of new knowledge through scholarship and research, the teaching and general development of students, and the transmission of knowledge and learning to society at large. Free inquiry and free expression within the University community are indispensable to the achievement of these goals. The freedom to teach and to learn depends upon the creation of appropriate conditions and opportunities not only in classrooms and lecture halls but also on the campus as a whole.*²⁵

²¹ Arundhati Roy, “The Greater Common Good”, 16(11) *Frontline* (May 22-June 04, 19991), available at: <https://web.cecs.pdx.edu/~sheard/course/Design&Society/Readings/Narmada/greatercommongood.pdf> (last visited on Dec. 12, 2023).

²² *Supra* note 20 at 3, second paragraph.

²³ *Vide* s. 124A of the Indian Penal Code, 1860.

²⁴ *Vide* Art. 38(1) of the Constitution of India.

²⁵ Quoted from Ashoka University Guidelines on Protecting Freedom of Expression; first paragraph, available at: https://www.ashoka.edu.in/static/doc_uploads/file_1519105915.pdf (last visited on Dec. 12, 2023).

Well known for its potential promise vis-à-vis social studies scholarship, Asoka University hereby demonstrates its leadership potential to deliver inhouse democratic governance while the same university applied yellow cards to discipline its individual colleagues as and whenever occasions required such otherwise democratic institution restrain them from enticing odious embarrassment for the university family. A major challenge lies in the maintenance of *Lakshmanrekha* between autonomy and anarchy. What the HEIs in India strives to secure is intellectual property upon their product; something devoid of intellectual propriety. Instead, they ought to afford their otherwise lawful IP rights left to public domain; thereby enable public access toward public good in time ahead. A(ny) university (sic.) ought to be worthy enough to its own nomenclature: university.

V. University in India: A Call for Unity in Diversity

So far as the social studies discipline is concerned, contemporary India has had a great range of diversity; something apparent in the glossary of our hitherto landscape of higher education. For instance, there are different variants like central universities, state universities, deemed universities, discipline-specific universities, and the like. The higher education regime under the statutory agency hardly reflects such diversity. The definition under the University Grants Commission Act of 1956 speaks for itself:²⁶

“University means a university established or incorporated by or under a Central Act, a Provincial Act or a State Act, and includes any such institution as may, in consultation with the University concerned, be recognised by the Commission in accordance with the regulations made in this behalf under this Act.”

Such an otherwise correct black-law-letter definition apart, what appears missing is very soul of the academia; something seen in a prudent epistemic definition, given by a veteran academic leader of USA. While he was quizzed, “what is university for?” Thus spoke David Watson:²⁷

“I received my copy of a glossy coffee table book, published by subscription from my undergraduate college. It is called Clare through the twentieth century. On the fly-leaf it repeats the charge of our Founder- Elizabeth de Burgh, Lady Clare- in 1359 that “through

²⁶ The University Grants Commission Act, 1956; s. 2(f), available at: https://www.ugc.gov.in/oldpdf/ugc_act.pdf (last visited on Dec. 15, 2023).

²⁷ Sir David Watson, Vice-Chancellor of the University of Brighton, on the future role of universities, The Guardian, 15 January 2002, available at: <https://www.theguardian.com/education/2002/jan/15/highereducation.news> (last visited on Dec. 15, 2023).

their study and teaching at the university, the scholars should discover and acquire the precious pearl of learning so that it does not stay hidden under a bushel but is displayed abroad to enlighten those who walk in the dark paths of ignorance” (sic.). As you see, Lady Clare was an early advocate of services to business and the community.”

Here lies IP policy paradox before the academia. Indeed, institutional interface with industry serves the purpose of survival for the academia through all its enterprises toward employment of its pupils; as a legitimate expectation after their enlightenment. The litmus test for the academia but lies in its independence from so-called ‘market’; institutional face of the system. In a way or other, academia ought to usurp the ideation of corporation in itself; meant for pursuit of knowledge with functional independence from the market. In final count, the institution is meant to extend service and not servitude to the industry. There lies a litmus test for independence of the institution:²⁸

“University means a self-governing corporation, a complete entity in its own right, a totality, In Latin it is a universitas magistrorum at scholarium- an independent institution of masters and students. Sometimes in Italy an older university may still be called by its full Italian title- universita degli studi- an independent corporation for study.”

Independence of the priests of wisdom is held no less essential to independence of the priests of justice since both are engaged in quest of truth; something available to those individuals engaged in performance of duties of their offices to the best of their ability, knowledge and judgment, without fear or favour, affection or ill-will.²⁹ Besides, the temple of wisdom resembles the temple of justice since both deserve non-intervention in course of internal discourse. Likewise, as it is applicable to the temple of justice,³⁰ the temple of wisdom is expected not to exceed domain for deliberation upon others’ internal proceedings, e.g., of the Legislature, the Executive, the Judiciary, to name few among them; something abetted by the temples and the priests of wisdom, albeit, in sporadic cases. On the contrary, institutions operative in the public sphere by default ought to heighten threshold of tolerance, if not endurance, about criticism; even if the fiction may not stand corroborated by the fact. Let truth prevail by merit, *Satyameva Jayate*; rather than might of the coercive forces at the cost of free speech. Let there be public discussion- followed by public debate- founded upon

²⁸ David Willetts, *A University Education*, Chapter 1, available at: https://books.google.co.in/books?id=bfUDwAAQBAJ&printsec=frontcover&source=gbs_atb#v=onepage&q&f=false (last visited on Dec. 15, 2023).

²⁹ *Vide* Form IV, Third Schedule, of the Constitution of India, 1950.

³⁰ *Vide* art. 121 to art.122, read with 211-212, of the Constitution of India, 1950.

reasoning behind the respective polemics. The unity and integrity of the Nation³¹ lies in diversity; including the diversity of competing- if not conflicting- propositions at loggerheads; subject to national security, though. However, otherwise legitimate concern vis-à-vis national security ought not to fall prey to ideologue politics to silence dissident voice by means of the Preambular provision to assure the unity and integrity of the Nation. In a nutshell, the cornerstone of the academia lies no less in its institutional integrity.

Back to policy advocacy for the academia, the author cites maiden incubation of the intellectual property jurisprudence by means of ideation of ‘industrial property’ as clear and unambiguous expression of commercial interest in exclusion of others;³² even before ideation of literary and artistic works. A clarion call for the protection of works as ‘intellectual property’ in technical sense of the term got documented little afterwards.³³ Therefore, while industrial property was subjected to patent regime, literary and artistic works represented the maiden expression of intellectual property and got subjected to copyright since then. Thus, unlike blunt commercial ownership of industrial property, the ownership of literary and artistic works stands subjected to intellectual propriety. Since the origin and early development of property rights, therefore, propriety is inbuilt in the very ideation of copyright and the characteristic is on its rise in recent times. Here lies the discursive diversity between two regimes; of Paris and Berne respectively; something applicable to appreciate cultural propriety involved in the social studies scholarship; more than commercial property alone, involved in the natural sciences scholarship. For the academia as a societal enterprise, therefore, spiritual propriety ought to get priority over and above material property; otherwise patented by commercial enterprises. While industrial property is meant to serve private gain alone, intellectual propriety is also meant to subserve public good; besides getting individual and communitarian interests optimized. The basic ideation of interesting balance vis-à-vis balance of interests prevails over the monopolization of interests upon the inventions since Paris and Berne in the late-nineteenth century. There lies the idealist hypothesis behind emerging (intellectual) property discourse toward progressive societal development by means of newer knowledge of science and technology; followed by largescale application of the same in commercial usage toward larger public good.

³¹ The Preamble to the Constitution of India, 1950.

³² Paris Convention for the Protection of Industrial Property, 1883.

³³ Berne Convention for the Protection of Literary and Artistic Works, 1886.

VI. Productivity or Probity? Paradox before the Academia

The author advanced a paradox between property and propriety. In final count, he has arrived at another; between productivity and probity. In general circumstance, similar to the IP jurisprudence, the author advocates synergy between these options. In cases of irreconcilable conflict between them, however, a public policy advocacy is hereby extended to favour the latter over and above the former in both cases, e.g., propriety over and above property, probity over and above productivity, and the like. The causal relations behind sequenced duos deserve deliberation. While productivity yields to property, probity yields to propriety. Here lies a consequential connectivity; with the cause and its effect. While the human lifeworld is getting increasingly neo-liberalized, fundamental civilizational norms- probity has proved one among them- remain non-negotiable even in an otherwise weird lifeworld; devoid of humane values in the wake of a market; getting flooded with commodity fetishism.

In the given neo-liberalized world order, the academia cannot afford to do away with either the intellectual property or the productivity behind since the same ought to keep pace with its time for survival of the university as a repository of knowledge. A corollary conclusion, however, cannot be derived out of the following premise that access to and availability of the intellectual property- consequential to productivity of the faculty as human agency- can be earned with price of propriety; consequential to the probity after humane values. The same is relevant to every sundry institution; more so to the university since the same is more societal than commercial enterprise by default. Thus, university-run researchers ought not to succumb to vested interests; thereby produce vitiated findings, even if their project is backed by corporate capital, or even by state governmentality. In final count, there is a remarkable resemblance between the temple of justice and that of knowledge since both engage their priests in quest of unadulterated truth. Therefore, functional autonomy (read independence) is a locomotive for both the judiciary and the academia to reach desired destination.

Last yet not least, here lies rationale behind the policy priority for the academia toward intellectual propriety; more than intellectual property. A coveted seat- either in the Judiciary or in the academia- is a seat of trust by default and the same derives public trust from capability of the priest- either of justice or of knowledge- to grace the seat of trust with propriety; more than capability to grace the seat with property. The litmus test for leadership insignia toward progressive development lies in passion for public good; not in profession for

private gain. Consequently, to the priesthood, what matters is penance for the discredit; not pride for the credit. To quote *Tagore*:³⁴

*“O humble me beneath the dust of your feet
O drown all my arrogance in my tears
In giving glory to myself, I only abase myself
In being immersed in me, I only go around in circles,
O drown all my arrogance in my tears
Let me not project myself in my work
Let your will be done in my life.”*

Spiritual rhetoric apart, Tagore hereby extends clear and unambiguous negation to narcissism in the institutional lifeworld of the university and individual lifeworld of the academia alike; something celebrated by the international community through recognition of his Visva-Bharati cult as World Heritage; declared by the UNESCO.³⁵ The slow-yet-steady development of a private educational enterprise for public good to a first-generation central university in India to a world heritage proves the premise.

³⁴ Ratna De (tr.), *“O humble me beneath the dust of your feet ...”*, in Rabindranath Tagore, *Gitabitan* (Garden of Songs, 1931), available at: <https://www.geetabitan.com/lyrics/rs-a1/aamar-matha-nato-kore-dao-english-translation.html> (last visited on Dec. 15, 2023).

³⁵ Available at: <https://whc.unesco.org/en/list/1375/> (last visited on Dec. 15, 2023).