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Spontaneously Emerging New Property Forms Reflections on Dharavi

Paul Babie*

I. Introduction

Earlier this year I visited Dharavi in Mumbai, Asia's largest urban slum[1]. Pervasive economic and social disadvantage are endemic to any slum, a fact which leads inexorably to wider societal instability, representing a serious political challenge to those states in which they emerge. The underlying causes of slums can be traced to neoliberal capitalism—'a mixture of free-market economic thought, the elevation of self-interest as the guiding force of progress, minimal state intervention and, increasingly, invasive forms of biopolitical control'[2] — and the politico-legal-economic structures of which it is both a part and which underpin it and, in turn, shape the world in which we live.[3] As Mike Davis writes in his seminal exploration of the urban slum, states ignore these communities at their peril, for as social, economic, and political tensions increase, the only response of the residents of such communities may be revolt: 'the future of human solidarity depends upon the militant refusal of the new urban poor to accept their terminal marginality within global capitalism.'[4]

The concept of property, one of the fundamental components of the politico-legal-economic base of neoliberal capitalism, structures the world in which we live. As a legal tool, a state employs property as a means of allocating goods and resources amongst people or groups of them, and to confer the power, backed by the force of law, in a system of rights and obligations that allows for the use and control of those things. The legal system of any state typically employs three ideal types of property—private, state, and common. Over time, a range of justificatory theories have been proffered for the adoption of the concept of property to achieve these objectives of allocating goods and resources and the power to use and control those things. For some people, the allocations made by private property and the justifications offered for those divisions work; for many, they do not. For the vast majority of the human population, the allocations made by property result in

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1 Denis Gruber, Andrea Kirschner, Sandra Mill, Manuela Schach, Steffen Schmekel, and Hardo Seligman, *Living and Working in Slums of Mumbai* (Otto-von-Guericke-Universität Magdeburg Fakultät für Geistes-, Sozial- und Erziehungswissenschaften Institut für Soziologie, 2005) 8; Habitat for Humanity Great Britain, 'The World's Largest Slums: Dharavi, Kibera, Khayelitsha & Neza' <https://www.habitatforhumanity.org.uk/blog/2017/12/the-worlds-largest-slums-dharavi-kibera-khayelitsha-neza/>.

2 Oli Mould, *Against Creativity* (Verso, 2018) 11. For the seminal account of neoliberalism, see David Harvey, *A Brief History of Neoliberalism* (Oxford University Press, 2007).

3 In relation to the failure or neoliberal solutions in Dharavi specifically, see Gruber, Kirschner, Mill, Schach, Schmekel, and Seligman, above n 1, 2.

4 Mike Davis, *Planet of Slums* (Verso, 2006; repub 2017) 202.

gross inequality.[5] Those who lose inhabit what we might call a locus of 'spatial injustice'.[6]

Property, as a concept, provides an important lens through which to view Dharavi; doing so reveals two realities. The first is a locus of spatial injustice: the power of property has divided up the world in such a way that results in people being compelled to inhabit slums like Dharavi due to their manifestly unequal shares of available goods and resources. This has been a dominant theme of much political-economic commentary about Dharavi and its future. But there is another view—one which in no way ignores or denies the wider political-economic implications of the urban slum, which the first view of Dharavi reveals—which property, as a concept, reveals. It was this second view which had a profound impact upon me during my visit; I was at once deeply humbled by the experience of human dignity in testing circumstances, and profoundly impressed with the way in which the collective use of limited space by residents emerges spontaneously from social exigencies.

Following my own visit to Dharavi, I began to think about how the experience of its residents demonstrates something very significant about humanity: it is a place/space where social exigency results in informal creation of innovation in the way the available space of the slum is allocated among its inhabitants. Put another way, one finds in Dharavi, and other places/spaces like it, the emergence of new property forms to meet social exigencies so as to allocate a scarce resource, in this case land, or, perhaps more aptly, space. What emerges, spontaneously, is a system of order amongst a group of people who must make use of scarce resource—a limited piece of a very crowded urban environment—in close proximity to many other people. Property can, in other words, emerge from social situations in which the interactions, relationships, and needs of a population dictate the nature of use and exclusion, with law only following the emergence of such property forms, providing protection for whatever rights may exists only almost as an afterthought. It is this second view of Dharavi upon which I reflect in this article.

I follow the approach taken by Mahabir, Crooks, Croitoru and Agouris, treating Dharavi not merely as one of a socio-economic and policy, physical characteristics, or a modelling construct, but as a 'social and physical construct[], [which]… provides a more holistic synthesis of the problem, [and] which can potentially lead to a deeper understanding' of the issues faced by its residents.[7] And the social-physical construct or synthesis of Dharavi is not entirely unknown during the last 300 years of human history. Indeed, examples abound. In the early 20th century, a slum community developed in Chicago's lower north side, forming the subject-matter for Harvey Warren Zorbaugh's seminal account of the American

5 Dany Dorling, *Inequality and the 1%* (Verso, 2014)

6 See Paul Babie, 'The Spatial: A Forgotten Dimension of Property' (2013) 50 *San Diego Law Review* 323.

7 Ron Mahabir, Andrew Crooks, Arie Croitoru & Peggy Agouris, 'The study of slums as social and physical constructs: challenges and emerging research opportunities' (2016) 3 *Regional Studies, Regional Science* 399, Abstract.

slum, *The Gold Coast and the Slum: A Sociological Study of Chicago's Near North Side*.[8] Zorbaugh wrote that the slum,

> [b]ased upon a segregation within the economic process,…nevertheless displays characteristic attitudes, characteristic social patterns which differentiate it from adjoining areas. … The slum sets its mark upon those who dwell in it, gives them attitudes and behavior problems peculiar to itself.[9]

In other words, the slum in the lower north side of Chicago constituted its own sociological phenomenon of which a very specific form of social norms emerged for the mediation of interactions between its inhabitants.

Los Angeles provides a second example. Beginning in the late 19th century, the area now known as Skid Row became home to a transient population of seasonal labourers as residential hotels began to develop. For decades it was home to the down and out and the unemployed. From the late 20th century, it has the highest concentration of homeless individuals in the United States. It is a place of desperate poverty, drug use, and crime.[10] And during the late-20th century, the gangland of southcentral Los Angeles developed a 'sociologically distinct gang culture' with its own specific 'turfs' or 'territories', unrecognised by the formal legal divisions of the city, but in which the various gangs 'were…the architects of social space in new and usually hostile settings.'[11]

Sometimes, these social-physical syntheses produce their own form of law, which ultimately gains formal recognition in the positive law of the state. One sees this in early 19th century colonial rural Australia, in which settlers squatted on rural lands—usually for the purpose of running cattle or sheep—despite having no legal right or title to them, thus occupying them illegally.[12] As these squatters began to develop the lands on which they squatted with fields, farms, and homes, the tensions between the state—the owner—and the squatters—with no formal property—began to grow. What was the state to do? The solution was not only ingenious, but also unknown in the history of the English land law. The state created a system of licences, and later of leases, allowing the squatters to occupy the lands upon which they already squatted, provided they did so for pastoral purposes. In return, the squatters-turned-pastoralists were required to pay an annual fee to the Crown to hold their licence.[13] The Crown had not only exercised its sovereignty over the lands, but had also created in the squatters a new form

8 Harvey Warren Zorbaugh, *The Gold Coast and the Slum: A Sociological Study of Chicago's Near North Side* (The University of Chicago Press, Midway Reprint, 1929, 1976, 1983).

9 Ibid 151.

10 *Jones v City of Los Angeles*, 444 F.3d 1118 (9th Cir 2006). While the Ninth Circuit Court of Appeals found that Skid Row violated the *United States Constitution* 8th Amendment prohibition of cruel and unusual punishment, the En Banc Court vacated the decision: see Kathryn Hansel, 'Constitutional Othering: Citizenship and the Insufficiency of Negative Rights-Based Challenges to Anti-Homeless Systems' (2011) 6 *Northwestern Journal of Law & Social Policy* 445, n 94, and 460.

11 Mike Davis, *City of Quartz* (Vintage Books, 1992) 293 and 301.

12 TP Fry, 'Land Tenures in Australian Law' (1946) 3 *Res Judicatae* 158, 161.

13 Ibid.

of property in recognition of the informal property which had developed as a consequence of their squatting.

In late-19th century Chicago and colonial Australia, and in late-20th and 21st century Los Angeles one finds the spontaneous emergence of informal norms that mediate social relations among inhabitants, which in some cases become informal new property forms—unrecognised by the formal positive law of the state, but enforceable as part of the social-physical context from which they emerge—which might in turn gain state recognition, and thus enforceability as part of the formal positive property law of the state. It is that process in Dharavi upon which I reflect in this article, which contains three parts. Part II theorises the way in which property systems, rights, and their enforceability can emerge spontaneously from social-physical syntheses such as that found in Dharavi, gaining legal status only once it has so developed. This I call 'spontaneously emerging new property forms.' Having developed a theory for use in explaining it, Part III turns to the story of Dharavi, arguing that the social-physical synthesis found there represents a paradigmatic example of spontaneously emerging new property forms, specifically what I will call the 'spontaneously emerged leasehold in Dharavi land'. This new property form is one possible response to the social exigencies found in Dharavi. The other possible response is that of the state, which may either seek to dismantle the slum or to confer formal property as part of the positive law. Part IV concludes, demonstrating the way in which spontaneous property emerges as a social, rather than a legal phenomenon. Still, because this is a piece of social theory, I suggest that further research—empirical and legal doctrinal—into both Dharavi and similar social-physical syntheses would yield significant results not only for both property theorists, but also for those engaged in social policy and law reform.[14]

I want to be clear, though, before I proceed: what I share here are my own personal reflections upon what I saw during my visit, as viewed through the eyes of a property theorist. For a theorist of property, as I am, while there is no doubt that the experience of Dharavi is a humbling one, it also offers an example of the way in which property is, indeed, a social phenomenon, one that does not solely, or even, in some cases, partially, dependent on law. It is in that light that my article should be viewed, and not as in any way presuming to have the solution for Dharavi. I limit my ambition to describing what I saw when I visited, and what I see when I think now of Dharavi.

II. Spontaneously Emerging New Property Forms

A. Property as Social Relations and Loci of Spatial Injustice

In previous work I have outlined my understanding of the concept of

14 See Paul Babie, Peter D Burdon and Francesca da Rimini, 'The Idea of Property: An Introductory Empirical Assessment' (2018) 41 *Houston Journal of International Law* 797; Paul Babie, Peter D Burdon, Francesca da Rimini, Cherie Metcalf, and Geir Stenseth, 'The Idea of Property: A Comparative Review of Recent Empirical Research Methods' (2019) 26 *Indiana Journal of Global Legal Studies* forthcoming.

property.[15] My approach, simply one of many ways to consider the concept, draws upon the work of many other scholars, especially those of the American legal realist and Critical Legal Studies movements. This section, then, summarises my understanding of the concept of property. I begin with a simple truism: no monolithic and univocal theory of private property exists. That being the case, though, theorists generally accept that the modern liberal conception of private property consists of a 'bundle' of legal rights or relations created, conferred and enforced by the state between people in relation to the control of goods and resources.[16] At a minimum, these rights include the 'liberal triad' of use, exclusivity, and disposition.[17]

Morris Cohen,[18] one of the American legal realists, added to this liberal foundation the idea that property confers a form of 'sovereignty' on rights-holders, creating a relationship between the person holding such sovereignty and others. And Felix Cohen added this important modification to the bundle of rights metaphor: '[p]rivate property is a relationship among human beings such that the so-called owner can exclude others from certain activities or permit others to engage in those activities and in either case secure the assistance of the law in carrying out [that] decision.'[19] In other words, the rights in the bundle are not in relation to things, but are the outcome of relationships among people.[20]

The claim that social relationships between people are the source and the origin of property, that they are constitutive of it — found most forcefully in the work of 'property as social relations' theorists[21] — is a major shift, for it means

15 Earlier versions of my approach to the theory of property appear as Paul Babie, 'Idea, Sovereignty, Eco-colonialism and the Future: Four Reflections on Private Property and Climate Change' (2010) 19 *Griffith Law Review* 527; Paul Babie, 'Choices that Matter: Three Propositions on the Individual, Private Property, and Anthropogenic Climate Change' (2011) 22 *Colorado Journal of International Environmental Law and Policy* 323; Babie, above n 6.

16 For various accounts of the liberal conception of private property see Jeremy Waldron, *The Right to Private Property* (Oxford University Press, 1988); Stephen R Munzer, *A Theory of Property* (Cambridge University Press, 1990); Margaret Jane Radin, Reinterpreting Property (The University of Chicago Press, 1993).

17 Radin, above n 16, 121-3. This builds upon the ground-breaking work of Anthony M Honoré 'Ownership' in Anthony G Guest (ed), *Oxford Essays in Jurisprudence: A Collaborative Work* (Oxford University Press, 1961) 107-47, who identified eleven 'standard incidents' of ownership.

18 Morris R Cohen, 'Property and Sovereignty' (1927) XII *Cornell Law Quarterly* 8.

19 Felix S Cohen, 'Dialogue on Private Property' (1954) 9 *Rutgers Law Review* 373 (emphasis added).

20 Gregory S Alexander, *Commodity & Propriety: Competing Visions of Property in American Legal Thought, 1776–1970* (The University of Chicago Press, 1997) 321.

21 This view can be traced to Wesley Newcomb Hohfeld, 'Some Fundamental Legal Conceptions as Applied in Judicial Reasoning' (1913) 23 *Yale Law Journal* 16; Wesley Newcomb Hohfeld, 'Fundamental Legal Conceptions as Applied in Judicial Reasoning' (1917) 26 *Yale Law Journal* 710; Wesley Newcomb Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning* (Walter Wheeler Cook (ed); Yale University Press, 1919); Wesley Newcomb Hohfeld, 'Fundamental Legal Conceptions as Applied in Judicial Reasoning, II' in Walter Wheeler Cook (ed), *Fundamental Legal Conceptions as Applied in Judicial Reasoning and Other Legal Essays* (Yale University Press, 1923) 65–114. These ideas were subsequently taken up by the early American legal realists: Cohen, above n 18; Cohen, above n 19; Robert L Hale, 'Bargaining, Duress, and Economic Liberty' (1943) 43 *Columbia Law Review* 603; Robert L Hale, 'Coercion and Distribution in a Supposedly Non-

(Contd. on next page)

that property only exists as a product of relationship between and among individuals. It was another American legal realist, Wesley Newcomb Hohfeld, who first brought this to our attention in the notion of 'jural opposites', which, at the risk of drastic oversimplification, means that where there is a right (choice) to do something, there is a corresponding duty (a lack of choice) to refrain from interfering with the interest protected by the right.[22] Rights would clearly be meaningless if this were not so.

Following the Cohens and Hohfeld, contemporary scholars — most significantly Macpherson,[23] Nedelsky,[24] Kennedy,[25] Rose,[26] Baker,[27] and Underkuffler[28] — have extensively developed and elaborated the view of property as social relations. Joseph William Singer, the foremost exemplar of property as social relations,[29] argues that property is comprised of a web of social relationships among people that concern control and disposition of valued resources.[30] Singer provides the most succinct summary of property as social relations: '[p]roperty concerns legal relations among people regarding control and disposition of valued resources. Note well: Property concerns relations among people, not relations between people and things.'[31]

The holder of the bundle of rights constituting property may exercise those rights in any way they see fit, to suit personal preferences and desires. Or, we might put this in a way that comports more closely with the language of liberal theory— rights are the shorthand way of saying that individuals enjoy choice, the ability

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Coercive State' (1923) 38 *Political Science Quarterly* 470. And, more recently, extensively developed and expanded, especially by those of the critical legal studies movement: in addition to the work of Joseph William Singer developed in this article, see also: CB Macpherson (ed), *Property: Mainstream and Critical Positions* (University of Toronto Press, 1978); Jennifer Nedelsky, 'Law, Boundaries, and the Bounded Self' (1990) 30 *Representations* 162; Jennifer Nedelsky, 'Reconceiving Autonomy: Sources, Thoughts and Possibilities' (1989) 1 *Yale Journal of Law & Feminism* 7; Jennifer Nedelsky, 'Reconceiving Rights as Relationship' (1993) 16 *Review of Constitutional Studies/Revue d'études constitutionelles* 1; Duncan Kennedy, 'The Stakes of Law, or Hale and Foucault!' (1991) 15 *Legal Studies Forum 327; Carol M Rose, Property & Persuasion: Essays on the History, Theory, and Rhetoric of Ownership* (West Publishing, 1994); C Edwin Baker, 'Property and its Relation to Constitutionally Protected Liberty' (1986) 134 *University of Pennsylvania Law Review* 741 (1986); Laura S Underkuffler, 'On Property: An Essay' (1990) 100 *Yale Law Journal* 127; Laura S Underkuffler, *The Idea of Property: Its Meaning and Power* (Oxford University Press, 2003).

22 Hohfeld (1913), (1917), (1919), (1923), above n 21.

23 CB Macpherson, 'The Meaning of Property' and 'Liberal-Democracy and Property' in CB Macpherson (ed), *Property: Mainstream and Critical Positions* (University of Toronto Press, 1978) 1–13, 199–207.

24 Nedelsky, 'Law, Boundaries', above n 21, 91.

25 Kennedy, above n 21.

26 Rose, above n 21.

27 Baker, above n 21.

28 Underkuffler, 'On Property', above n 21; Underkuffler, *The Idea of Property*, above n 21.

29 See Stephen R. Munzer, 'Property as Social Relations' in Stephen R Munzer (ed), *New Essays in the Legal and Political Theory of Property* (Cambridge University Press, 2001) 36–75, 36.

30 Joseph William Singer, *Property Law: Rules Policies & Practices* (Aspen, 5th ed, 2010) 2.

31 Ibid (citation omitted).

to 'set agendas'[32] about the control and use of goods and resources in accordance with and to give meaning to a chosen life project. The liberal individual therefore holds choice, the ability to set an agenda about a good or resource, while all others (the community, society[33]) are burdened with a lack of choice. C Edwin Baker summarised rights and relationship this way: '…[private] property [i]s a claim that other people ought to accede to the will of the owner, which can be a person, a group, or some other entity. A specific property right amounts to the *decisionmaking authority* of the holder of that right.'[34] In this web of 'asymmetrical'[35] legal relationships, which instantiate the rights that comprise it, we therefore find the liberal concept of private property.

Choices made by those holding property have the potential to create negative outcomes—consequences, or what economists call 'externalities'—for those with the latter.[36] Every legal system acknowledges the problem of externalities, and in so doing, '…takes for granted that owners have obligations as well as rights and that one purpose of property law is to regulate property use so as to protect the security of neighbouring owners and society as a whole.'[37] In other words, while it legitimately exerts its power to create, confer and protect the decisionmaking authority of liberal private property vested in the individual, more importantly, through regulation, the state mediates the socially contingent, relational, boundary between property holders and the non-property rights of others.[38]

Property, though, can create loci of spatial injustice.[39] Over the last twenty years, a 'spatial turn' in the social sciences and law[40] has identified instances and events of systemic injustice, or 'urbanization processes [that] have built into their impact the magnification of economic and extra-economic (racial, gender, ethnic)

32 This phrase was coined by Larissa Katz, 'Exclusion and Exclusivity in Property Law' (2008) 58 *University of Toronto Law Journal* 275.

33 See Gregory S Alexander and Eduardo M Peñalver (eds), *Property and Community* (Oxford University Press, 2010).

34 Baker, above n 21, 742-3 (emphasis added).

35 This phrase was coined by David Lametti, 'The Concept of Property: Relations Through Objects of Social Wealth' (2003) 53 *University of Toronto Law Journal* 325.

36 See especially Joseph William Singer, 'How Property Norms Construct the Externalities of Ownership' in Gregory S Alexander and Eduardo M Peñalver (eds), *Property and Community* (Oxford University Press, 2010).

37 Ibid 60 (emphasis in the original).

38 Joseph William Singer, *Property Law: Rules Policies & Practices* (Aspen, 3rd ed, 2010) 204 (emphasis added).

39 This appeared earlier in Babie, above n 6.

40 See Nicholas K Blomley, *Law, Space, and the Geographies of Power* (The Guildford Press, 1994); Nicholas Blomley, David Delaney, and Richard T Ford (eds), *The Legal Geographies Reader: Law, Power, and Space* (Wiley-Blackwell, 2001); Peter S Menell and John P Dwyer, 'Reunifying Property' (2002) 46 *St Louis University Law Journal* 599; William Taylor (ed), *The Geography of Law: Landscape, Identity and Regulation* (Hart, 2006); Andreas Philippopoulos-Mihalapoulos (ed), *Law and the City* (Routledge, 2007); Abraham Bell and Gideon Parchomovsky, 'Reconfiguring Property in Three Dimensions' (2008) 75 *University of Chicago Law Review* 1015; Franz Benda-Beckmann, Keebet von Benda-Beckmann and Anne Griffiths (eds), *Spatializing Law: An Anthropological Geography of Law in Society* (Ashgate, 2009).

inequalities along with destructive consequences for both the built and natural environments.'[41] Spatial thinking assists us to locate these processes and their consequences and allows us to see how law not only causes, but can also become a vehicle not merely for locating such injustice, but for correcting it, for providing spatial justice.[42] Law may 'reshape the social production of space in more socially beneficial ways; to restructure the relations between space, knowledge, and power; to deal more effectively with the problems of race, class, gender, and all forms of oppression, subjugation, and exploitation; to create a more forceful notion of spatial justice….'[43] And so spatial justice means that in viewing the totality of human existence—historical, social, and spatial—we must identify where injustice is being done to people and the environment, how it needs to be corrected and how we might go about doing that. Thus, property is both a significant source of spatial injustice and one of the primary means of overcoming it through spatial justice.

Any system of property exhibits two responses to loci of spatial injustice. First, one finds informal, spontaneously emerging new property forms, typically forms of private property. This we saw in the Introduction in the examples found in 19th century Chicago, 20th 21st century Los Angeles, and 19th century colonial Australia. Second, the formal positive law of a state may attempt to impose a structure on that space or place, typically through the creation of a new form of property, usually established by legislation. In many cases the second response follows the first, as we saw in the Introduction in the case of pastoral licences and leases. The goal, of course, is spatial justice. We will see, in Part III, that the conditions found in Dharavi catalyse both responses. Before we consider those responses, though, I turn first to the theoretical background for the first response, the spontaneous emergence of new property forms.

B. Spontaneous Emergence of New Property Forms

The interactions made possible by property law may establish and reproduce interactions of spatial injustice, thereby producing the conditions in which it becomes necessary to resolve novel disputes that arise among members of a given social-physical synthesis.[44] Robert Ellickson, considering the interactions of residents in Shasta County, California, found that 'people frequently resolve [such] disputes in cooperative fashion without paying any attention to the laws that apply to those disputes',[45] instead 'apply[ing] informal norms, rather than

41 Edward W Soja, *Postmetropolis: Critical Studies of Cities and Regions* (Wiley-Blackwell, 2000) 410.

42 For the ground-breaking treatment of this, see Edward W Soja, *Seeking Spatial Justice* (University of Minnesota Press, 2010).

43 Edward Soja, 'Afterword' (1996) 48 *Stanford Law Review* 1421, 1423, 1429; Soja, above n 41, 407–15. See also Edward W Soja, *Postmodern Geographies: The Reassertion of Space in Critical Social Theory* (Verso, 1989); Edward W Soja, *Thirdspace: Journeys to Los Angeles and Other Real-and-Imagined Places* (Wiley-Blackwell, 1996).

44 See Pierre Bourdieu, *On the State: Lectures at the Collège de France 1989-1992* (Patrick Champagne, Remi Lenoir, Franck Poupeau, and Marie Christine Rivière (eds); David Fernbach (trans); Polity, 2014) 21, 193, 237, 271-74, 324-28.

45 Robert C Ellickson, *Order Without Law: How Neighbors Settle Disputes* (Harvard University Press, 1994) vii.

formal legal rules, to resolve most of the issues that arise among them.'[46] In short, what Ellickson found is that 'in many contexts, law is not central to the maintenance of social order'.[47]

What does this mean for property? Notwithstanding Bentham's well-known aphorism that '[p]roperty and law are born together, and die together. Before laws were made there was no property; take away laws, and property ceases[]',[48] Ellickson's insight yields important conclusions about the ways in which social exigencies encountered by those living in close proximity to one another give rise to informal norms, a form of 'living law' at the very least equally as important as the formal law of the state in judge-made law and legislation.[49] Some commentators suggest that such informal norms or living law which emerges in the face of social exigencies can, over time, become a form of property '[r]ights that exist in reality or "on the ground." The[se] may be different from *de jure* rights [those rights found in the formal positive law of the state][] (e.g. a person's right to possess and occupy a property is recognized by the community irrespective of the de jure rights or lack thereof).'[50]

In a lengthy reflection upon the 1982 closure of two steel plants in Youngstown, Ohio, by the United States Steel Company, Joseph William Singer provides further definition for these informal property rights.[51] The closures bore heavily on the 3500 directly employed workers; the union representing those workers took a number of steps, the most significant of which involved litigation, in order to protect their interests.[52] The plaintiffs argued 'that the local managers had explicitly promised the workers that the plants would not be closed as long as they were profitable and that the workers had relied on those promises to their detriment by agreeing to changed work practices to increase the plants' profitability and by foregoing opportunities elsewhere.'[53] This theory gave rise to the central claim on the part of the workers, which Singer summarises,

> recast…in Hohfeldian terminology: (1) The union claimed both (a) a power to purchase the plant with a correlative liability in the company to have the plant transferred against its will to the union for its fair market

46 Ibid 1.

47 Ibid 280.

48 Jeremy Bentham, *Theory of Legislation* (CK Ogden (ed), Richard Hildreth (trans), Harcourt, Brace & Co 1931 [1802]) 111-3.

49 See Babie, Burdon and da Rimini, above n 14, and Babie, Burdon, da Rimini, Metcalf, and Stenseth, above n 14.

50 Vikram Jain, Subhash Chennuri, and Ashish Karamchandani, *Informal Housing, Inadequate Property Rights Understanding the Needs of India's Informal Housing Dwellers* (FSG Mumbai, 2016) 15 and 13-17 generally <http://www.citiesalliance.org/sites/citiesalliance.org/files/Informal%20Housing,%20Inadequate%20Property%20Rights.pdf>.

51 Joseph William Singer, 'The Reliance Interest in Property' (1988) 40 *Stanford University Law Review* 611.

52 *Local 1330, United Steel Workers v United States Steel Corp.*, 631 F.2d 1264, 1265 (6th Cir 1980) (*'Local 1330, United Steel Workers'*).

53 Singer, above n 51, 616 (footnote omitted).

> price and (b) a right to have the plant not be destroyed with a correlative duty on the company not to destroy the plant if the union sought to exercise its power to purchase.[54]

This captures the emergence, from social relations that give rise to informal norms, of a form of property. Judge Lambros, the United States District Judge who presided at trial, wrote that:

> …when we take a look at the whole body of American law and the principles we attempt to come out with—and although a legislature has not pronounced any laws with respect to such a property right, that is not to suggest that there will not be a need for such a law in the future dealing with similar situations—*it seems to me that a property right has arisen from this lengthy, long-established relationship between United States Steel, the steel industry as an institution, the community in Youngstown, the people in Mahoning County and the Mahoning Valley in having given and devoted their lives to this industry.* Perhaps not a property right to the extent that can be remedied by compelling U.S. Steel to remain in Youngstown. *But I think the law can recognize the property right to the extent that U.S. Steel cannot leave that Mahoning Valley and the Youngstown area in a state of waste, that it cannot completely abandon its obligation to that community, because certain vested rights have arisen out of this long relationship and institution.*[55]

Yet Judge Lambros ultimately decided that no precedent existed for and the Federal courts lacked the authority to change state property law so as to establish a property right which arises as a result of reliance, or a 'reliance property interest'. The Sixth Circuit Court of Appeals agreed.[56] Singer, however, argues that the two courts not only could but should, as both a matter of law and of morality, have accepted the claim to a reliance property interest. Such a right would not only have placed obligations upon the company towards the workers, but it would also have gained state protection: '[t]he goal should be to identify flexible remedies that are appropriate to protect the workers' reliance interests.'[57] And precedent was available to allow for such an outcome.[58]

For my purposes, Singer makes the simple point that property, or new forms of it, can emerge from social relations, from the fact, identified by Singer, that people are connected to one another through a network or web of social relationships.[59] Indeed,

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54 Ibid, 618, citing Hohfeld (1913), above n 21, 30. See also Joseph William Singer, 'The Legal Rights Debate in Analytical Jurisprudence from Bentham to Hohfeld' [1982] *Wisconsin Law Review* 975; Duncan Kennedy & Frank Michelman, 'Are Property and Contract Efficient?' (1980) 8 *Hofstra Law Review* 711, 760.

55 *Local 1330, United Steel Workers*, above n 50, 1280, as cited in Singer, above n 51, 619 (emphasis in the original).

56 *Local 1330, United Steel Workers*, above n 50, 1266 and 1280, as cited in Singer, above n 51, 620.

57 Singer, above n 51, 621.

58 Ibid 621.

59 Ibid 652-3.

> [m]any of the legal developments of the twentieth century can be described as recognition of obligations that emerge over time out of relationships of interdependence. These entitlements are neither fully articulated initially by clear state-imposed obligations nor by fully-executed and complete contracts. Rather, these obligations often are imposed to protect the interests of individuals in relying on the continuation of important relationships of interdependence. Moreover, these obligations are not created only at magic moments when decisions are made by the state or by contracting parties; instead, they may change as the relation between the parties changes.[60]

What this means is that property, as with any other legal doctrinal category—torts and contracts being the most obvious examples—is at the very least partially driven by 'the justified expectations of the parties affected by the issue';[61] these might include those exigencies of social life which emerge as part of

> long term social relationships…between strangers, among neighbors, among family members, among businesses, between landlords and tenants, between businesses and members of the public, between citizens and government entities. They involve various sorts of interests in obtaining access to valuable resources purportedly controlled by others….[62]

What Singer identifies is the truth that if property is a matter of social relations, then its newest forms, both social and legal, can emerge from such relationships and their exigencies. At least in the first instance, Ellickson's informal norms may themselves constitute a form of property which does not require law for its existence or even, at least to some degree, for its enforcement. Social relations may both give rise to new property forms and to their enforcement. And having so emerged, the state may, and often does recognise such new property forms, conferring upon them the protection of formal law. Singer identifies a number of ways in which the state, in American law (which mirrors, to a great extent, most common law jurisdictions), through both common law and statute, has both recognised and provided enforcement for property forms which emerge from social relations, which fall under four major divisions: (i) rights of access; (ii) marketplace relations; (iii) intimate relationships; and, (iv) reliance on the state.[63] There is little doubt that the state frequently not only recognises, but also provides protection for those new property forms which emerge spontaneously from the exigencies of social relations.

The organisation of social relationships and the consequent requirements for the allocation of goods and resources, then, are a product not only of law, but of the many ways in which people interact with one another. Indeed, in many cases, as

60 Ibid 653 (footnote omitted).

61 Joseph William Singer, *Entitlement: The Paradoxes of Property* (Yale University Press, 2000) 210 (footnote omitted).

62 Singer, above n 51, 663-4.

63 Ibid 663-701.

Singer shows, it is law which follows social exigency rather than the other way around. In short, existing property forms have spontaneously emerged, and new property forms continue spontaneously to emerge from social exigencies, with the state, through law, only conferring its protection upon those forms once they have so arisen. And those forms are not asymmetric or one-sided, conferring only entitlement and benefit. Rather, they '[a]re not only claims of entitlement but claims that it is fair to impose obligations on others to respect those entitlements. … Because entitlements represent legal relations among persons, they can only be understood and justified by reference to the fairness of imposing vulnerabilities or duties on those affected by the assignment of entitlements to other people.'[64]

In other words, just as social relations are multi-lateral, a web or network of relationships, so, too, are the new property forms which may emerge from consequent exigencies of the multi-valent nature of social relationships. And that means that there are both entitlements, or rights, and obligations, or duties. Property, in short, 'is something we collectively construct. We must give it its meaning, both social and legal.'[65] Or, put another way, property often emerges spontaneously from social exigencies, which result in both entitlements and obligations, enforceable in some cases as a matter of the social relations which gave rise to the new form, but just as often ultimately recognised and enforced by the conferral of property status by the state. And this is what one sees in Dharavi, to which I now turn.

III. Spontaneous Emergence of New Property in Dharavi Land

The vast majority of the literature that considers the place of the concept of property in Dharavi does so from the perspective of the negative consequences for residents that follow the absence of formal property, especially the secure title to housing and the lack of public space appurtenant to it.[66] As I noted in Part II, what I suggest here, though, is that in response to the spatial injustice wrought by property itself, and which produces the conditions for the emergence of a slum like Dharavi, two responses follow: the spontaneous emergence of new property forms to fill the void created by the failure of formal positive law, and the subsequent response of the state through either the re-location of residents and redevelopment of the land, or through the enactment of formal positive law recognising and providing for the enforceability of the existing new property forms. This Part considers each in turn as found in Dharavi. In so suggesting, I do not in any way seek to dismiss or to downplay negative consequences for the residents of Dharavi of such social and economic disadvantage, or the economic and political challenges that face Dharavi and India. Rather, what I do want to show is that in the midst of deprivation and tragedy, one also finds what Ellickson found in Shasta County: the use of informal norms to mediate social interactions that do not rely on the formal positive property law of the state.

64 Singer, above n 61, 211.

65 Ibid 215.

66 See, eg, Gruber, Kirschner, Mill, Schach, Schmekel, and Seligman, above n 1, 2.

A. Spontaneous Informal Response

(i). Social-Physical Exigencies

(a). The Slum

As of 2014, 54% of the world's people lived in cities, with that percentage predicted to grow to 66% by 2050, comprising an additional 2.5 billion people living in urban areas. The United Nations notes that over 90% of urban growth is occurring in the developing world, adding an estimated 70 million new residents to urban areas each year, with approximately a quarter of the world's urban population lives in slums. United Nations Habitat estimates the number of people living in the slums of the world's developing regions as 863 million, in contrast to 760 million in 2000 and 650 in 1990. As such, it is likely that today one third of the developing world's urban population is living in slums, representing 15% of all people living in those regions.[67] In Mumbai, the financial capital and most populous city of India, 42% (nearly 5.2 million people) of the population live in slums, with this number is predicted to increase.[68]

Slum dwellers lack any civil rights, living a life of vulnerability in every respect.[69] The life of a slum dweller is marked by 12 deprivations: (1) lack of access to improved water, (2) lack of access to improved sanitation facilities, (3) insufficient living area, (4) poor structural quality/durability of dwellings, (5) insecurity of tenure,[70] (6) increased risks to health, (7) inadequate education, (8) vulnerabilities to labour and livelihood, (9) increased risks due to the impacts of climate change[71] and natural hazards, (10) asymmetric gender dynamics, (11) limited mobility and connectivity, and (12) lack of public space.[72] Two of these constitute the primary focus of this article: insecurity of land tenure and lack of public space. The former means that '…residents…live…under constant threat of eviction, which prevents them from accessing credit and constrains their motivation to improve their homes and neighborhoods. Slum areas that are not titled challenge existing land registration and cadastral approaches. In the slums there is little spatial information and the land use does not often fit the town plans.'[73] An important

67 UN Habitat, United Nations Human Settlements Program, *World Habitat Day: Voices from the Slums, Background Paper* (UN Habitat, 2014) <https://unhabitat.org/wp-content/uploads/2014/07/WHD-2014-Background-Paper.pdf>) 1-2. See also UN Habitat, *Slum Almanac 2015/2016: Tracking Improvement in the Lives of Slum Dwellers* (UN Habitat, 2016) 2, 8-9 <https://unhabitat.org/wp-content/uploads/2016/02-old/Slum%20Almanac%202015-2016_EN.pdf>.

68 Yue Zhang, 'Building a Slum-Free Mumbai? State and Informal Urbanization in India', Conference on the Political Economy of Contemporary India, Indira Gandhi Institute of Development Research, Mumbai, India (9-10 January 2017) <http://www.igidr.ac.in/indiapolecon/temp/Paperstobepresented/Yue%20Zhang.pdf> 1.

69 Gruber, Kirschner, Mill, Schach, Schmekel, and Seligman, above n 1, 2.

70 UN Habitat, United Nations Human Settlements Program, above n 67, 4, 10-11. See also UN Habitat, *Slum Almanac 2015/2016*, above n 67, 3.

71 See Babie, 'Idea, Sovereignty, Eco-colonialism and the Future, above n 15; Babie, 'Choices that Matter, above n 15.

72 UN Habitat, *Slum Almanac 2015/2016*, above n 67, 12-4. See also Gruber, Kirschner, Mill, Schach, Schmekel, and Seligman, above n 1, 2.

73 UN Habitat, United Nations Human Settlements Program, above n 67, 6. See also UN Habitat, *Slum Almanac 2015/2016*, above n 67, 3.

adjunct of secure private property holding in land is the access to adequate public space as part of the use of one's land: '…slum areas are infamous for lacking public areas and for the predominance of fragmented patches of empty land that fulfil their residents' needs for open space.'[74] Slums, then, '…are marginalised, large agglomerations of dilapidated housing often located in the most hazardous urban land—e.g. riverbanks; sandy and degraded soils, near industries and dump sites, in swamps, flood-prone zones and steep slopes—disengaged from broader urban systems and from the formal supply of basic infrastructure and services, including public space and green areas.'[75]

It is the very fact that these conditions exist, and that the use of land fails to fit the formal positive property law of the state that results in the social exigencies from which new property forms can emerge in order to structure the social relations of those living there. It is because of 'the failure of formal approaches [to] improvement, [that] the poor have to fall back upon their own solutions and survival strategies, sometimes with more and sometimes with less success.'[76] Indeed, in these conditions, spontaneously emerging new property forms ought to be treated as one of a complex of solutions, taking account of the lived experience of residents and the resulting social-physical context. We need, then, to understand the lived experience and social-physical context of Dharavi's residents.

(b). Dharavi

From a social perspective, a very specific pattern of interaction has developed in Dharavi among the population of 800,000 people living in the more than 2,000 huts in the 67 single slum areas between Mumbai's two main suburban railway lines—the Western and the Central Railway.[77] '[O]riginally a mangrove swamp[, i]n the late nineteenth-century, Koli fishermen made up the majority of its residents. The swamp eventually filled in, and a huge wave of immigration swept through the area.'[78] Still, social exclusion represents the primary cause for the existence of the community: from 'both…religious and ethnic perspectives, the social composition is very heterogeneous: Muslims, Christians, Neobuddhists, Melangs, Dhars and Tamilians form an "amazing mosaic of villages and townships from all over India."'[79] A resident of Dharavi describes living there, in an account representative of other accounts found in the literature, this way:

> I am the 6th generation of my family living in Dharavi, my forefathers came to this place in the early 19th century when this place was more of a swamp/creek initially inhabited by the local fisherman known as Koli.

74 UN Habitat, *Slum Almanac* 2015/2016, above n 67, 14.

75 Ibid 4.

76 Gruber, Kirschner, Mill, Schach, Schmekel, and Seligman, above n 1, 2.

77 Ibid 8.

78 Joey Shea, 'Dharavi: Life in the Slums', *The Political Bouillon* (10 February 2012) <thepoliticalbouillon.com/en/dharavi-life-in-the-slums/>.

79 Gruber, Kirschner, Mill, Schach, Schmekel, and Seligman, above n 1, 9, citing S Sharma, 'Rediscovering Dharavi' (2000) <www.hinduonnet.com/2000/09/17/stories/13170632.htm - 19k, 03.04. 2005>.

> …
>
> Being brought up in the slum was similar to a normal childhood of a child belonging to middle class family. That was possible as my family was well settled and living in Dharavi for close to a century.[80]

And Denis Gruber, Andrea Kirschner, Sandra Mill, Manuela Schach, Steffen Schmekel, and Hardo Seligman summarise the lived experience of Dharavi this way:

> …having entered the narrow lanes Dharavi proves that the prejudice of slums as dirty, underdeveloped, and criminal places does not fit real living conditions. … Inside the huts, it is, however, very clean, and some huts share some elements of beauty. … The various production units and stores of Dharavi [plastics,[81] leather, gloves, and jeans[82]] could also exist in other parts of the city, but here for sure most of them are informal-sector enterprises.[83]

Dharavi therefore constitutes 'a highly complex space of living and working, with socioeconomic connections to formal and informal economy, the world market, and the place of origin of the migrants. Aspects of ethnicity, religion and social structure cut across this space.'[84] The social interaction of Dharavi results in an informal means of organising the use of goods and resources, especially the available space/land. Thousands of small businesses thrive in Dharavi, creating an informal economy with an annual turnover of $1 billion by some estimates. And 'amid Dharavi's narrow alleys, open drains and canopies of electric cables, migrants who came in search of better economic opportunities have created a community of schools, temples, mosques, restaurants, tailors and mobile phone shops.' Tens of thousands of people work as potters, leather tanners, weavers, soap makers, and in its massive recycling industry, with homes doubling as work spaces.[85] Dharavi is an 'ecosystem[] buzzing with activity...[exhibiting] the messy economic and social activities that thrive in slums[.]'[86] 'The squat tenements are perfectly suited for businesses, with living and sleeping spaces sitting atop work spaces, workers spilling into the alleys and material stacked outside and on roof tops.'[87]

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80 Atik Vora, 'What is it like to be born and brought up in the Dharavi slum of Mumbai in India?', *Quora* (30 July 2016) <https://www.quora.com/What-is-it-like-to-be-born-and-brought-up-in-the-Dharavi-slum-of-Mumbai-in-India>.

81 Rina Chandran, 'What's a slum? India's Dharavi defies label with thriving informal economy', *Place* (11 October 2016) <www.thisisplace.org/i/?id=7f6614e4-b139-4db2-9dd7-e0cf4f38f2d3>.

82 Gruber, Kirschner, Mill, Schach, Schmekel, and Seligman, above n 1, 9-10.

83 Ibid 9.

84 H Schrader, 'Land Tenure Rights as a Development Opportunity: Reflections on a pre-study of urban poverty policy in Mumbai (Bombay)' (2004) (unpublished document) as cited in Gruber, Kirschner, Mill, Schach, Schmekel, and Seligman, above n 1, 9.

85 Chandran, above n 81.

86 Ibid, quoting Sanjeev Sanyal.

87 Chandran, above n 81.

While '[t]o outsiders, the buildings that house these…[inhabitants] may look informally cobbled together,…they are in fact constructed by professional contractors [who] have clear ideas of what they can or should build based on local needs; according to long-established tradition, the buildings are divided into one-room tenements (chawls) that function as both living and working spaces.'[88] Prakash Apte concludes that

> The 'unplanned' and spontaneous development of Dharavi has led to the emergence of an economic model characterized by a decentralized production process relying mainly on temporary work and self-employment. The multiplicity of independent producers makes the production process extremely flexible and adaptable. Its viability is proven by the national and international market its products command.[89]

Still, notwithstanding the pattern of social and economic occupation, development, and building, the residents of Dharavi are not owners of the land on which their settlement and so chawls sit. And while the residents themselves acknowledge this fact, Rahul Srivastava, a founder of the Institute of Urbanology in Mumbai, says that '[t]he biggest impediment to the improvement of many of these settlements is the misconception that they are illegitimate, because residents don't own the land they occupy[]'; he asks: '[c]an settlements which are home to fifth-generation migrants be called 'informal'? We need to transform our perception of these neighbourhoods.'[90] According to Jockin Arputham, President of the National Slum Dwellers' Federation in Mumbai, residents' self-perception is that of 'a people-sponsored economic zone…a township, not a slum.'[91] Rahul Srivastava and Matias Echanove conclude, then, that '[a] majority of homes in areas notified as "slums" by the government are built in bricks, steel and cement, by experienced teams of contractors, masons, plumbers, electricians and carpenters.'[92]

And as such

> Rather than "slums",…a political label, we call…Dharavi and other such settlements "homegrown neighbourhoods". These neighbourhoods… developed gradually, by the people who live there,…usually with little or no support from the authorities. They belong to another history of urbanisation, one that is as universal and ubiquitous as the skyscraper, only much older.

88 Feargus O'Sullivan, 'In Mumbai, a Push to Recognize the Successes of 'Informal' Development' *CityLab* (21 June 2018) <https://www.citylab.com/design/2018/06/dharavi-mumbai-informal-development-urbanism-urbz/563150/>.

89 Prakash M Apte, 'Dharavi: India's Model Slum', *Planetizen* (29 September 2008) <https://www.planetizen.com/node/35269>.

90 As cited in Chandran, above n 81.

91 As cited in Chandran, above n 81.

92 Rahul Srivastava and Matias Echanove, ''Slum' is a loaded term. They are homegrown neighbourhoods' *The Guardian* (29 November 2014) <https://www.theguardian.com/cities/2014/nov/28/slum-loaded-term-homegrown-neighbourhoods-mumbai-dharavi>.

> Homegrown neighbourhoods are more common than usually assumed. At a global level they are the norm rather than the exception. Entire cities have been developed outside official plans. Tokyo or even Shenzhen…are cases in point. Most Middle Eastern and European old towns, with their charming, irrationally narrow streets and small buildings are homegrown. Even the well-planned streets of New York and Los Angeles' suburbs are full of houses that have been modified by their users in contradiction to zoning codes….
>
> [So we need to] [l]ook[] at Mumbai's homegrown neighbourhoods less as urban anomalies and more as…residents' initiative….[93]

In short, as Prakash Apte suggests, Dharavi represents 'the kind of self-sufficient, self-sustaining 'village' community that Mahatma Gandhi—the Father of the Nation—dreamt of and wrote about in his books on India's path to development.'[94] While 'homegrown neighbourhoods' or 'self-sustaining village communities' may develop through an invisible process of development and construction—the role of professionals in construction is masked because it is carried out orally, without written or drawn designs, through discussions with clients, responding effectively to residents' needs and means[95]—they also have their roots in 'social and cultural support networks' which exhibit 'an intricate and valuable complexity', the product of 'self-help urban development'[96] with origins in the 'very special relationships between economic activity, family needs, community needs'[97] found in 'a highly engaged community'.[98]

We could, of course, describe the social-physical process of the homegrown neighbourhood or self-sustaining village community found in Dharavi another way: it is the sort of place of which Ellickson spoke in relation to informal rules which develop so as to allow for neighbours to settle disputes involving access to and use of goods and resources, and which Singer described when identifying socially-contingent property forms which develop on the basis of reliance, expectation, and entitlement. I have theorised the process explained by Ellickson and Singer as spontaneously emerging new property forms in response to social exigencies. Dharavi's social-physical synthesis, in other words, presents the conditions necessary for the spontaneous emergence of a new property form; to which I now turn.

93 Ibid.

94 Apte, above n 89.

95 Sullivan, above n 88.

96 Apte, above n 89.

97 O'Sullivan, above n 88, quoting Rahul Srisvastava.

98 O'Sullivan, above n 88.

(ii). Leasehold Interest

As a matter of the formal positive law of India, slums fall into one of three classes:[99] (i) notified—those areas in a town or a city notified as a 'Slum' by State, Union Territory Administration, or Local Government under any Act, including a 'Slum Act'; (ii) recognised—those areas recognised as a slum by State, Union Territory, or Local Government, Housing and Slum Boards, which may have not been formally notified as slum under any Act; and (iii) identified—any compact area of at least 300 people or about 60-70 households of poorly built congested tenements, in an unhygienic environment usually with inadequate infrastructure and lacking in proper sanitary and drinking water facilities.[100] And the formal positive law of property applies only to the underlying status of the land on which a slum sits; in the case of Dharavi:

> [m]any of the six-hundred-odd acres of land on which [it] sits are state owned. The largest landowner is the Brihanmumbai (Greater Mumbai) Municipal Corporation (BMC), which owns 59 percent of the land. The Maharashtra Housing Development Authority owns 17 percent, and the Central Government Railways 4 percent. The remaining portion of Dharavi land is privately owned, including "Koliwada," a village inhabited by the region's original Koli fishing communities, who have legal land ownership rights.[101]

And state law and policy contribute to the underlying causes for the emergence of slums, causing

> not only…[in] insufficient investment in urban infrastructure and housing but also creat[ing] a policy orientation that deprioritizes urbanization, which led to the creation of a series of restrictive land development policies. These policies dismantled the rental market and disincentivized the private sector in housing construction, thus pushing a large number of the urban residents into the informal housing market and causing the proliferation of slums. The rise of the regional political parties and intense interparty competition, on the other hand, motivate[d] politicians to mobilize voters at the grassroots level, thus strengthening the interdependence between parties and slum dwellers. By offering slum dwellers infrastructural improvements and building informal leadership in the communities in exchange for votes, political parties help stabilize and institutionalize the slums.[102]

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99 See Laura B Nolan, 'Slum Definitions in Urban India: Implications for the Measurement of Health Inequalities' (2015) 41 *Population Development Review* 59; Anirudh Krishna, M S Sriram, Purnima Prakash, 'Slum types and adaptation strategies: identifying policy-relevant differences in Bangalore' (2014) 26 *Environment and Urbanization* 568.

100 C Chandramouli, Registrar General & Census Commissioner, India, *Housing Stock, Amenities & Assets in Slums - Census 2011* (2011) <https://suburbin.hypotheses.org/754>.

101 Shahana Chattaraj, 'Property Markets Without Property Rights: Dharavi's Informal Real Estate Market' in Eugenie L Birch, Shahana Chattaraj, and Susan M Wachter (eds), *Slums: How Informal Real Estate Markets Work* (University of Pennsylvania Press, 2016) 94-106, 98 (citations omitted). See also Zhang, above n 68, 1.

102 Zhang, above n 68, 28. And see also Srivastava and Echanove, above n 92.

Beginning with the enactment of the *Maharashtra Slum Areas (Improvement, Clearance And Redevelopment) Act, 1971*, Dharavi has been the subject of successive notifications and notices.[103] Notwithstanding the formal proprietary status of land in a slum, notification has, over time, made possible the provision of taps, toilets and electrical connections as part of slum improvement measures, the construction of the Sion-Mahim Link road, the 60 feet and 90 feet roads, and the laying of sewer and water lines.[104]

Viewed from the social-physical perspective, however, one sees property in Dharavi very differently: what has emerged 'strand by strand'[105] to meet social exigencies, is a new property form, one based upon reliance, expectation, and entitlement, in which both rights and obligations operate amongst residents. While it developed slowly, this does not obviate the fact that this new property form of landholding and social relationship emerged spontaneously in the face of vicissitudes of life and concomitant social exigencies. Perhaps unsurprisingly, while the new property form operates in 'the absence of [planning and development permits,] clear and secure property rights, legal titles and property deeds, a system of property registration, bank financing through mortgages, or legal redress[] systems[]'[106] and 'in a gray space where the legal value of a contract is uncertain[]',[107] it nonetheless mirrors proprietary interests in land recognised by the formal property system found in the positive law of the state.

The spontaneously emerged new property form in Dharavi land exhibits five primary strands, components or characteristics. First, the bundle itself rests upon possession rather than formal ownership and documentary evidence of title, although other forms of documentary evidence establish possession, including transfer agreements, rental leases, electricity bills, property tax or fee receipts, building plan approvals, utility bills and state-issued 'ration' cards. 'Slum residents in Mumbai keep such forms of paperwork carefully, as they are important means of becoming "visible to the state" and increasing legitimacy.'[108] Second, possession gives rise to a right to use—the formal landowner's failure to evict leads to a spontaneously emerged new property right to use. Third, possession and use are contained within what the formal law recognises as a leasehold interest, either of a residential or business premises or frequently both, for short and long terms. This spontaneous 'leasehold interest', though, is 'frequently violated…by selling or subdividing the property, using it for prohibited or nonconforming industrial activity, or building additional floors for rental purposes[.]'[109] Thus, fourth, this leasehold interest confers a power to

103 Chattaraj, above n 101, 100.

104 Slum Rehabilitation Authority, Mumbai, Government of Maharashtra, 'History of Growth of Slum in Dharavi' <sra.gov.in/page/innerpage/growth-history.php>; Slum Rehabilitation Authority, Mumbai, Government of Maharashtra, 'DRP Notifications & Notices' <http://sra.gov.in/page/innerpage/drp-notifications---notices.php>.

105 Jain, Chennuri, and Karamchandani, above n 50, 43.

106 Chattaraj, above n 101, 95 and 96.

107 Ibid 96.

108 Ibid 100.

109 Ibid.

transfer, either by sale, subdivision, sub-lease or by testamentary devise. And, finally, while a few involve bank loans, the vast majority of transactions involving the leasehold interest are financed using cash only.[110] I call this bundle of rights comprising collectively the informal leasehold interest the 'spontaneously emerged leasehold interest in Dharavi land'.

The difficulty, of course, as theorised in Part II, is that the spontaneously emerged 'leasehold interest' in Dharavi land lacks enforceability in the formal positive property law of the Indian state.[111] Chattaraj writes

> [p]roperty transactions in Dharavi occur in a "gray space," where the line between what is "legal" and "illegal" appears to be irrelevant to participants. Although the form of the transactions…mimic that of the formal system, they are not likely to stand up in courts. "Because of the tangle of legislation governing the management and development of urban land, as well as a long history of lax enforcement of existing regulations concerning slum areas, very few tenants or landlords had a clear idea of their rights and obligations to each other…".[112]

Adverse possession, though, may be one possible avenue which those who hold the spontaneously emerged 'leasehold interest' in Dharavi land may pursue so as to gain the formal recognition and protection of the positive law of property.[113] Moreover, '[w]hile property transactions and procedures in Dharavi mimic those of the formal system, contracts are enforced not through the legal system but through informal political and community networks.'[114] As such, the convergence of both the operation of some limited components of the formal positive law of property and of political action comprise the recognition of and protection for the spontaneously emerged leasehold interest in Dharavi land. This is not entirely unsurprising, as Singer noted that such property forms have in some cases gained the protection of the formal positive law of the state.

Still, notwithstanding the absence of recognition and enforceability within the formal positive property law of the state, and the existence of some legal and political protections, there has also emerged an informal system of recognition and enforcement, which we can add to the components of the spontaneously emerged leasehold interest in Dharavi land. Its operation depends upon the existence of a network of actors or brokers, each of whom

> …gathers and shares information, brokers compromises during disputes, keeps abreast of the complex legal environment within which property transactions occur, and knows how to obtain the "papers," legally enforceable or not, for a sale. He is embedded in a network of

110 This list is compiled on the basis of Jain, Chennuri, and Karamchandani, above n 50, 22, Figure 3: Typical Property Rights in the Different Categories and Segments of Housing, and Chattaraj, above n 101, 95 and 100.

111 Chattaraj, above n 101, 102.

112 Ibid 103.

113 Ibid 103-4.

114 Ibid 104.

> local brokers, fixers, community leaders, party workers, elected state representatives, municipal councillors, police and municipal officials who play a key role in the organization of informal economic activities in Dharavi, as in most other informal spaces in Mumbai. These networks provide a framework within which information is shared, disputes are settled, and access to public resources is negotiated outside the formal institutional and legal system. …"People take commercial decisions, such as making large investments in property without clear title and so on, based on confidence in the system, or rather, confidence in the lack of a system. Here, people have confidence in the 'non-system,' which is not very transparent and not what it should be according to the legal system." In this, Dharavi's slum market is not so different from property transactions in more "formal"-seeming settings, for example middle-class or luxury housing developments built on illegally subdivided rural, public, or disputed lands. These developments inhabit a space where the line between legal and illegal is blurry, determined through political bargaining and quasilegal adjudication…. Through political lobbying, "informal" developments get "regularized" and formalized.[115]

But how does the state itself respond to the social-physical context of Dharavi, and slums like it, which give rise to spontaneously emerged new property forms?[116] I turn next to that question.

B. State Formal Response

Of course, as one commentator writes '[r]ecognizing the vitality and variety of ways in which Dharavi-ites have created their own environment doesn't mean sentimentalizing squalor. Indeed, the area could greatly benefit from infrastructure investment that could make it cleaner, more accessible, and altogether easier to live in.'[117] But it does 'mean[] acknowledging that informal neighborhoods could actually develop to function well without total re-planning, if they had their facilities upgraded. This upgrade is often withheld because the state views the area's construction and character as inherently invalid and irremediable.'[118] Still, notwithstanding the social-physical synthesis, the official responses fall into two types. On the one hand, some call for the government of Maharashtra to re-locate residents and develop the land so acquired so as better to serve the tides of neoliberal capitalism.[119] Yet, we have seen that a spontaneously emerged leasehold interest in Dharavi land has developed as a consequence of the social-physical synthesis found there. And as Singer found in the case of the Ohio Steel Plant closures, the state, in the form of positive law (both legislation

115 Ibid 104-5 (footnotes omitted).

116 See ibid 106.

117 O'Sullivan, above n 88.

118 Ibid.

119 Chattaraj, above n 101, 98-9; Kailash Babar, 'Dharavi: Maharashtra government invites tenders to redevelop Asia's biggest slum', *The Economic Times* (24 November 2018) <https://economictimes.indiatimes.com/news/politics-and-nation/dharavi-maharashtra-government-invites-tenders-to-redevelop-asias-biggest-slum/articleshow/66780316.cms>.

and judge-made), has available to it a range of means to recognise and provide protection for new property forms. Calls to clear and redevelop Dharavi at once reject and deny the importance of those rights. And, unsurprisingly, as a consequence, '[r]esidents [who] live and work in the same place…campaign[ed] actively to ensure that any redevelopment of their homes or construction of new housing takes into account the need for home-based ground floor workspaces.'[120]

The theory outlined in Part II predicts a second possible response: the state conferral of formal property rights to the existing spontaneously emerged new forms of property through the positive law of the state, usually through legislation. This allows some scope for the existing socially constructed forms of property as well as providing for their protection and enforceability. While no proposals for the conferral of property rights currently exists for Dharavi, some commentators suggest that:

> State governments could consider granting various bundles of property rights that are politically feasible and cater to diverse contexts of informal housing settlements. The formal property right to use and right to basic services, which bureaucrats are more comfortable with, could form the basic bundle. Additional rights (e.g., right to exchange, right to mortgage) could be added to the bundle, depending on local needs and feasibility. The rights could also be granted for a limited period (e.g., 5 or 10 years)….[121]

In some parts of India, the government has already implemented such a bundle of rights, thereby formalising the new property rights of use and testamentary devise which had already arisen through reliance, expectation and entitlement, and enhancing them with the additional rights of basic services, and limited term rights to exchange and mortgage. The legislation enacted by the state government in Odisha provides a representative example.

Proposed in 2012, *The Odisha Property Rights to Slum Dwellers and Prevention of New Slums Bill, 2012* sought to provide for the identification, redevelopment, rehabilitation, the prevention of slums, and to provide residential houses with infrastructure, and for the assignment of property rights to identified slum dwellers in the Indian state of Odisha. The Bill was enacted, in modified form, in 2017. Viewed as a historic step benefitting tens of thousands of urban inhabitants of one of India's poorest states,[122] *The Odisha Land Rights to Slum Dwellers Act, 2017*

120 Paola Totaro, 'Slumscapes: How residents of the world's five biggest slums are shaping their futures', Place (accessed 29 December 2018) <http://www.thisisplace.org/shorthand/slumscapes/>.

121 Jain, Chennuri, and Karamchandani, above n 50, 50 (footnote omitted).

122 Jatindra Dash, 'Indian state to give property rights to slum dwellers in 'historic' step', *Reuters* (9 August 2017) <https://in.reuters.com/article/india-landrights-lawmaking/indian-state-to-give-property-rights-to-slum-dwellers-in-historic-step-idINKBN1AO229>; 'House passes land rights to slum dwellers Bill', *The New Indian Express* (14 September 2017) <www.newindianexpress.com/states/odisha/2017/sep/14/house-passes-land-rights-to-slum-dwellers-bill-1657017.html>; Niloufer Memon and Soumitra Pandey, 'What the Odisha Land Rights Act can teach us', *Livemint* (20 November 2018) <https://www.livemint.com/Opinion/ztenupgTJBSxIhrtElzYeL/Opinion--What-the-Odisha-Land-Rights-Act-can-teach-us.html>.

('The 2017 Act') assigned land rights to identified slum dwellers, and provided for the redevelopment, rehabilitation and upgrade of slums. Speaking to the Bill at the time of its enactment, the Industries Minister, Niranjan Pujari, said:

> The informal settlements of the slums without land rights expose its dwellers to insecurity of land ownership and they remain under constant threat of demolition or eviction. Therefore, it was felt by the government to enact a separate legislation to provide for assigning land rights to identified slum dwellers, for redevelopment, rehabilitation and upgrade of slums in the municipal and the notified areas of the state, in order to facilitate inclusive growth and ensure delivery of basic urban services to the urban poor.[123]

The 2017 Act contains five Chapters: Chapters I (sections 1 and 2) and V (sections 10-18) contain general and miscellaneous provisions and definitions; Chapter II, which contains sections 3-5, defines the land right conferred and the means of its settlement upon defined inhabitants of slums; Chapter III, containing sections 6-8, provides the authority and procedure for the settlement of land rights; and, Chapter IV contains section 9, which establishes offences and penalties. The key sections are 2(k), which defines a 'land right' as the 'right to land assigned to slum dwellers under section 3', 2(s), which defines a 'slum dweller' as 'any landless person in occupation within the limits of a slum area', and 3, which comprises the keystone right. Section 3 provides an extensive definition of the land right conferred upon defined slum dwellers:

3. (1) Notwithstanding anything contained in any other State law for the time being in force, and subject to provisions of sub-section (2), every landless person, occupying land in a slum in any urban area by such date as may be notified by the State Government, shall be entitled for settlement of land and certificate of land right shall be issued in accordance with the provisions of this Act.

   (2) The land shall be settled in favour of a slum dweller to the extent specified hereinafter,….

   (3) The land so settled as per sub-section (1) shall be heritable but not transferable by sublease, sale, gift, or any other manner whatsoever: Provided that, the land so settled may be mortgaged for the purpose of raising finance in the form of housing loan from any financial institution.

   …

   (5) If the slum dweller, with whom the land has been settled or right has been accrued for allotment of any land under this Act, transfers such land except by way of mortgage under subsection (3) or uses the said land for any purpose other than residential purpose, the following consequences shall follow, namely:—

      (a) the certificate of land right issued under sub-section (1) shall stand automatically cancelled;

123 'Land right for urban poor', *The Telegraph (Online Edition)* (14 September 2017) <https://www.telegraphindia.com/states/odisha/land-right-for-urban-poor/cid/1659843>.

(b) such transfer shall be null and void;

(c) no right shall accrue to the transferee in respect of such land;

(d) the Authorized Officer shall dispossess the person who is in actual possession of such land;

(e) such slum dweller shall be debarred from getting any land in future under this Act; and

(f) such slum dweller shall be guilty of an offence under this Act.

…

(8) The evidence for grant of certificate of land right under sub-section (1) in favour of slum dweller shall include —

(a) Government authorized documents such as Aadhaar Card, voter identity card, ration card under National Food Security Act, 2013, smart card under Rashtriya Swasthya Bima Yojana (RSBY) or passport; or 20 of 2013.7

(b) Government records such as Census, survey, maps, satellite imagery, plans, reports, reports of committees and commissions, Government orders, notifications, circulars, resolutions.

(9) The certificate of land right granted under sub-section (1) shall be acceptable as evidence for address proof of residence.

Importantly, the s 3 land right, to some extent, takes account of, recognises, and provide formal protection for a spontaneously emerged new property form in land, such as the leasehold interest in Dharavi land described above in Part III.A. It provides for the substantive content of the right (sub-ss (1) and (2)), the issue of a certificate of title (sub-ss (8) and (9)), some limited form of transfer by inheritance and mortgage (sub-ss (3) and (5)), but not by way of sublease, sale, gift, or any other manner whatsoever (this limits what is possible pursuant to the spontaneously emerged leasehold interest in Dharavi land). The theory of the spontaneously emerging new property forms in Part II, then, predicts the state response found in Odisha. This is but one of the possible responses to the spatial injustice found in Dharavi.

IV. Conclusion

Recall that the goal of the responses to loci of spatial injustice is spatial justice. But are the two responses to loci of spatial injustice outlined here sufficient to achieve spatial justice? There is no easy answer to that question, for to provide such a response involves us asking whether property, as a political concept and as a legal vehicle can ever produce just outcomes. Recall further that it is property that structures the world in such a way as to produce the socio-economic conditions that make Dharavi possible in the first place, structured it so as to produce loci of spatial injustice. Any response can only ever therefore be one which reproduces the conditions which produced spatial injustice in the first place.[124] This raises issues beyond the scope of this article; but it ought to remain in mind as one considers any real-world setting such as that found in Dharavi.

124 See Bourdieu, above n 44, 21, 193, 237, 271-4, 324-8.

The primary concern of this article has been to identify, as a matter of theory, the possibility of new property forms that emerge spontaneously in response to social exigencies, and as a matter of observation, the possibility that Dharavi may represent a real-world example of such a development. Because this is a piece of normative social theory rather than empirical analysis, however, what is now required is further research—as suggested by Mahabir, Crooks, Croitoru and Agouris[125] —into both Dharavi and similar social-physical syntheses. Such research would yield important results not only for property theorists, but also for those engaged in social policy and law reform. Further research ought to take two directions, one empirical, the second doctrinal.

An empirical assessment is necessary to understand better the lived experience of Dharavi's residents would—such a study would achieve two ends. On the one hand, such research would answer questions about the existence of and attitudes to, as a matter of lived experience, the spontaneously emerging property in land, as opposed to those which may have the formal recognition of the positive law of the state. On the other hand, empirical research would allow the Indian government to effect law reform based upon a full understanding of the nature of the spatial injustice being addressed. Lawrence Friedman argues that law involves the modification of human behaviour, and the study of law therefore involves two main questions: first, the consideration of 'where…the laws, decisions, rules, and regulations come from?',[126] which involves primarily the investigation of judges, legislators, and lawyers,[127] while the second question asks 'what kind of impact or influence…any of these act within the legal system have?',[128] which is really the issue of 'impact…[on] behavior tied causally, in some way or other, to some particular law, rule, doctrine, or institution.'[129]

And, in the face of a spontaneously emerged leasehold interest in Dharavi land, the doctrinal question arises as to whether any attempt to remove, relocate, or evict those residents might constitute a taking of property such as to animate the provisions of Article 300A of the *Constitution of India, 1949, and of the Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act, 2013*.[130] Further empirical evidence could provide stronger support for the existence of the leasehold evidence identified in my theoretical observations.

125 Mahabir, Crooks, Croitoru & Agouris, above n 7.

126 Lawrence M Friedman, *Impact: How Law Affects Behavior* (Harvard University Press, 2016) 1.

127 Ibid 2.

128 Ibid.

129 Ibid (emphasis in original).

130 Some Indian decisions suggest, for instance, that such takings or expropriations might violate the right to life under the *Constitution of India, 1949*, Art 21: *Olga Tellis & Ors v Bombay Municipal Council* [1985] 2 Supp SCR 51; *Supreme Court of India Ahmedabad Municipal Corporation v Nawab Khan Gulab Khan & Ors* (Supreme Court of India, 11 October, 1996); *TM Prakash v The District Collector* (High Court of Judicature, Madras, 27 September, 2013). And see also Jain, Chennuri, and Karamchandani, above n 50, 16; Krithika Ashok, Paul T Babie, and John V Orth, 'Balancing Justice and Private Property in Constitutional Takings Provisions: A Comparative Assessment of India, Australia, and the United States' (2019) 42 *Fordham International Law Journal* forthcoming.

But putting aside both avenues of further research, whatever might happen in Dharavi, the current socio-economic status of its residents is not a situation in which one ought to take any pride merely for the fact that it represents an interesting case study for the property theorist. Indeed, my purpose here is merely to point out a working example of the ways in which social relations can give rise to methods of interaction that account for the allocation, control, and use of goods and resources in the absence of formal law. That does not mean that this is a situation which ought to pertain. Rather, the very fact of its existence draws attention to the pernicious effects of neoliberal capitalism and the existence of a vast urban proletariat which may constitute a serious threat to its hegemony.[131]

Thus, to end where I began: Dharavi, as any with slum, represents a fascinating instance of social relations giving rise to a spontaneously emerging new property form. For the property theorist, this is of interest. From the perspective of politico-economic theory, and the justifications proffered for private property, it ought to give us pause for concern and draw attention to the need not only to take seriously, but to respond, through both law and policy, to the plight of so many millions of people the world over who live in such circumstances.

131 See Davis, above n 4.

The Paris Climate Change Agreement: An Analysis of the Legal, Economic and Other Underlying Dynamics

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Abstract

In recent times, a number of evidence from employment of technology suggest that human activity continues to drive climate change. The American Geophysical Union suggests that societal intervention is needed to reverse the impact of years of negative activities in the environment. The objective of this essay therefore is to examine the various legal framework that have shaped climate change, especially the most recent; the Paris Agreement on Climate Change. Its impact, legal provisions and the cost of implementation of its provisions will be the main issues to be addressed in this article. Suggestions will also be made on ways to accommodate all divergent parties, despite their current levels of development in an effort to support world climate change through an effective public enlightenment mechanism. It is pertinent to reveal the concerted efforts that various legislations of governments have put in place at various levels to support their home manufacturing sectors and energy sectors to observe emission targets in tandem with the set goals of the Paris Agreement. These goals are incorporated with the adoption of broad based policies that mirror international conventions that preceded the Paris Agreement such as the Kyoto Protocol.

1.1 Introduction

French scientist, Jean Baptist Fourier, was the first to describe the greenhouse effect in 1824, where in an article, he discussed the temperature of the earth and how it could be balanced with the atmosphere.[1] According to Jonathan M. Harris and Others;[2]

> Clouds, water vapour, and the natural greenhouse gases carbon dioxide (CO2), methane, nitrous oxide, and ozone allow inbound solar radiation to pass through but serve as a barrier to outgoing infrared heat. This creates the natural greenhouse effect, which makes the planet suitable for life. Without it, the average surface temperature on the planet would average around –18° C (0° F), instead of approximately 15°C (60° F).

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1 James R Fleming, "Joseph Fourier, the 'Greenhouse Effect', and the Quest for a Universal Theory of Terrestrial Temperatures" *Endeavour* Vol 23/2 (1999) 72-75.

2 Jonathan M. Harris, Brian Roach and Anne-Marie Codur, *The Economics of Global Climate Change* (Global Development and Environment Institute, Tufts University 2017) 3.

Thus, the greenhouse effect is necessary, however, due to human activities and industrialisation, the level of GHG in the atmosphere have increased over the years, causing increased greenhouse effect and consequently, an increase in the temperature of the earth, commonly referred to as global warming.[3]

Statistics show that the earth is warming, and the rate of warming is increasing every year. Increasing seas affect coastal areas, for example, 31 towns and cities in Alaska, are at risk of being flooded, while some cities in Florida have experienced damage from persistent floods.[4] Records show that that the fourteen or fifteen warmest years occurred from 2000 to 2015, and even year 2016 was warmer and was about 1 degree Celsius above pre -industrial levels. This goes to show that from records kept in the mid –nineteenth century, the global average temperature had risen by about 1 degree Celsius.[5] The current rate of warming is about 0.13 degrees Celsius per decade, but the US Department of Energy's Pacific Northwest National Laboratory has figures to show that this rate of warming could be as high as 0.25 degrees Celsius by year 2020.[6] Global warming has significant impacts on plants, animals and all forms of life in the ecosystem. Many of the changes in the environment as a result of global warming include rising sea levels, ocean warming, as well as, diminishing snow and ice levels.[7]

The quest to find a more diplomatic and balanced approach to climate change issues led to the formation of the UN Framework Convention on Climate Change (UNFCCC).[8] 23 years after the Parties to the UNFCCC signed the Convention, specifically on 12th December, 2015, the Paris Agreement was adopted.[9] Prior to this, there had been the Climate Conference in Copenhagen in 2009. The Paris Agreement set out from the beginning to produce a superior document to the Copenhagen Conference.[10] Previously, under the 1997 Kyoto Protocol,[11] only

3 Costello, Anthony, et al. 'managing the health effects of climate change: lancet and University College London Institute for Global Health Commission.' *The Lancet* 373.9676 (2009): 1693-1733.

4 Jonathan Harris, Brian Roach and Anne-Marie Codur, "The Economics of Global Climate Change" Available at <http://www.ase.tufts.edu/gdae/education_materials/modules/The_Economics_of_Global_Climat e_Change.pdf> viewed on 12 November 2018.

5 *Andrew Freedman, "The Hottest Year: 2015 was Hot, 2016 will be Hotter" Available at* <https://mashable.com/2016/01/20/2015-hottest-year-record/#h8WeU75D3Zqt> viewed on 22 November 2018.

6 The Guardian, "Global warming 'set to speed up to rates not seen for 1,000 years" (March 9, 2015) Available at <https://www.theguardian.com/environment/2015/mar/09/global-warming-set-to-speed-up-to-rates-not-seen-for-1000-years> Viewed on 12 November 2018.

7 Damian Carrington, "World's Climate about to enter "Un- charted Territory" as it passes 1°C of warming", *The Guardian*, November 9, 2015.

8 United Nations Framework Convention on Climate Change (UNFCCC) 9 May 1992, 1771 UNTS 107, 31 ILM 849 (entered into force 21 March 1994).

9 The Paris Agreement to the United Nations Framework Convention on Climate Change, 12 December 2015. Dec CP.21, UN Doc FCCC/CP/2015/L9 [Paris Agreement].

10 Charlotte Streck, Paul Keenlyiside and Moritz Von Unger "The Paris Agreement: A New Beginning" *Journal for European Environmental and Planning Law* Vol 13 (2016) 3-29; see also Paris Agreement, Art. (2).

11 Kyoto Protocol to the United Nations Framework Convention on Climate Change, 11 December 1997, 2303 UNTS 148, 37 ILM 22 (1998) (entered into force 16 February 2005).

a limited number of 35 countries were willing to consider limiting the GHGs they emit.[12] We live in a world that is currently propelled by oil and other fossil based products. However with the hue and cry for governments everywhere to lower their carbon footprints it becomes imperative that there should be a concerted and long term action by nations and organisations to effectively tackle global warming rather than resorting to volatile short term policies.

It is hoped that the Paris Agreement on Climate Change, being a more accommodating legal regime, will not only instil the needed desire to change energy supply source, but will actually awake in States, the yearning to keep to the timeline entered by nations for such changes to occur. Such nations have to recognise the appropriate role of economic indices of various nations in working out acceptable solutions to climate change. The time seems right for such a change, especially in Africa which is home to some of the world's largest oil reserves. According to the 2012 BP Statistical Energy Survey, Africa had proven oil reserves of 132.438 billion barrels at the end of 2011 which accounts for 8.01% of the world's reserves. Despite that, many years of oil production in African countries such as Nigeria, Libya, Algeria, Egypt and Angola have not been matched by commensurate level of growth and development. In Nigeria for example, oil exploration is linked to substantial damage to the environment, especially in the Niger Delta area. Other effects are loss of aquatic life resulting from oil spills and massive injection of hydrocarbon to the environment and other attendant health hazards from gas flaring.[13]

2.1. A Historical Precursor to the Paris Agreement

It is necessary to give a brief outlay of events that led to the Paris Convention. Some of these events include various negotiations by the UNFCCC, as well as the Climate Conference in Copenhagen of 2009.[14] Prior to this was the Kyoto Protocol, which, though many nations signed, very few were quick to pass it or ratify it into their domestic legislation, and this has greatly affected the compliance rates.[15] Climate change is an international issue because it requires global co-operation to achieve desired results.

2.1.1. Rio de Janeiro UN Framework Convention on Climate Change (UNFCCC) 1992.

At the 1992, Rio de Janeiro UN Framework Convention on Climate Change (UNFCCC),[16] Countries agreed to reduce emissions through the employment of "common but differentiated responsibilities." This was the first attempt to look

12 Spash Clive L, "The political economy of the Paris Agreement on Human Induced Climate Change: A Brief Guide" *Real World Economics Review* 75 (2016): 67-75.

13 O Tolani, "Legal and Institutional Pre-requisites for Sustainable Oil and Gas Investments in Nigeria" *Afe Babalola Journal of Sustainable Development Law and Policy*, (2013) Vol.1 189-195.

14 Charlotte Streck and others, (n 10).

15 K. Ash, "Paris Treaty Is best Even with USA as a non-Party: But the USA Has No Ratification Dilemma" (2014) Available at <www.greenpeace.org/usa/wp-content/uploads/legacy/Global/usa/planet3/PDFs/ParisTreat yBrief2014.pdf> Viewed on 12 November 2018.

16 UNFCCC (n 8).

at the levels of development of the various Countries to determine what their individual contribution to reduction of GHG into the atmosphere would be.

2.1.2 Bonn in 2001(COP-6)

After the UNFCCC, there have been extensive international discussions, known as "Conferences of the Parties" or COPs, aimed at reaching a global agreement on emissions reduction. One of such is the Conference held in Bonn in 2001(COP-6).

2.1.3 The Kyoto Protocol

In giving legitimacy to the Paris Agreement, it is important to refer to the Kyoto Protocol to the United Nations Framework Convention on Climate Change of 11 December 1997,[17] with its grand plans of massive emission reductions from 2008 – 2020. So many countries were reluctant to sign on to the Kyoto protocol.[18] The Kyoto protocol required parties to work together in promoting the proper system for the development, facilitation and transfer of environmentally sound technologies, which are applicable to climate change.[19] Very few nations signed on to the Kyoto Protocol, and even those who signed, did not rapidly ratify it under their domestic laws. The United States (US) for example signed, but never ratified it. Even at that, the Bush administration of the US withdrew its signature in 2001.[20] This led to a trend where other nations who are major emitters, refused to reduce their operational emission targets. Nations like Russia, naturally had their CO2 emission levels fall due to declining industrial activities, subsequent to the fall of the Soviet Union, and not as a result of aspiring to meet any given targets under the Protocol.[21] Due to the internal workings, of their different economies, some EU (European Union) nations were able to negotiate a collective target under flexible arrangements to either increase or reduce emissions in tandem with the internal workings of their various economies.

Some nations like Canada and Australia withdrew because they could not keep to their emission targets. Canada initially promised a 6% reduction, but thereafter withdrew its commitment in 2011, by which time its CO2 emissions had increased 20% over 1990 levels.[22] Also under Kyoto, emissions were assigned to the countries where the goods were produced, rather than where they were consumed. This had an effect on the capacity of such nations to outsource their carbon credits. Besides, there were hardly any restrictions placed on emissions being generated by developing countries, so the framework to produce emissions was not really curtailed under Kyoto.[23]

17 Kyoto Protocol (n 11)

18 Clive l. Spash, (n 12)

19 Kyoto Protocol, (n 11) Art10 (c)

20 K. Ash, (n.15)

21 G.J.Olivier. Janssens-Maenhout, M. Muntean, and others, 'Trends in Global CO2 Emissions': 2015 Report. Ref. no. JRC98184, PBL1803. Netherlands Environmental Assessment Agency (PBL), European Commission Joint Research Centre (JRC), Institute for Environment and Sustainability (IES), The Hague.

22 Clive l. Spash, (n 12)

23 Jonathan Harris and others (n 4)

2.1.4 Copenhagen 2009 COP-15

After Kyoto, was the Copenhagen 2009 COP-15 where countries agreed to limit emissions to 2 degrees Celsius, and developed countries made commitments to assist developing countries in their goals to embrace climate change. There was also the Durban Conference of 2011, (COP-17) where parties agreed to adopt a universal legal agreement on climate change, no later than 2015, and which is to take effect by 2020.[24]

2.2. The need for carbon offsetting to reduce emissions

It is necessary that for any meaningful reduction in emission levels, rather than placing emphasis on national emission levels to work towards, as outlined by the Paris Agreement, all concerned sectors who contribute immensely to GHG have to set long term sectorial targets.[25] Carbon offsetting, which is the process of purchasing carbon credits on the international or domestic market to offset carbon emissions, is fast becoming an option for industries seeking to alleviate climate change.[26] Commercial sectors like the aviation sector have been identified as being key contributors to the rise in emission levels of GHG due to the levels of emissions they produce. This rate has been rising steadily over the years. As a result of this, the Paris Agreement recognises that the International Civil Aviation Organization (ICAO) has a role to play in sustainable development by keeping emission levels low; specifically making industry participants keep to the global market based measure (MBM).[27] The principal instruments regulating the reduction of anthropogenic GHG emissions include the 1992 UNFCCC,[28] the 1997 Kyoto Protocol[29] and the 2015 Paris Agreement.[30]

There is provision for 'policy progression' over time in Article 4 (3) of the Paris Agreement. The goal of this clause is to ensure that once nations have taken a stand on their respective policy plan, they have to review such plans every five years to ensure greater potentials for sustainability. This progression plan is part of the outcome of extensive negotiations with the support of the EU, Brazil and some other countries to avoid policy stagnation.[31]

Standards such as VCS, CCB and Gold Standard to promote the mutually supportive implementation of most of the goals of the Paris Agreement include policies that integrate local stakeholder with assistance for capacity building.[32]

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24 Ibid.

25 Markus Gehring and Freedom – Kai Philips *'Intersection of the Paris Agreement and Carbon Offsetting'* CIGI Policy Brief No.88 September, 2016.

26 Charlotte Streck, and others, (n 10)

27 *Ibid*

28 UNFCCC (n 8)

29 Kyoto Protocol (n 11)

30 Paris Agreement (n 9)

31 Lavanya Rajamani, (2016) 'Ambition and Differentiation in the 2015 Paris Agreement' *International and Comparative Law Quarterly* vol.65, pp. 493-514

32 *Ibid*

In furtherance of reaping the full benefits of this arrangement, there has to be a shift from basing emissions on sectorial production to having long term emission reduction targets in any given sector.[33] What this implies is that sectors such as aviation and other manufacturing outfits with high emission levels would effectively key into global emission reduction levels as agreed by parties to the Paris Agreement, rather than leaving such reductions to fluctuations which are often encountered in the line of production. Thus, despite the rise in sectorial business activities, reduction levels remain consistently on the increase, rather than being subject to a percentage of output levels. This will reduce the perceived inequality of carbon credits that can currently be accessed in the market and will overtime time achieve 'carbon-neutral growth' which in effect means growth that can be monitored and revisited over time for reduction in sectorial emissions.

3.1. An Analysis of the Contents of the Paris Agreement

3.1.1 The Legal Obligations Encapsulated under the Paris Agreement

In the run up to the Paris Agreement of 2015, there were a lot of behind the scene decisions. As already been stated, the Paris Agreement is subject to review every five years by individual nations to determine their progress towards reducing emission levels as well as to sort out other grey areas which the agreement did not want to forcefully impose upon participating nations. This is especially given the non-binding nature of the agreement and its reliance on the force of diplomacy.[34]

3.1.2. The Paris Decision

One of the agreements which exerts great influence over the Paris agreement is the Paris Decision (P.D). The P.D. was adopted to establish implementation details for the Paris Agreement before its entry into force. It acted as a soft cushion to compel nations like the US to agree to the terms of the Paris agreement without the need for an outright treaty to compel them to reduce carbon levels. Rather than an outright treaty, core legal principles were adopted under the UNFCCC which acted as a guideline to the parties.[35]

3.1.3. The Non- Binding Nature of the Legal Provisions of the Paris Agreement

Some authors such as Tolani[36] emphasis that there is a need for individual nations to have coherent national energy and allied natural resource policy and master plan. This kind of well-defined master plan not only makes it invaluable to prospective investors who will have a fair overview of a countries' energy potentials, but also serves as a guiding tool to the state to speedily ratify certain international agreements and conventions which have parallel provisions and aspirations as the domestic policy.[37]

33 *Ibid.*

34 Charlotte Streck and others (n 10)

35 *Ibid.*

36 O Tolani (n13) p.192.

37 *Ibid.*

The Paris Agreement contains more details in terms of structure than most other agreements before it. It is a classic in the realm of international law. Despite all of these, its provisions are hardly binding on parties. This is because the states were given the leverage to decide what their mitigation goals would be. They are to formulate procedures and goals within their own given domestic objectives. The provisions of the agreement are not mandatory and can hardly be called legal obligations, and this also makes them non- enforceable.[38] There are no external or internationally recognised monitoring bodies. The monitoring is done internally by experts in member nations, by following the accountability process built into the agreement which is reviewed every five years.[39] Instead, the Convention carries out its supervisory role after every 5 years to monitor how nations are committed to their carbon reduction targets.[40]

Since every country determines how much pressure to allow on internal monitoring, it is no surprise that this flexibility led to the ratification of the agreement by over 80 countries, just a year after it was negotiated.[41] The arrangement remains in force despite the pull out by the Trump administration of the US with members still committed to global timetables in such areas as the elimination of the use of fluorocarbons (HFCs) and greenhouse gases, which was agreed on in October 2015.[42] The developed countries that are parties to the agreement recognise the challenge of addressing climate change in developing countries especially in their quest to move away from a fossil dominated economy to cleaner forms of energy. From year 2020, they are committed to over $100 billion a year to aid issues of climate change especially in technical areas in these countries. Most of these funds will be needed to fund forestation to counter the effects of carbon emissions.[43]

While the anticipated aid sum of over US $100 billion a year from year 2020[44] may be far below actual sums needed, it is a good start. Most developing countries, battling with everyday issues of access to health, housing, employment, and education, may be thinly spread financially, and not in a position to develop forests, which by all accounts is a long term investment, with no visible yields in terms of physical improvement of welfare and wellbeing of the populace in the short term.

3.2. Other Crucial Contents of the Paris Agreement

Unlike the Kyoto Protocol which established specific emission limits, the Paris agreement does not establish emission reduction targets, but formulates overall

38 The Paris Agreement (n 9).

39 The Paris Agreement Art. 4(9).

40 *Ibid*. Art. 14.

41 Jonathan Harris and others (n 4).

42 Coral Davenport, "Paris Climate Deal Reaches Milestone as 20 More Nations Sign On," *New York Times*, September 21, 2016; Coral Davenport, "Nations, Fighting Powerful Refrigerant that Warms Planet, Reach Landmark Deal," *New York Times*, October 15, 2016.

43 Scientific American, www.scientificamerican.com/article/poorer-nations-demand-more-aid-to-deal-with-climate- change/; http://roadtoparis.info/2014/11/06/climate-finance-too-little-too-late/

44 ibid

climate change goals.[45] It is within these set goals that nations are to determine their own national priorities, and how to contribute to such goals, bearing in mind the principle of common but differentiated responsibility.[46]

3.2.1 Achieving Balance, Equity and Support for Different Countries

Though the Paris agreement is a reality today, the issues of equity and a balanced approach to the developmental goals of the various parties is properly addressed. This considers the different levels of development of the developed and developing countries in order to set priorities right.

The so called 'firewall divide' amongst the party states, prior to the signing of the agreement was in recognance of the individual assertive approaches and gaps that may account for the difference in GHG emission levels between the developed and developing countries. As a move to curb and perhaps blur this sharp divide, the 'high Ambition Coalition' group was formed by the Foreign Minister of the Marshall Islands, Tony de Brum. The group consisted originally of 3 countries and later grew to over 100 countries. Its purpose was to effectively integrate, under a unified agenda, all the need and concerns of most member states.[47]

3.2.2 The Principle of Differentiation

The principle of differentiation has been applauded as being instrumental to the success of the Paris Agreement. It reflects a reference to the stages and developmental goals and aspirations between the developed and developing countries. The burden sharing formula in all ramifications towards reducing climate change is fundamental to the commitment of Parties. The principle of differentiation recognises that developed countries have to put in more efforts in undertaking emission reduction targets.[48] Since the developed nations have more manufacturing concerns and sectors that contribute to GHG emissions, then it becomes a moral obligation on their part to be in the vanguard for reducing such emission levels, at a rate that is significantly lower than that of the developing nations.

The nation of or nation-state China, accounts for 26 per cent of global GHG emissions. China has undertaken several ambitious de-carbonization programmes which are meant to have long term implications for sticking to the Paris goal of a world that is within carbon levels of 1.5 % of pre- industrial levels.[49] The European Commission has advocated that most developed nations like the US and China who are major emitters have to ratify the Paris Agreement. Just like the Kyoto Protocol, the Paris Agreement could only become effective if it was signed and ratified by the parties. Though 174 countries and the European Union

45 Kyoto Protocol, Art.2 (n 11)

46 The Kyoto Protocol, Art 2(2) (n 11)

47 Charlotte Streck and others (n 10); Paris Agreement, Art. 2 (n 9)

48 The Paris Agreement Art. 4, *ibid*.

49 Ivey Business School, 'The Paris Agreement on Climate Change: An Overview and Implications for Canada' *Policy Brief* https://www.ivey.uwo.ca/cmsmedia/3780635/iveyenergycentre_parisagreement_march1.pdf viewed on 8 December, 2018, see also Art. 2 of the Paris Agreement.

signed on to the agreement on the opening for signature date of 22 April 2016, yet a significantly fewer number were able to ratify them in their home countries through the procedures laid down by their individual governments.[50]

4.1. The Economic and Market Force Dynamics of the Paris Agreement

When it comes to reducing emission levels as envisaged by the Paris agreement, the developed countries postulate that they stand to lose a whole lot more than the developing countries, especially in economic improvements if the terms of the Paris Agreement are strictly adhered to. This makes it important to look at arguments on both sides of the divide to see what the position really is. While J. Olivier and others, comment that visible changes in world C02 emission levels were more precipitated by downturn in the economies of nations like Russia, rather than a pre-meditated effort to comply with targets set by the international community for such reductions,[51] there is also the need to recognise that societies at different levels of development contribute GHG in relation to their developmental activities, and this area is addressed by the Paris Agreement through Article 2.2.[52]

4.1.1 The Position of Developing and Third World Countries

As of now, the scrutiny is on developed economies. Despite this, it is predicted that most of the major future pollutants will be coming from the boisterous activities of developing countries. Most of the developing countries are viewed as not having firm and decisive commitments to the terms of the Paris Agreement.[53] Most of their commitments are conditional. India, which is an emerging economy, ties its CO2 emissions to the Gross Domestic Product (GDP).The growth of the GDP is seen as paramount, and reduction levels are not expected to rise higher than the rate of growth of the GDP.

Also, more coal fired plants will be constructed in the developing countries. An example can be seen in the joint venture entered into by China and Pakistan, for the purpose of generating 1.3 gigawatts from coal power plants.[54] Because there are no formal repercussions for not meeting set targets by the Paris Agreement, African nations and other developing economies might not be under any pressure

50 Clive l. Spash, (n 12); European Commission, 2015. "The Paris Protocol: A Blueprint for Tackling Global Climate Change Beyond 2020." Ref. no. COM (2015) 81 final 25.02.2015.

51 G.J. Olivier. Janssens-Maenhout, M. Muntean, and others, (n 22)

52 Charlotte Streck, Paul and others (n 10)

53 Nicolas D. Loris and Brett D. Schaefer, "Withdraw from Paris by withdrawing from the U.N. Framework Convention on Climate Change" Available at <https://www.heritage.org/environment/report/withdraw-paris-withdrawing-the-un-framework-convention-climate-change> Viewed on May 25, 2017; Energy Information Administration, "Projected Growth in CO2 Emissions Driven by Countries Outside the OECD," (2016) <https://www.eia.gov/todayinenergy/detail.php?id=26252> Viewed on 20 November 2018.

54 Nicolas D. Loris and Brett D. Schaefer, (Ibid.); Press Trust of India, "Chinese President Xi Jinping Announces $2 Billion Fund for South–South Cooperation," *The Economic Times*, September 27, 2015, Available at <http://economictimes.indiatimes.com/news/international/business/chinese-president-xi-jinping-announces-2-billion- fund-for-south-south-cooperation/articleshow/49125071.cms> Viewed on 10 October 2018.

to conform to set targets. Daily environmental issues which are weightier than carbon emissions such as erosion, flooding and pollution of drinking water sources mean that controlling carbon emissions may not be their immediate concern.[55]

Most developing nations, including Nigeria who is a producer of crude oil have import dependant economies on refined petroleum products. Because of their obvious energy dependence, it is clear that a good measure of locally produced alternate energy sources are not available, given that even the technology to process fossil is minimal. Such countries will definitely have their energy needs compromised by an outright switch to modern energy sources. In this regard, the initial resources to put in place alternate energy will be from external sources such as from developed countries.[56] The switch to cleaner forms of energy can take the form of paying for the expertise to come from outside to install the needed infrastructure, human and technologies if this will massively lead to benefits of in the long run. This will work much better than short term technological adjustments to their present energy operations that may not yield the needed effects.

There are still developing countries that are oil producers and are not import dependant for their energy. Countries like Saudi Arabia, Iraq and Iran are oil producers who depend on oil rents to shore up their budget deficits. Even with the coming into effect of the Paris Agreement and the decarbonisation spiral by most countries, the alternative for such countries such as Saudi Arabia would be to produce oil at a cheaper rate that will ensure that demand is maintained.[57]

4.2. The Position of the Developed World, Especially the Five Major C02 Emission

Producing Countries

It is noted that for the Paris Agreement to achieve desired results, the major polluters must be part of the agreement. The major polluters consist of most of the top 20 wealthiest countries in the world whose economies are mostly built on oil, gas, coal and petroleum. They account for 60 percent of global emission.[58]

A report by COP 24 identifies that although developing countries have a lot to contribute to achieving the goal of limiting global temperature rise to 1.5 degrees Celsius above pre- industrial levels, it is felt that the support of the more wealthier nations of the world would have a higher impact if they support actions that are not happening within their territories. It is time to confront the glaring inequalities between nations, and also even inequalities within nations. This is because disparities exist between rich corporate organizations and not so rich ones. This

55 Ibid.

56 Simon Upton, 'Implementing the Paris Agreement in a world of Fossil Abundance' Being a presentation at Imperial College London on 21 April, 2016, available at www.oecd.org/ environment/

57 *Ibid*.

58 G.J.Olivier . Janssens-Maenhout, M. Muntean, and others, (n 22)

situation has not been helped by the US rolling back regulations that relate to climate change. Brandon Wu of Action Aid states that the easier way out would involve rich countries making stronger commitments to alleviate the climate crisis they mostly generated.[59]

Most developed nations now have a strategy of drastically reducing fossil consumption to drive their economies, while switching to coal. Coal remains a veritable source of emissions and so, an economy that is driven by coal fired plants is just as damaging as a fossil driven one. These nations justify their positions on the fact that most developing nations also add to the carbon time line through agricultural activities which is also a major contributor to atmospheric GHG emissions.

Another strategy used by developed nations in relieving themselves of responsibility for GHG emissions is to pass the blame to the end users of their products. A national economy like Norway is largely built on oil. But their oil is largely used and combusted by other nations. They lay claim to a green economy, as electric cars with their almost zero GHG emission levels are in dominant use, but for some reason neglect to acknowledge their role in economic activities in other countries, built on the oil purchased from Norway. As a matter of fact, they plan to expand their activities to gas related activities, since they opine it will be amongst the energy mix of the future. It becomes clear that their future focus is not related to reducing emissions, but in taking advantage of the by-products of fossil such as gas for driving their new age economies.[60]

4.3. The Position of the Corporate Giants on Use of Fossil versus Clean and Renewable

Energy Sources

Statistics show that the world CO2 emissions from fossil fuels and industry are now around 36 Gt.5. The challenge with keeping to the current status quo is that if that rate is sustained, the 2°C carbon budget will be exhausted in around 30 years.[61] Since the needed framework is not yet in place to forestall emission, the deadline is even more urgent from an infrastructure perspective given its potential to lock-in emissions for decades.[62]

There is no doubt about it, consumers want cost effective energy. Most of the energy giants such as BP and Chevron rely on consumer needs to reiterate that

59 Jessica Corbett "Rich nations aren't 'paying their fair share' to mitigate the climate crisis, says report released by COP24" www.commondreams.org accessed 8 December, 2018

60 K Keil, 2015. Report from 2015 Arctic Frontiers Conference "Climate and Energy". The Arctic Institute, Washington. On line at http://www.thearcticinstitute.org/012015-arctic-frontiers-part1/.

61 IPCC, "Summary for Policymakers", Climate Change 2013: The Physical Science Basis: Contribution of Working Group I to the Fifth Assessment Report of the Intergovernmental Panel on Climate Change, Cambridge University Press, Cambridge, United Kingdom and New York, NY, USA, www.climatechange2013.org\\images\\report\\WG1AR5_SPM_FI- NAL.pdf

62 IEA, World Energy Outlook 2012, IEA, Paris; http://www.oxford- martin.ox.ac.uk/news/201603-two-degree-capital; http://www.ft.com/intl/cms/s/0/a2d181a0-f839-11e5-803c-d27c7117d132.html#axzz44zAavoX2

energy produced from fossil sources remains the most affordable source and that it is only a mix of all energy sources that can effectively deliver cost effective supply. It is this lacuna that the corporate players in the energy sub-sector rely on to state categorically that from above statistics, it is not likely that other forms of renewable energy will overtake fossil sources anytime soon. To them maintaining the 2 percent GHG emission level might not be foreseeable even in the next 30 years. They point to the huge infrastructure required to put in place alternate forms of energy as a cost outlay that will need a very long period to offset.[63]

For example, BP In its Energy Outlook confidently states that 'fossil fuels remain the dominant form of energy powering the global expansion: providing around 60% of the additional energy and accounting for almost 80% of total energy supplies in 2035'.[64] Then again, statistics show that for the major newly industrialised nations such as China, though reliance on coal may be slowing down;[65] the growth rate in fossil and allied products has been on a steady rise. Therein lies the view that there might not be a weighty reduction in fossil production to meet up with the 2 percent anticipated averages projected by the Paris agreement.

4.4. The US. Withdrawal from the Paris Agreement

During the Obama administration, President Obama was in favour of transitioning to a carbon free economy rapidly. In pursuance of this, he had committed the US to 'reduce carbon emissions by 26 percent to 28 percent below 2005 levels by the year 2025 in its nationally determined contribution to the Paris Agreement'.[66] This was intended to increase to 80 percent reductions by the year 2050.[67] To carry out this de-carbonisation process, regulations were put into place in areas such as electricity generating units, vehicles oil and gas sectors.

Recently, President Donald Trump fulfilled his election promise and withdrew the US from the Paris Agreement at the May G7 meeting of 2017. This withdrawal was mostly predicated on the premise that it will not only be detrimental to US energy sector, but will also result in massive job loss across different strata of society in the years to come. This position is coming on the heels of pressure that has been mounted on the US over the years as the second largest contributor to GHG to reduce emission levels. While the president has been vocal on this, businesses within the US and most other organizations continue to pledge their support for the principles of the Paris Agreement.[68]

4.4.1 The Reasons for the US Withdrawal from the Paris Agreement

The main reason for the United States (US) withdrawal from the Paris agreement according to Simon Uptown is to bypass the cost that will be required to set up

63 Simon Uptown, (n 58)

64 *Ibid.*

65 *Ibid.*

66 Nicolas D. Loris and Brett D. Schaefer, (n 55)

67 *Ibid.*

68 Ibid

the infrastructure to support renewal and clean energy sources such as wind and geothermal energy. According to him economic considerations play a vital role in how far nations are prepared to implement the Paris Agreement since the consumer will bear the burden for increased cost of production of clean energy or a switch to renewable sources.[69] The main reason for the US withdrawal from the Paris Agreement has to do with the cost of setting up infrastructure to comply with the agreement. It is anticipated that these costs will definitely drive energy prices higher. The economic significance of such increased costs is that business may choose to absorb such higher costs or pass them on to their consumers. Each option has its own attendant set of impacts.

Macron, President of France has been spearheading environmental issues, especially some of the positions that were elucidated at the Paris meeting which goals are to the extent that some strict measures must be put in place for such transition to a carbon free environment. Macron for instance, continued with a set of fiscal policies which had been put in place by former president Francoise Hollande "which included a carbon tax of $51 a ton (paywall)" Through the taxes levied on products, and producers and importers of fossil fuel, they are finally passed to the consumers.[70]

It seems apparent that International decarbonisation is a sure way to promote global energy poverty without a commensurate decline in the global carbon levels. Studies from the Massachusetts Institute of Technology's Joint Program on the Science and Policy of Global Change projects that the Paris agreement on guidelines for controlling warming would only reduce global warming by an almost insignificant 0.2 degrees Celsius by 2100.[71]

With the rise in diesel price by 6.2% between January 2017 and January 2018, more low income households are feeling the brunt of these taxes. It is suggested that to lessen the impact of carbon taxes, the government may reinvest the proceeds in social subsidies that will benefit the low income consumers.[72]

4.4.2 A Contrary View to US Pull Out from the Paris Agreement

The editorial board of the New York (NY) Times submit that the decision to pull out from the agreement was not substantiated by full data. They commended the agreement for its flexibility and point to the fact that a great number of jobs have been created in the renewable energy sector. Rather than the US feeling constrained by the terms of the Paris Agreement, flexibility if affords Parties should be commended.[73]

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69 Simon Uptown, (n 58)

70 Annabelle Timsit 'France's fuel protests show how poor people can bear the cost of fighting climate change' , https://qz.comaccessed on 8 December 2018

71 Mark Dwortzan, "Report: Expected Paris Commitments Insufficient to Stabilize Climate by Century's End," MIT News, October 22, 2015, http://news.mit.edu/2015/paris-commitments-insufficient-to-stabilize-climate-by-2100-1022

72 Annabelle Timsit (n 74)

73 *The New York Times* –The Opinion Pages "Our Disrespectful Exit from the Paris Accord" Editorial Board June 2012 Anchored by Marie Guillard www.nytimes.com/2017/06/01/opinion/tru accessed on 23 August 2017

A divergent view to President Trump's exit of the US from the Paris Agreement is expressed by the New York Times. It is the opinion of their editorial board that it is the future generations that will suffer from Trump's short sighted decision. The New York Times editorial board goes on to say that apart from this, he has endangered American Leadership and competitiveness at the international global playing field. The winners in this game seem to be the "various fossil fuel interests" who stand to gain in the short term; thereby supporting the view that implementation of the Paris Agreement will sabotage and cost the economy in various ways.[74] It is a voluntary agreement put in place by over 190 countries through the UN acting through the UNFCCC and has surmounted all the pitfalls of the 1997 Kyoto Accord, which had called for a legally binding agreement. They conclude that there really was no need for President Trump to roll back policies aimed at reducing GHG from coal fired plants automobiles and other such sources which had been put in place by the Obama administration.[75]

The New York Times goes on to list the demerits of Trumps decision. He is insensitive about the stark warnings of imminent environmental disruptions and the attendant chaos it will have on poorer nations who may not be able to handle the outcomes of such altered weather conditions.[76] This will be as a result of efficiency in use of cleaner fuels. Though carbon emissions were down by 12 percent in the last decade, it did not effect job creation under Obama, as more than 11.3 million jobs were created.[77] Though the coal industry, which is fossil based is losing jobs, employment within the solar industry which is a source of clean and renewable carbon free energy has consistently increased from 24,000 which it was a decade ago to 260,000. Besides, 70 percent of US voters do not support President Trump on this. So many corporations have also pledged their continued support to the climate change deal within the US. Exon Mobil stockholders won a crucial vote requiring the company to start accounting for the impact of climate change policies on business.[78]

4.5.0. The Real Benefits the Paris Agreement Generally will give to All Concerned Parties

The Paris Agreement, if implemented to a very high degree, would meaningfully lower the economic cost of combating outdoor air pollution. Air pollution from fossil fuel emissions, especially from road transportation directly impacts healthcare, although this may not be so obvious. It has been estimated for example, that outdoor air pollution in OECD countries cost 1.7 trillion USD in 2010.[79]

74 *Ibid.*

75 *Ibid.*

76 *Ibid*.

77 Ibid.

78 Ibid.

79 Simon Uptown, (n 58),citing OECD, 'The Cost of Air Pollution: Health Impacts of Road Transport' (Paris: OECD Publishing, 2014)

Aside from air pollution from transportation, global warming increases the incidences of flooding. For example, in Miami Beach, Florida, more than $400 million has been spent on persistent floods due to a rise in sea levels.[80] Some of the fall outs of global warming and attributes the plummet of estate prices of residents along such coastal cities as Florida to the constant flooding that often overwhelms the area.[81] It is noted in conclusion that the Paris Agreement is having impact. Developing nations though still relying heavily on coal are making use of renewable sources. Jos G.J hopes that this trend will continue and that countries such as India and China who are very fast expanding economies will also tune in to renewable energy.[82]

Such recurrent flooding effects real estate pricing. Residents of several coastal cities experiencing higher frequencies of flooding face reduced worth of their property. There are major implications for the insurance industry; according to the president of the Reinsurance Association of America, global warming could ruin the industry.[83] This is in form of high claims from damaged buildings and other infrastructure covered insurance premiums.

If indeed the effects of climate change are likely to be severe, it is in everyone's interest to lower emissions for the common good. Climate change can thus be viewed as a public good issue, requiring collaborative action to develop adequate policies. In the case of climate change, such action needs to involve all stakeholders, including governments and public institutions as well as private corporations and individual citizens.

5.0. Conclusion and Reccomendations

There is a future of impending climate disruption. The massive scale of hurricane Irma that hit Florida and the coastal town of Miami in September 2017 is evidences of climate change disruption. Gradual warming temperatures, extreme winds, rainfall and storm surges are key ingredients of a hurricane.[84] The Paris Agreement provides an avenue for governments to embrace long term reliable changes that will give the desired effect and keep global emission averages at 2 percent, working progressively to 1.5 percent as envisaged by the Paris Agreement.

In developed countries, there have been changes in everyday use of energy. A continuous switch from coal to natural gas and renewable energy is on-going, lowering overall CO2 emissions. Though coal production is still expanding, especially to enable people in the lower income bracket to have affordable energy but an increasing share of new energy production is also coming from renewables.

80 Erica Goode, "Intensified by Climate Change, 'King Tides' Change ways of Life in Florida," *New York Times*, November 17, 2016

81 Eugene Linden, 'How the Insurance Industry sees Climate Change' *Los Angeles Times*, June 16, 2014

82 G.J.Olivier . Janssens-Maenhout, M. Muntean, and others, (n.22)

83 Eugene Linden, (n 85)

84 Friends of the Earth US, CNN on Hurricane Irma as it barrels towards Florida on 9 September 2017

There have been signs of levelling off, when it comes to emissions. It is hoped that this is an indication of a more permanent state of affairs. This is because emissions continue to rise from rapidly expanding developing countries such as China and India; so much so that China surpassed the United States in 2006 as the largest carbon emitter in the world.[85] In addition to total emissions by country, it is important to consider per capita emissions. Per capita emissions are much higher in developed countries.[86] The highest rates are observed in Gulf countries, such as Qatar.

A meeting will be held in December 2018 as diplomats meet in Katowice, Poland in a bid to reassess the efforts made by nations so far, and make new commitments. Details from climate tracker three years on from the agreement show that many emitter nations are far from meeting their targets. The goal is to prevent the world from heating up beyond appreciable levels. Even now, it is pushing in excess of 2 degrees Celsius (3.6 degrees Fahrenheit). It is estimated that even with the current pledges; the world may only be able to achieve 3 degrees Celsius warming. It is suggested that the only way to effectively achieve the 1.5 degrees Celsius Paris target would be to consistently and effectively achieve transition to clean energy as soon as possible.[87]

When it comes to calculating carbon credits, it is a very meticulous task. The main challenges lie in offsetting carbon credits. It is not easy to set standards that cut across board and across international boundaries. The determining factors for calculating carbon offsets are taken from a normal business day of the company offering the offsets. This has led to a backlash of accusations from the media and other interest groups as to possible existence of fraud, non-existent projects, and abuse of this emerging sector.'[88] The Paris Agreement thus has a role to play in setting standards for the calculations of these emissions.

Renewable energy sources such as wind, solar, geothermal are much relatively clean sources of energy over and above fossil sources such as fuel, and other crude end products. Fossil use should be reduced because of the environmental issues that detract from their efficiency in reducing carbon emissions.[89] In addition to use of renewable energy sources there will be the need to invest in energy efficient projects, which include technologies that promote economies that are energy-efficient.[90] One of such energy efficient technology is the process of methane

85 G.J.Olivier and others, (n 22)

86 International Energy Agency, 16 March 2016 https://www.iea.org/newsroomandevents/ pressreleases/2016/march/decoupling-of-global- emissions-and-economic-growth-confirmed.html

87 Brad Plumer and Nadja Popovich, 'The world still isn't meeting its Climate Goals" *New York Times* 7 December 2018 Accessed at www.nytimes.com viewed on 8 December 2018

88 Doug Struck, "Buying Carbon Offsets may Ease Eco-guilt but not Global Warming", Christian Science Monitor (20 April 2010), Available at <www. csmonitor.com/Environment/2010/0420/ Buying-carbon-offsets-may-ease- eco-guilt-but-not-global-warming> Viewed on 22 October 2018.

89 Markus Gehring and Freedom – Kai Philips (n.26)

90 Deborah Carlson and others, "Purchasing Carbon Offsets: A Guide for Canadian Consumers, Businesses, and Organizations" (Vancouver, BC: David Suzuki Foundation & Pembina Institute, 2009) 23; Otto Andersen, Unintended Consequences of Renewable Energy: Problems to Be Solved (London: Springer, 2013) 1.

recovery from landfills mining areas and livestock waste. This is significant, considering the immense contribution of methane gases to global warming. However, in most jurisdictions, there are legally recognised forms of methane sequestration. In such cases, there may be no further need for carbon offsets.[91]

As far as the corporate world is concerned, there is never a right time to implement better climate enhancing policies. The irony of our governments is that we have most of these corporate moguls in governance, and they put their weight into legislation that would enhance their profit levels, despite the volatile nature of such policies. Governments have a responsibility to resist such pressures by giving better incentives to corporations and business that are willing to partner with it. This is the whole essence of the carbon offsets. Such offsets must be properly monitored to be in line with future emission targets.[92] The Climate Action Tracker which is an independent organization that tracks compliance with climate change goals, rates as 'inadequate the commitments by a long list of countries, including Russia, Japan, Australia, New Zealand, Canada, Argentina, South Africa, Chile, and Turkey.'[93] Policymakers of oil producing countries are at a big advantage because of the enormous wealth at their disposal. They should take advantage of the leverage provided by their sovereign wealth funds to create the institutional and infrastructural foundations of sustainable growth outside the fossil fuel sector.[94]

The Paris Agreement relies on a high level of transparency from the parties. This is reflected in Article 13. There is required to be in place, a robust accounting standard, as well as a network of efficient support system to other nations who may need the expertise to set up their own accounting systems.[95]

For the Paris Agreement on climate change to work, nations must seek out what is mutually beneficial to mankind, rather than having a myopic view based on volatile economic short term indices. The challenge of non-ratification of the agreement will fizzle away once the political will to put in place a stable framework for transition to the proposed newer forms of energy is in place.

91 Ibid.

92 OECD, Companion to the Inventory of Support Measures for Fossil Fuels (Paris: OECD Publishing, 2015).

93 Climate Tracker, Available at http://climateactiontracker.org/methodology/85/Comparability-of-effort.html viewed on 8 December 2018.

94 Simon Upton, 'Implementing the Paris Agreement in a world of Fossil Abundance' (n 57)

95 Summary to the Paris Agreement, Available at https://www.unece.org/fileadmin/DAM/stats/documents/ece/ces/2016/mtg/Session_1_Bigger_picture_of_COP21.pdf viewed on 8 December 2018.

Delegation of Obligations under Part III/IV of the Indian Constitution to Non State Actors: Ushering of Police State in India!

Dr. Ashutosh Hajela*

Abstract

The Constitution of India fastens upon the 'State' the obligations that it owes to the citizens and persons as prescribed under its Part III and Part IV. The obligations under Part III are 'guaranteed' to be fulfilled by the State at the behest of the apex court of the land as also those running under Part IV which are equally obligatory upon the State, though non-enforceable through the courts of law. The State, however, has required private players in the field of education and health to reserve seats/facilities for the economically weaker people, through legislation(s)/guidelines, thereby offloading itself from the Constitutional Obligations and casting burden upon them. The apex court, too, in its zeal to enforce the 'guaranteed' delivery of these fundamental rights to the citizens, has not been able to draw a line in between the individual claims of the citizens and the interest of the public. The court, going by the majority opinions, in Society for Unaided Schools of Rajasthan read with Indian Medical Association v Union of India in the education sector as well as its opinion in the subject matter of Social Jurist, v NCTD vide Union of India v. Mool Chand Khairati Ram Trust, in the medical stream, unfortunately, facilitates the state in forcing charity upon the non-state/private players, being in a commanding position, thereby, re-stepping in the shoes of a police state. This is an unwelcome trend; the state must explore and devise suitable and effective means to cater to its primary obligations rather than 'outsourcing' them to private players and implementing them with 'heavy hands'. Nevertheless, the non-state actors must, voluntarily, conscientiously assist the state in the noble cause of education and heath, which is essentially a service towards mankind."

I

The basic requirement of life, if stretched from bread, clothing and shelter, necessarily, hangs on to health and education. A healthy and educated mind, only, is in a position to earn a decent living and command suitable clothing and shelter, thereafter. If not for an educated and healthy mind, the remaining facets of life would actually prove to be meaningless.[1] It is consequent to the basic requirement of health and education for every human being that the State has been made duty bound to cater for the twin needs of its citizens. The basic law of the land, the Constitution of India, mandates the State to "provide free

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1 *Mohini Jain v State of Karnataka* (1992) 3 SCC 666: "The dignity of the individuals cannot be assured unless accompanied by the right to education" cited by Justice K. Radhakrishnan at Para 5 in *Society for Unaided Private Schools of Rajasthan v Union of India* available at http://ncpcr.gov.in/show_img.php?fid=522 visited on 19.06.2018

and compulsory education to all children of the age six to fourteen years".[2] It further empowers[3] the State so that it may to provide for the education related claims of the children by legislating upon the subject in the most appropriate manner. Even though the express imposition of this mandate has come down a bit late[4] in India's tryst with governance, the same is a benevolent initiative of the Indian Parliamentarians who ventured[5] to fasten the liability upon the state to cater for the most important human right that must be made available to the citizenry, though the act was triggered in pursuance of the ruling of the apex court in several cases[6] culminating in *Unnikrishnan J.P. v State of Andhra Pradesh*.[7] It was emphatically ruled by the apex court of India in *Unnikrishnan* that the citizens of the country did possess a fundamental right to receive education.[8]

The Right of Children to Free and Compulsory Education Act, 2009 got enacted in furtherance of the mandate under Article 21A of the Constitution of India, purportedly, to deliver to the masses the right to education and to fasten the liability for the same on to the Central and State governments including the local authorities. The legislation, however, appears to save the state considerably from its liability by 'roping' in the resources of the 'private players' as far as the delivery of the right to provide free and compulsory education to the children is concerned. The legislation has caused outsourcing of substantive part of the state's duty to the unaided schools of the state to make provisions for reserving twenty five percent students of their intake capacity in Class I to the disadvantaged and weaker sections of the society and from which no "fees or charges or expenses"[9] can be charged. Such private schools have been brought under an arrangement of reimbursement[10] of the expenses, thus incurred by them, in the process of

2 Article 21a, the Constitution of India

3 *Ibid*, "The State shall provide free and compulsory education to all children of the age of six to fourteen years in such manner as the State may, by law, determine."

4 Inserted vide the Constitution (Eighty-sixth Amendment) Act, 2002, Section 2 with effect from April, 1, 2010.

5 Lot of financial implications had been coupled with elevating right to education to the status of the fundamental right; The financial implications were worked out by the then National Institute of Education Planning and Administration according to which, the government needed to spend Rs 3,21,196 crore over six years to implement the legislation. Inputs as available at: //economictimes. indiatimes.com/articleshow/3010412.cms?utm_source=contentofinterest&utm_medium=text&utm_campaign=cppst visited on June, 18, 2018.

6 *Supra* n 1: The apex court had declared the right to education to be a fundamental right flowing under Article 21

7 (1993) 1 SCC 645

8 *Ibid* at Para 226, Part V

9 Section 3(2), Right of Children to Free and Compulsory Education Act, 2009

10 *Ibid*, Section 12 (2): "The school specified in sub-clause (iv) of clause (n) of section 2 providing free and compulsory elementary education as specified in clause (c) of sub-section (1) shall be reimbursed expenditure so incurred by it to the extent of per-child-expenditure incurred by the State, or the actual amount charged from the child, whichever is less, in such manner as may be prescribed: Provided that such reimbursement shall not exceed per-child-expenditure incurred by a school specified in sub-clause (i) of clause (n) of section 2: Provided further that where such school is already under obligation to provide free education to a specified number of children on account of it having received any land, building, equipment or other facilities, either free of cost or at a concessional rate, such school shall not be entitled for reimbursement to the extent of such obligation."

providing free education to the students to the tune of twenty five percent. The amount to be reimbursed, has to be only that much amount which the State would have incurred in providing education to those children in its schools. The fact remains pertinent to be noted that the fee charged by the government schools is on an extremely lower side as compared to that charged by the private schools, being commensurate with the quality of services provided by them to the students. It is, thus, that the 'compensation' offered by the state in this regard is of the least advantage to the private schools.

It is important at this juncture to analyse the act of the State in roping in private resources for the purpose of catering to the delivery of the fundamental right of education to the masses. The State, through the parliamentary legislation, has offloaded its primary responsibility to the private players and has armed itself with the power to compel the non-state/un-aided/private players to reserve substantive number of seats for the disadvantaged and weaker sections of the society backed by the sanction of de-recognising[11] and penalizing[12] such institutions in case of non-observance/non-compliance of the mandate. It is, thus, that the private schools are left at the caprices, whims and fancies of the State and are being forced to offer charity to the society. It is now an established fact that establishment of educational institutions happens to be covered under Article 19(1) (g)[13] of the Constitution of India and as such, the fundamental rights of all such private players is at massive jeopardy due to the legislation. It has been emphatically held by the apex court in *P.A. Inamdar v State of Maharashtra*[14] that

> "(E)stablishing and administering of an educational institution for imparting knowledge to the students is an occupation, protected by Article 19(1)(g) and additionally by Article 26(a), if there is no element of profit generation. As of now, imparting education has come to be a means of livelihood for some professionals and a mission in life for some altruists."[15]

It is, thus, that any injury to the fundamental rights of the non-state educational institutions needs to be well guarded and the same cannot be merely overlooked taking the plea of 'larger public interest'; an imbalance between the two issues cannot and should not be created.

It is important to appreciate that soon after the ruling of the apex court in *Unnikrishnan*[16] the Department of Education, Ministry of Human Resources

11 *Ibid*, Section 18(3): "On the contravention of the conditions of recognition, the prescribed authority shall, by an order in writing, withdraw recognition"

12 *Ibid*, Section 18(5): "Any person who establishes or runs a school without obtaining certificate of recognition, or continues to run a school after withdrawal of recognition, shall be liable to fine which may extend to one lakh rupees and in case of continuing contraventions, to a fine of ten thousand rupees for each day during which such contravention continues."

13 Article 19(1) (g) of the Constitution of India: "All citizens shall have the right-(g) to practice any profession, or to carry on any occupation, trade or business."

14 (2005) 6 SCC 537

15 *P.A. Inamdar v State of Maharashtra* available at: http://ncpcr.gov.in/show_img.php?fid=523 visited on 19.06.2018

16 (1993) 1 SCC 645

Development, Government of India drafted a Bill[17] for the purpose of adding a new Article 21A in the Constitution which had specifically kept the "educational institutions not maintained by the State or not receiving aid out of State funds"[18] outside the purview of any duty to cater to the delivery of the fundamental right of education to the children. It is further to be pertinently noted that the said Draft Bill was placed before a Committee by the Rajya Sabha Chairman for examination and preparation of a report, wherein one member of the Committee, Smt. Hedwig Michael Rego, M.P, along with several other stakeholders, had categorically expressed a strong opinion[19] against delegation of the 'state role' to the private educational institutions. Unfortunately, this Bill was not pressed in the eventual chain of circumstances,[20] and we are set across the current Article 21 A of the Constitution of India to be read with the Right of Children to Free and Compulsory Education Act, 2009.

The judicial development in the field of ascertaining the liability of the non-state actors in delivering the fundamental right of education to the masses is widely known by virtue of the apex court ruling (majority decision) in *Society for Unaided Private Schools of Rajasthan v Union of India*.[21] Herein, the Court has upheld the legislative provision under the Act of 2009 mandating twenty five percent reservation for admission in Class I in all unaided non-minority schools. The court, by majority, has held that the State has derived the power to 'regulate' the non-state educational institutions under Article 21 A[22] of the Constitution of India and such a regulation stands protected by Article 19(6) of the Constitution of India.[23] The implication of the majority ruling of the apex court needs to be critically appraised with strict reference to the fundamental right of the citizens to "establish and administer the educational institutions"[24] under Article 19(1) (a)[25] of the Indian Constitution, in terms of the 'impediment' caused on their 'occupation'

17 Constitution (Eighty-third Amendment) Bill, 1997

18 *Ibid*, Constitution (Eighty-third Amendment) Bill, 1997, Clause (3): "The State shall not make any law, for free and compulsory education under Clause(2), in relation to the educational institutions not maintained by the State or not receiving aid out of State funds." Quoted by Justice Radhakrishnan in Para 6 in *Society for Unaided Private Schools of Rajasthan v Union of India* available at http://ncpcr.gov.in/show_img.php?fid=522 visited on 19.06.2018

19 "I do not wish the State to make laws regarding free and compulsory education in relation to educational institutions not maintained by the State or not receiving aid out of State funds." Cited in Para 8 by Justice Radhakrishnan

20 The Parliamentary Standing Committee on Human Resource Development did adopt the report of the Committee. It was submitted to the Rajya Sabha and also laid before the Lok Sabha. However, the Lok Sabha got dissolved thereafter. Later the elections were declared and the Bill was not pressed.

21 (2012) 6 SCC 1; snippets at http://www.supremecourtcases.com/index2.php?option=com_content&itemid=99999999&do_pdf=1&id=24500 visited on 20.06.2018

22 *Ibid*, "Article 21-A vests the power in the State to decide the manner in which it will provide free and compulsory education to the specified category of the children. As stated, the RTE Act, 2009 has been enacted pursuant to Article 21-A" at Para 45

23 *Ibid*, "If Parliament enacts the law, pursuant to Article 21-A, enabling the State to access the network (including infrastructure) of schools including unaided minority schools such a law would be saved under Article 19(6) and would not be unconstitutional; at Para 35/36."

24 Deemed to be a Fundamental Right for the purpose of Article 19(1)(g) of the Constitution of India

25 Article 19(1) (g) of the Constitution of India: "All citizens shall have the right-(g) to practice any profession, or to carry on any occupation, trade or business."

by the coercive legislative mandate of twenty five percent reservation imposed on them by the legislation of 2009.

The non-aided schools, which have been coerced to step in the shoes of the State, are those schools which have invested immensely in their infrastructure and academic resources which, in natural circumstances, warrant them to levy a higher fee on their students, commensurate with their infrastructural superiority and far greater academic excellence. A look at their governmental counterpart reflects them lagging in terms of school buildings, classrooms, play and recreational facilities, libraries, etc., as well as in terms of the academic resources, including the number of teachers, training and skills of teachers, use of teaching and pedagogical techniques, etc., For the sake of a mere illustration, one of the private schools in New Delhi projects its infrastructure on its website mentioning the fact of a "wi-fi enabled campus, comprising of ninety well ventilated classrooms".[26] It, also, boasts of "Science, Maths and Language Laboratories, well equipped libraries, a sound proof auditorium, recording studio, an audio-visual room, space for facilitating physical fitness and indoor games, a discovery room to enhance the scientific temperament, an art gallery to showcase the creative flair of the students, etc.,"[27] It states the fact of having a "well-qualified faculty of 150 (one hundred and fifty) teachers who are constantly exposed to workshops, symposia and are in service training to keep them abreast with the latest information",[28] as well. It is assumed that most of the government schools would not be having 'such' infrastructural facilities and academic vigour within their premises. It is under these variances in the cost of operation of the two sets of schools that happens to be a matter of grave concern. It is worrisome that by virtue of the mandate under the Act of 2009, such private schools need to spare out as charity about[29] twenty five percent of the fee that would have accrued to them in the usual course of action. It is, this way that the state is causing impediment(s) in the exercise of the fundamental rights accruing to such players in the field of establishing and administering education.

There is no scope for any doubt that the various international covenants[30], legislations[31], etc., impose an obligation on all the non-state actors to foster respect to the rights of the children as well as to protect them. There also lies an implied obligation upon them to ensure that the rights guaranteed to children are not impaired or destroyed by them but in no case does a positive obligation lie upon them to actively ensure the delivery of such rights to them. It has been categorically stated by Mill that "the only purpose for which power can be

26 Inputs as available at: http://www.bluebellsinternational.com/infrastructure/ visited on 21.06.2018

27 *Ibid*

28 *Ibid*

29 Re-imbursement by the state is at a very lower margin; equivalent to the amount charged by the state in educating the child in its schools

30 UDHR, ICCPR, ICESCR, UNCRC, etc.,

31 The Factories Act, 1948; Mines Act, 1952; Child Labour (Prohibition and Regulation) Act, 1986; Juvenile Justice (Care and Protection of Children) Act, 1986 along with the Amendment Act 33 of 2006; Immoral Trafficking Prevention Act, 1956; Prohibition of Child Marriage Act, 2006, etc.,

rightfully exercised over any member of a civilized community against his will, is to prevent harm to others."[32] As such, without under-estimating the dimension(s) of imparting education to be of a charitable fragrance, the point needs to be emphatically clear and precise that as far as any active role of the non-state actors in the issue of providing 'free' education is concerned, it needs to be voluntary and out of free volition, rather than being coerced[33] upon them by the State through legislations or otherwise.

II

The allied field wherein the State is required to pay substantive attention is the right to health which happens to be a necessary ingredient of the human rights of the persons. The Constitution of India vide Article 47 explicitly fastens upon the State one of its primary duties to "improve public health".[34] Besides the express provision in the basic law of the land, there have been numerous rulings of the Supreme Court of India to the effect of holding right to health within the canopy of right to life. The apex court had emphatically spelt out the position as stated in *State of Punjab & Ors v Mohinder Singh Chawla & Ors*.[35] Further, in *Balram Prasad v Kunal Saha & Ors*,[36] the apex court had categorically declared the right of the patients to be treated with dignity to be flowing from Article 21 of the Constitution of India. The apex court had once again brought the right to health under Article 21 of the Constitution of India in its ruling in *Parmananda Katara v Union of India*.[37] It is, thus, a settled proposition that it is one of the primary duties of the state to cater for the health requirements of its citizens as well as that of the non-citizens.

However, it is here too that the State is roping in the "private resources via the private hospitals" to assist the state in attending to its primary duty of delivering sound health to them. It had been ruled[38] by the Delhi High Court in the year 2007 vide its ruling in *Social Jurist, a lawyer's Group v Govt of NCT of Delhi*[39] that all the private hospitals which had obtained either free or concessional

32 Mill, "On Liberty" cited in See, Lloyd, Introduction to Jurisprudence, 4th Edition, Stevens & Sons, London, 1979 at 151

33 See, Malinowski, "A New Instrument for the interpretation of Law" 51 Yale Law Journal 1237-1254 at 1247 (1942); reflecting upon the limitations of 'law', it had been remarked significantly that "Law has often been used as an instrument of legislative omnipotence". It was also remarked in the same reference that "there was an attempt to make a whole nation sober by law. (but) It failed."

34 Article 47, the Constitution of India, "Duty of the State to raise the level of nutrition and the standard of living and to improve public health.-The State shall regard the raising of the level of nutrition and the standard of living of its people and the improvement of public health as among its primary duties and, in particular, the State shall endeavor to bring about prohibition of the consumption except for medicinal purposes of intoxicating drinks and of drugs which are injurious to health."

35 (1997) 2 SCC 83

36 (2014) 1 SCC 384

37 (1989) 4 SCC 286

38 Final Judgment on 22nd March, 2007; PIL filed in 2002

39 W/P 2866 of 2002 Inputs available at: http://ciconline.nic.in/cic_decisions/CIC_SA_C_2014_000223_M_145133.pdf visited on 16th July, 2018; Also see https://www.sci.gov.in/supremecourt/2015/6668/6668_2015_Judgement_09-Jul-2018.pdf visited on 16th July, 2018

land from the 'State' shall need to provide free treatment to 10% In Patient Department by reserving 10% of the beds for them along with catering to 25% Out Patient Department by way of providing them free treatment. It is pertinent to mention that the said ruling was passed with reliance on the findings and recommendations of the Justice Quereshi Committee Report on the issue. Subsequent to the High Court ruling in the matter, guidelines were issued by the Delhi government to the private hospitals as well as to the government hospitals to implement the order of the court. The guidelines prominently mandated that

> "The conditions of free patient treatment shall be 25% of patients for OPD and 10% of beds in the IPD for free treatment. This percentage of patients will not be liable to pay any expenses in the hospital for admission, bed, medication, treatment, surgery facility, nursing facility, consumables and non-consumables etc. The hospital charging any money shall be liable for action under the law and it would be treated as violation of the orders of the court. The Director/M.S./member of the trust or the society running the hospital shall be personally liable in the event of breach /default."[40]

It is thus that here also, there has been caused an 'impediment' in the exercise of the citizens in freely exercising their fundamental right to profession at the behest of the State; the private hospitals have been 'mandated' to spare out a substantive amount of their infrastructure and services for the cause of the economically weaker sections of the society. They have also been put under regulatory regime(s)[41] for ensuring the effective compliance of the mandate fastened upon them. It is thus that 'undue restrictions' have been fastened upon the private players, once again, in the exercise of their right under Article 19(1) (g) but differently in the sense that the restriction, herein, does not come through a statutory law but through the guidelines passed by the government in compliance of a judicial order.

It is pertinent to note that the Delhi High Court, while ruling in favour of making reservations of medical facilities by the private hospitals for the economically

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40 For the detailed guidelines see http://ciconline.nic.in/cic_decisions/CIC_SA_C_2014_000223_M_145133.pdf visited on 16th July, 2018

41 *Ibid*; The guidelines issued by the government mandate publishing and reporting of the information pertaining to vacant free beds to the directorate of health services; the hospitals have also been required to cause inspection of their records vouching for the compliance of the guidelines issued by the government by a duly constituted committee. The Hospitals have been required to send information on daily basis pertaining to the availability of beds to the nearest government hospital. Committees have also been required to be set up for inspection of the hospitals in question along with the constitution of Special Committees for inspection of Accounts. Provisions for maintaining Referral Desks for receiving patients from the government hospitals have also been inserted in the guidelines.

"An Inspection Committee now constituted by the High Court would also inspect any of the private hospitals. The inspection committee shall, have to be entertained and would be facilitated to carry out physical inspection of the hospital where the free treatment has been provided and would also be shown the records of having provided free treatment. The said committee has been given the liberty to revive the petition or for issuance of any directions from the court and wherever necessary for action against defaulters under the provision of Contempt of Court act read with Article 215 of the constitution of India."

weaker sections of the society, has taken a stand that the government had allotted land to the private hospitals in question at concessional rates and as such they should not be permitted to thrive at 'public cost' and 'state expenses' without active compliance of the minimum conditions that had been fastened on them, as such. The court has also ruled that if one has an analytical look on the expressions under Article 21 and 47 of the Constitution of India, it projects a clear picture that the obligations, contained therein, have been meant not only for the State but are "equally true for all those who are placed at an advantageous position."[42] The court has gone on to opine that the individual interests must give room to the public interest, even though it may be at some cost, taking account of the inherent principle that the social policies must be devoid of the concept of 'profiteering'.

The matter, as above has been finally[43] put to rest by the Supreme Court vide its order dated July 9, 2018 in *Union of India v Mool Chand Khairati Ram Trust*.[44] The court, while attending to the issue whether or not imposition of certain conditions as done by the government amounts to imposing a restriction for the purpose of Article 19(1) (6)[45] has answered in negative and has held that the imposition of conditions does not amount to a restriction on the right to carry medical profession rather it (charity) is the "very purpose of existence of medical profession"[46]. The court has then commented that since the private hospitals have been holding the governmental land at concessional rates and "enjoying

42 At Para 95, Social Jurists v Government of NCT of Delhi "No right exists without any obligation and no obligation can be dissected from the duty tagged with it. Right should correlate to a duty. The wider interpretations given to Article 21 read with Article 47 of the Constitution of India are not only meant for the State but they are equally true for all who are placed at an advantageous situation because of the help or allotment of vital assets. Such assets would be impossible to be gathered in a city like Delhi where the land is not available in feet, much less in acres, which the State at the cost of its own projects had provided land at concessional rates to these hospitals. The principle of equality, fairness, and equity would command these hospitals to discharge their obligations of free patient treatment to poor strata of Delhi."

43 Several special leave petitions had been preferred by some 'aggrieved' hospitals against the Delhi High Court's decision in Social Jurists which were all dismissed by reasoned orders in 2011, while affirming the directions of the High Court in that regard.

44 Civil Appeal no 3155 of 2017: See https://www.sci.gov.in/supremecourt/2015/6668/6668_2015_Judgement_09-Jul-2018.pdf visited on 16th July, 2018

45 Article 19(1) (6), the Constitution of India, "Nothing in sub-clause (g) of the said clause shall affect the operation of any existing law in so far as it imposes, or prevent the State from making any law imposing, in the interests of the general public, reasonable restrictions on the exercise of the right conferred by the said sub-clause, and, in particular, nothing in the said sub-clause shall affect the operation of any existing law in so far as it relates to, or prevent the State from making any law relating to,-(i) the professional or technical qualifications necessary for practicing any profession or carrying on any occupation, trade or business, or(ii) the carrying on by the State, or by a corporation owned or controlled by the State, of any trade, business, industry or service, whether to the exclusion, complete or partial, of citizens or otherwise."

46 Supra n 43 Para 83/95: "In our considered opinion such stipulation for free treatment does not amount to restriction under Article 19(6) on the right enshrined under Article 19(1)(g) and even otherwise it was not necessary to enact a statutory provision by the Government in view of existing liability as per policy/rules/statutory provisions as to ethical standards and other statutory provisions in force."

huge occupancy benefits",[47] they can be asked to impart free treatment to the economically weaker strata of the society as required in the governmental order. The Court finally declared it to be mandatory on the part of all the hospitals to observe the conditions (of reserving free services to the economically weaker strata of the society) as imposed upon them by the government and ruled that their leases could be cancelled in event of non-compliance of the guidelines.

It is pertinent at this juncture to critically attend to the injury to the fundamental rights of the citizens running such hospitals in wake of the coercive responsibility fastened upon them by the government. The State feels empowered to fasten duties upon the non-state and private actors in the medical field by the mere fact of having had allotted them the land for building the hospitals in question at concessional rates at some point of time. It is humbly submitted that this action on the part of the government amounts to giving by one hand and taking the same back from the other hand and ironically the fact of having given some concession to some person empowers the government to keep the same 'recovering' from that person *sine die*. This action on the part of the State, somewhere or the other, unfortunately dents its image of a maternal state, though the State has been defending the action for long under the garb of social welfare and 'larger interest' of the public. It would have been appreciable had the State prudently invested its own resources and finances in the delivery of adequate health services to the masses and maintained as well as upgraded the government hospitals to rise up to its image of a maternal and welfare state. Unfortunately, the State has adopted a 'short cut' in fulfilling its constitutional obligations under Part III[48] and Part IV[49] of the Constitution by pooling in the resources of the private and non-state players in the field by 'coercing' them to observe charity and philanthropy.

If it is averred that the private hospitals have turned into "centres of commercial exploitation"[50], and that the hospitals charge phenomenally high for the medical services, the government needs to cure that rampant evil by coming up with stringent regulatory norms under some legislative enactment instead of necessarily fastening upon them the government's own burden of share of providing medical facilities to the masses as a reactionary and reflexive action. It is humbly submitted that one wrong cannot be and should not be tried to be cured by committing another erroneous act. The act of the private hospitals in charging exorbitantly or unnecessarily from the patients cannot and should not be cured by the government by way of saddling them with a distinct set of responsibilities which act, further, amounts to undue curtailment in the enjoyment

47 *Supra* n 43 Para 83/95: "In our considered opinion such stipulation for free treatment does not amount to restriction under Article 19(6) on the right enshrined under Article 19(1)(g) and even otherwise it was not necessary to enact a statutory provision by the Government in view of existing liability as per policy/rules/statutory provisions as to ethical standards and other statutory provisions in force."

48 Article 21 of the Constitution of India

49 *Ibid*, Article 47 of the Constitution of India

50 *Supra* n 43 Para 65 "It is very unfortunate that by and large the hospitals have now become centers of commercial exploitation and instances have come to notice when a dead body is kept as security for clearance of bills of hospitals which is per se illegal and criminal act."

of their right to free profession guaranteed by the Constitution of India. The fact needs to be brought to light that the government has all the teeth to nail down the errant practices adopted by the private hospitals of the day and it has been successfully doing so. Recently, the government has successfully, lowered the high costs involved in heart surgeries by lowering down the rates of 'stents' via its National Pricing Authority[51]. A little earlier, the Delhi Government had ordered the cancellation of a private hospital on the charges of medical negligence(s)[52]. It is thus to illustrate that the government needs to regulate the malpractices in the private hospitals as well as in the other hospitals via its regulatory authorities but the imposition of reservations in medical services being offered as a regulatory measure does not seem to be a prudent step.

It is thus, that a lamentable position is being witnessed in the current times where the non-state and private entities have been delegated the responsibility by the State to cater for the educational as well as the medical and health requirements of the citizenry in India to a particular quantum. The State is somewhere offloading its primary Constitutional duties to the other non-state players based on the premise of correlation between the rights and duties and also harping on the essentially charitable fervor of education and medics as a profession.

III

Jurisprudential Basis: It has been categorically stated that "(A) law which a man cannot obey, nor act according to it, is void and no law; and it is impossible to obey contradictions, or act according to them."[53] It is with this insight that the current trend of the delegation of the primary duties of the State by it to the non-state entities, which consequently affect the 'free' enjoyment of the rights by them, needs to be analysed. The jurisprudential dimensions as propounded by distinguished jurists towards the rights of the citizens and their duty towards the state as well as towards the society need to be particularly taken into active cognizance at this juncture to arrive at a correct analysis and consequent inference. Lon L. Fuller, the noted legal philosopher, had propounded the principle of legality, which principles have been comprehended to be "constant polestars"[54], guiding the legal process. Fuller, while embarking upon eight different attributes[55] of a 'law', had categorically opined that the legal rules should not be contradictory

51 See "Cardiac stent price cap lowered further to Rs 28,000" by Rema Nagarajan, Times of India, 13 February, 2018 available at: https://timesofindia.indiatimes.com/india/cardiac-stent-price-cap-lowered-further-to-rs-28000/articleshow/62889521.cms visited on 18th July, 2018

52 See https://economictimes.indiatimes.com/news/politics-and-nation/delhi-max-hospitals-licence-cancelled-over-newborns-death/articleshow/61980106.cms visited on 18th July, 2018

53 Vaughan, C.J. in Thomas v Sorell, 1677 as quoted by Lon L Fuller in The Morality of Law, Revised edition, Universal at p. 33

54 See, Lloyd, Introduction to Jurisprudence, 4th Edition, Stevens & Sons, London, 1979 at 89

55 See Lon L Fuller, The Morality of Law, revised edition, Universal Law Publishing Co. Pvt. Ltd. At 38-39 He has maintained that "The attempt to create and maintain a system of legal rules may mis-carry in at least eight ways; there are in this enterprise….eight distinct routes to disaster. The first and most obvious lies in a failure to achieve rules at all, so that every issue must be decided on an ad hoc basis. The other routes are; (2) a failure to publicize, or at least to make available to the affected party, the rules he is expected to observe; (3) the abuse of retroactive legislation, which

(Contd. on next page)

in their very basic nature and implication(s). It has been his idea that if the law demands 'competing' actions to be performed, there would result confusion and chaos.[56] Fuller has emphatically stated that "avoiding contradistinctions in the law demands a good deal of painstaking care on the part of the legislator."[57] It is pertinent at this juncture to analyse the act of the Indian Parliament in fastening the obligation of reserving twenty five percent of seats in private schools for the disadvantaged sections of the society vide a legislation[58] as well as that of the government (of Delhi) in imposing an obligation upon the private hospitals to reserve up to twenty five percent of the medical facilities for the economically weaker strata of the society with reference to Fuller's idea of 'legality of law'. He has categorically sounded a warning bell to the tune that "enactments of contradictory laws"[59] and "rules requiring conduct beyond the powers of the affected party"[60] do take the laws to 'mis carry' or fail in the eventual run. It is, thus, to be mooted that if the Constitution of India guarantees the right to its citizens to freely profess a profession (subject to the restrictions that the State may impose in that regard as permissible under the Constitution), whether the same can be undone or whittled by another legislation. It is humbly submitted that such an act on the part of the legislator may result in enactment of 'incompatible' laws if not 'contradictory' laws. This would cause definite hardship(s) to a person in the enjoyment of his right (of freely pursuing a profession) guaranteed by the Constitution of India because of an additional liability fastened upon him through another legislation (reserving seats and facilities in favour of economically weaker strata of the society).

It has to be realized that the State, at this juncture, must not burden the non-state entities in the carrying out its own primary constitutional duties. It has to be left to the philanthropic fervor of the private players, in question, dealing with education and health as to how do they find convenience in attending to the nobility of the cause involved rather than by coercing them to share the State's primary burden. The non-state entities need to attend to their 'morality of duty' in responding to the needs of the economically weaker section of the strata, be it in the field of education or health or otherwise; the state, on its end, may provide these entities substantive incentives[61] of various likes to motivate them to attend to such duties through suitable legislations.

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not only cannot guide action, but undercuts the integrity of rules prospective in effect, since it puts them under the threat of retrospective change; (4) a failure to make rules understandable; (5) the enactment of contradictory rules or (6) rules that require conduct beyond the powers of the affected party; (7) Introducing such frequent changes in the rules that the subject cannot orient his action by them; and, finally, (8) a failure of congruence between the rules as announced and their actual administration."

56 https://unilaglss.wordpress.com/2015/03/10/the-inner-morality-of-law-an-analysis-of-lon-l-fullers-theory/ visited on 28.06.2018

57 *Supra* n 54 at 65

58 Right of Children to Free and Compulsory Education Act, 2009 in pursuance of Article 21 A of the Constitution of India

59 One of the postulates as enshrined by Fuller in his idea of "Legality of Law" See Supra n 54 at 38-39

60 *Ibid*

61 This may somewhere resemble the Governmental policy(s) of giving rebates in Income Tax for voluntary donations made by persons under the Income Tax Act, 1961

Individualism vis-à-vis Collectivism: A Constitutional Perspective

Dr. Subir Kumar*

Prologue

In In this age of rights, there is an on-going tussle between the rival stands that support the interests that are conflicting as the as the arguments that support them. This confrontation of claims of rights has omnipresence which crosses across the bounds of geographical limitations. It is concerned with the interests of those whose very existence depends upon the consequence of which claim has the primacy over the other. One such conflict has taken the shape of individualism and collectivism debate. These antagonistic concepts have invigorated many a debate, and the conclusion seems inconclusive. Still, there is a pressing need to find the golden mean that would balance the conflicting claims. The collective rights and the individual rights, and their varying manifestations need to be reconciled. But how can that be done is question worth pondering upon. Despite the plethora of provisions that adore the legal documents and claim pristine sanctity, the basic liberties of the individuals are stand threatened. The incessant pursuit of the goal of development has landed them in a predicament where the larger interests of the society or the state tend to deprive them of their individual rights and interest. Unfolding arguments bring to fore a picture where the role of the State assumes primal and prominent importance, especially in this era of welfare State. Burdened with the obligation of ensuring the welfare of the people, it is confronted with the tedious task of taking care of the rights and the interests of the individuals, who, an individualist would argue, are the building blocks of the societal edifice. A humble effort is being made to analyse the various aspects of the individualism and collectivism conflict and the brewing debates. And while doing so, many related aspects such as the role of the State and question of development would be discussed and deliberated upon.

Concept of right

With the emergence of the notion of state, the rights and duties no longer had the same colour that they had prior to the coming into existence of the State. Some of the basics rights of the people changed in that they acquired a new content and meaning. The entire landscape of rights and societal needs developed a new dimension. And this development saw the conflict of interests that has invited many a scholarly writings that invigorated the unsettled waters of jurisprudence. Before deliberating upon the notions of individualism and collectivism, it would be befitting to peep into the notion of rights and their multifarious manifestations and, how the collective rights and individual rights lock their horns once the state implements its policies which generally are guided by the obligations that are cast upon the state.

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The concept of right and its evolution to the status that it now enjoys has an eventful history which shows how with the passage of time its colours and contours have changed considerably. A large part of each human being's time on earth is spent in declaiming about his "rights," asserting their existence, complaining of their violation, describing them as present or future, vested or contingent, absolute or conditional, perfect or inchoate, alienable or inalienable, legal or equitable, *in rem* or in *personam*, primary or secondary, moral or jural (legal), inherent or acquired, natural or artificial, human or divine.[1] However, what exactly constitutes right is a question that deserves some consideration before moving onto the issue of individual and collective rights, and the another important aspect of individualism and collectivism. Rights are interests that are recognised and protected by the state, said Salmond eons ago and this conception has found its pristine place in the study of jurisprudence. However, the word "right" can be seen from another angle where it incorporates many other concepts that are also a manifestation of what is generally understood by the term. As Hohfeld observed[2]:

> "…the term "rights" tends to be used indiscriminately to cover what in a given case may be a privilege, a power, or an immunity, rather than a right in the strictest sense; and this looseness of usage is occasionally recognized by the authorities"

Right in a certain sense may be claim with a corresponding duty; I may be power, immunity, and liberty depending upon the context in which the word right is being used.[3] Especially, the right as claim and duty is helpful for the discussion the ensues, besides that of power and liberty.

Individualism and Collectivism: Debating the Debate

Interaction of the society and the individuals, who constitute the same, has brought into being conflicting views, views that stem from a concern for the protection and propagation of interests that are ably justified by those who support them and those who oppose them. And, these conflicting views take the shape of *individualism* and *collectivism*—two different views that have invigorated many a debate about the primacy of the one over the other or how far it is justified to let one view supersede the other. The debate continues!

Gaston Gavet says that "We individualists begin, the world is assured, "from the *a priori* and hypothetical assertion that natural man, that is to say man considered as an isolated being separated from other men ...." Right here we must interrupt- where has any one seen such a situation?"[4] He further elaborates: "Two centuries ago it was occasionally admitted, as a dogma, that civilization had an artificial character and that it had a deforming influence upon "human

1 Arthur L. Corbin, "Rights and Duties", *33 Yale L. J. 501*

2 Wesley Newcomb Hohfeld, "Some Fundamental Legal Conceptions As Applied in Judicial Reasoning", *23 Yale L. J. 16*

3 A detailed account of how Hohfeld dealt with concept of right as jural correlatives is beyond the scope of this paper. So, it is not being discussed in detail.

4 See *infra* note 7.

nature." Thereupon, to visualize this nature, philosophers invented the concept of man fallen from the clouds at a given moment and not yet having come into contact with his fellow man. With all due deference to our critic it must be said that this was not a "hypothesis." It was never supposed that these were the facts; nor was this *a priori* reasoning. It was something on the order of Wells, an effort at divination to conceive what man might be under given extraordinary circumstances. But how long could this exotic concept carry illusion? Indeed, it is alleged to carry conviction in the great home of the "individualist doctrine," which contains so many distinct cases, including in reality that of our critic, Duguit; that so-called system is perhaps only a vacuum, the only one, it seems, which no longer has a disciple. It has been uninhabited for over a century, and yet it is this house that has been assaulted, to drag from it the skeleton which is represented as being ourselves!"[5] While discussing the question under consideration the issue of culture acquires a new dimension. Culture is a varying factor. It differs from society to society and from one part of the globe to the other part. In fact, it can be said that "Culture is a fuzzy construct. If we are to understand the way culture relates to social psychological phenomena, we must analyze it by determining dimensions of cultural variation. One of the most promising such dimensions is individualism-collectivism. Cultures differ in the extent to which cooperation, competition, or individualism is emphasized. At the psychological level, these differences are reflected in a personality dimension labeled *allocentrism* versus *idiocentrism*".[6] To illustrate the point which relates the cultural aspect with the question of individualism and collectivism, it will be apt to say that:[7]

> Cultural complexity … is in all probability related to individualism-collectivism by a U-shaped function. That is, in extremely simple societies … there is proto-individualism, in which the individual is closely related to very few others and has considerable freedom to act independently of others. At higher levels of complexity …collectivism is very high. The individual relates to a few very important ingroups, organized in concentric circles (e.g., nuclear family, extended family, clan, city, state).

Be that as it may, one of the arduous tasks that one faces is defining the terms 'individualism' and 'collectivism'. That is, while we try to decide to import of the terms, it requires being cautious and careful especially in view of the debates galore about what the rival ideas these terms portray. Notwithstanding the difficulty that mars any such effort, it can be safely said that we can broadly pinpoint the basic tenets that underlie the texture of these two antagonistic expressions. Besides, it is worth noticing that collectivism and individualism debate should be analysed against the backdrop of the society where such questions arise.

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5 *Ibid*.

6 Harry C. Triandis, Robert Bontempo, and Marcelo J. Villareal et.al., "Individualism and Collectivism: Cross-Cultural Perspectives on Self-Ingroup Relationships" Journal *of Personality and Social Psychology*, Vol. 54, No, 2 , 323-338(1988)

7 *Id* at 324.

To begin with, those who espouse the cause of individualism maintain that it is the individuals who form the society; they are the building blocks of the societal edifice. And that being so, they cannot be ignored. It is they who constitute the society whose existence depends upon the individuals. The reverse is unimaginable. Being the unit of the society, the individuals are an end in themselves. Any achievement in the society can be traced back to the individual given the fact that he is unit of achievement. However, individualism should not read as implying a life which is Robinson Crusoe-esque! It does not mean isolation. Never. If it is read as implying that, then it is a misconception. That would be tantamount to reading into this conception that which it does not contain. The reason is not far to seek given the fact that the very notion of individualism can be said to imply an existence of a society or a group. It simply asserts that it is the individual and not the group that form the focal point of the society. Besides, individualism never betokens non-cooperation. The spotlight of individualism is centred on an individual. It is concerned only with the individual, it is generally believed. And that may be a reason enough to fuel the misconceptions that abound regarding the very notion of individualism. I think the essence of individualism lies in the very notion that says that an individual has the right to his life and happiness. And it should not be undermined that protecting one's rights requires co-operation with other individuals in the society or in a group.

It can be safely said that group rights are constitutive of individual rights in that individuals constitute the groups. In a group, the individuals' rights should be protected in a society that claims to be a civil society. It deserves some attention that in a society that respects individual rights has a sound bedrock and foundation. Imagining a society sans respects for the individual's right is akin to imagining a society that lacks the moral basis that a society should otherwise have. Needless to say, there are certain rights like right to life, right to liberty among other rights that should be protected as these are inalienable rights, the basic rights –the minimum that should not be taken away from an individual.

Individualism basically is representative of ideas that emphasise the importance of individuals and individuals' interests. It subsumes all the doctrines, philosophies and notion that espouse the cause of the individuals, which attach importance to them. It is about individual freedom and choice. Hobbes, arguably the most consistent and greatest individualist, accepted the discrete, egoistic, self-interested, atomistic individual as the building block of the societal edifice. The individual had the right to private space, namely thoughts and economic activities. The individual did not get subsumed or merged in the all-powerful state. If the individual was threatened, then the Leviathan lost its rationale to exercise. Society was cooperative enterprise as long as the individuals saw it as necessary for their well-being and benefit.[8] Nibset says:[9]

> …it is the individual whom Hobbes has in his mind as the embodiment of virtue. Hobbes did not seek the extermination of individual rights

8 Subrata Mukherjee and Sushila Mukherjee, *A History of Political Thought*, 181(2008)

9 R. Nibset, *The Quest for the Community*, 123 (1990).

> but their fulfilment. This could be accomplished only by removing the social barriers to the individual autonomy. In his eyes the greatest claim of the absolute State lay in its power to create an environment for the individual's pursuit of his natural ends.

Before we analyse the contrasting notion individualism with that of the collectivism, it will serve the purpose to explore the import of what is collectivism. Those who march under the banner of collectivism swear by the importance of society, nation and the race among other things. They attach more importance to these entities than to the individuals. They argue that the needs of the individuals are subordinate to that of the larger group, and if the situation demands, the individual needs should be sacrificed for the sake of collective goods. However, it is argued that collectivism does not mean that each and every need and interests will be sacrificed for the sake of collective goals; it only when the collective goals and needs demand the sacrifice of individual rights, needs and goals that an individuals are mandated to surrender their those rights. The reason for this proposition is not far to seek, in a society where the individuals are made to sacrifice every need of theirs, such a society would not exist.

Collectivism maintains that society is an entity in itself, an argument which the individualism refutes. Those who argue in favour of collectivism would say that the individual is only a means to satisfying the needs of the society. The state is the instrument for organizing people to meet those needs. And, therefore state is the sovereign, a view that runs counter to the view of the individualists who argue that it is the individual who is the sovereign.

Need to reconcile the conflicting ideas

But there is a need to reconcile and balance the conflicting ideas. A synthesis of the approaches, balancing of ideas and interests that would result in a just society, is what the society needs to be just where the people are not denied their basic rights—though, to some, it may appear to be a utopian idea! Kohler advocated a synthesis and reconciliation of individualism and collectivism in legal control… He pointed out…that social cohesion…is necessary, in order that humanity may not fall apart, turning into a collection of individuals, and the community lose its control over its member. Nothing great can be accomplished, in his view, except by devoted cooperative effort. The individual should develop independently but the tremendous advantage of collectivism should not therefore be lost.[10] The entire debate can also be seen from the perspective of liberty and restraint that curbs or limits that liberty. The governmental authority may exercise its power in such a manner that some of the rights or freedoms available to people may stand threatened. Chief Justice Stone argues:[11]

> Man does not live by himself alone. There comes appoint where in the organisation of a complex society where individualism must yield to traffic rules, where the right to do as one will with his own must bow

10 Edgar Bodenheimer, *Jurisprudence*, 113-114(2006)

11 Harlan F Stone, "The Common Law in the United States", *50 Harv. L Rev. 4* at 22 (1936).

> to zoning ordinances, or even on occasion to price-fixing regulations. Just where the line is to be drawn which marks the boundary between individual liberty and right and that of the government action for the larger good, so as to insure the least sacrifice of both types of social advantage is the perpetual question of constitutional law.

Duguit writes: "With certain rare exceptions all modern theories of the State and of public law rest upon the notion of the personality of the State, on the notion of the State conceived as the personification of all its inhabitants. Sometimes the State may be seen exercising a will, the collective will of that moral person of which Bluntschli speaks: the metaphysical theory of the State which proceeds directly from Jean Jacques Rousseau. Sometimes the State is seen as the organized collectivity, as a biological reality living as an individual, *a vast organism of which the individuals are component cells*, subject to the laws which govern the birth, development and death of every organism. Sometimes the State is conceived at one and the same time as an organism and as having a will, the organism being the support of the will. Again, finally, we affirm the collective personality of the State without explaining its metaphysical or organic character."[12] G. Belvob in his small book, *What is the State?*,[13] outlines the relation between the state and individual thus:

> Each individual lives within the borders of a certain country, which has one or another state system. The state's activities have an impact both on the individual and on the society as a whole. It influences every aspect of life. …The state has large groups of people in its employ…Together, all of these groups form the state's political system.

One of the important aspects of the existence of state is that "it has power over members of the society…decision taken by state organs are binding upon all. Only the State can lay down rules and standards of behaviour which must be complied with by al those living within the territory of the state without exception…"[14] Max Weber defined State as "an institution claiming a monopoly of legitimate force."[15] That is, the exercise of power by the state has to be within the parameters set by the expression 'legitimate'. There are other attributes of the states also besides the element of force. To Rousseau, morality, right and duty form the basis of the state. There are people like Hamlin and Petit who argue that "the state is best defined in terms of a system of rules which embody a system of rights—this is crucial to what they call a 'normative system of the state".[16] Some identify state with government. One of the important attributes of state is sovereignty. It is a debatable and highly discussed subject in the realm of jurisprudence. Be that as it may, another important aspect of state and individual relationship is that of the role that is played by the state that affects the rights of the people. Besides, the crucial position occupied by law in a state is worth being deliberated upon

12 Gaston Gavet, "Individualism and Realism", *29 Yale L. J. 523*. Emphasis added.

13 G. Belvob, *What is the State?*, 5(1986)

14 *Id* at 26.

15 John Hoffman and Paul Graham, *Introduction to Political Theory*, 4 (2006).

16 *Id* at 19.

considering the trinity of notions—state, individual and law—are so intimately intertwined that they cannot be seen in isolation.

To Plato, State is the individual magnified. Aristotle who shared the same views regarded the relation between the individuals and the state as intimate and delicate. And, in this relationship, State is the form and the individuals are the matter.[17] Aristotle writes:

> …the polis belongs to the class of things that exist by nature, and that man is by nature an animal intended to live in a polis. He who is without a polis, by reason of his own nature and not of some accident is either a poor sort of being, or a being higher than man: he is like the man of whom Homer wrote in a denunciation: clanless and lawless and heartless he is.[18]

Individual is the unit of the society. Laws made by the state are binding upon him. The rights and duties created to regulate the conduct of the individuals are an important manifestation of the existence of a state.[19] Kelsen identified State as a legal order and that every State is governed by law. The State is, according to him, nothing but the sum total of norms ordering compulsion, and is thus coextensive with the law.[20] And, according to Hart:[21]

> The most general feature of law at all times and places is that its existence means that certain kinds of human conduct are no longer optional, but in some sense obligatory

The relationship between the state and the law, and the impact it has on the lives of the individuals—both collectively and individually—is important as regards the rights and obligation of people in a given society. Social contract theory shows how the status of the individuals change once they enter into a social contract surrendering some of their rights so that they can have a life that is peaceful and civilised and where they are afforded protection by the sovereign. One of the classic contract theorists, Thomas Hobbes, came to the conclusion that it is rational to submit to a powerful sovereign—a proposition that may not appear liberal. But "the way he reaches that conclusion draws on ideas which have become a major part of liberal reflection on the state. The method he uses for justifying obligation to the state is contractarian: we are to imagine a situation in which there is no state—the state of nature—and ask ourselves whether it is better we remain in the state of nature or agree to submit to a sovereign (or state)."[22] Since the first law of nature enjoined individuals to seek peace, the only way to attain it was through a covenant leading to the establishment of a state. Individuals surrendered all their

17 See, Y Masih, *A Critical History of Western Civilization,* 110-111(2006).

18 *Supra* note 8 at 108.

19 According to Hart, law is a combination of primary and secondary rules. While the primary rules casts duty upon the individuals, the secondary rules confer rights onto them. For Austin, law is the command of the sovereign and disobedience of the same invites sanction. Command, duty and sanction form the core of his theory.

20 *Supra* note 10 at 103.

21 H L A Hart, *The Concept of Law*, p.6 (1961).

22 *Supra* note 7 at 171.

powers through a contract to a third party who was not a party to the contract, but nevertheless received all the powers that were surrendered.[23] As to law, he observes:[24]

> The use of laws, which are but rules themselves is not to bind the people from all voluntary actions; but to direct and keep them in such a motion as not to hurt themselves by their own impetuous desires, rashness or indiscretion, as hedges are set, not to stop travellers, but to keep them in the way.

Locke asserted that legitimate political authority owed its genesis to the consent of the people and such consent could be withdrawn when the freedom of the individuals was violated or curtailed. He advocated a limited sovereign state, for reason and experience had taught him that the political absolutism was untenable. Describing the characteristics of a good state, Locke said it existed for the people who formed it, and not the vice versa. It had to be based on the consent of the people subject to the constitution and the rule of law. He said such a state would be limited, since its power were derived from the people and were held in trust.[25] Immanuel Kant, a German philosopher, differentiated the concept of right from good and observed that:[26]

> The rights of man must be held sacred, however great a sacrifice the ruling power may have to make. There can be no half measures here; it is no use devising hybrid solutions such as a pragmatically conditioned right halfway between right and utility. For all bend politics must bend the knee before right….

The role of the State *vis-à-vis* the individuals and their rights has been treated differently by Robert Nozick through his proposition of *minimal state* which he describes as a nightwatchman state whose legitimation lies in the protection of certain basic rights. He says:[27]

> The minimal state is the most extensive state that can be justified. Any state more extensive violates people's rights.

Be that as it may, if we try to analyse the trinity of state, individual and their rights in the modern era of welfare state[28], in the light of the overarching ideal of justice, it becomes pertinent to take not of what John Rawls says in his *Theory of Justice*:[29]

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23 *Supra* note 10 at 177.

24 *Id* at 197.

25 Mukherjee *op.cit* at 201.

26 Wayne Morrison, *Jurisprudence*, 131 (1997).

27 Robert Nozick, *Anarchy, State and Utopia*, 149 (1974)

28 "The main characteristics of the welfare state are the vast increase in the number, range and detail of governmental control of privately owned economic enterprises, the furnishing of direct services by the government to individual members of the political community..." See: Harry W Jones, "The Rule of Law and the Welfare State", *(1958)58 Columbia L. Rev. 143 at 144*.

29 John Rawls, *Theory of Justice*, 4 (1971).

> Each person possesses an inviolability founded on justice that even the welfare of the society as a whole cannot override. Justice denies that loss of freedom for some is made right by a greater good shared by others…in a just society the liberties of equal citizenship are are taken as settled; the rights secured by justice are not subject to political bargaining or to the calculus of social interests.

The role of rule of law becomes very decisive and important in a welfare state. It should ensure that the interaction of the individual citizens with the state does not result in the infringement of their sacrosanct rights and that vices like arbitrariness and unjust treatment are done away with.

Constitutional perspectives

According to DD Basu, the constitution of India was founded on the school of individualism inasmuch as it guaranteed to the individual, against the State, the right to acquire and hold any property without any limit as to kind or quantity.[30] The state, he says, "is not an end in itself but exists for the purpose of securing benefits to the individuals who compose the political society called the State".[31] Under the constitution of India, state has been defined very broadly for Part III of the Constitution. The same meaning of state has been extended for Part IV of the Constitution which deals with the directive principles that cast an obligation on the State to take positive action to promote the welfare of the people. At times, the action taken by the state may come in conflict with the exercise of fundamental rights or at least there is a probability that it may so happen. The exercise of power by the state to *fulfil* its obligations in keeping with the directives is regarded as curtailing the enjoyment of the rights of the people as there are many a rights guaranteed under Part III of the Constitution that need to be *compromised* in order to see that larger societal interest and goals are served. However, there is always a palpable tension between the protection of inviolable rights and the exercise of power by the state to ensure the well being of the people, and which is aimed to achieve economic democracy. In a such tedious situation, the state is required to balance both the conflicting claims and has to act cautiously to ensure that rights of people are justly protected and at the same time, the constitutional obligation cast upon it are fulfilled.

Alluring yet deceptive[32], the ideal concept of justice has always been the guiding lamp. An Indian authority in his profound work, *Justice—Natural, Social, Economic and Political*, remarks:[33]

> "Justice, considered to be the harmony of the individual and societal behaviour, is throughout a conceptual process. It is hardly possible that

30 DD Basu, *Human Rights in Constitutional Law*, 52-53(1994).

31 *Ibid*.

32 "The quest for justice has been as challenging as the quest for the Holy Grail, and elusive. To some this is because justice is a will-o-of-the –wisp, to others because it is too vast to be encompassed by one mind.", says Dias. See, Dias, *Jurisprudence*, 65(1994)

33 Dr. R G Chaturvedi, *Justice- Natural, Social, Economic and Political*, 8 (1997).

> the social body as a whole may be seen behaving in some particular mode. The welfare of the society is a matter of aspiration, and the aspiration is a matter of inner experience. The aspiration is first conceived and then standardised. When some behaviour emanating from a constituent part is sought to be reconciled with the aspiration of the whole, what is significant is the point of view of the whole."

Any march towards the attainment of justice should been guided by the fact that "Justice is not 'some' thing', which can be captured in a formula once and for all; it is a process, a complex and shifting balance between many factors…."[34] To ensure that justice is done, it is necessary that the rights of the people are taken care of. Any law made or passed should be in consonance with the spirit of justice as Krishna Iyer, J said that "Justice is a factor of sound law."[35] Cicero also favoured the position that an utterly unjust law lacks the quality of law.[36] It should be emphasised that the aim of justice is to "satisfy the reasonable needs and claims of the individuals and at the same time promote productive effort and that degree of social cohesion which is necessary to maintain a civilised social existence.[37]

In the context of discussion so far made, it is at to say that any talk of justice has to be done against the backdrop of welfare of the society and the individuals, as the Supreme Court of India in *Kesavananda Bharati v. State of Kerala*[38] observed that justice is harmonious reconcilement of individual conduct with the general welfare of the society. As to the preambular promise of rendering justice, in *Dalmia Cement case*[39], the Court observed that the word justice envisioned in the Preamble is used in the broad spectrum to harmonise individual right with the general welfare of the society and it implies equality consistent with the competing demands between distributive justice with those of the cumulative justice. Justice aims to promote the general well-being of the community as well as individuals' excellence.[40]

Be that as it may, the essence of justice is enwombed with beauteous brevity in the words of Mahatma Gandhi:

> *…I shall work for an India , in which the poorest of poor shall feel that it is their country in whose making they have an effective voice; an India in which there shall be no high class and low class; an India in which communities shall live in perfect harmony.*

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34 *Supra* note 23 at 66. As Friederich observed "Justice is never given, it is always to be achieved"

35 V R Krishna Iyer, *Human Rights in India*, 93 (2000).

36 Edgar Bodenheimer, *Jurisprudence*, 15(2006). To Cicero "… "Pestilential" statutes put into effect by nation…no more deserved to be called laws than the rules a band of robbers might pass in their assembly."

37 *Id* at 196.

38 AIR 1973 SC 1461.

39 *Dalmia Cement (Bharat) Ltd v. Union of India*, (1996) 10 SCC 104.

40 "Justice is the dictate of right, according to the consent of mankind generally, or of that portion of mankind who may be associated in one government, or who may be governed by the same principles and morals." See, P. Ramamnathan Iyer, *Advanced Law Lexicon*, 2543 (2005)

The trilogy of fundamental rights (FRs), directive principles of state policy (DPs) and fundamental duties (FDs) is the bedrock of the Indian Constitution. Granville Austin calls them as 'the conscience of the Constitution.' The FDs, which were introduced in 1976, take the Constitution closer to the Indian tradition of *dharma* (duty). It is notable that though the FRs and DPs appear in separate parts of the Constitution, the leaders of the independent movement drew no distinction between the positive and negative obligations of the state. The Assembly separated them on the ground of justiciability. The FRs and DPs were not just formally introduced into the Constitution. 'They had their roots deep in the struggle for independence of the country. The leaders of the struggle were not satisfied with the British model of implied rights, which was supported by Dicey's rule of law approach of unwritten rights protected by courts. They wanted specific guarantees in view of their experience with the British rule and the fears of the minorities.[41] Part IV of the Constitution containing Articles 36-51 deals with DPs. As mentioned earlier, DPs signify the belief of the Constitution Makers in the interdependence of civil and political rights on the one hand and the socio-economic rights on the other.[42] Part III of the constitution recognises certain fundamental rights of the people.[43] It is axiomatic that while an ordinary right is protected and guaranteed by the ordinary law of the land, a fundamental right is one which us protected and guaranteed by the written Constitution of a State.[44] These are legal rights in the sense of justiciability; but they are called fundamental because while ordinary right or rights created by Legislature may be changed by the legislature, a fundamental right cannot be altered by any process shorter than that requires for the amending the constitution.[45]

In fact, what is now goes by the name of fundamental right is basically natural right re-incarnated.[46] In *Maneka Gandhi v. Union of India*[47] Bhagwati, J, observed that:

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41 M P Singh and Surya Deva, "The Constitution of India: Symbol of unity in Diversity", (2005) 53 *Jahrbuch des Offentlichen Rechts der Gegenwart*. "We call it 'trilogy' because *together* they constitute the vision of a particular type of society which the Constitution envisages for India; a society which affords an equal opportunity to all its people for an all-round development, and in which citizens bear responsibilities towards nation and society as such. This interrelation among the three constituents is manifested more clearly in the judicial decisions, especially in the last two decades, as the judiciary has relied on one of these to interpret the contents of the other or even of the rest of the Constitution." Also see, M P Singh, "The Statics and the Dynamics of the Fundamental Rights and the Directive Principles – A Human Rights Perspective" (2003) 5 *Supreme Court Cases (Journal)* 1

42 *Id* at 13.

43 Articles 12 -35. Part III of the constitution does not confer any fundamental rights. It confirms their existence and gives protection to them. A right becomes a fundamental right because it has some foundational value. In fact, the fundamental rights are human rights that have given protection and recognition under the constitution. See, *M Nagaraj v. Union of India*, AIR 2007 SC 71.

44 See generally, DD Basu, *Commentary on the Constitution of India*, Vol.I, 590 (2007)

45 *Ibid*. Also see, *West Virginia State Board v. Barnette*, (1943) 319 U.S. 624.

46 In *Golak Nath v. State of Punjab*, AIR 1963 SC 1643 at 1656, it was observed that "Fundamental rights are the modern name for what have been traditionally known as 'natural rights'." For the development of fundamental rights from natural rights, see: DD Basu, *Human Rights in Constitutional Law*, 40-80(1994)

47 AIR 1978 SC 597.

> These fundamental rights represent the basic values cherished by the people of the country since the Vedic times and they are calculated to protect the dignity of the individual and create conditions in which every human being can develop his personality to the fullest. They weave 'a pattern of guarantees on the basic structure of human rights' and impose on the State not to encroach on individual liberty in its various dimensions.[48]

"The Directives lay down the lines on which the State of India should work under this Constitution. Their contents may be divided into several groups:

i) Certain ideals, particularly economic, which the framers of the Constitution wished that the State should strive for.

ii) Certain directions to the future Legislature and the future Executive to show in what manner they should exercise their legislative and executive powers.

iii) Certain rights of the citizen shall not be enforceable by the courts like the 'Fundamental Rights' but which the State shall nevertheless aim at securing, by regulation of its legislative and administrative policy.[49]

B R Ambedkar in Constituent Assembly observed explaining the objective underlying the Directives:[50] "While we have established political democracy, it is also the desire that we should lay down as our ideal, economic democracy." "The Directive Principles of State Policy set forth the humanitarian socialist precepts that were the aims of the Indian social revolution… Part III an IV essentially form a basic element of the Constitution without which its identity will completely change…. the Directive Principles prescribed the goal to be attained and the Fundamental Rights laid down the means by which that goal was to be achieved."[51] While the Fundamental Rights have been given the 'pride of place' in the Constitution, the Directives have been given 'a place of permanence'.[52]

Conclusion

The emerging picture presents two conflicting aspects of the debate. There are people who march under the banner of individualism and there are people who support the sanctity of individuality. And when the entire debate is seen in the light of the role that State has to play in the modern times, it becomes apparent that there is a grave need to protect the rights of the individuals who constitute the society and are therefore an essential element of societal edifice. Under the Indian Constitution, Fundamental Rights provided under Part III have been

48 In *A K Gopalan v. State of Madras*, AIR 1950 SC 27, Supreme Court remarked that the aim behind having a declaration of fundamental rights is to make inviolable certain elementary rights appertaining to the individual and to keep them unaffected by the shifting majority in the Legislature.

49 D D Basu, *Commentary on the Constitution of India*, Vol.3, 4017(2008).

50 CAD III, 494-495.

51 *Kesavananda Bharati v. State of Kerala,* AIR 1973 SC1461.

52 See, *V Markandeya v. State of A.P.*, AIR 1989 SC 1308.

made enforceable. This shows the importance that these rights bear. They are symbolic of the framers' attempt to safeguard some of the inalienable rights of the individuals in that a person sans these rights can be said to have been denied the essence of a human existence. Whereas the pursuit of collective goals is justified as furthering the goal of improving the lives of the people, it should not be at the cost of sacrificing the rights of those who stand to lose their basic liberties.

An Overview of the Practice and Prospect of Alternative Dispute Resolution in Criminal Justice System of Bangladesh: Promotion of Access to Justice

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Abstract

Alternative Dispute Resolution (ADR) is treated as a scheme to resolve dispute among the litigants in a rapid and easy way out of formal court proceedings. The lower criminal courts of Bangladesh are loaded with horrendous number of pending cases and such backlog of cases pose a great threat to both victim and offender and the state as well resulting more afflictions in the field of criminal justice system. This study seeks to provide a comprehensive idea about the plea bargaining along with a brief analysis of the present practices of plea bargaining in different region and legal system over the globe. To this context this article aims to promote and implement the concept of ADR in criminal justice system of Bangladesh like other countries. However, the ADR mechanism in criminal case is subject to criticism in many ways but there is no alternative for resolving disputes between the offender and victims. Finally, certain recommendations are made for the exhaustive success of ADR towards promotion of fruitful, speedy and fertile access to criminal justice for every citizen.

Keywords: Alternative Dispute Resolution, Plea Bargaining, Compound Offences, Criminal Justice system.

1. Introduction

Effective access to justice is treated to be one of the exigent elements of human rights and such rights regarding justice have been guaranteed as fundamental rights in the constitutions of many countries around the world. In this context article 35(3) of the Bangladesh Constitution indicates "Every person accused of criminal offence shall have the right to a speedy and public trial by an independent and impartial court or tribunal established by law". Equality of every citizen, right to harbor of law and right to be treated with conformity of law come within the mandate of the constitution of Bangladesh. Due to the shortage of resources, lack of manpower, partiality of police department, complex procedural rules, political barrier and most gravely corruption, the perception of justice to common people has become a day dream. Delay in criminal justice system causes miscarriage of justice occasioning discontent of general citizens over judicial system. One of the much known quotes of Gladstone is "Justice delayed justice denied". Another problem which has paralyzed our judiciary is the congestion of huge number of pending criminal cases. Certain terms for speedy trial and

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summary trial by criminal courts are there to dispose few numbers of cases while most other cases have to pass through the prolonged and formal procedures. Such harassment of court proceeding is dropping the confidence and trust of the citizens over law and order of country.

Practically some of the notable and major issues of criminal cases depend much on police department and it is repeatedly seen that police takes lofty time to accomplish necessary execution and investigation (Al-Mamun, 2013). Such delay by police department may be either premeditated or due to heavy workload. Preparing seizure list, case diary, medical report, statement of the witnesses, investigation etc. are some of the phenomenon without which criminal trial cannot proceed on. Enormous number of criminal cases is pending for years in which police report has not been yet submitted. Even in the pre- trial and trial stages of a case delay occurs due to some procedural complexities. In spite of these, some of the petitions by defense also take additional months to dispose a case. Producing witnesses before the court becomes another cumbersome job for prosecution as non-producing of witness causes irritating delay. Unfortunately it occurs mostly due to inaction of prosecution but sometimes the witnesses try to avoid insecurity and vexation in court. Furthermore, judges and lawyers also take spare time for official functioning and unavoidable situations. Last but not the least astonishingly low rate of conviction is an interruption towards justice. In order to eradicate such unexpected and unavoidable delay and backlog of criminal cases the ADR mechanism, preferably plea bargaining should be flourished more in criminal laws of Bangladesh along with the Code of Criminal Procedure. However, the provisions of ADR are already incorporated in many civil laws of Bangladesh like many other countries but there is debate regarding advantages and drawbacks of introducing ADR graph in criminal justice system. According to the theory of criminal justice method state stands in a position to uplift social control, ensuring security of citizens, clogging crimes and dressing down the offenders but never to compromise. There are some sorts of offences which do not come beneath the shed of crimes prejudicing states but harming only any individual and subsequently ADR can be operative there (Gulfam, 2014).

2. Notion Regarding Alternative Dispute Resolution and Plea Bargaining

"Dispute resolution outside of courts is not new; societies world-over have long used non-judicial, indigenous methods to resolve conflict" (US Centre for Democracy and Governance, 1998). Around the world people are actually searching for an easy, faster and cheaper means to resolve their disputes within shortest possible time. Alternative Dispute Resolution (ADR) can play a significant role of an alternative to formal litigation. Professor J. R. Sternlight has rightly said ADR as "Appropriate Dispute Resolution" instead of "Alternative Dispute Resolution". But it must be kept in mind that ADR is only an extra method to ensure justice but not a machinery to replace traditional court system. Basically ADR is nothing but an innovative tactic to settle dispute instead of going to court. It is usually mentioned as a time saving mechanism to resolve disputes other than judicial determination as well as treated to be an external dispute resolution. According to the definition of World Bank Group, "ADR is a wide range of means to resolve conflicts that are short of formal litigations".

In Bangladesh, though, the concept of ADR is already incorporated in different civil laws particularly applicable in civil litigations. In criminal justice system of Bangladesh ADR has not yet been broadly initiated. The idea of ADR in criminal cases is inspired in the case of *Md. Joynal and others vs. Rustam Ali Miah and others* (1984, 36 DLR (AD) 240). Two types of ADR in criminal justice system are found worldwide namely, 'Compounding of Offence' and 'Plea Bargaining'. In *Abdussatter and others vs. The State and other* (1986, 38 DLR, AD), the Appellate Division opined that "our criminal administration of justice encourages compromise of mere certain disputes and some of the particular cases can be compounded as provided by section 345 of the Code of Criminal Procedure". Compounding of offences means settlement through compromise and amicable solution with or without the permission of court. Compromise in criminal case is possible in any stage even in appellate stage but before the pronouncement of judgment (karim, 2015). Insertion of ADR in criminal litigation does not substitute the court system but strengthens the criminal judiciary (Gulfam, 2014).

It must be noted that the idea of ADR may not always be appropriate in criminal trials as some issues of criminal trial can only be solved through judicial and legal procedures. Section 345 of the Code of Criminal Procedure (CrPC) 1898 incorporates two charts covering 67 offences which are compoundable and among them one chart shows the offences where permission of court is immaterial and another chart identifies the offences where parties must have authorization of the concerned court to compound. The first chart containing section 345(1) includes offences like uttering words with willful intent to coup the religious feelings of any person, causing hurt on provocation, wrongful detainment or confinement and forced labor etc are compoundable without approval of the court and these offences contain confinement of maximum one year and/or fine. The second chart in section 345(2) indicates more grave offences like rioting with deadly weapon, voluntary causing grievous hurt, act endangering the personal safety of others and assault to women with intent to outrage her modesty. These offences of second chart involve punishment from two to seven years along with fine and cannot be compounded without approval of court.

According to the provision and guideline of the Conciliation of Disputes (Municipals Area) Ordinance, 2004, ADR can be used to dispose suits easily and rapidly in municipal area by instituting a Dispute Conciliation Board. If any offence takes place in the municipal area and among the residents of the municipal area then the aforesaid Board can try the offences summarily mentioned in schedule of Chapter XXII of this Ordinance. The Chairman along with two members selected by both sides shall form the Board where one must be commissioner of the municipal area. However, this Board is authorized to give verdict only for remedy of fine and reclamation of property.

Moreover, arrangements of the Gram Adalat Ain, 2006 and Birodh Mimangsha (Paura Elaka) Board Ain, 2004 are there to resolve some light criminal cases through compromise (Karim, 2015). It is necessary to note that compounding of a case may be done only by the victim but not the public prosecutor and such compounding is not possible in cases under special law. (Mamun, 2013). If the

person who would compound an offence under section 345 of CrPC is below the age of 18 years, idiot or lunatic, any legal person competent to contract may compound such offence on his behalf.

Another method of ADR is Plea Bargaining which is widely adopted and developed in many countries of the world like India, United States of America, Canada and Australia. This method refers to an agreement as well as negotiation lies between the accused and prosecution where the accused pleads guilty to an inferior crime in lieu of some concession by the prosecutor. According to Bevier Law Dictionary, "as to make an agreement in which the defendants plead guilty to a lesser charge and the prosecutor in return drops more serious charges". Pleas bargaining may be treated as a bond between the prosecutor and accused of a criminal case where the accused consents to admit guilty in return of an offer or in exchange of some allowances from the prosecutor. It is an activity for achieving mutual satisfaction of disputants during trial stage of a criminal case under the approval of court. The ultimate goal of plea bargaining is to ensure unequivocal, cheap and rapid justice by resolving dispute through an amicable agreement.

Plea bargaining has not gained any scope in our criminal justice system of Bangladesh. According to the Code of Criminal Procedure, 1898 and Evidence Act, 1872, an accused may confess his guilt before a magistrate at the time investigation or at trial stage. The essence of both the CrPC and the Evidence Act, 1872 describes that if any accused of criminal offence admits his guilt not by inducement or threat before the magistrate, the court is at liberty to penalize the accused on such confession. Again under section 25 and 26 of the Evidence Act any confession by accused given to police or given under police custody shall not be considered as evidence. But unfortunately no provisions by the Evidence Act or CrPC are there stating that the accused will enjoy a lenient punishment upon his confession (Kader, 2007).

Relevantly under section 337 of the Code of Criminal Procedure, 1898 there is rule of 'Tender of Pardon' which implies that at any stage of trial or investigation a magistrate may tender pardon to any accomplice if the concerned accused fully discloses the circumstances relating the offence. Such provision is a kind of light house for adopting plea bargaining in our criminal justice system. Furthermore, it is almost unimaginable that a person who has not committed an offence but would plead guilty. Last but not the least the prosecution may create some undue influence over the accused in plea negotiation.

3. Proposal of Compounding against the Offences Under Penal Code and Other Laws

In *Murlidhar Meghraj Loyat vs. State of Maharashtra* (2000, Cr.LJ 901), the Indian Supreme Court described "Although in civil suits we find compromises actually encouraged as more satisfactory method of settling disputes between individuals, such mechanism of compromise seems immoral in criminal cases. This is because crimes are against the state and the 'State' can never compromise. It must enforce the law". But to resolve the current fatality of criminal courts of Bangladesh and for the ends of justice, following offences may be proposed to be compoundable.

Section 345 of Code of Criminal Procedure has enlisted the offences which are compoundable but still it is realized that some non-compoundable offences cause onerous distress to the litigants. For example, the punishment of Unlawful Assembly under section 143 of the Penal Code, 1860 is the confinement may increase to six months or with fine or both but section 345 of the CrPC has not treated this offence as compoundable. Apart from this, offence of rioting under section 147 of the Penal Code is compoundable though the punishment is confinement may extend to two years or with fine or both. The CrPC in its schedule prescribed that any other offence except Penal Code is condemnable with confinement for less than two years and more than five years are deemed to be non compoundable but bail-able. Again any offence other than Penal Code in which the punishment is confinement for less than two years or with fine or both are also non compoundable but bail-able. Pendency of huge cases may be reduced by making these offences compoundable.

Under the Negotiable Instrument Act, 1881 section 138 describes a non compoundable offence but in reality after being dishonored and lodging a case, the concerned figure complained of is conferred to the complainant by the accused during trial stage of the case. The prosecution may no longer be interested to further the case after being paid. So section 138 of NI Act becomes compoundable in this aspect (Alamin, 2015). Even under the Children Act, 1974, ADR mechanism can be introduced to ensure juvenile justice. This is how many offences can be made compoundable and it will assist to avoid delay and backlogging of cases in criminal courts.

4. Implantation of Plea Bargaining as ADR Mechanism in Bangladesh

Plea bargaining may be called such an instrument in which the prosecutor and convict negotiate in an agreement and subsequently the convict pleads guilty for some incentives provided by the prosecution. It is honestly an agreement in criminal litigation between the prosecution and accused where the accused receives lesser punishment by confessing guilt. It is an amicable method to resolve dispute by reducing cost and time of both parties. Lack of adequate number of judges and backlog of cases are enormously increasing the sufferings of litigants in criminal courts of Bangladesh and presently low rate of conviction has provoked such distress. In these pending cases if the accused is not released on bail, he is confined in prison and as a result prisons are gradually being overcrowded (Karim, 2015). Under such annoying circumstances, introduction of plea bargaining can play efficient role by giving lesser punishment to the offender instead of rotting in prison.

Through plea bargaining the accused will receive lesser penalty by taking incentives from the prosecution. All sorts of expenditures to run a criminal case and valuable time will be saved. Plea bargaining can also keep the parties free from uncertainties due to long process criminal justice system. It is often debated that if plea bargaining is induced occurrence of crime may be increased. However, this is not factual as the court before granting an application of plea bargaining will scrutinize the overall issues of the crime (Alamin, 2015). Some critics may further argue stating that plea bargaining is a mechanism to defeat due penalty.

This is not also substantial because the system of plea bargaining involves concession of treatment but not punishment. Therefore, an efficient and fair prosecution is the pre condition for plea bargaining. As the criminal justice system of Bangladesh got much similarity with India, our country may adopt identical method to implant the principle of plea bargaining just like India. However, it is not argued that all forms of criminal offences should come under the shed of ADR mechanism.

4.1 Various Methods of Plea Bargaining

Three various areas of plea bargaining for criminal cases are there namely i.e. Charge bargaining, Fact bargaining and Sentence bargaining.

Charge bargaining is the most common form of plea bargaining. It occurs when the defendant is allowed to plead guilty by the prosecution to a lesser charge or to only some of the charges brought against him. In such bargaining there remains an opportunity for the accused to negotiate with the prosecution and reduce the number of charges against him. When multiple numbers of charges are framed, some of them are exuded if the accused pleads guilty to less grave charge. But while only one charge is there, a grievous charge is exuded in barter for a plea guilty to less significant charge.

Sentence bargaining takes place mostly in high profile cases when the accused in advance gets to know about his conviction and sentence if he pleads guilty. In fact, it is an agreement for a lighter sentence to plead guilty by the accused and recommendation is made by the prosecution for a specific sentence, provided that such recommendation must be approved by the trial court.

Fact bargaining occurs when either some tedious factual circumstances are not revealed to the court by the prosecution to avoid severe punishment. In some other cases, the accused may assists the prosecution by disclosing vital facts to the police of the concerned case. There remains a promise between the litigants not to disclose such facts which may bind the court to pass to an obligatory minimum judgment against the accused.

4.2 Suggested Mechanism of Plea Bargaining

The form of plea bargaining in India may be mimicked to engraft it in criminal justice strait of Bangladesh. Discussing the methods of plea bargaining of India will be helpful to understand. Like India, a new and unique chapter on plea bargaining can be incorporated in the Code of Criminal Procedure. Some basic features of the scheme are as follows:

i. The accused may lodge a petition for plea bargaining in the trial court,

ii. The court must examine the application as well as the accused whether he has filed it voluntarily or forcefully. Such negotiation takes place upon the free will of the prosecution and defense and time is given to both parties to work out reciprocally. This involves giving of compensation and case expenditure by accused to the victim.

iii. If the case is settled through such mutual satisfaction, the court will sentence the accused by giving one-fourth of the penalty for such offence. The court may award compensation to the victim and release the accused on probation.

iv. The confession and admission by the accused in the application for plea bargaining must not be used for other issues except plea negotiation.

v. An appeal against the order in case of plea bargaining shall be barred by law.

5. Credence of Plea Bargaining in Different Countries

The methods of Alternative Resolution were adopted by the Romans in the Twelve Tables at 450 B.C. and the inception of plea bargaining goes back to the seventeenth century at English Common law courts when pardon was granted to abettors in felony cases upon defendant's acquittal or conviction. Actually there is no direct and specific provision of international law regarding ADR in criminal cases but several international instruments prefer the adoption of ADR in criminal justice system (Dana, 2017). Presently many developed and developing countries of the world have already adopted the principle of plea bargaining in their criminal justice system.

5.1 Plea Bargaining in India

The concept of plea bargaining is successfully incorporated in Indian criminal justice system. A report on "Concessional Treatment for the Offenders who on their own initiatives choose to plead guilty without any Bargaining" was recommended by the twelfth Law Commission of India to incorporate plea bargaining in their criminal justice system. Subsequently by the 154th report on "The Code of Criminal Procedure, 1973" the Law Commission suggested that the introduction of plea bargaining in criminal justice of India fell within the incumbent duty of government. Initially the Indian Supreme Court was not in favor of plea bargaining and in *State of Uttar Pradesh vs. Chandrika* (1999), the apex court concluded that the concept of plea bargaining should not be adopted to dispose criminal cases but few years layer Gujarat High Court in *State of Gujarat vs. Natwar Harchanji Thakor* (2005) pondered the necessity of alternative mechanism to resolve the suffering due to caseloads in criminal courts. Accordingly in 2005, the government of India Criminal Law (Amendment) Act, 2005 by which a new Chapter XXIA was added in the Code of Criminal Procedure containing section 265A to 265L. Offences for which the punishment is more than seven years of confinement or committed against woman and child under the age of 14 years are not compoundable through plea bargaining in India. The accused has to file an application for plea bargaining along with an affidavit declaring his voluntariness to do so. Besides when a case is instituted under police report, participation of the police officer, prosecution, victim and accused will take place for negotiation.

5.2 Plea Bargaining in Pakistan

Principle of plea bargaining was duly incorporated in criminal justice system of Pakistan. In 1999 an anti-corruption law named as National Accountability Ordinance raised the provision of plea bargaining in Pakistan under which if the

application of plea bargaining is approved by the court, the blamed person does not face any direct sentence but just stands convicted (Al-Mamun, 2013). Though in other cases the provision of plea bargaining is quite narrow but the prosecutor has the power to drop a case or some of the charges of a case. It is notable that bargaining does not take place over the judgment or sentence of court.

5.3 Plea Bargaining in the USA

Plea bargaining is tremendously popular in the USA and surprisingly 90% of criminal cases are settled through this mechanism. In 1970, US Supreme Court in *Brady vs. US* (1970) opined that plea bargaining is in no way unconstitutional but immensely beneficial to the disputants in a criminal case. One year later in *Santobello vs. New York* (1971, 404 US 257) the apex court further justified that "plea bargaining is an essential component of the administration of justice. Properly administrated, it is to be encouraged". In the USA with the prior permission of court, the government and the defendant may initiate a plea negotiation where the court notifies the accused about the effect of negotiation. Before granting the negotiation the court ensures that the negotiation was not performed under any coercion or threat but voluntarily. Another privilege for the accused is he sustains authority to withdraw the plea of guilty before acknowledgement by the court.

5.4 Plea Bargaining in Canada

The Supreme Court of Canada directed that the view of plea bargaining is an indispensable material of Canadian criminal justice system. In criminal litigations the Crown has authority to recommend and suggest lighter punishment in exchange of pleading guilty by the accused. Like the USA, almost 90% of the criminal cases are resolved through plea bargaining in Canada (Alamin, 2015:70)

5.5 Plea Bargaining in Europe

Many European countries like the UK, Germany, France, Italy, Poland and Estonia have adopted plea bargaining in confined formation. In the UK, Criminal Procedure and Investigations Act, 1996 has founded the theory of plea bargaining and under the Criminal Courts (Sentencing) Act, 2000 judges have discretionary power to curtail any condemnation where the accused pleads guilty. There is Code of Crown Prosecutor as guideline for the crown prosecutor to handle any case under plea bargaining. Criminal justice system of Britain does not involve any formal negotiation of plea bargaining like the USA but an accused pleads guilty on assurance of lesser punishment.

In 2009, the German government promulgated Law on Arguments in Criminal Proceedings for plea negotiation and bargaining. This law empowers court to scrutinize the confession by the defendant and indicates that the offences effecting economic affairs, drug offences, tax evasion and crime against environment may be resolved by means of plea bargaining. In Germany approximately 50% of criminal cases are settled through plea bargaining (Al-Mamun, 2013:26).

The Criminal Procedure Code, 1989 of Italy does not mention the term plea bargaining but exhibits two methods by which formal trial of court can be

avoided. In Italy without going into trail, parties can enter into an agreement to impose specific penalty on the accused and provisions of summary trail is also concluded under which some sentences may be reduced.

In France, crimes are of three types such as minor offences, intermediate and grave offence along with three different courts namely police court, correctional court and assize court. Serious crimes are tried in the Assize Court where the prosecutors have authority to charge an accused with a minor offence in place of grave offence.

6. Convenience of Plea Bargaining Towards Criminal Justice System

The criminal courts of Bangladesh are overloaded with pending cases and such pendency of cases brings hideous suffering to prosecution, litigants as well as state. Unbearable pressure on both judges and prosecution is rapidly rising and our criminal judiciary is infected with various drawbacks (Karim, 2015). Taking requisite step in order to win in trial of all cases has become very cumbersome for the prosecution. Success to diminish this outrageous number of unresolved cases lies in the plantation of plea bargaining as it has been significantly fruitful in many countries. Although the mechanisms regarding compounding of offences are mentioned in section 345 of the Code of Criminal Procedure but those are not applicable in serious cases. The most significant grace of plea bargaining for accused is getting lesser penalty by pleading guilty. On the other hand the prosecution also gets the assistance of the accused to prove the case in a successful way. Any convict may save huge amount of money specially the poor people who do not have adequate financial ability to consult a renowned lawyer and defend themselves.

The prosecution may lose a case even after long, tiring and bold battle and if accordingly the offender gets acquittal the trial system comes under serious suspicion and dissatisfaction of victim rises over judiciary. Besides, the defense also suffers from anxiety about the uncertainty of sentence after a long and delayed trial. Under such circumstance plea bargaining gives relief to the prosecution and defense from the pain of long and awaited trial proceedings (Alamin, 2015). By adopting plea negotiation the torture in remand and police custody can be removed because both the litigants may primarily enter into an agreement under the approval of court (Karim, 2015). In most of the criminal cases an accused has to rot in prison which is already overcrowded. Some inmates are there who are not capable of applying in superior court for bail and unfortunately they set up their mind to stay in lockup. If plea bargaining is introduced these prisoners would apply for lighter punishment instead of moping in jail. It gives a scope of rectification to the offenders.

There are some famous and well known persons in our society who never want to pass through the enormous proceedings of court due to their reputation. Those people to avoid the harassment of trial system may enter into plea negotiation (Kader, 2007). Some witnesses and victims of sexual and domestic violence do not feel righteous to come at the court due to emotional and sensitive situation.

Inception of plea bargaining can ensure justice for them without instead of formal litigation. Huge and material resources of state would be preserved and it would enhance the scope for the court to deal cases which have real merit (Halim, 2014:201).

7. Inconvenience of Plea Bargaining Towards Criminal Justice System

Everything around us have both good and bad impacts and plea bargaining is no different from this theory. High rate of possibility is there to create pressure on the accused in case of plea bargaining as the prosecutor may threaten the convict with a gross punishment if the convict cogitates to proceed to trial. Even if the accused agrees to enter into plea negotiation he waives some of his fundamental rights such as the right to trial by a jury, right not to be forced in criminal case to be a witness against himself etc.

In plea bargaining most often the victim may be ignored if negotiation is decided by the prosecution and accused as well as court's ability to separate the guilty from the innocent is mugged away. In some serious cases an accused may plead his guilt under coercion even if he has not committed any wrong and following the situation he has to provide fine and suffer imprisonment. Plea bargaining method may not function in the field of utmost imbalance of power between disputants. Using of plea bargaining will be inappropriate to resolve a multi party case where some of the parties do not give consent to cooperate. In plea bargaining the prosecution always gets the opportunity to dominate over the accused and may determine the charges according to his sweet will. Fairness and equality is hampered in these stages. Plea bargaining curtails the power to court to regulate offence but increase the authority of prosecution in a boundless manner. Basic principles of criminal justice system are desperately violated by plea bargaining and may cause serious failure of justice by giving indulgence to the criminals. It must be kept in mind that without proper application of rule of law, the practice of plea bargaining may cause serious anarchy in the criminal justice system (Karim, 2015).

8. Rationality and Challenges of Adoption of Plea Bargaining in Criminal Justice System of Bangladesh

In criminal justice scheme plea bargaining is in very repugnant position as many jurists describe that method of plea bargaining is not the perfect means to ensure justice. The legal system of Bangladesh is adversarial in nature and some critics concluded that plea bargaining does not have some basic features of adversarial doctrine, together with the availability of impartial and inoperative conclusion makers and regulations that administer the evidential and arbitration method. It is also altercated that if plea bargaining is adopted in criminal case, occurrence of crimes may be increased as criminal will get opportunity to compound their offences. In plea negotiation the prosecution may coerce the accused and if the victim is wealthy, corruption may take place in plea negotiation. On the other hand the accused may face great hardship if the application of plea bargaining is rejected. Proper education and training system is also absent regarding application of plea bargaining in our country.

Promotion of ADR in criminal justice system may cause decriminalization of crimes which means that crimes will not turn up in our criminal justice system but still insist with all its evils. There will also be a way to settle criminal offences through village shalish but it is already submerged with winged decisions and local politics. In such case the assurance of justice is not expected and people will further need to come at court. So without the involvement of any judicial body in compounding of offences may decriminalize crime and anarchy in society.

Very often it may be seen that at the beginning of a case the prosecution may overcharge the accused and ignores the interest of the victim. Some scholars remarked that plea negotiation is disrespect to the victim's interest. Plea bargaining is such case may impose huge pressure on accused to plead guilty to an offence which he has not committed. Some of basic fundamental rights of both accused and victim may be badly injured by introduction of plea bargaining in criminal case. Plea bargaining may turn into a tool of prosecution in lieu of a tool of justice. In some cases a co-accused may plead guilty to take the blame for someone else and it may be a trap for others.

Arguments raised that pleading guilty in plea negotiation by an innocent accused may take away his right of taking part in election, holding public office and obtaining a bank loan etc. Even after getting lesser punishment by pleading guilty an accused may be still confined in prison for a specified time. Corrupt investigation report by police may influence the aspects of plea negotiation and cause misery to the accused. Moral message to prohibit may be diluted by plea bargaining. Many criminal may get impunity and exemption from due punishment.

In spite of these drawbacks, some justifications comprehend that to bring appropriate and optimal result in criminal justice system plea bargaining is a must. It will assist both the court and prosecution to come into a conclusion by the facilitation of accused. Satisfactory result will be there for both litigants and resources of state will be saved. It is pertinent to mention that mediation as ADR mechanism in civil suits takes place under the guidance of court. As some of the criminal offences are settled by village courts and municipal dispute settlement boards, settlement by such quasi formal courts may be encouraged instead of compounding by parties.

The "contractarian" theory points out that plea bargaining is a sound machinery and saves judicial resources and ensures the participations of all disputants keeping them free from uncertainty of long trial (Alamin, 2015:77).

Finally to assure fair justice, some requisitions of plea bargaining have to be maintained like, the hearing of application of plea bargaining must occur in court, the voluntariness of the accused must be ensured by the court and he must be aware of such negotiation and lastly if the petition of plea bargaining is rejected by the court then the concerned judge will not further hear the case.

9. Recommendations

It cannot be denied criminal justice system of Bangladesh is already hunch-back with huge number of pending cases and delay in trial procedures have added more suffering. Considering such a tremendous situation of complex and prolonged criminal trial proceeding and all the limitations existing as well, this

paper suggests that inclusion of plea bargaining in criminal justice system can assist to eradicate affliction due to backlogging of cases in Bangladesh. Following recommendations are pointed out to be considered for smooth performance and prospect of ADR in criminal justice system of Bangladesh that promote access to justice in a positive manner:

I. At the initial stage of incorporating plea bargaining, it will be wise to apply only sentence bargaining rather than true application of charge bargaining that may not be very fruitful as it may facilitate the prosecution. On the other hand fact bargaining is very complicated issue and depends much on the personal skill of the lawyers.

II. Before introduction of plea bargaining as ADR mechanism, impartiality and fairness must be ensured from all departments of criminal justice system. Not only the judges but all administrative employees of court must act fairly to enhance plea bargaining mechanism. Accountability of both judges and executives of court must be ensured.

III. Like India, a new and exclusive chapter on the plea bargaining may be included in the Code of Criminal Procedure, 1989. This paper shall prescribe both substantive and procedural rules of plea bargaining in a criminal case. and also further mention of the individual duty of both court and disputants entering into plea negotiation along with the consequences of such agreement. The court shall have the duty to disclose how some of the constitutional rights will be excluded if plea bargaining is adopted. Offences which can be compounded under plea bargaining have to be clearly specified within this chapter.

IV. Plea bargaining may be applicable for those delinquencies under Penal Code and other penal legislations for which the confinement is not more than 7 years. Some offences under special law may also be subject to plea bargaining if mentioned therein. Offences like sedition or relating socio-economic vulnerabilities of country, assault against women and children under the age of 14 years shall not come under the feasibility of plea bargaining. Approval of High Court Division or Session Judge along with trial court shall be obligatory in plea negotiation of exceptional cases.

V. Plea bargaining mechanism shall have to be fully independent from the involvement of police department. The court shall perform the major task in plea negotiation and may arrange a primary examination in camera to assure the voluntariness of the accused. There may be a preliminary conversation between only the accused and judge regarding plea bargaining of a case. In anti-corruption cases the theory of plea bargaining may be implemented. An application for plea bargaining may be made by the accused to the commission as well as to the court confessing his guilt and if the court approves the application, the accused will be convicted but won't face any imprisonment. He might be suspended from his service and might be unfit to take part in election or some of his properties might be attached by law.

VI. While determining lesser penalty for the accused, the reaction of the victim shall never be overlooked. Plea bargaining shall be applied as a process

to bring balance and to ensure justice on both sides. Equal consent of prosecution, victim and accused must be taken to operate plea negotiation. The court must deliver its judgment on the mutual settlement of the disputants and it must be in an open court.

VII. Where a minimum punishment is given for the convict, the accused may face one-third, one-fourth or half of such penalty. Any judgment of court coming through plea bargaining shall be final and application of appeal or revision shall be barred by law.

VIII. Any accused pleading guilty may be released on probation but the habitual offenders will not be able to avail the opportunity of plea bargaining.

IX. Special training institute for the judges and lawyers shall be established for the effective application of plea bargaining in criminal cases and awareness program is to be initiated in every level to aware common people about plea bargaining. A specialized department on plea bargaining might be formed in every district court to corroborate litigants in plea agreement.

10. Concluding Remarks

Alternative Dispute Resolution is a machinery to settle disputes in an amicable situation out of traditional court proceedings. Plea bargaining can use as a tool for the smooth functioning of ADR in criminal justice system and to provide relief from backlog of cases and annoyance caused by long procedural trial. Timely disposal of criminal cases has become an unbelievable matter for disputants. In such distress inclusion of plea bargaining in criminal justice system can create a window of hope and opportunity for the litigants especially for the poor. Plea bargaining indicates the formula to confess the guilt by taking some concession from the prosecution or by receiving lesser punishment. Various forms and principles of plea bargaining are noticed which are successfully adopted in many countries around the world and those countries have achieved tremendous success in this field. Some provisions regarding compounding of offences are found in the Code of Criminal Procedure but not so effective to mitigate the hardship of disputants. Debate in favor and against plea bargaining is always there but it might be the proper and effective mechanism to overcome the existing problems of criminal justice system. Dissatisfaction of citizens over judiciary is gradually rising due to delay and backlogging of cases while other forms of repression are also there. Some drawbacks of plea bargaining are observed but still those can be avoided by true effectuation of rule of law. It is the time to amend relevant legislations and incorporate the provisions of plea bargaining in criminal laws of Bangladesh. Adequate legal framework, competent judges and skillful lawyers can play momentous role to civilize plea bargaining in criminal cases. Plea bargaining process requires careful oversight to secure that it will not cause coercion and undue influence over any party but guarantees substantial justice. However, it is expected that plea bargaining as ADR mechanism will boost up the criminal trial system of Bangladesh.

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Surrogacy Laws in India: Are We Ready for Womb on Rent?

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Abstract

Surrogacy has been one of the most controversial issues in various jurisdictions around the world because of legal, ethical, religious and socio-economic fronts. This work highlights the problems faced by different stakeholders involved in the process of surrogacy. In this paper the researcher attempts to bridge the gap that exists between legal norms and it's on ground implementation by authorities across the globe. The researcher will conceptualize around the international conventions and national framework of laws for the protection of all the stakeholders involved. The paper analyzes the effect which the Surrogacy Bill, 2016 will have on contentious issues like citizenship, legality of the child, involvement of foreign citizens in surrogacy etc. The researcher suggests probable solutions both at international as well as national level to ease the current stalemate situation.

I. Introduction

Surrogacy/Infertility

In the 21st century with rapid technological development it is extremely difficult to determine the legal complexities of a surrogate child. These issues have cropped up due to the cutting edge assisted reproduction technologies in this field to deal with infertility issues among couples.

The procreation of a child it highly desirable to couples who want to continue their family legacy and traditions. Nowadays, both medical infertility which arises out of medical conditions[1] (for example: an infertile lady) and social infertility which may arises because of social restrictions or family structure system prevalent in a country[2] (for example: a divorced lady) issues are prevalent in the society around 70-80 Million couples worldwide[3]. There have been numerous instances where infertility has led to separation of couples[4]. Hence, the desire of giving birth too young one gave rise to further research in the field of science and technology to overcome this issue.

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1 S. Samal, *Epidemiological Study of Male Infertility*, Vol. May, INDIAN MEDICAL GAZETTE, 174, 174, (2012).

2 Van Balen F, Bos HMW. *The social and cultural consequences of being childless in poor-resource areas*, Vol.1(2), FACTS, VIEWS & VISION IN OBGYN, 106-121, (2009).

3 *Id*.

4 Daniela Vuri, *Fertility and Divorce, 4* (Working Paper No. 2001/5, Department of Economics, European University Institute, 2001).

Assisted Human Reproductive Technologies like IVF, surrogacy and others came into existence to overcome the issue of infertility[5]. In this article the researcher will be focusing only on Surrogacy.

India is becoming a hub of assisted human reproductive technologies particularly surrogacy, because when compared to the developed countries it is very inexpensive to perform these methods in India.

Legal Trends Governing Surrogacy

In India, in the year 1997, the first commercial surrogacy sparked huge controversy on the legal and ethical issues involved. Thereafter, the Indian Council for Medical Research came up with guidelines governing the surrogacy regime in India which were adopted as Ethical Guidelines for Biomedical Research on Human Participants. However, apart from the guidelines which were submitted to the Government of India, there was absence of any other supporting legal framework concerning surrogacy. In the year 2008, the Assisted Reproductive Technology (Regulation) Bill was circulated along with rules but could not be enacted as a law.

Definition of Surrogacy

Surrogacy means 'womb on rent'. It is a situation in which a third person agrees usually on contractual terms to bear the child of a couple and leave her parental right after giving birth to the child for a consideration. Surrogacy is very useful for couples who are infertile or have suffered miscarriage and individuals who do not wish to continue with the marital relation or have separated[6]. In this way IVF and other technologies for helping individuals connected child without adoption or other medical complications. Hence, the use of these technologies is very prevalent in modern times.

Surrogacy can be classified into the following types:

1. When both the parents contribute their genes which are implanted in a surrogate.
2. Where only one parent contributes the genes and the other is procured from a third person and implanted in a surrogate.
3. Where both the genes of both the male as well as the female are procured from outside and implanted in a surrogate.

The first method is very prevalent as compared to the other two which are rarely used. Surrogacy has historical traces even in our ancient past. Historically, only relatives used to be surrogates but with globalization and modernization, surrogacy has started taking place inter-religion, inter-community and cross border. Therefore, with increasing diversity in surrogacy approaches, critical and complex- ethical, moral, cultural and social issues like citizenship, status of

5 John A. Robertson, *Assisted Reproductive Technology and the Family*, Vol.47 HASTINGS LAW JOURNAL, 911, (1995-1996).

6 VP Aneesh, *Surrogacy under Indian Legal System*, 100, (Ph.D Thesis, Cochin University, 2013)

contract, enforcement of contract, religious status, jurisdiction issues of contract and others are coming to light.

In the absence of a strict legal regime surrogacy techniques have given rise to even more complex issues like decrease in sex ratio as parents prefer males or females, the notions of objectification of human body is also increasing as parents prefer white in colour donors and genes of individuals on the basis of socially constructed notions of beauty which is also in a way promoting racism, and others.

On the other hand any prohibition with regard to the reproduction rights of a woman will be contrary to the inalienable human rights guaranteed to every citizen of the country.

The issues concerning Surrogacy have been discussed globally under the supervision of various committees and commission reports. These reports vary from country to country according to the social economic conditions prevalent. Thus, the practice is permitted in some countries and prohibited in others.

Surrogacy is rapidly expanding in India because of the inexpensive medical treatment practices and low cost of surrogacy as compared to developed Nations. The business of surrogacy of is also growing because of high poverty and unemployment of the nation. Nevertheless, the surrogacy practices are generating huge money and contributing to the GDP of India.[7]

Cases involving Surrogacy in Indian Context-

In the case of *Baby Manji versus Union of India*[8] (2009) this case involved a couple from Japan which contracted with an Indian women for surrogacy and in the middle of gestation period, the couple got separated and one of the to be parent refused to take the child, but fortunately The other parent and his family was willing to take the child born out of the surrogacy contract.

In this case although the matter got settled because of the steps taken by one party, but the case in itself raised many unsettling questions like what will happen if both the parents are unwilling to take the child born out of surrogacy contract, what will be the citizenship of the child, how will the contract get enforced engagement party defaults, which jurisdiction will have proper authority to adjudicate the cases, who will compensate the surrogate mother, what will be the legal rights of the child, what will be the rights of surrogate mother, whether private international law or public international law will govern the issues, whether it should be made mandatory to register a surrogacy contract for the making it enforceable and many more diverse issues remained unanswered.

In the case of *Jan Balaz versus Anand Municipality*[9] (2010) in this case the passport issuing authorities refused consider the passport application for child born out of

7 VP Aneesh, *Surrogacy under Indian Legal System*, 100, (Ph.D Thesis, Cochin University, 2013)

8 (2008) 13 SCC 518.

9 AIR 2010 Guj 21

surrogacy to a German man by use of surrogacy techniques in India and as per the law of the land the name of the mother must be mentioned passport application form but in the present case the German man was unable to provide the name of child's mother, the passport authorities used to issue him the passport. Ultimately, the court intervened remind the status of citizenship of the child born out of a surrogacy contract in India out of contract with an Indian women, hence the court held that the citizenship of the child will be Indian and directed the passport authorities that the child is eligible for Indian passport which should be provided to the parent as soon as possible. "…a comprehensive legislation dealing with all these issues is very imminent to meet the present situation created by the reproductive science and technology which have no clear answers in the existing legal system in this country…views expressed by us, we hope, in the present fact settings, will pave the way for a sound and secure legislation to deal with a situation created by the reproductive science and technology"[10]

Now, as it is clear from the cases that surrogacy is a big problem in India. Therefore, The Law Commission of India presented its 228th Report[11] on various issues involved in surrogacy and how the draft legislation should be framed by the Parliament of India but till date even when the report was circulated way back in 2009, no action was taken neither parliament nor by the government to handle the situation widespread in the country. Even the courts intervention in those two cases urged the government to bring a law on the issue without any delay to avoid further legal, ethical, moral, social and cultural problems concerning surrogacy damage the delicate social fabric and harmony present in the society.

It has been observed that even after judicial pronouncements in the present matter concerning surrogacy issues, the court has generally tried to resolve the issues involved in the case till date issues involved are not resolved.

Therefore in the next few parts the researcher intends to given in-depth analysis of various avenues that surrogacy issues may bring into light and the analysis also focuses on acceptability of surrogacy in Indian society.

II. Research Questions

1. What is Surrogacy?
2. What are the laws and regulations governing Surrogacy in India?
3. What are the rights and duties of Surrogate parents and Surrogate mother?
4. What are rights of a Surrogate Child and the legal protection provided to him?
5. What is the legality of a Surrogacy Contract and its enforceability issues?

III. Right to Reproduce

'Only motive in life is to disseminate the information a man gathers during his lifetime to the next generation for a healthy development of society in which the

10 *Id*.

11 http://lawcommissionofindia.nic.in/reports/report228.pdf (Last accessed on August 1, 2018)

individual is bound to perish but his deeds survive and keep him alive in the minds of people'

Every religion around the world accepts that children are God gifted and to a great extent it is an accepted view that children complete the social institution of marriage and family.

In Hindu religion, having a child has great significance in society and it has been elucidated at great length by some ancient scholars like Manu and ancient texts like Vedas which state that a man reaches heaven as well as attains salvation only if a child is born and specifically when a boy is born. Moreover the religious ceremonies in Hindu religion are also intermingled and well connected with sons and daughters such as threading ceremony among Brahmins, Kanyadaan[12] (Giving daughter as charity/gift), the cremation ceremonies and others many establish the importance of having children under Hindu mythology and rituals. These rituals increase the importance of reproduction and procreating a child.[13]

Even Christians, Muslims and Jews have similar understanding and religious backing towards procreation in society.[14]

Further, there are many significant drivers which sway the feelings of couples like emotional attachment and affection towards the child which reflects their personality, social norms as well as respect, family expectations to continue the traditions and rituals of a particular class, to get legal heirs for estate and property and plethora of other significant reasons.

In words of Bruce "procreation signifies deliberate actions by an individual, which lead to birth of a child, whom that individual intends to raise as his/her child from the time of birth to maturity, and to be legally bound as the child's parent, even when the genetic material was obtained by that individual from a source outside his/her body"[15].

Hence, it is evident from the definition that it is a process to reproduction without any ifs and buts as to how and with whom it should be done to satisfy the need of couples and individuals. This is exactly where surrogacy derives its legitimacy in modern times in the absence of any straight jacket and universally accepted definition of the same.

In the international arena the United Nations Programme of Action of the *International Conference on Population and Development*, 1995; *International Convention on the Protection and Promotion of the Rights and Dignity of Persons with Disabilities, 2006; African Charter on Human and Peoples Rights on the Rights of Women in Africa, 2003; CEDAW, 1979; UDHR, 1948; ICCPR, 1966; ICESCR, 1966*[16].

12 http://shodhganga.inflibnet.ac.in/bitstream/10603/7301/10/10_chapter%207.pdf (Last accessed on August 1, 2018)

13 VP Aneesh, *Surrogacy under Indian Legal System*, 100, (Ph.D Thesis, Cochin University, 2013)

14 Usha Rangachary Smerdon, *Crossing Bodies, Crossing Borders: International Surrogacy Between The United States And India*, 39 CUMB. L. REV. 15, 16, (2009)

15 VP Aneesh, *Surrogacy under Indian Legal System*, 100, (Ph.D Thesis, Cochin University, 2013)

16 Art. 16 (1) (2) UDHR, Art. 23 (2) (3) (4) ICCPR, Art. 10 (1) ICESCR, and Art. 16 (1) (2) CEDAW.

IV. Rights and Duties of Parents involved in Surrogacy Contracts

It has been estimated that around 9[17] percent of married couples are infertile therefore the desire for having a child is very high and hence surrogacy plays an important rule the lives of hundreds of thousands of people around the globe but particularly in India, the matter is of great concern given the fact India has a huge population and lack of any proper coordination authority to deal with the issues of such nature becomes even more difficult.

The surrogacy techniques are more prevalent and widely used because of less medical complications and high similarity rate with the genetic coding of the gene donors[18] with the development of Human Rights regime third gender couples around the world the issues concerning surrogacy are bound to become more and more complex with time. Thus, surrogacy and other assisted medical reproductive Technologies will require more transparent and strict legal sanctions to avoid the conflict of interests in society.

Who are Parents when it comes to Surrogacy?

Having a child is one of the most unique joyful moments in a person's life and particularly in the life of a couple but due to various reasons the Desire remains unfulfilled and can be frustrating for the couple in the kind of society and social arrangement which human civilization considers normal.

The parent in a surrogacy contract is usually a couple but in some cases even individuals want to go for a surrogate child and fulfil their Expectations and Desire of having a child of their own. In surrogacy contracts, usually the genes of the expected parents are implanted in the surrogate mother but due to some reasons if one of the parent or both the parents are medically incapable of donating the genes then some other person also steps in.

Socio-Economic Point of View in Surrogacy Contracts

It has been generally seen that the expected parents are socio-economically very strong and the position of the surrogate mother is usually weak. Hence, the need for having a strict legal framework to protect both the parties involved in the surrogacy contract is necessitated by the emotional, physical and financial consequences which the parties may have to undergo during the process of surrogacy.

The questions as to what should be the permissible limits within which the expected parents can you control the life and health of the surrogate mother and does that violate right to life. Consequently, this raises important questions like, How much freedom which a surrogate mother has as an individual can be compromised and controlled through a contract? Are the expected parents under an obligation to keep the hidden and confidential? and many others.

17 *Supra* Note 6.

18 VP Aneesh, *Surrogacy under Indian Legal System*, 100, (Ph.D Thesis, Cochin University, 2013

Right to be a Parent out of Surrogacy

According to various International covenants and domestic laws[19], the right of reproduction and sexual independence of not only parents but also individuals are enshrined and guaranteed to all.

When it comes to surrogacy the expected parents have a right of independent choice as to how and with whom they want to reproduce to have a child. The parents also have right to privacy against any intrusion in their sexual independence by the state or government authorities, the authorities of the state cannot compel the expected parents or individuals to maintain number of children's which they want to have or the minimum gap between two children or the number of children which a couple or individual may wish to have. The parties involved in a contract of surrogacy also have privacy rights against any intrusion which restricts their choice of selecting a partner and sexual intercourse. The state cannot intervene in the use of modern scientific developments by individual or a couple to fulfil their desire of having a child by use of scientific development as a matter of right to life and personal liberty which encompasses within itself the right to have family of one's own choice.[20]

Prerequisites of expected Parents in a Surrogacy Contract

The Research report emphasizes on the fact that it is very difficult certain prerequisites for the parties in surrogacy contracts. It has ignited a debate at global level as what should be the minimum prerequisites required to enter into a surrogacy contract and as to whether there can be some restrictions vis-a-vis prerequisites. The debates as to the restrictions on surrogacy will face several constitutional and legal hurdles if it has to be implemented at Ground Zero.

In the United States as well as the United Kingdom, the statutes dealing with surrogacy are ambiguous on the issue of prescribing prerequisites. Hence, it is imperative to get in-depth information as to how the requisites the rules work around the world.

In case of couples the laws are relatively less complex. In most jurisdictions the laws allow the couples who are either infertile or do not want to have a child due to busy work and other engagements.

In India the ART Bill which was brought in 2010 states that assisted reproductive technology shall be available to all individuals' namely single persons, married couples and unmarried couples. Hence, the bill allows all the persons to enter into surrogacy but the ICMR Guidelines Rule 32 Clause 10 states that only couples which physical incapacity to produce young one can go for surrogacy[21].

19 Art.16 of UDHR, Art.2(1) and Preamble of ICCPR.

20 VP Aneesh, *Surrogacy under Indian Legal System*, 100, (Ph.D Thesis, Cochin University, 2013)

21 https://icmr.nic.in/final/RDA-2010.pdf (Last accessed on August 4, 2018)

The Surrogacy Bill, 2016[22] states that only citizens that too only after proving infertility i.e. inability to conceive will be allowed to take the help/recourse of Surrogacy[23].

In case of transgenders, some of the countries have allowed it while others have not. for example state of Florida has restricted transgenders to enter into surrogacy but Wales along which Queensland have allowed it.

Even though ART Bill did give a clear picture, the Supreme Court in Suresh Kaushal case disallowed same sex marriage and consequently the transgender surrogacy also got a big blow and couldn't be continued in India.

There are various pros and cons of allowing transgender to be a party to the surrogacy contract. The point raised in favour of the transgender community is that gender is unrelated with parenting and hence there is no connection between the two. On the other hand jurists have argued that allowing the same would not provide a healthy environment for the wholesome development of the child as both mother and father play an important role in making the child a good citizen.

Hence, the effect of same gender parents raising the child maybe or may not be detrimental to the overall development of a child but at the same time the basic inalienable human rights of the third gender category which is also guaranteed under international law and constitutional law has to be balanced with that of the society at large.

In case of single and unmarried people, it has been argued that right to reproduce is a separate right in itself unconnected with a person's individual choice of getting married. Hence, the researcher states that sexual independence and right to reproduce of even single individuals should be protected and preserved by law. While drawing an analogy with couples the states like South Africa, Wales and Queensland have allowed single parent.

In India, ART Bill, 2010 as well as ICMR Guidelines[24] allows individual to act as a parent in their personal capacity regardless of their marital status.

In case of old couples and people with special abilities-

Most of the legislations dealing with surrogacy have provided for minimum and maximum age for becoming a surrogate parent because presumes that a person who is too young or too old will be unable to take care of a young one. Thus, law mandates that the maximum upper age limit in the absence of a Nominee should be 50 years and similar is the case with is lower age limit(in most jurisdictions the age of maturity is 18 years after which a person can be allowed to enter into a service contract). Under Indian law there is no such maximum age limit prescribed till date.

22 http://www.prsindia.org/uploads/media/Surrogacy/International%20comparison%20of%20surrogacy%20laws.pdf (Last accessed on August 2, 2018)

23 *Id*.

24 https://icmr.nic.in/final/RDA-2010.pdf (Last accessed on August 4, 2018)

Even Specially Abled Persons (SAP) are given right to be a parent what they had to establish that proper care and overall growth of the child will not be compromised under their supervision which is usually monitored with the help of NGO and social services.

Lastly, in case of inmates Article 8 of European Convention on Human Rights[25] read with Article 12 of the European Convention on Human Rights[26] provides that even inmates after their period of sentence should be allowed to live normal life and have a family of their choice with reasonable restrictions.

It is also very important that the rights and obligations of all the parties involved in a surrogacy contract are well defined so as to avoid any further legal complications and conflict of interest in future or during of gestation period. In following due diligence while drafting the contract terms will avoid legal hassles which may arise in case anything adverse happens in between. It is also advisable that insurance laws must be amended so as to protect the future needs of surrogate child as well a surrogate mother in case the other party defaults.

The expected parents must have the following rights, viz. independence in selection a suitable person for surrogacy; authority to impose certain health related restrictions; freedom to visit the surrogate mother during the gestation period; possession of child after the gestation period is over and many others for a smooth and hassle free performance of contract that is the surrogacy contract.

The parents are responsible a number of legal duties which arise out of surrogacy contracts such as duty to maintain the child as a natural child and to fulfil all his responsibilities (Rule 3 clause 12 of ICMR Guidelines)[27], duty to pay the consideration to the surrogate mother and full payment must be done at the time of delivery of the child, duty to take possession within 72 hours of the delivery, the parents also have a duty not to undergo prenatal sex determination of the child, duty to appoint a local representative to take general care of the well being of the child's health as well as the surrogate mothers health.[28]

Various provisions of ART Bill of 2010 and Surrogacy Bill 2016[29] prescribe that the parents cannot go back on the sum assured as they are bound by principle of estoppel under law of evidence and the parents are also bound by the contract till the end (Section.34) and others.

Thus, it can be concluded that although with technological advancements many rights and duties have emerged out of surrogacy contracts but the law is still inadequate and at a very nascent stage to handle the legal complexities arising out of these contracts.

25 Hereinafter ECHR

26 *Id*.

27 https://icmr.nic.in/final/RDA-2010.pdf (Last accessed on August 4, 2018)

28 VP Aneesh, *Surrogacy under Indian Legal System*, 100, (Ph.D Thesis, Cochin University, 2013)

29 http://www.prsindia.org/uploads/media/Surrogacy/International%20comparison%20of%20surrogacy%20laws.pdf (Last accessed on August 2, 2018)

Therefore, it is an obligation on the part of the Parliament to take care of the issue as soon as possible to maintain social harmony and well being of parties involved in such contracts.

V. Legal Options available to a Surrogate Woman and her Obligations

The Ultimate Gift which a woman can give is a child, her child. Even when the concept of consideration has come into contracts and agreements which govern surrogacy, emotional and physical attachment which a woman has with a child with the child she bears is immeasurable. Hence, robust protection must be given to the surrogate mother to avoid any form of injustice to her. The basic premise on which the researcher argues is that the rights and obligations which may arise out of a surrogacy contract really understood by the woman who agrees to such contract that is by way of assisted human reproductive technologies (ARTs). The law must protect and clearly elucidate the rights which a surrogate mother can claim and her obligations so as to protect her from exploitation on the part of expected parents who are usually socioeconomically sounder.

Surrogates are either Traditional or Gestational surrogates[30] which differ in the manner in which the genetic material is implanted and whose genetic material is implanted in the surrogate mother. Surrogacy is mainly inspired by economic consideration and sometimes by emotional attachment. Under different International Covenants and National Legislation's the rights of a surrogate mother are protected. Every woman has a right to be a surrogate mother because of three fundamental reasons:-

1. Because a surrogate mother has right over her body according to John Locke's theory of property[31].
2. Because every woman is right to life and personal liberty as enshrined under Article 21 of the Indian Constitution.
3. Lastly, because every woman has right to use the scientific developments under ICCPR[32], UDHR[33], ICESCR and various other International Covenants[34].

These rights have been upheld in a series of judicial precedents in India, United States and England.

There are various prerequisites to become a surrogate mother which encompass Age limit which must be in between 25 to 45 years of age that is before menopause, Marital status in which the other spouses concurrence is mandatory, the surrogate mother be free from hereditary diseases, she must have a child

30 Peter R.Brinsden, *Gestational surrogacy*, HUMAN REPRODUCTION UPDATE, Vol.9, No.5, 483-491 (2003)

31 K Widerquist, *Lockean Theories of Property: Justifications for Unilateral Appropriation*, PUBLIC REASON, Vol.2(1) (2010)

32 Art. 15 of ICCPR

33 Art.27 of UDHR

34 Art. 15 of Universal Declaration on Bioethics and Human Rights, 2005

before she agrees to become a surrogate mother and surrogacy should be allowed to the extent of 3 times only to avoid any abuse of women.

Any law which has to be drafted for surrogacy related issues must take into consideration the above stated prerequisites for being successful.

Surrogacy procedures are complex and therefore the law must be clear about the duties of the surrogate mother which include duty to disclose details about herself and her ancestry, duty to confide any health related issues (ICMR Guidelines Rule 3 Clause 10)[35], Duty to undergo pre and post medical check up to avoid any complications in future, duty to take care of herself and her child during the gestation period and eliminate all conducts which may endanger the health of the child or her own body, duty to waive her right over the child post delivery and lastly the surrogate mother must avoid any personal meeting with the child in future.[36]

In a surrogacy contract whether altruistic or commercial, the free and fair consent concerning- anonymity, consideration for surrogacy, treatment expenditure, Maternity Benefit and other mandatory as well as voluntary compliance under different statutes along with ICMR Guidelines of the surrogate mother must be adhered to eliminate the chances of future legal complications.

To conclude, the laws and regulations around the world have not taken into consideration all the factors which may affect the parties and the society at large. Hence, a greater debate and involvement of various parties involved is required to make the procedure of Surrogacy more robust.

VI. Surrogacy Agreements: Trends and Contentious Problems

As far as Surrogacy contracts are concerned the Indian Contract Act, 1872 governs it but the law is not suffice as many issues like international enforceability, legality, breach of contract, compensation and other significant questions are rather complicated and require a separate legislation which would encompass similar provisions as are enshrined in the Contract Act and Specific Relief Act, 1963 along with stricter penalties and liabilities.

VII. Analysis of Rights and Duties of the Surrogate Child

"Currently, the biggest risk to children in the surrogacy context comes not from the actions of either set of parents but from the uncertain status of the law, which.., can lead to the child being subjected to years of litigation to determine who will be considered to be his or her legal parents."

A surrogate child is one which is born out of the surrogacy process with the use of Assisted Reproductive Technologies (ARTs). This child is born without any sexual intercourse between the parties to the Surrogacy arrangement.

35 https://icmr.nic.in/final/RDA-2010.pdf (Last accessed on August 4, 2018)

36 VP Aneesh, *Surrogacy under Indian Legal System*, 100, (Ph.D Thesis, Cochin University, 2013)

Perhaps the most vulnerable segment of the entire Surrogacy process is the child and because of this reason it becomes more significant that laws play a vital role in the protecting their rights. The grey areas in this part are manifold and complex like the issue of citizenship, default in surrogacy contract, what will happen to a child deformity, legality of the child and others.

Baby Manji Case[37] extensively dealt with the issues involved in the case but did not provide a permanent solution.

In the case of *Jan versus Anand*[38] (2010), the court held that surrogate child has no right under the Evidence Law of 1872, similar to a legitimate child. The ICMR Guidelines states that the surrogate child shall have equal rights similar to a natural child (S.35).

There are four theories which elaborate on the issue of determination of true parent-child relation namely causation, genetic link, intent and care.

Therefore, it is evident that along with the above stated that, rights of the surrogate child also include right to know is descent and the issue as to the possession of the child is adjudicated by the court on the basis of interests of the surrogate child along with consideration as to who is the donor of the genetic material.

Hence, by keeping in mind all the considerations a robust legislation is required in this area to protect the rights of the surrogate child.

VIII. Conclusion in Seriatim and Recommendations: How the law must be framed to resolve the issues arising in Surrogacy?

1. The fundamental right to life and personal liberty must include right to reproduce.
2. The trans-boundary surrogacy should be recognized by all Nations and there must be an international Covenant providing the minimum threshold of rights and duties of all the parties involved in a surrogacy contract.
3. The legal structure must provide for the prerequisite for becoming a surrogate parent or a surrogate mother.
4. The law must provide all the prohibitions with regard to surrogacy for example prenatal sex determination.
5. The rights and obligations surrogate mother as well as expected parents must be clearly specified in white and black.
6. There must be establishment of an platform international for standardizing the service contract to make the contract accessible incomprehensible in multiple languages around the world.

37 (2008) 13 SCC 518.

38 AIR 2010 Guj 21

7. A new body or authority must be created to register the contracts of surrogacy.
8. There must be stringent provisions for breach of contract and penalty for any offence which may be committed during surrogacy.

"Laws and institutions must go hand in hand with the progress of the human mind. As the human mind becomes more developed, more enlightened, and as new discoveries are made, new truths discovered and manners and opinions change with the change of circumstances, the Laws and Institutions must also advance to keep pace with the changing times."[39]

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Democracy is Anti-Federalist – Putting Two Alpha Males Together

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Abhivardhan**

Abstract

For a long time now the periphery of Federalism has been polluted with ill-determined and imprecise definition, most of which has emphatically led to a deviant or rather limited definition of federalism. Similarly, the Supreme Court, the highest body to define or determine any matter, routinely is called into action to define and provide a formalistic structure of the term. However, surprisingly, most of the Court's wisdom gets limited to the conventional meaning of the term. One of the basic reasons of which have to be attributed to the limited understanding of the term and more importantly linking it with Sovereignty. However, there is much more to the definition of federalism than it is generally being credited for. Federalism, irrespective of representing a human artefact is indeed a doable concept of political governance from an archetypical insight to its pragmatic reality, where backsliding is politically a grave challenge. Similar is the case with democracy and intentionally keeping it with federalism is nothing short of a theoretical homicide. For under the science of ethology, there are certainly many alpha males, wherein constitutional law faces certain obvious harsh realities as in the dynamics of suzerainty: Similar is the case with Democracy and Federalism, wherein pluralism at a definitive bridging may face certain instrumental issues of representation being computed into the political realms of governance and decision-making. In which inevitably, almost every time, democracy tends divergent to federalism.

Therefore, the paper makes an earnest effort with the pursuit cum purpose of surfacing the inherent antagonism between the two most celebrated principles of modern day republics and investigate the true purpose they seek to fulfil with an intended conclusion on the basics of their nexus deemed to be possible.

I. What does federalism mean?

The term federalism is derived from a Latin term *foetus*, which literally means compact or covenant. In due essence, a federal government is an arrangement under which the partnership is established and governed by covenant, the internal reflection of which reflects the special sharing between the partners, who is required for a healthy polity, in wider sense; federalism involves linking of groups & states in union for the energetic pursuit of common ends. As a political principle, federalism is concerned with the political dispersion of power so that the constituting element of the union can take part in the policy making process. In federal structure, the policy making is undertaken through a process

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of negotiations and compromises in some form, so that all the various constituting elements of the union can have a share in the course of it. Daniel Elgar defines federalism in his book 'Exploring Federalism' as a contractual non-centralization, the organized dispersal of powers amongst many centres whose legitimate authority is duly constitutionally manifested and endured, which resembles to the widespread and rooted dispersion of power that retains the principal physiognomies of, and argue for, a federal democracy.[1]' Federalism, in its most imperfect form, is typically defined as partaking to do with the due distribution of powers. However, in its wider sense - federalism does emphasise on citizen participation in governance: more appropriately styled as compound governance.

The general definition which is relatable and generally susceptible with Federalism is the Centre-State division of powers and is further summarized as[2]

A) Centre-State division of powers

B) Constitutional distribution power between the Centre and the State

C) Written and Rigid Constitution

D) Supremacy of the Judicial Authority

However, Heather K. Gerken, who is currently working as Dean at Yale Law School, holds different view as to the generally acceptable definition of Federalism, in one of her articles 'Federalism all the way down' published in Harvard Law Review, November 2010; she argues as to the viability of the age old paradox of centre and state.[3] As the world enters the era of cooperative federalism, much more integration is required for the governance of the nation as one. Therefore, what Gerken proposes is a system of compound governance, wherein the traditional dissection of powers between the two sovereign bodies working within the same polity namely State and Centre, are done away with and federalism is pushed further down, beyond its characteristic limits, not just only integration of State and the Union, but the cities and not only cities but also of smaller provinces in the governance of the Union at an illustrative purpose with in to the mayoral model.[4]

In response to decision of the federal government of US of the due withdrawal from the Climate Change agreement, Governors A. Cuomo, J. Inslee, and J. Brown created the US Climate Alliance. This bi-partisan coalition of states is dedicated to the goal of plummeting greenhouse gas emissions reliable with the objects of the Paris Agreement.[5] Now, this case is quite interesting because it represents another

1 Elzar, Daniel Judah, *"Exploring Federalism"*, University of Alabama Press, United States, 1991.

2 Shukla, V.N, *"Constitution of India"*, 13th edition, Eastern Book Company, Lucknow, 2010, p. 714.

3 Nov 19, 2010, 124 Harv. L. Rev. 4 and also visit https://harvardlawreview.org/2010/11/federalism-all-the-way-down/, last accessed at 16/09/2017 23:42 P.M IST

4 One important thing is ascertainable from this approach discussed that the qualitative transformation of federalism is tending the International Community to a more cogent, real, practical and optimistic set of statutory and individualistic manifestations, with the harmonious presence of specificity and objectivity of such 'de jure' determinant structures. Let us analyse one consideration for this purpose.

5 UNITED STATES CLIMATE ALLIANCE, ABOUT. Retrieved December 12, 2017 from https://www.usclimatealliance.org/.

new element of federalism, which does not only make it more cogent, but also more realistic in its pragmatic contingencies; It is self-determination.

Self-determination is generally expressed as political cum legal principle, and a *de jure* right.[6] It has been, in normal terms, comprehended as the rights of people under colonial, external or alien domination to self-government,[7] whether through formation of a new state connotation in a federal state, or autonomy or acclimatization in a unitary vis-à-vis non-federal state.[8] Henceforth, self-determination is a special individualistic concept. However, if we try to notice the action furthered by the US Climate Alliance, then it shall be that the Alliance, with adherence towards the US Constitution, represents itself in its paradigm of voice. It does not demean it. Despite the withdrawal decision of US, members of the alliance are committed in the auxiliary sense to the accord, and are in pursuit of aggressive climate action to facilitate progress toward its goals.[9] This signifies an important landmark action because it represents self-determination again. Henceforth, self-determination is the easing principle to smoothen the rigidity that federalism has possessed due to the idea of traditional sovereignty and power utility. One more thing is there that every nation, which attains the sovereign equality according to the Purposes and Principle of the Charter of the UN, is actually bound by self-determination. It is understandable from two important Vienna Conventions- the first one related to VCLT and the other related to VCDR.

Representatives qualified by States to some international conference or an international organization (or one of its organs), for the due purpose of an adoption of the text of a treaty in that conference, organization or organ[10] are actually the entities. However, the establishment of diplomatic relations between states, & of such permanent missions, does take place by due mutual consent.[11] Moreover, the mutual consent is not that simple or traditionally limited; it is also based on the other established provisions of the VCDR. Its Article 29 stipulates that the person of a diplomatic representative shall be inviolable and he shall be exempted from any liability of arrest or detention of any form. Plus, the receiving State shall subject him to treatment with due deference and shall take all apposite steps to prevent any so forth attack on his person, freedom or dignity. Here, self-determination is an attribute developed from this article. However, the working out of self-determination is not attributed to the advocacy of the State but the resemblance of the diplomatic mission and all of its members' rights, personal contingencies, which shape up the rightful coordination of the mission as well as their mutual determination. For example, a diplomat has to adhere with the State for he/she has to, but this adherence is limited to all those actions, that not

6 The shift from 'principle' to 'right' first appeared in the Declaration on the Granting of Independence to Colonial Countries and Peoples, GA Res 1514(XV), 14 December 1960.

7 E.g. GA Res 1514(XV), 15 December 1960; GA Res 1541(XV), 15 December 1960; GA Res 2625(XXV), 24 October 1970. Also: *Namibia,* ICJ Reports 1971 p 16, 31; *Western Sahara*, ICJ Reports 1975 p 12, 68; *East Timor (Portugal v Australia)*, ICJ Reports 1995 p 90, 102; *Wall,* ICJ Reports 2004 p 136, 171-2.

8 See GA Res 1541(XV), 15 December 1960; GA Res 2625(XXV), 24 October 1970.

9 *Ibid* 4.

10 *United Nations, Treaty Series*, vol. 1155, p. 334, Article 7, para. 2, clause c.

11 500 UNTS 95, Article 3.

only leave a legal mark, impact or effect on the object, policy and role of the State, which the State is availed of to decide as such, which cannot be even modified or questioned by us unless it affects the International Community in any sorts but also an applied influence or outcome of what the State's foreign policy represents. Let us consider the Mansabdari scheme for a while.

Akbar wanted to evolve an exclusive system of adapting these regal facilities and the result was the announcement of the Mansabdari scheme. He introduced this system in 1571 with the assistance of Shahbaz Khan. In this system, the military and civil duties were simultaneously handled and coalesced. However, the most interesting feature of this system is that the Zat and Sawar configurations that are made are, at its fullest, a clear representation of subordination and a special recognition was present. No mansab was inherited. It is ascertainable that this system reflected some important facets of federalism in the area of military and civil services, i.e., the utility of every participant in the system, his rank and subordinated self-determination in terms of his stature that he had possessed and the direct subordination to the emperor irrespective of the rankings as an inversion to hierarchical cum traditional institutions. Moreover, this system turns out to be realistic as both the Zat and Sawar numbers decide the realistic position and active configuration. Thus, federalism in its comprehensive sense must be real, which is a required attribute for consideration.

II. Difference between Compound governance and Independent governance

The idea behind a compound governance or compound majority was put forward by James Madison in federalist paper number 51 while talking about the compound republic as the best republic remedy for the republican diseases. The idea behind a compound majority is the essence of the constituting elements which blossom into a majority. In easy words, self-rule and shared-rule, wherein the constituting element of compound majoritarian are independent in matters of self-governance and integrated in matters of shared-governance. For example, the different polities, groups representing minority interests in the national government constitute majority at state level: hence they govern at the state level but integrate with other minor polities to form government at the union level. In theory, federalism is contrived for achieving some degree of political integration and is based on a mixture of self-rule and shared-rule.

The idea behind compound governance being creation of an supportive insider like a servant serving his master for the welfare of a Union and not the creation of an autonomous outsider, who supports the cause of Union from outside.[12] The supporters of cooperative federalism do not account for the sovereign limits of the state as a boundary in the working out a federal policy but rather choose to disregard the sovereign limits of the state so that the state can take an active participation in the federal policy-making as a supportive insider. Whereas, the supporters of competitive federalism limit the support of the state in the federal policy-making to the sovereign limit of the state, in easy words to the extent that federal policy making does not effects the sovereignty spheres of the state and

12 Jessica Bulman –Pozen and Heather K. Gerken, *Uncooperative federalism*, The Yale Law Journal, 2007.

therefore the state works as an autonomous outsider; assenting or dissenting with the federal policy without participating in its making.[13] Sovereignty over integration gives an option to the State majority but National minorities to exit or non-participate in the federal policy-making or making laws over its own cause. But cooperative federalism seeks integration over autonomy (sovereignty), interdependence over independence so that a national minority can participate in the federal policy making and serve as a federal servant or ally instead of limiting its power to governing itself within its sphere and existing from the federal policy making.[14]

In this system, the minorities voice their assent or dissent in the federal policy-making instead of exempting itself from the process by opting to stay away from the federal policies. This gives a right of not only of making the federal policies but rather stopping its implementation.[15] Rather federalism is organized on the foundation of regulatory check on the federal policy by local cum state-level authorities, who participate in the federal decision making.[16] Additionally, federalism as such is an institution for the representation of heterogeneity subsisting in the society and therefore linking federalism with sovereignty will limit the sphere of federal policy making only to the extent of union making laws for its own sphere and state making laws for its own sphere within its territorial sovereign boundary. However, this will be highly unjust to the vast diversity of human race that needs adequate representation in the federal policy making, in the lack of which, there are possibility it will lose out its very existence. One of the major goals served by federalism after end of the World War II was the formulation of a mechanism for the adequate representation of the diversity subsisting so that equal representation of their interest is made and therefore, compound governance, wherein the people participate in the federal policy making so that their interest is represented.

One important thing is ascertainable in this argument. Owned rights and in this special sense, categorically sovereign encompass a wide-ranging impression, not possible to be reduced to *territorial sovereignty*.[17] In more clearer terms, sovereignty as a power is exercised by the right to exercise it. In addition, this right is availed only to a state as a viable international legal personality. Or let us consider the basic aspects of responsibility vested with sovereignty. When the idea of welfare state is practically analysed, we generally believe that sovereignty as a power does not only privelige and demand from us to adhere with the police-state as Plato's been thinking of it, but also with some other manifestations that actually shape up our exclusivity and beauty that we want to gift to this state via our socio-economic, political and military architectures. Even a judicial system, a constitution, a parliament or any other authoritative and statutory set-up is primarily based on how and why is it to be made. That is why even if constitutionalism is a doctrine for democracies, but the sculptures of every

13 *Ibid*.

14 Supra note 1.

15 Rubin, L. Edwin and Feeley, Edwin, "*Federalism: Some notes on a national neurosis*, Berkeley Law Review, 1994.

16 Ernest A. Young, *Two Cheers for Process Federalism, 46 Villanova Law Review* 1349-1395 (2001)

17 Crawford, James (7th Edition, 2008). *Brownlie's Principles of Public International Law*, 2008, p. 206.

democracy is not the same with some similarities, which is quite obvious due to the similar contingencies that had to occur.

Henceforth, if the exercise of sovereignty as a right is done like a mere insider, which is questioned as the matter of the demarcation of sovereignty and federalism is considered, it is necessary to understand that sovereignty and federalism cannot be demarcated because of their reciprocal and proportionate resemblance, which is the first factor. This factor must exist otherwise federalism itself shall be demeaned and sovereignty shall be of no applicative value. Moreover, a cogent presence of a resembling and connective construct of human instruments must be dealt as an important factor, where the referential density of observance shall always be there. No authority can challenge it nor can end it because it is natural to happen. Rule of law, as from its inception, has never been hierarchical; it is a presumptive advocate of the validity and the applicability of law with its required utility of what spirit of concern, consent and mutuality it has to embrace and spread.

Hence, sovereignty is the sole (and only) way to concentrate the rule of law but not an eternal and only way to establish or maintain it. Regarding federalism, this is important to be understood that when there is a macroscopic distribution and simultaneous displacement of the relevance, recognition and representation of some vague concept called power, then it is imperative to an extent to consider its quantitative aspect. Still, the better utility of power is qualitative because its quantity can only ascribe how much heavy is it and nothing else. A material impact on the external and internal configurations with reverence to a sovereign state and its incumbent agent is important, but what remark will it leave is dependent on its real outcomes.

Now, even if the U.S.A. declares Jerusalem as the capital of Israel, it does not qualify that Jerusalem is because the quantitative impact of the US as a permanent member in the UNSC and as a big power in the Western bloc can only leave some influence. What is important is the legal aspect. That is why even a UNSC resolution was vetoed by its representative, the UNGA passed it successfully against the wished of President Trump. Even India's diplomacy is that interesting to consider because even it supports the US, it has its own concerns to ponder upon, which is a practical aspect pertaining to its utility of power as a UN member as well as a special member (in representative nature only) due to its better diplomatic standoff that has it endeavoured to show to the International Community[18]. It is quite obvious that the US Congress is under a due contemplation over occlusion of financial support to some UN projects at the real pretext of being unduly the single chief donor to the UN. This seems to be an existential reality as embarking upon some significance upon this internationalization of the sovereign question. However, the due realism that it possesses is indeed duly speculative and public policy, even at a significant dais of realism is differential at a embarking significance. In addition, that is a due beauty of genealogy. However, it is an important mandate that we adequately crystallize responsibility at an objective sense. Subjective attributions have an effect; but it is a timely need that sovereignty is not made so much abstract at that

18 Quentin Skinner, A genealogy of the modern state Philpapers.org (2018), https://philpapers.org/rec/SKIAGO (last visited Sep 3, 2018).

subjective instance. Thus, power is an essential tool to be used; it just depends on how is it used. It is the fragile instrument of a relevant persistence that an international legal personality needs to attain irrespective of its older definitions that has qualified that power is based via might and it has gone to a paradigm shift to an armour of responsibility. Thus, federalism needs the regulated essence of sovereignty in a better way such that its realism exists.

Now, this is true that sovereignty has overridden federalism many a times, so in its realistic analysis, it is seemed to consider that federalism is underestimated and not decimated. Now, let us change an outlook a little bit. When mankind has travelled from the unitary, homogenous and unilateral exclusivity of the societies (the earliest ages in the English society) and states to a comprehensive, connective and unified network of heterogeneity (the modern contemporary ages), it has earned to learn the wind of change[19]. Same is the case with sovereignty and its utility. Federalism was made after sovereignty so that sovereignty is utilised. That is why federalism is deemed to represent at least two points-

(i) That it is deemed to deepen and clarify every minuscule essence of the structure cum all its possible subsidiaries of a State;

(ii) That it is deemed to make a cogent network of utility and resembling strings of its subsidiaries;

However, even if these are required or concerned, these attributes are less observed in the resemblance of the nexus between sovereignty and federalism, which is important to be put in its fullest application.

III. Justification for federalism

The move towards compound governance has not been elegant, the annals of history is suffuse with battle for independence within a independence, whether it be Texas in the U.S or Maharashtra in India, the cry for representation has always found a voice. However, under this part we shall discuss about the rhetorical basis on which federalism stands upon.

a) No Taxation without representation

During the colonial era in America, various disagreement and deference arose between the colonial masters, the British and the Americans; one of such disagreement was on the ground of representation. Back in the 1750's and 60's the Americans were generally taxed by their colonial master with no representation, it was a general belief in the British regime that there was no necessity of representation for taxing any estate under British empire as the British believed in the idea of virtual representation: which was based on the belief that a member of the legislative body practically epitomized every individual in the domain & there was no necessity for an explicit representation from the estate which was being taxed under the British empire. This idea of virtual representation ran contrary

19 *See,* e.g., S. E Finer, A Primer of Public Administration (1977); Abbas Kelidar, *States without Foundations: The Political Evolution of State and Society in the Arab East*, 28 Journal of Contemporary History 315-339 (1993); Bedri Gencer, *Sovereignty and the Separation of Powers in John Locke*, 15 The European Legacy 323-339 (2010).

to the principle of federalism, which signifies compound governance which was to a larger extent limited under the British regime. James Otis, a prominent American politician, raised voice against this arbitrariness, as he argued for actual representation in the house of common for every tax being levied in America whether it is levied in Virginia or Texas, they should be given a representation.[20] Thus James Otis lay down for the coming generation a foundation stone for federalism, for if not a province is taxed without representation, it surely will be arbitrary. For the state is being run on the taxes extracted from each province but when the policies are being formulated only a selected few are representing the whole will be unjust to its taxpaying citizens. Similar to this was French democracy, after the fall of King Louis XIV there was bleak start of democracy in France, however, the voting rights were limited only to the property owners, as they were belief to be the only one having interest in the country of France. This surely is nothing short of a dark period for federalism as the voting rights are limited which will eventually limit the representative in the parliament and which will hamper interest of varying background, who could not voice their concern through representation.[21]

Hence the arbitrary nature or realm of federalism is only due to a fallacious assumption that must not be taken. The assumption is- there should be a representative basis. However, it would be more cogent that the basis, utility and methods of representation are not made fundamental but their legal cum coherent relationships are emerged. Based on the nature of law and the coherence and the relationships that are coherent, federalism can be used, based and methodized into a referential but credible, required and all-round cogent phenomenon. Henceforth, it must be the law and its observance of those required relationships that are meant with the people too. For example, a Parliamentarian can be of any creed, gender, religion, caste, sex, etc., according to the Constitution of India, 1950. However, nowhere is there any reference about the relationship that he embarks and creates with the State as a representative of the people other than in the legal provisions, oaths and other liabilities and legal binding on each of the akin. This substantiates us to understand that his representative calibre and essence is not only due to the law, but also due to those contingencies that created it. Thus, federalism must be realistic, general in its legal application and the coherence of those relationships and responsibilities. Moreover, hierarchy in these relationships must not coincide with authoritarian effects even if there exists a legal protocol because the intent of a legal protocol is meant for a subjective representation and utility, which it has been showing and not for a mere structure in which power is levied. Henceforth, when it emanates to the essence of representation, it is important to consider because the reference of a protocol not only represents hierarchy but also the nature of the State system. This, in all its ends, suggests

b) General Application of Law

The second and the most obvious reason for justification of federalism is that the laws made by the parliament are of all-purpose application and not of particular application. They are to be subjected to the application as in to the whole terrain

20 United States History, *No Taxation without Representation*. Retrieved September 24, 2017 at IST 16:00 hours from http://www.u-s-history.com/pages/h640.html.

21 Amar, Akhil Reed, "*The Bill of Rights as a Constitution*" (1992) Faculty Scholarship series. Paper 1033.

of the country and not to only a particular province of the country which has sent his representative. Therefore, it becomes quintessential that a parliament is a manifestation of diverse interest representing every nicks and corner of a nation, so that each group has equal opportunity of voicing its interest in the policy making. Therefore, it is quintessential that seats are reserved for the diverse minority in the parliament to facilitate them some accommodation in the decision making process, as in the lack of their representation, possibility of them fading away increases. As the parliament is a representative legislative body, which formulates laws for the general mass and it will be highly unjust to limit the number of people representing the masses to a handful, who without logical or emotional connection with the masses are formulating laws which will be applied ignorantly on the masses.[22]

It is thus the same thing that the coherence of relationships is limited to a meagre quantitative representation and it is not understood in its fullest. The qualitative aspect of what the parliament is really needed to do is absent irrespective of the principles of constitutionalism because we have limited political recognition, representation and participation up to the general political principles. However, those political principles are not limited but they are more concentrated. They have not diluted in its clarity and observance and henceforth, they have yet not emerged as so transparent as the concept of international and regional human rights and environmental jurisprudence has become. Realism is something, which is inevitable. However, it is necessary to understand that the required basis of realism is not wrong but its outcomes may be critical, which must be judged. For example, if we assume that there is certain community called X, which is majoritarian in its state. However, it is not represented by any one from their side and only from the minorities much due to the nature of the constitutional law, which can be a case, then it is ascertainable that there is some quantitative mishap plus recognizable representing bias. Here arises the doctrine of self-determination. If independence is the significant criterion of statehood, self-determination implies to be a principle duly concerned with the right to be a state.[23] Thus, it is necessary that self-determination is used as a neutral doctrine in using federalism. This is actually important.

IV. Federalist and Anti-federalist paper

Within the history of American federalism lies the history of federalism itself, as the compromise for a United America was set into motion after the American civil war, wherein the founding fathers namely: J. Jay, J. Madison and A. Hamilton wrote down a series of papers for persuading the American member states towards the creation a United front (United State) instead of staying independent and segregated. The papers are excellently known as the 'Pubilius'(or the Federalist Paper). The summary of the papers is discussed by the authors for the due purpose of better understanding federalism.

Under the papers published to the public of New York and Philadelphia, Madison has been very adamant as to the need of the Union government which

22 McLaughlin, A. (1918). *The Background of American Federalism*. American Political Science Review, 12(2), 215-240. doi:10.2307/1943600

23 www.mfa-ks.net/?page=2,33

according to him is the sole saviour and protector the state from the relentless war for survival. In the papers at length the three apprehend that in the absence of a unified force, the possibility of a foreign invasion rise up again and therefore it will be unwise to leave fertile ground open for another foreign invasion on their land, which for a century had broken their backs. Not only defence, but in federalist paper number 13 Hamilton talks at length as to the economic benefits which the states could savour if they unite together as a Union, as they always would have a cushion of Union to help them at times of economic constrain. Simultaneously, the taxing power of the state was also to be intact so that the state can remain independent in its own sphere and generate its own revenue Hamilton addresses this issue in a series of paper from federalist paper number 31 to 36

In federalist paper number 45, 46, 47 and 51 James Madison at length talks about separation of power between the Centre and the State and the alleged danger from the power of the Union to the state. However, in a very crucial introduction to the Federalist Papers, John Jay enumerated a core basis of the idea of self-determination in the No. 2 paper, which is the precedent idea to the aforementioned federalist papers.

> [When] the people of America reflect, that the question now submitted to their determination, is one of the most important that has engaged, or can well engage, their attention, the propriety of their taking a very comprehensive, as well as a very serious, view of it, must be evident Nothing is more certain than the indispensable necessity of government; and it is equally undeniable, that whenever and however it is instituted, the people must cede to it some of their natural rights, in order to vest it with requisite powers. It is well worthy of consideration, therefore, whether it would conduce more to the interest of the people of America, that they should, to all general purposes, be one nation, under one federal government, than that they should divide themselves into separate confederacies, and give to the head of each, the same kind of powers which they are advised to place in one national [government][24].

The US Climate Alliance can also be considered as that same concept for a better matter of reflective consideration.

However, the idea of federalism was rebutted by the fellow Americans by the way of 'Anti-Federalist' paper, also known as 'Farmer' which was flaunted against the federalist paper by the founding fathers who were against the idea of US. Major work of the anti-federalist was written by Cato (George Clinton), Brutus (Smith) and Henry Lee who adverted that the federalist under the apprehension of foreign invasion and instability are attempting to persuade us to join the federation against our interest. It is like a scenario in which a boot-polisher comes up to an Englishmen and puts dirt on his shoe and says don't worry Sir I am a boot-polisher I shall polish your shoe. Similarly, the federalist under the pretext of foreign invasion is creating a mythical utility of their own. It is attributable from

24 Hamilton, Alexander; Jay, John; Madison, James (Edited by George W. Carey and James McClellan, 2001). *The Federalist*, Liberty Fund, Inc., p. 5.

a mentioned part of the papers as stated because in the end, what remains is the applied realism in political theories, which not only municipal laws shall avail for benefit but also the International Law.

V. What Democracy Wants

Democracy as a term is resultant from two terms 'demos' and 'Kato's' which means government by the people. The origin of democracy was to establish a republican government which was no longer governed under the tyranny of a monarch, the most talk about origin of democracy can be traced to the French revolution, where the citizens of France being wearied of the class division and rule of monarch King Louis XIV revolted against him and threw away the established hierarchy and embraced adult franchise for the first time. Though initially and for the substantial part of the history democracy was/is seen as a saviour from the tyranny of monarch but little less is known that democracy brought evils of its own. The very mechanism of democracy, intentionally[25], favours the rule of the majority at an outset of social choice realms being pragmatized[26]. In easy words, a rule of the due majority of common minded people who think that a particular set of rules (or rather a specific set of policy choices)[27] should be their guiding principle. There seems an adequate difference in the Monarch and Democracy, wherein an interesting conduction is observant from Amar's works on the US Constitution[28]. There are functional inadequacies with respect to voter turnouts and their comparative aspects in a distributivity generality, one such example is of a small State of India 'Jharkhand' where in the General Elections of 2014, only 66% of the population turnout for voting and the party coming into power from the area got only 28% of the votes[29], this creates a generic ambiguity as to the assumed and expected correctness of the purpose served by democracy and is, at a ground-level settlement, quite divergent to the constitutional liberty of the minority at a distributive sense who may have dissent with the majority of those turning up for voting. If the legitimacy of the government depended on the diluting and rather limited consent of the governing authority than the idea of limited suffrage ran contrary to it. This is a harsh reality, but it is subservient to understand that a fundamental practicality might have a relativity with the universal aspect of decision and governance[30]. For in the coming of democracy in the American terrain, the initial rights to vote were limited only too few hands: namely the property owners, sometimes only a member to the colony can vote as only he would have sufficient interest in the affairs of the colony, further, women were denied right to vote as they were seen

25 Eoin Daly, *Legislative form as a justification for legislative supremacy*, 8 Jurisprudence 501-531 (2017); supra note 19.

26 Albert Weale, *Social Choice Versus Populism? An Interpretation of Riker's Political Theory*, 14 British Journal of Political Science 369 (1984).

27 Richard Bellamy, Political Constitutionalism: A Republican Defence of the Constitutionality of Democracy (2007).

28 Supra note 21.

29 Press Trust of India, Indo-Asian News Service, *Record 66% turnout in 5-phase Jharkhand polls.* Retrieved September 17, 2017 at IST 2:06 hours from http://www.thehindu.com/elections/assembly2014/jharkhand-assembly-polls-fifth-phase/article6710604.ece.

30 *Supra* note 27.

as fundamentally dependent on their partners, similarly protestants were denied right to vote, which over that historical movement, were under an corporation as in the electoral case. It is deemed to consider however that constitutional doctrines & their deemed values have a profound historicity precisely as they are human artefacts, which shape over time.[31] However, at a developmental stake, it is perhaps a societal necessity that an absolutist sense is resolved[32]. And so. under such a revelation of these facts, it may be quite hard to see that democracy did extend its imagery-based purpose, the basic idea of government by the people, of the people and from the people seem debunked under limited suffrage, where only the limited few were deciding the fate of all the community, under this disclosure it is hard to see that the diversity which mostly subsists and subsisted in the American terrain could have been given equal representation in making their claims. However, the factions of making responsiveness to those historicity challenges newer instrumentalities as in an inverted totalitarian regime. There are dynamic throwbacks and perhaps it may be resolved at an adequate instrumentality of making the past and future factions of the political development of constitutional regimes at a steady and originally abled observance

a) Downfall of a limited franchise (Principle of Self-Interest)

The biggest shortcoming of a representative government would be its limited franchise, as that limited franchise will result in general application. Quite justifiably, if only property owner would have right to vote, therefore possibility will be that he will vote in a candidate who would make such laws which will maintain the right to property of the person voting, however, this might be against the interest of the person who does not have any property and did not had any opportunity of putting forward his concern by electing his representative.

For example, in the late 18th century in most of the American territories the right to vote was limited only with the property owner. The conflict that erupted during the revolution were between the interest and idea. The planters, manufacturers, the big farm owners had interest in keeping the franchise narrow, because if the franchise was expanded there were possibilities that their societal position will be toppled. However, the debate was not between the self-interested have and the have-nots of the society, the idea behind limited franchise to property owner was that property-less persons: namely peasants, women and pauper were not competent enough to be independent and therefore cannot be wise enough to possess a will of their own to choose a representative. Even the British Jurist Sir William Blackstone favoured narrow franchise, he writes about this in his celestial work 'Commentaries on the law of England'

> [T]he true reason of requiring any qualification, with regard to property, in voters, is to exclude such persons as are in so mean a situation that they are esteemed to have no will of their own. If these people had votes, they would be tempted to dispose of them under some undue influence of other. This will indirectly give a great share to the rich and

31 Keyssar, Alexander. *The Right to Vote: The Contested History of Democracy in the United States*. New York: Basic Books, 2009.

32 Jack M Balkin, Constutional Redemption (2011); Bernard Manin, The Principles of Representative Government (1997).

> powerful in the share of the liberty, but we cannot expect that the man in indigent situation can exercise his wisdom uninfluenced, therefore, it is quite justifiable that the right of franchise is limited to the independent property [owners][33]

Similarly, the ancient Greek city is quoted as an adequate example of democracy time and again, but it was not a democracy in real sense, as it was a government by a small fragment of the people, who were called the 'Freemen'; majority of the people living in city were slaves or alien, slaves and women had no political right under the system.[34]

b) Demagogue Idealism

H.E Fosdick, an American pastor and political jurist says that most of the democracy is misled by demagogues. They are invoking the emotions of the voters for voting in their favour and therefore misguiding them from making a rational choice. And noticeably all of the modern-day elections are played on the ground of public image and emotional provocation. This can also be understood by a criticism of the concept of consent by Rousseau, where Gauba states-

> Among the exponents of social contract, Locke alone postulates a conditional consent; hence he clearly creates a limited political obligation. Hobbes and Rousseau postulate unconditional consent and absolute sovereignty […] Rousseau, too, creates an equally powerful sovereign, but it does not stand above the community. Theoretically this is all right, but in actual practice sovereignty will be exercised by a government consisting of a group […] who might project their selfish and foolish designs as the expression of the general will.[35]

VI. Petting two alphas

Coming at the discerning part of the article, the very proposition of democracy runs contrary to the principles of federalism, whereas, federalism is a mechanism of representing diversity and equal opportunity of all to participate in the policy-making process, the same is not the case with democracy which is a means of majority rule. However, mostly the majority rule comes from the dominant audience of the society which will hamper the diversity as it will get lesser opportunity to represent. However, there are possibilities when the minority and majority may form single consensus as to the political affliction but it is an exceptional scenario; normally under a majority rule, the minority rights have to suffer and it effects their power to participate in the policy-making process. Therefore, the metaphor of petting two alphas together justifies the title of the article; as Federalism represents diversity and Democracy represents majoritarian governance which mostly consists of like-minded people choosing

33 William Blackstone, *Citation and Explication*; William Blackstone, *Commentaries on the Laws of England*, (4th Vol., 1765-1769), Oxford

34 Gauba, O.P, *An Introduction to Political Theory*, (6th ed., 2013), Macmillan Publishers, Delhi, 2013, p. 536.

35 Gauba, O.P, *An Introduction to Political Theory*, (7th ed., 4th Reprint, 2016). Mayur Paperbacks, p. 300.

their representative, therefore more repeatedly than not democracy ends up debilitating the purpose for which federalism was brought into existence. Henceforth, let us estimate some of the vague but an important political realm, which may intend to give a more clarity to represent a better picture of what is estimated.

A constitutional referendum was held in Syrian Arab Republic on 26 February, 2012. In response to the civil war in Syrian Arab Republic, President Assad ordered a new constitution to be drafted. This constitutional referendum was based on to create a newer constitution for the Syrian Arab Republic and the election of the President of the same. However, it is claimed that people were allowed to vote multiple times[36] and irrespective of the fact that the opposition may have called for a boycott of the vote, the vote wasn't so much about changing the constitution as it was showing support for his embattled president.[37] Assad insists that he is dedicated to reforms in a country under a dynast sovereign rule for 40 years, but has also swore to crush a rebellion, which he continuously blames on some foreign-backed terrorists.[38] The newer constitution dropped a controversial clause in the Article 8 stating that the Arab Socialist Ba'ath Party is the leading party in the society and state, which effectively granted the party a due monopoly on power by adapting.[39] Several new parties have been subject to accreditation; however, the new text forbids political activity or parties based on due religious, denominational, tribal or local basis, which is contravening to the forbidden Muslim brotherhood and restricts parties of Kurdish minority.[40] Moreover, the most interesting part for this to discuss is the Article 2 of the Constitution. It stipulates:

> [The] system of governance in the state shall be a republican system; Sovereignty is an attribute of the people; and no individual or group may claim sovereignty. Sovereignty shall be based on the principle of rule of the people by the people and for the people; The People shall exercise their sovereignty within the aspects and limits prescribed in the [Constitution].[41]

Now this statement is a prerequisite to a critical understanding that sovereignty is again considered supreme, the idea of self-determination is demeaned but a stylish recognition of the utility of sovereignty is suggested that it is governed by the people for the people, where the sovereignty is of the people. The Constitution stipulates about the Islamic jurisprudence, which is a different topic of subject. However, it is debatable because it is somehow inconsistent with a special portion of the Article 23 of the Cairo Declaration of Human Rights, which stipulates:

36 Macleod, Hugh; Flamand, Annasofie (February 27, 2012 · 4:38 PM UTC). *Syria referendum called 'a sham'*. Available at https://www.pri.org/stories/2012-02-27/syria-referendum-called-sham.(visited on January 15, 2018)

37 *Ibid*.

38 Reuters Staff (February 25, 2012, 19:35 hours). *Factbox: Referendum on Syria's new constitution*. Retrieved January 15, 2018 at 21:19 hours IST from available at https://www.reuters.com/article/us-syria-constitution/factbox-referendum-on-syrias-new-constitution-idUSTRE81O0BT20120225. (visited on January 15, 2018)

39 *Ibid*.

40 *Ibid*.

41 Constitution of the Syrian Arab Republic (2012), Article 2.

> "Authority is a trust; and abuse or malicious exploitation thereof is absolutely prohibited, so that fundamental human rights may be guaranteed."[42]

Moreover, there is one interesting portion from the Article 11 of the Constitution. It states-

> "This institution shall be in the service of the people's interests and the protection of its objectives and national security.''[43]

Moreover, the Article 12 is more interesting. It stipulates:

> "Democratically elected councils at the national or local level shall be institutions through which citizens exercise their role in sovereignty, state-building and leading society."[44]

Now, pursuant to the Article 2, self-determination is exercised to make sovereignty function, which may be hypothetically sound but has never happened in Syrian Arab Republic at least for this. It is vague but there can exist one exemption that this is just like a perambulatory or a preliminary clause, which may form a basis of understanding the constitutional multilateral government and its machinery. Still, the Article 84 of the Constitution in the end represents a subjective phenomenon, where resemblance is authored by subjective approach within the net of objectivity. This example ascribes an interesting part of the two alpha males, which we have been analysing with time.

In the end, the better conclusions can be drawn are-

- Federalism is a concept of heterogeneity and representative diversity, but political and legal subjectivity shall always as observable subjectively element or character that every municipal law individually possesses. In the end, the rule of law is not universal sometimes due to systematic subjectivities, which is due to the diversity existent in the International Community. Thus, law can be developed and maintained in the extraversion of various subjective principles attributed to a state and the general objectivity that law itself possesses.
- Democracy is majoritarian, but it is not an easy recognition cum representation. It covers the basic factors of participation and recognition irrespective of the referential or circumstantial repetition of the same. Henceforth, it is related to federalism in a very small but fragile way. This is understandable by the observance of the proposed presumptions the equity existent in each of them. Considering the above example, it is clear that subjectivity is shaped in a way that it represents a mere akin-like structure of objectivity. Henceforth, it is the subjectivity, which utilizes system to form a referentially objective system, where democracy, is attributed to federalism.

42 Cairo Declaration on Human Rights in Islam, Article 23.

43 *Ibid* 32, Article 11.

44 *Ibid* 32, Article 12.

- A better way of the nexus of the alpha males is scarcely observed or if is observed, then the legal implications shape up them under responsibilities and the required sui generis state practices. Henceforth, the sovereignty based on erga omnes itself is utilized and shaped as its relevance always rests with the federalist self-determination and representation, which stipulates that relevance is the characterisation of a bridge from federalism to democracy and vice versa.
- Democracy is objectified as majoritarian, but the essence of majority contributes the utility and construct of distribution of the representation, recognition and participation of every individual or any non-state actor (if possible) and thus it does not matter whether these three traits are how paved because they are actually the medium of action or inaction of those subjective self-determinations of the individuals individually, which in the end shape up in their own way. Thus, law is shown objective like a mediator to bring a stable equilibrium between federalism and democracy such that it internally manifests the subjectivity and its essence (due to the socio-political and economic diversity existent in every region of the International Community, which is actually recognized by various statutes and conventions) leading to a more better representation so forth understood.

Democracy is a utility of partial subjective and partial objective manifestations of mankind, where objectification is generally advocated as general, but it remains general for that state-system and its ingredients only, showing the referential functionality with the neutrally advocated federalism, where the concept itself is based on how better a neutral, open and all-comprehensive systemization is possible, where in the end, this remains general for that state-system and its ingredients only. This can be a possibly beautiful demarcation of the two alpha males, which breath and die together.

Citizenship and Assam: Legality and Politics Behind

Himangshu Ranjan Nath*

1. Introduction

In a democratic country law and politics are two components of society which cannot be detached from each other. There is a *neutron* and *proton* type relationship between the two. Even the ruling class in every political setup has used the means of law to exert its will over people for political gain. The Sate, being a sanctioning authority, has used law as a weapon to maintain the society in their own way.[1] Be it Nomos in Athenian democracy or *Führerprinzip* in Nazi Germany, law and politics have proven every time as integral part of the society that supplements each other. In India, the history recites the saga of the constitutional amendments and landmark judgements that shaped the nation and its politics. With every ideological shift in the centre, the law-making authorities have consistently tried to use law to spread their respective ideology. However, in numerous instances, the legal authorities have taken law as a route to restore the basic societal ethos and has kept a control over politics as a means of checks and balances.[2] The North Eastern region of India which is known for its heterogeneity in terms of tribes, languages, culture etc. has seen many confrontational movements against the policies of centre. There has been number of examples[3] where the centre had tried to assert their will over people of this region using law as a means. Although, people of this region have fought tirelessly against it.

The issues like natural calamity, self-determination, refugee, illegal migrants, ethnic conflict etc. have predominantly shaped the politics of the North-East. Among these, the issue of illegal migrants from Bangladesh to the North Eastern states, especially in Assam has boiled the politics of the State for decades in the form of confrontational protests and agitations. There is a long pending demand for updating the National Register of Citizens (*hereinafter*, NRC) in Assam to tackle the problem. After almost 25 years, the Central Government was compelled to start the process of updating the NRC on the order and supervision of the Hon'ble Supreme Court.[4] But, then, the Government with a plan to change the definition of *'illegal migrant'* has come up with the Citizenship (Amendment) Bill, 2016 that grants citizenship to people who come from Afghanistan, Bangladesh and Pakistan and who are of Hindu, Sikh, Buddhist, Jain, Parsi or Christian extraction diluting the existing law for detection and deportation of illegal

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1 Fedrich Engels, Karl Marx, *The German Ideology*, Progress Publishers, Moscow, 1932, <Available at: www.marxists.org>, (Viewed on: 30 October, 2018)

2 E.g. Maneka Gandhi v Union of India 1978 AIR 597, Justice K.S. Puttaswamy (Retd) v Union of India W.P.(C)No. 494 of 2012

3 E.g. Armed Forces (Special Powers) Act

4 Assam Public Works v Union of India W.P.(C) 274/2009

migrants in India. This has again fuelled the anger of the people of Assam and has created a complicated situation as the NRC was in the verge of completion. A popular vibe in this process was developed that if the Bill is passed, the whole process of updating the NRC might go in vein. This paper is an endeavour to study, analyse and assess the legal and political aspects of this issue.

2. Research Methodology

The methodology adopted for framing and shaping the idea of this article is doctrinal, analytical and descriptive. The author while writing this article has mainly depended on the primary sources like statutes, judgments and various committee reports and secondary sources like books, journals, newspapers, periodicals etc. Opinions of research scholars, experts in the respective fields are used as real contribution to this work. Internet has provided with a major contribution of most relevant and latest information on the web including the official websites of various government authorities and blogs which has helped the authors to explore the subject through various dimensions.

3. Defining Citizenship

"Citizenship is the right to have rights" was famously claimed by Hannah Arendt.[5] The term citizenship is ambiguous. Ambiguous in the sense that many times it has been used as a synonym of the term nationality. The dictionary meaning of citizenship can be found as the state of being a member of a particular country and having rights because he/she is a part of that country.[6] On the other hand, the term nationality is somewhat related to ethnicity and race. In 'citizenship', there is somewhat a legal sanction present which distinguish it from nationality. Thus, it can be said that the concept of nation and citizenship goes hand in hand.

Citizenship is a concept as old as politics itself that has always marked two distinctions: it is bound to the existence of a state and therefore to a principle of public sovereignty, and it is bound to the acknowledged exercise of an individual "capacity" to participate in political decisions[7]. In his celebrated work, Politics Aristotle reflects the history of the Athenian polis and of the institution of citizenship over a span of almost three centuries and gives the following definition: *"The good citizen should know and have the capacity both to rule and to be ruled, and this very thing is the virtue of a citizen"*[8]. In other words, citizenship as depicted by Aristotle talks about a relationship of mutual co-operation in which each individual had the capacities and moral qualities to rule and to be ruled

5 Alison Kesby, *The right to Have Rights: Citizenship, Humanity and International law*, Oxford University Press, Great Britain, 2012

6 The Cambridge Dictionary

7 Etienne Balibar,"Propositions on Citizenship", The University of Chicago Press, Chicago, Ethics, Vol. 98, No. 4, 1988, 723, <Available on https://www.journals.uchicago.edu/doi/citedby/10.1086/293001>, (Visited on 30 October, 2018)

8 Ulrich K. Preuss, The ambiguous meaning of citizenship, Professor of Law and Politics, Free University Berlin, Paper presented at the University of Chicago Law School to the Center for Comparative Constitutionalism, December 1, 2003, <Available at: http://ccc.uchicago.edu/docs/preuss.pdf>, (Visited on 30 October, 2018)

equally. Similarly Jean Bodin has also tried to define citizenship by his own understanding. He defines citizen as *"a free subject dependent on the authority of another"*[9]. He rebuffs the view held by Aristotle and other political thinkers that a citizen is defined by his access to public office, or by his right to have a voice in public affairs. Rather, he argued that it is "the mutual obligation between subject and sovereign" which makes a man a citizen.[10]

From time to time the idea and dimension of citizenship has always undergone a change. Whenever a new state is going to be established, the first and foremost question that comes to the mind of its founders is the question of determination of its citizens and their rights and duties. It is to be noted here, that with citizenship, the state gives some rights to its citizens and also expects some duty to perform by them. That is why the term citizen is always associated with either the terms "good citizen" or "responsible citizen". However, with time the definition of citizenship like any other definition has changed. The Aristotelian concept now stands invalidated. The concept which suggested that the citizens are the active members of a state, which has a direct role to play in shaping the will of the state by directly making decisions or taking part in democracy.[11] The other concept, which is somewhat relevant in today's world is the subject which suggests that the holder of the citizenship is somewhat a passive member of a political community which does not have any direct role to play in shaping the common will of the state or laws. But, the holder itself is subjected to the laws and rules and regulations that is made by the representatives that he/she has chosen.[12]

Historically, there are two methods predominantly used by states when giving citizenship to people.[13] They are *Jus Soli*[14] and *Jus Sanguinis*.[15] The *Jus Soli* method is when the citizenship is given by virtue of getting birth in a particular nation and the *Jus Sanguinis* method is when either of the parents is citizen of that nation and by virtue of that, the subject gets citizenship. Till 18th Century, in Europe the *Jus Soli* method was widely prevalent. But, France was a kind of exception. In 1804, when the French Civil Code was accepted as the law of the land, they decided not to opt for the predominant method.[16] Slowly, most of the European nations, except Britain had shifted to the Jus Sanguinis method and made the provisions of getting citizenship much rigid than earlier. Britain and its colonies kept the Jus Soli method intact and hence, India being a British colony followed the same method till independence. After independence, India had the provision of Jus Soli but slowly, by amending citizenship laws, India too had tried to make the process of getting citizenship little rigid than before.[17]

9 Ibid

10 Ibid

11 Patricia Mindus, "The Contemporary Debate on Citizenship, Revus" *Journal for constitutional theory and philosophy of law,* Vol.9, 2009, 24 <Available at: https://journals.openedition.org/revus/425#bodyftn22>, (Visited on 30 October, 2018)

12 Ibid

13 Santanu Borthakur, *Sangbidhan, Nagarikatwa aru Asom*, Muktidoot,Guwahati, 2018, pg. 10

14 Latin word meaning Right of Soil

15 Latin word meaning Right of blood

16 Ibid

17 The Citizenship (Amendment) Act,2003 No. 6 of 2004

European countries have a history of being a nation with secular characteristics. After the dominance of Church over the European society overcame, the neo bourgeois class gave much importance to nationality rather than religion. Eva Schubert said that the separation of power between church and state has its history from 17th Century and it can be traced back to the pitiless fights of religion.[18] Near the ending of the 17th Century the religious and political authorities got separated and had a parallel way of looking which ended the hegemony of Roman Catholic Church which earlier worked as both political and religious authority. The partition of religion and politics is one of the vital feature of the 18th Century which also gave 'individual religious freedom and rationality'.

Thus, the above discussion makes it clear that the modern theory of citizenship has nothing to do with religion. Religion did not have a say in who will get the citizenship, who will not. However, In India, at the time when the Constitution for independent India was getting drafted, the Constituent Assembly had witnessed fierce debate on this vital issue.

4. Citizenship and the Constitution of India

The discussion regarding citizenship had came up to the Constituent Assembly on 10th August, 1949. Dr. B. R. Ambedkar, the Drafting Committee Chairman while introducing the Articles relating to citizenship to the Assembly said that these Articles are not general but specific that tends to solve the question of citizenship on the date of commencement of the Constitution. It also suggested that the business of deciding who can acquire citizenship after the commencement of the Constitution will be left in the hands of Parliament.[19] It is therefore, proved that the Assembly didn't wanted to restrict the fate of determining citizenship in India. The Assembly passed a separate Article[20] to provide the law making power in this regard to the Parliament of India.

Dr. Ambedkar and other Constituent Assembly members carefully and sensitively did not considered religion while debating Article 5-11[21] of the Constitution of India, maintaining the secular nature the country. This issue gets clearer when we look at Ambedkar's speech while discussing Article 6 and 7 of the Constitution of India. In the draft proposal, Dr. Ambedkar emphasized on the fact that those who go voluntarily to Pakistan and then come back again to India with a government permit which will entitle him/her not only to enter India, but to stay here then the law of the land will permit him/her to settle in the Indian territory.[22] Most of the people who first went to Pakistan and then came to India were followers of Islam, yet the Constituent Assembly did not hesitated to allow them to resettle in India. Interestingly, Dr. Panjabrao Shamrao Deshmukh, who came to the Constituent Assembly representing the Central Provinces, had a different view from the rest.

18 Eva Schubert Religion and Citizenship: Multiple identities in the modern world", *Journal of the Institute for the humanities at SFU,* Vol. IV, 2006, <Available at: http://journals.sfu.ca/humanitas/index.php/humanities/article/view/5/8>, (Visited on 30 October, 2018)

19 Constituent Assembly Debate, 10 August 1949

20 Article 11 of the Indian Constitution

21 Article 5-11 of the Constitution of India contains the provisions regarding acquisition of citizenship of India at the commencement of the Constitution.

22 Supra note 21

He proposed an amendment to article 5 and asked to add a proviso to it.[23] He suggested:

"5 (ii) every person who is a Hindu or Sikh by religion and is not a citizen of any other state wherever he resides shall be a citizen of India."

The rationale that he put forwarded was that the Assembly should not open up Indian citizenship so indiscriminately. He opined that that the Assembly is going too far 'in the business of secularity'. For him secularity does not mean wiping out the 'own people'.[24] Apart from this, he put forwarded arguments which can be inferred as Pakistan a country for Muslim and India as the homeland for Hindu. In reply of his arguments leaders like Jawaharlal Nehru, N. Gopalaswami Ayyangar, B.R. Ambedkar also debated.[25] Because of these long term debate, it took several days to finalise the provisions for citizenship and ultimately the Constituent Assembly rejected the contentions of Mr. Deshmukh. It is to be sincerely mentioned here that the arguments put forwarded by Mr. Deshmukh is similar to the arguments now being put forwarded by the present government and some organisations with Hindutva outfit defending the Citizenship (Amendment) Bill, 2016.

After independence, the Parliament of India has enacted the Citizenship Act, 1955 to provide the mode of acquisition of Indian citizenship after the commencement of the Constitution. The Act lays down four methods of acquiring citizenship in India viz; Citizenship by Birth, Decent, Registration and Naturalisation. The Act has later got amended four times but the Act, nowhere has mentioned that citizenship in India can be acquired on the basis of religion. However, the recent proposed amendment to the Act namely; the Citizenship (Amendment) Bill, 2016 tends to insert a religious angle by inserting provision regarding awarding of citizenship to six particular religious communities migrated from Pakistan, Afghanistan and Bangladesh.[26]

5. Migration, Citizenship and Assam

The history of mankind evolves around migration. Assam is not an exception to that. Migration is not a new thing that has happened to Assam. After the treaty of Yandaboo was signed on 24 February, 1826 Assam was handed over to British Raj. After that, there were four waves of migration that hit Assam.[27] The first wave is the tea garden workers. After British discovered Tea in Assam, they started establishing various Tea gardens across Assam and for that they needed workers. Hence, from states like Bihar, Orissa, Andhra Pradesh etc. many workers came to work in the Tea estates most of which did not returned. The flow of people started decreasing 1940 onwards. The second wave of people came from Mymensingh around 1920-30. Around 7 lakh people came to Assam of which 87.1% of people were Muslims.[28] The third stage of migration can be said

23 Ibid

24 Constituent Assembly Debate, 10 August 1949

25 Supra note 15, Pg. 14

26 Citizenship (Amendment) Bill, 2016, Bill No. 172 of 2016

27 Abdul Mannan, *Infiltration Genesis of Assam Movement*, Ayena Publications, Guwahati, 2017, Pg.10

28 Ibid. Pg. 12

as people came from Nepal and Bhutan to Assam. They were pre dominantly engaged with jobs related to animal husbandry. They stayed in hills and forests of Assam. The last wave of migration can be identified as the people of Hindu faith that came from East Pakistan to India as refugees after independence. It is here to note that After Independence, the flow of Muslim population to Assam decreased and the flow of Hindu refuges started as there were large scale of religious persecution at that time.[29] At time, when Assam was facing the migration pressure from East Pakistan increasingly, the revolutionary change itself happened in East Pakistan. The war of liberation took place in 1971 and religion failed to keep intact the two halves of Pakistan. The cultural nationalism that emerged as a counter to Urdu based hegemony of western Pakistan resulted in liberation of East Pakistan and formation of Bangladesh.[30] When the liberation war broke out, huge mass of Eastern Pakistan crossed over to India and mainly took shelter in Assam, Tripura and West Bengal. After Bangladesh was created, many people again went back to Bangladesh but many did stay in India itself for livelihood. The Indian government too failed to keep count of the outgoing and incoming number of refugees.

At this point, It would be apt to note that in 1931, C. S. Mullan who was the Census Superintendent, in his census report stated; *"Probably the most important event in the province during the last 25 years- an event, moreover, which seems likely to alter permanently the whole feature of Assam and to destroy the whole structure of Assamese culture and civilization has been the invasion of a vast horde of land-hungry immigrant"*.[31] The immigrants therefore have a major role in changing the ethnic and linguistic demography of Assam. As C.S Mullan stated, From British's libertarian policy in welcoming migrants to Assam for work till the creation of Bangladesh- immigrants have kept coming to Assam and sadly, till date there is no concrete statistics present in the hands of the administration as to how many people have come to Assam and stayed here for ever.

The government was not at all unaware of the fact that many immigrants came to India after independence and they too thought of making laws to control the infiltration. In 1950, the central government enacted a legislation named The Immigrants (Expulsion from Assam) Act, 1950. The act though extends to whole of India, yet it was made specially for Assam. The Section 2 of the Act[32] gave power to the central government to remove person or class of persons who came to Assam after or before commencement of the Act and that stay of that class of persons or person in Assam is detrimental to the interests of the general public of India. But, it was also mentioned in the Section 2(b) of the Act that it will not apply to those persons who came to Assam from Pakistan due to civil disturbances or fearing any disturbances. In this Act, however there was no mention about any particular religion. The word 'civil disturbance' was applicable for everyone who came to India, not people from any particular religion.[33] The

29 Ibid Pg 12

30 *Why NRC*? Published by Axom Nagarik Samaj, Pg. 08

31 Dr. Manju Singh, *Assam, Politics of Migration & Quest for Identity*, Anita Publications, Ghaziabad, 1990, Pg. 38

32 The Immigrants (Expulsion from Assam) Act, 1950, Act No. 10 of 1950

33 Supra, Pg. 22

Act was an ambiguous one and didn't helped much in identifying immigrants and influx of illegal immigrants continued. In 1951, under the supervision of R. B. Vagaiwalla, the then Census Commissioner on the directives of Ministry of Home Affairs prepared a National Register for Citizens of India in accordance with the 1951 census which was ought to get updated after every census. This would have helped to keep a track of the illegal influx of people from outside India. But, sadly, due to lack of will of both State and Central Government, the process of updating NRC didn't really happen.

5.1 The Assam Accord:

The Assam Accord was signed after a six-year long movement demanding deportation of illegal immigrants from Assam. The movement, widely known as *'Axom Andolan'* primarily began in 1979 initiated by the All Assam Students' Union, was a kind of revolution by the native people against the illegal influx mainly from Bangladesh. The movement which is regarded as one of the largest movement in India stared by students, left behind a history of wounding hearts and bloodstained fields. Thousands of people died fighting for an illegal immigrant free Assam. The six years long movement which started after finding irregularities in the votes' list of Mangaldoi constituency which was filled with suspected illegal voters, finally ended in 1985 with a 'Memorandum of Settlement' (popularly known as the Assam Accord) between the leaders of the movement and the Assam & Central Government in presence of Rajiv Gandhi, the then Prime Minister of India. Various contentions were raised through the memorandum by the agitating leaders. The most important of them was the issue of illegal migrants. The Assam Accord concretise the idea of awarding of citizenship to those who came between the years 1951 to 1971. Also, it said that it would suspend voting rights of those who came to Assam on or after 1st January 1966 till 24th March 1971. The most important clause of the Accord was 5(8) which read as:

"Foreigners who came to Assam on or after March 25, 1971 shall continue to be detected, deleted and expelled in accordance with law. Immediate and practical steps shall be taken to expel such foreigners."[34]

This clause compelled the Central and State Government to identify and expel people who came to Assam after 24th March, 1971 midnight. It was in pursuant of this accord, the Citizenship Act, 1955 was amended and Section 6A was inserted in the Act.[35]

5.2 The IMDT Act, 1983:

To identify illegal immigrants, the Central Government promulgated Illegal Migrants (Determination by Tribunal) Act, 1983. This Act, which was prior to the Assam Accord was also to protect 'minorities' who were unnecessarily harassed in Assam Agitation. The infamous Act had some surprising provisions which made it even more difficult to identify immigrants and paradoxically it acted as an 'advantage of the accused illegal migrant'.[36] The Act in its definition clause

34 Assam Accord, available at https://assam.gov.in/documents/1631171/0/Annexure_10.pdf?version=1.0 (Accessed on November 2, 2018)

35 "NRC Faqs". 2018. *@Businessline*. Available at <https://www.thehindubusinessline.com/specials/india-file/nrc-faqs/article25030916.ece> (Accessed on November 2, 2018)

36 Sarbananda Sonowal v Union of India (2005)5 S.C.C 665 (India)

has a meaning of 'illegal immigrant' which is different from the Citizenship Act, 1955. In Section 3(c) apart from different other provisions, says an illegal migrant is one who has entered into India on or after 25th March, 1971.[37] This means whosoever have come before the said date is an Indian citizen and by default they will get voting rights under Article 326 of the Constitution of India (this is even in contradiction of the Assam Accord). Secondly, the Act though extends to whole of India yet, it is being forced into the state of Assam. Hence, it differentiates Assam and rest of India in terms of citizenship. Also, the burden of proof under the instant Act lies on the complainant and not on the accused. This is a contradiction to the Section 9 of The Foreigners Act, 1946 under which burden of proof is on the accused.[38] The current Chief Minister of Assam, Mr. Sarbananda Sonowal through a *Public Interest Litigation* in the form of a Writ Petition filled in the Apex Court contended that the IMDT Act increases vote bank politics and is not addressing the real issues related to illegal migrants.[39] The Supreme Court vide its decision in this case held that the Act is ultra vires to Article 14 of the Constitution of India and hence unconstitutional. It was further held that foreigners should be as per the provisions of the Foreigners Act, 1946 and the Foreigners (Tribunals) order 1964. It was also held that irrespective of the said provisions the provisions of the Passport (Entry into India) Act, 1920; the Passport Act, 1967 and the Immigrants (Expulsion from Assam) Act, 1950 would also continue to hold the field.[40]

5.3 Updation of NRC:

The process of updating NRC 1951 was not started because the present government wanted to, but because of an Assam based Non-Government Organisation which filed a petition on the Apex Court which stated that nearly 41 lakh illegal migrants had been included in the voters list of 2006 and asked the Apex Court to direct the officials to strike their names from the electoral rolls.[41] The All Assam Students' Union (hereinafter, AASU) have been demanding updation of NRC from 1980s. In May 05, 2005, a tripartite meeting was held among the State Government, the Central Government and leaders of the AASU which was chaired by then Prime Minister Dr. Manmohan Singh. The then Central Government promised to start the process of updating NRC and gave directions to the State Government. As per the meeting the process started in June 2010 as a pilot project in two districts- Kamrup and Barpeta of Assam.[42] But, it was stopped due to law and order situation that arose in these districts. In 2013, a bench comprising of J.J. Ranjan Gogoi and HL Gokhale ordered Central

37 Section 3(c)(i), Illegal Migrants (Determination by Tribunal) Act,1983

38 The Foreigners Act, 1946, No. 31, Acts of Parliament, 1946 (India)

39 "SC Strikes Down IMDT Act As Unconstitutional". 2005. The Economic Times. Available at <https://economictimes.indiatimes.com/sc-strikes-down-imdt-act-as-unconstitutional/articleshow / 1168803.cms.> (Accessed on November 2, 2018)

40 Md. Bahaluddin Sheikh v Union of India and Ors. W.P.(C) 256 of 2013

41 "How The 2008 Assam Bombings And A Meeting Set The NRC Ball Rolling". 2018. Available at Https://*Www.Hindustantimes.Com*/. (Accessed November 2, 2018)
<https://www.hindustantimes.com/india-news/how-the-2008-assam-bombings-and-a-meeting-set-the-nrc-ball-rolling/story-2dos1EpN8muIO21X7f8WXL.html>.

42 "Everything You Want To Know About The NRC". 2018. Telegraphindia.Com. Accessed November 2 2018. <https://www.telegraphindia.com/india/everything-you-want-to-know-about-the-nrc/cid/1352646.>

Government to submit modalities and forms to the Court before July 16, 2013. Since then, the Supreme Court is directly monitoring the updation of NRC in Assam. The updation of NRC is now being held as per the cut-off date mentioned in the Assam Accord.[43] It is to be mentioned here that as per the NRC Coordinator Prateek Hajela, the process of NRC updation is not to determine who is an illegal migrant but to determine who is a resident of Assam.[44]

6. The Citizenship (Amendment) Bill, 2016:

The Citizenship (Amendment) Bill, 2016 which was introduced on July 15, 2016 in the House of the People by the Minister of Home Affairs, Mr. Rajnath Singh has again fuelled the debate of 'citizenship of India'. With this Bill the central government is all set to change the definition of 'illegal migrant'. The Bill seeks to amend the Citizenship Act, 1955 and is ready to provide citizenship to Illegal migrants from Afghanistan, Bangladesh and Pakistan and interestingly to the people who are of Hindu, Sikh, Buddhist, Jain, Parsi or Christian extraction. The Bill also seeks to reduce the requirement of 11 years of continuous stay in the country to six years to obtain citizenship by naturalisation.[45]

The problem with the Bill however is a more serious one. The Bill directly threatens one of the basic tenets of our Constitution i.e. secularism. The Preamble of our Constitution says that India is a Sovereign Socialist Secular Democratic Republic.[46] However, the supporters of the present ruling party, which are followers of the hard core Hindutva ideology believes that the Constituent Assembly never intended to make India a secular nation. Even the lawmaker from the Bharatiya Janata Party claims India to be a Hindu Rasthra.[47] They think it as a conspiracy of the Indira Gandhi government (to declare India a secular nation) as the word 'secular' was added to the Preamble by an amendment[48] in 1976. But, the claim makes not much sense as the judiciary in many cases have interpreted that secularism is a basic tenet of our Constitution. The Supreme Court expressing its views on the secular nature of the Constitution for the first time said, that Article 25 and 26 talks about religious toleration and identified it as a characteristic feature of Indian civilisation from the start of history.[49] The judgment also said that the founding fathers of Indian Constitution considered secular nature of Indian democracy as a basis of our Constitution. Also, in the seminal *Kesavananda Bharati* case[50] the judgments given by J.J. Sikri, Jagmohan Reddy reiterated the essence of secular and federal character of the Constitution of India. In *S. R. Bommai* judgment,[51] the Supreme Court observed :

43 "Why The NRC Of 1951 Is Being Updated As Per The Assam Accord". 2018. *The Wire*. Accessed November 2 2018. <https://thewire.in/rights/nrc-assam-accord-updating-residents>.

44 Ibid

45 Supra Note 28

46 Preamble, Constitution of India, 1950

47 "BJP MLA Says Only Those Muslims Will Stay In India Who Embrace Hindu Culture". 2018. *The Indian Express*. <https://indianexpress.com/article/india/only-those-muslims-will-stay-in-india-who-assimilate-into-hindu-culture-bjp-mla-5024134/.> (Accessed November 3, 2018)

48 The Constitution (Forty-Second Amendment) Act, 1976, Government of India.

49 Sardar Taheruddin Syedna Saheb v. State of Bombay, AIR 1962 SC 853, 871

50 *Kesavananda Bharati v State of Kerala*, (1973) 4 SCC 225

51 S.R. Bommai v. Union of India (1997) 3 SCC 1

> "… This (Secularism) may be a concept evolved by western liberal thought or it may be, as some say, an abiding faith with the Indian people at all points of time. This is not material. What is material is that it is a constitutional goal and a basic feature of the constitution. Any step inconsistent with this is unconstitutional."

The importance of this judgment lies in the fact that it was delivered by a Constitutional Bench of the Apex Court. Hence, after all these judgments where the Supreme Court has identified secularism as basic tenet of the Constitution of India, the constitutional validity of the Citizenship (Amendment) Bill, 2016 is doubtful as it violates the basic principle of secularism by providing a biased treatment towards some particular religion.

Further, Article 14 of the Constitution of India mandates that the State (i.e. Parliament, Union Government, State Legislatures, State Governments etc.) shall not deny to any person (i.e. citizens and non-citizens) equality before the law or the equal protection of laws within the territory of India. Therefore, in India, the foreigners and migrants should be treated equally regardless of religion. The Citizenship Amendment Bill, 2016 tends to lower down the eligibility criteria mentioned in Section 6 of the Citizenship Act, 1955 for obtaining citizenship of India through naturalisation for migrants belonging to six specified religious communities from Afghanistan, Bangladesh and Pakistan. These communities are Hindus, Sikhs, Buddhists, Jains, Parsis and Christians.[52] This implies that migrants from these countries who are Muslims, other minorities who do not belong to the above groups (i.e. Jews), or Atheists who do not identify with a religious group will not be eligible to take the benefit of the proposed amendment. Migrants from countries apart from the above mentioned will also be negated from enjoying the benefit of the proposed amendment. The Supreme Court in *State of West Bengal v. Anwar Ali Sarkar*[53] has held that Article 14 only permits laws to differentiate between groups of people if the rationale for doing so serves a reasonable purpose. But, the Statement of Objects and Reasons of the Bill does not explain the rationale behind differentiating between illegal migrants on the basis of the religion they belong to. Moreover, the Supreme Court in *Nain Sukh Das v. State of Uttar Pradesh*[54] has opined that a classification or differentiation to be counted as valid under Article 14 of the Constitution must be a reasonable one and religion per se is not a reasonable ground for classification. Therefore, this Bill is in contravention with Article 14 of the Constitution as it envisage to provide differential treatment to migrants on the basis of their religion.

7. The Politics of Citizenship:

The Citizenship (Amendment) Bill, 2016 as stated earlier, fuels a new debate in the State of Assam. Assam has seen six years long movement, numerous hartals, bandhs demanding settlement of the illegal immigrant issue. Many governments came to power giving assurance to resolve the matter of illegal migrants, but till date it is still number one political issue in the state of Assam. In 2014, in an

52 Supra

53 AIR 1952 SC 75

54 AIR 1953 SC 384

election rally the then Prime Ministerial candidate, and now the Prime Minister of India, Mr. Narendra Modi said that after he comes to power, all illegal migrants must go back to Bangladesh.[55] He also assured to seal the border and said no one would be allowed to enter into India illegally. Yet, in contravention of their electoral promises, with the new Bill, the Modi led National Democratic Alliance (hereinafter, NDA) government now wants to give citizenship to a selected number of people who are from specific religions.

The introduction of the Bill is not a momentary decision of the government, but well planned one. As Shakespeare said[56], "…Though this be madness, yet there is method in't." The plan to change the definition of illegal migrant was first executed in 2015. Amending Passport (Entry into India) Rules 1950, Rule 4(I), the amendment[57] added a new clause (ha) which said that persons belonging to minority communities in Bangladesh and Pakistan, namely, Hindus, Sikhs, Buddhists, Jains, Parsis and Christians who were compelled to seek shelter in India due to religious persecution or fear of religious persecution and entered into India on or before the 31st December, 2014 can stay in India. On the same date, there was same kind of amendment done in the Foreigners Order 1948 too.[58]

This was the first step to legalise the stay of the illegal migrants in India. The job now was to give the migrants belonging to the instant religious group citizenship of India. Hence, with the aforesaid Bill, the government now wants to give the illegal migrants citizenship, and without amending the Citizenship Act, 1955, it cannot be done. If the Bill gets passed in the Parliament of India and the Citizenship Act gets amended, then the NRC updation process will halt as it is not taking religion as criteria in identifying people who came to Assam after the mid-night of 24th March, 1971. This means that foreigners issue, which is being tried to solve by updating NRC under the supervision of the Supreme Court, will again come into dispute and will again burn the state of Assam. After knowing all this, the NDA government wants to pass the Bill in the Parliament. This hints that it is a political move played by the government to ensure an intact vote bank.

The politics of polarisation is not a new move played by Bharatiya Janata Party[59] In many elections it had played the communal card and maintained an intact vote bank. The same has been done this time in Assam. Soon after the Bill was introduced in the Parliament, the people in Assam also got divided mainly among religious lines arguing in favour or against the Bill. Slowly the argument falls into a heated debate between the Bengali and Assamese speaking people. In Assam there is an unfortunate history of conflict between Assamese and Bengali speaking people. So far, the government has succeeded in dividing the people of Assam in terms of language and ethnicity. The Asom Gana Parishad, which is a part of the

55 Staff Reporter,. 2014. "Modi Asks Bangladeshi Immigrants To Pack Up After May 16". *The Daily Star*. Accessed November 3 2018. <https://www.thedailystar.net/modi-asks-bangladeshi-immigrants-to-pack-up-after-may-16-21989.>

56 Hamlet Act 2, scene 2, 193–206

57 By Ministry of Home Affairs Notification, G.S.R. 685(E), http://parliamentlibraryindia.nic.in/writereaddata/Library/Reference%20Notes/citizenshiip_amendment_bill.pdf

58 Ibid.

59 "With Eyes On 2019, BJP Is Shifting To A New And Sharper Polarisation". 2018. *The Wire*. Accessed November 3 2018. <https://thewire.in/politics/bjp-2019-strategy-general-election>.

NDA also has started its half-hearted protest against the Bill.[60] Another political casualty caused by the Bill is that it nullifies the Assam Accord. If the Bill is passed then the date of deportation of illegal migrants set vide the Assam Accord will undergo a change. Hence, the most debated cut-off date which was at last agreed by all the parties[61] will have no value. The blood of thousands of Assamese people who gave their life fighting for the motherland will go in vain if the Bill gets passed by the Parliament.

8. Conclusion:

The North East region of India is not like every other state. It has been neglected in terms of development, fund sanctioning and it is often said that the Centre looks at this part as resource and treats it like a foster mother. However, in current politics of India, no one can deny the essence politics of the North-East, especially the politics going on in Assam regarding citizenship. It is playing a key role in other states also.[62] The current government knows the importance of geopolitics of Assam and therefore, playing it safely for the larger interest of the party. However, it looks like in working for the larger interest, the Central Government has once again ignored the aspiration of the people without giving fair chance to express the opinion of people of Assam[63] The influx of illegal migrant in Assam has caused a serious problem in the State and it should be settled as soon as possible and must start focusing on development agenda. However, the newly brought Bill, which allows certain class of people to get Indian citizenship is not acceptable for the people of Assam. Assam is already tired of taking the burden of lakhs of illegal migrants and it is therefore not feasible for people of Assam to accept the Bill. Also, Assam is said to be the land of Shankardev and Azaan Fakir. Religious harmony among people is one of the most charismatic characteristic of Assam. Dividing illegal migrants in the name of religion will not only harm the social fabric of Assam but will also divide the people among themselves. The divisive politics that the government is playing is not at all desirable. The Citizenship (Amendment) Bill, 2016 which is in our opinion unconstitutional should be scrapped off and the process of updating NRC should be done as soon as possible.

60 Rahul Karmakar,. 2018. "Uproar Over Citizenship Bill". *The Hindu*. Accessed December 3 2018. <https://www.thehindu.com/todays-paper/tp-national/uproar-over-citizenship-bill/article23859232.ece.>

61 "Defend 1971 Cut-Off Date For Expelling Illegal Migrants: Assam Congress To President". 2017. Https://*Www.Hindustantimes.Com*/. Accessed December 3 2018. <https://www.hindustantimes.com/india-news/defend-1971-cut-off-date-for-expelling-illegal-migrants-assam-congress-to-president/story-EYh0pIentdqkKcYC5KCHNJ.html.>

62 Divide and Rule: Mamata Banerjee Slams Assam's Draft Citizens' List, NDTV India, Web Portal, July 30,2018

63 "Clear Stand On Citizenship (Amendment) Bill, Parties Told - The Sentinel". 2018. The Sentinel. Accessed November 3 2018. https://www.sentinelassam.com/news/clear-stand-on-citizenship-amendment-bill-parties-told/.

Grundnorm for Effective International Commercial Arbitration in India

Pallavi Bajpai*

Abstract

India is a large, diverse and wonderful cosmopolitan country. We opened up our markets in the early 1990s and have embraced the good and the bad of the globalisation process. Our large population exerts tremendous pressure on India's resources and institutions including the legal and judicial systems. Law has to continuously evolve to keep pace with changing times, human needs and technology. Being a growing market, India has become an attractive destination for investment in infrastructure and manufacturing. To provide a conducive environment for business, it is now time to make India a strong hub for international commercial arbitration. Like all the Institutions even arbitration is plagued with occupational diseases. Indian Arbitration was at a cross –road. India had spent the last twenty years pushing forward a permissive party autonomy arbitral regime which sets out a framework for making, challenging and enforcing awards, where courts are expected to have a minimum role, only stepping in when parties fail to act. Theoretically this system was workable but it had become cumbersome and complex. The A, B, C, D for Arbitration should be in the right direction. A would mean (UNIVERSAL) Access, B (REDUCING) backlog, (LOWERING) costs, D (REMOVING) Delay. The requirement is not only the Brick and Motor but its operationalisation too. Setting up world-class arbitral institution with expert arbitrators on their panel is the need of the hour. Apart from solving disputes arising within the country, these institutions can become magnets for businesses operating in foreign countries. This Research paper will highlight the Basic procedural framework of International Commercial Arbitration in India, legislative changes, judicial impediments and the appropriate eco-system required for becoming a preferred destination for International Commercial Arbitration, along with an introspection of one of the leading Institutions for arbitration which is SIAC. The Methodology to be adopted for the research would be doctrinal in nature. Reliance will be placed on International Conventions, legislative provisions, case laws and other authoritative texts and scholarly works on the subject matter. The data would be collected by primary and secondary sources. The primary data would comprise of Policies, Conventions, Acts, Legislations and various other instruments including various data from findings of commissions. Secondary data would comprise of textbooks, journals, magazines, articles and related reports on the subject.

Introduction

International Commercial Arbitration provides an efficient and effective means of resolving international disputes. The United Nations convention on the

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Recognition and Enforcement of Foreign Arbitral Awards and most national arbitration statutes prescribe an effective "pro-arbitration regime that ensures the enforceability of International arbitration agreement and awards. The New York Convention (Like other international arbitration convention) applies only to arbitration agreements that have some "foreign" or "international" element, and not to purely domestic agreements[1]. The same is true under many national legal regimes, where international or foreign arbitration agreement is often subject to legislative and judicial regimes distinct from those applicable to domestic arbitration agreements. That is true, for example, under UNCITRAL Model Law, which is limited by Article 1(3) to international matters. In these jurisdictions, domestic arbitration agreements, arbitral proceedings and awards are often subject to separate, non- international legal regimes. This is consistent with the purpose of the convention and the Model Law, which is to facilitate international arbitral process, without disturbing regulation of domestic arbitration matters. The effectiveness of arbitration is because of number of reasons. To summarize International Arbitration provides a speedy, neutral and expert dispute resolution mechanism which is subject to the control of the parties having an international enforceable decision. International Arbitration has fewer sufferings as compared to litigation in the national courts.

Elements of International Arbitration

International Arbitration is a consensual process pursuant to the arbitration agreement between the parties. Parties are largely free to draft their arbitration agreement in whatever terms they wish and in practice this freedom is liberally exercised. There are some critical elements of International Arbitration which are:

Agreement to Arbitrate
Scope of Dispute Submitted to Arbitration
Institutional Arbitration or Ad-hoc Arbitration
Arbitral Seat
Arbitrators Number, Qualifications and Method of Selection
Language of Arbitration
Choice –of – Law Clauses

Although parties frequently agree to arbitrate, in practice they also sometimes reconsider that commitment after the dispute arises. In particular, notwithstanding their agreement to arbitrate, parties may seek either to litigate their dispute in local courts or to obstruct the arbitral process. Ultimately, the efficacy of an arbitration agreement often depends on the parties' ability to enforce that agreement. The legal framework for enforcing international arbitration agreement has undergone important changes over the past century, evolving from a position of relative disfavour to one of essentially universal support. That legal regime consists of International conventions, principally

1 By virtue of Article I (1), the New York Convention is applicable to specified categories of Foreign or non- domestic arbitral awards. The Convention does not define expressly the arbitration agreements to which it applies, it is best interpreted as applying to all international arbitration agreements, wherever they are seated, rather than to purely domestic arbitration agreements. See G. Born, International Commercial Arbitration 313-20(2nd ed. 2014).

New York Convention and UNCITRAL MODEL Law[2]. When their jurisdictional requirements are satisfied, these instruments provide a robust and highly effective framework for enforcing international arbitration agreement.

India and International Commercial Arbitration

Increment in worldwide exchange and venture is joined by rise in cross-border commercial disputes. Given the requirement for an effective dispute resolution mechanism, international arbitration has risen as one of the most favoured choice for settling cross-border commercial disputes and protecting business connections. With an inundation of remote speculations, abroad business exchanges, and open finished monetary arrangements going about as an impetus, international commercial disputes involving India are relentlessly rising. This has drawn gigantic spotlight from the global network on India's international arbitration regime.

India could not be considered to be at forefront with its arbitration regime serving its best to the world. Infact it is considered to be laggard. Because of certain dubious decisions by the Indian courts over the most recent two decades, especially in cases including a foreign party, the international community has kept an eagles watch on the development of arbitration laws in India. The Indian judiciary has frequently been reprimanded for its interference in international arbitrations and extra territorial application of domestic laws, especially in foreign seated arbitrations.

The Legislative authority of India had introduced Arbitration and Conciliation Act 1996 as the then existing law could not serve the needs of the arbitration stake holders[3]. The objective statement of the 1996 Act shows the recognition that arbitration regime in India needed responsive measures with respect to contemporary requirements. If the dispute resolution mechanism is in consonance with the international community, it would further enhance the economic growth of the Nation. Part 1 of the Act refers to the domestic arbitration governance, which is based upon UNCITRAL Model Law on International Commercial Arbitration. Arbitration is the most favoured mechanism amongst the ADR Techniques. However it has become plagued with high costs and delays. These lacunas have made the foreign investors apprehensive of the risks associated with arbitration in India. Consequently the Indian Government realised the urgent need to redesign the country's arbitration laws. After two failed attempts

2 Margaret L. Moses, The Principles and Practice of International Commercial Arbitration, 96 (2nd edn. 2012, Cambridge University Press)

3 Prior to the enactment of the Act, the arbitration regime in India was governed by multiple legislations, which were often criticized for the extensive judicial intervention permitted thereunder. Domestic arbitrations were governed by the Arbitration Act, 1940 and recognition and enforcement of foreign awards was provided for under two separate legislations, the Arbitration (Protocol and Convention) Act, 1937 (for awards under the 1927 Geneva Convention) and the Foreign Awards (Recognition and Enforcement) Act, 1961 (for awards under the 1958 New York Convention). See Alan Redfern, Martin Hunter, et.al, International Commercial Arbitration, 78-79 (5th edn. Oxford University Press, 2015)

to inspire reform in 2001[4] and 2004,[5] the Law Commission of India took up the project to amend the Act in 2010 and gave its report in August 2014[6]. These recommendations were accepted by the Parliament and received presidential assent on December 31, 2015[7]. Recently, the Arbitration and Conciliation (Amendment) Bill 2018 has been approved by the cabinet. The changes brought in are in line with India's aim of becoming a model arbitration friendly jurisdiction.

The noteworthy changes brought by the Arbitration and Conciliation Act, 2015 are crucial for supporting International Arbitration in our country. A new Regime that combines the right blend of carrot and stick was the catalyst that Indian Commercial dispute resolution was waiting for. The reforms to arbitration regime were expected to provide this flip that was the need of the hour. "One of these is the provision permitting arbitral institutions to create their own rules consistent with the Act to ensure that arbitrations are swift and effective. Coupled with this is the express inclusion of communication through electronic means for formulating the arbitration agreement[8] and a model fee schedule to curb exorbitant fee of tribunals and arbitrators (however for international commercial arbitration and institutional arbitration, the fee limit is not applicable)[9]. One of the most widely debated amendments is the fixing of a one year time limit for resolving arbitral matters[10]. This timeline may be extended by a period of six months with the consent of the parties. Interestingly, timely disposal within six months is incentivised by increasing the fee of the arbitral tribunal and delay is penalised by up to 5% per month for each month of delay. The amendment also provides for fast track proceedings under which parties can consent for resolving the dispute within six months with only written pleadings and without any oral hearing or technical formalities. Further, an arbitrator has to be appointed within six months and a challenge to an award has to be within one year determined on the basis of the parties' conduct and other facets[11]. This would play an important role in dis-incentivising dilatory tactics. The tribunal has been now empowered to impose a higher rate of post award interest and to hold day to day hearings as far as possible. The arbitrator can confer high costs in case a party seeks unreasonable adjournments. With respect to the involvement of courts, the amendment provides that an arbitration tribunal can be constituted within 90 days of interim

4 Law Commission of India, Report No. One Seventy Sixth - The Arbitration and Conciliation (Amendment) Bill, 2001 (2001) Available at, http://lawcommissionofindia.nic.in/arb.pdf. (Last Visited on 25 December, 2018)

5 Ministry of Law and Justice, Justice Saraf Commission Report on Implication of The Recommendations of The Law Commission's one seventy sixth Report and Amendment Bill of 2003 (2005).

6 Law Commission of India, Report No. Two Forty Sixth, Amendments to the Arbitration and Conciliation Act, 1996 25 (2014), Available at http://lawcommissionofindia.nic.in/reports/Report246.pdf (Last Visited on 9 January, 2019)

7 Arbitration and Conciliation (Amendment) Act, No. 3 of 2015 (India).

8 See Section 7(4)(b) *Id*.

9 See Fourth Schedule *Id*.

10 See section 29A *Id*.

11 See section 29B *Id*.

protection of the court and has limited the powers of the court once the tribunal has been constituted[12]. Even the tribunal has been given powers similar to those of the court in granting interim protection[13]. So far as regulating the arbitrator is concerned, the amendments has built inclusions to ensure that the arbitrator has sufficient time for arbitrations that they take up[14]. Another significant amendment is inclusion of neutrality in promoting proceedings. This has been done through prescribing International Bar Association guidelines (Under fifth and seventh schedule) on conflict of interest as a schedule to the Act. Under this employees of a party to the case cannot be appointed as an arbitrator."

The latest arbitration judicial jurisprudence has reflected a pro-arbitration ideology and adoption of the best international practices. The judgements from 2012 to 2018 have completely changed the landscape of India with respect to International Arbitral Practices. The decisions which have truly been applauded world-wide are declaring Indian arbitration law to be seta – centric, taking away the power to interfere in arbitration seated outside India, facilitating multi-party arbitrations by referring non-signatories to arbitration agreement ,redefining ambit of public policy for both domestic and foreign-seated arbitration and qualifying that even fraud is arbitrable in India.

Analysis of Arbitration & Conciliation (Amendment) Bill, 2018

The Arbitration and Conciliation (Amendment) Bill, 2018 was introduced in Lok Sabha by the Minister for Law and Justice, Mr. PP Chaudhary, on July 18, 2018 which has recently been passed in the Lok Sabha on August 10, 2018. The Act contains provisions to deal with domestic and international arbitration, and defines the law for conducting conciliation proceedings[15]. The Bill has been introduced following the recommendations of a High-Level Committee constituted by the Central Government under the Chairmanship of Justice (Retd.) B. N. Srikrishna[16]. The committee was set up to examine and evolve measures which would strengthen institutional arbitration in India and also suggest mechanisms to upgrade the effectiveness of arbitral framework in India. Some key issues within the Bill are discussed below:

Highlight Changes

- The main focus of the bill aims for Institutionalisation of Arbitration in India. These Arbitral Institutes would be expected to replace the hazards of the courts with respect to procedure for appointment of arbitrators. As

12 See section 9(3) *Id*

13 See section 17 *Id*

14 See Section 12(1)(b), Fourth Schedule and Sixth Schedule *Id*.

15 Available at http://www.prsindia.org/billtrack/the-arbitration-and-conciliation-amendment-bill-2018-5280/(Last Visited on 9 January, 2019)

16 Report of the High Level Committee to Review the Institutionalisation of Arbitration Mechanism in India (30 July 2017), available at http://legalaffairs.gov.in/sites/default/files/Report-HLC.pdf. See also MLJ press release of 4 August 2017, High Level Committee on making India hub of Arbitration Submits Report, Available at http://pib.nic.in/newsite/PrintRelease.aspx?relid=169621 (Last Visited on 9 January, 2019)

per the proposed amendments, "if the Supreme Court or any High Court has designated an institution then that court does not have jurisdiction to entertain an appointment application under Section 11 of the Act".

- The Bill clarified that the amendments made to the Arbitration and Conciliation Act, 1996 which were introduced with effect from 23 October 2015 will be prospective in nature, meaning that the amended Act will be applicable only to arbitrations, and court proceedings relating to arbitrations, if the arbitration itself was commenced after 23 October 2015.
- Provision for establishing a statutory body for appointment of arbitrators under the designation by the high court or the supreme court which would be called the Arbitration Council of India and will identify and grade arbitration institutions.
- The proposed amendments recognise party autonomy in international commercial arbitration. Significantly specifying that "International Commercial Arbitration (and domestic institutional arbitrations) are not bound by the arbitrator fees prescribed under the fourth Schedule and the time limit for completion of arbitration proceedings does not apply to International Commercial Arbitration".
- The Amended Act provides a strict time line for completion of arbitration proceedings. "This twelve-month time limit prescribed for completion of the arbitration proceedings will commence after exchange of pleadings is complete (for which a new time limit of 6 months has been introduced) even for domestic arbitrations. An arbitrator's mandate can continue even after expiry of the time period pending the court's consideration of an application made by parties for extension of time".
- At the time of filling applications for setting aside an arbitral award, restrictions are imposed on the parties on reference of documents produced during arbitration to prove their case. This provision will curtail the chances for challenging arbitral awards and would facilitate finality of award.
- Requirement for confidentiality would now have statutory stamp. However, the extent of the same has to be determined with precision especially with respect to arbitral awards.

Making India the Global Arbitration Hub – The way forward

The countries worldwide are unenthusiastic about subjecting themselves to the jurisdictions of other countries. To bring India as a global leader with respect to international commercial arbitration we need to open ourselves and adopt international best practices specially by building world class arbitral institute and a pro arbitration legal structure. This restructuring would be required from the three pillars of governance i.e the Legislative, executive and Judicial fronts. The efforts would need physical infrastructural development as well as efforts with human capital. Then establishing the arbitration foot strongly at the domestic forefronts lead towards making India a preferred International Arbitration Venue. With each of such considerations, efforts are needed on several individual fronts. The following discusses them at length:

I. Restructuriing Arbitral Institutions:

Step I: Institutional Setup

The foremost challenge for India is creating effective international arbitral centre. For achieving this two considerations are there, firstly whether to have a single central arbitral centre and secondly having multiple arbitral centres across the nation. "For example, China has 230 arbitral institutions where as other countries such as Singapore have only one institution[17]. With deliberations and discussions amongst the legal fraternity at various National and International conferences and seminars it was suggested that India needs to have one central arbitral institution with regional offices in main commercial cities such as Mumbai, Delhi, Bangalore, Hyderabad etc. Another criterion which needs to be determined would be whether arbitral centres should be government aided or should be private bodies. Citing examples of various world – class arbitral centres, The Singapore International Arbitration Centre (SIAC) was set up as a not for profit non-governmental organisation in 1991. Though it was funded by the Singapore government at its inception, SIAC is now entirely financially self-sufficient[18]. The Hong Kong International Arbitration Centre (HKIAC)[19], on the other hand was established in 1985 by a group of leading business people and professionals with funding support from the Hong Kong Government. It now operates as a company limited by guarantee and a non-profit organisation. International Chamber of Commerce (ICC) based in Paris was founded in 1919[20] and is operating as a non-profit Chamber and the London Court of International Arbitration (LCIA) was set up in 1883[21]. Like all other institutes it is also a private, not-for-profit company not linked to, or associated with, the government of any jurisdiction[22]. In India a number of arbitral institutions are in operation. Foremost amongst them is the International Centre for Alternative Dispute Resolution (ICADR) which was founded as a society in 1995. It is an autonomous organization working under the aegis of the Ministry of Law & Justice, Govt. of India. ICADR has its head office in Delhi and two regional offices in Hyderabad and Bangalore[23]. In Southern India, the Nani Palkhiwala Arbitration Centre in Chennai is a private institution incorporated as a Company[24]. Another institution is the Indian Council for Arbitration (ICA) which was set up in 1965 at the national level under the initiatives of the Govt. of India and apex business organizations

17 Available at: http://www.siac.org.sg/2014-11-03-13-33-43/why-siac/arbitration-in-singapore (Last Visited on 9 January, 2019)

18 Available at: http://www.siac.org.sg/2014-11-03-13-33-43/why-siac/arbitration-in-singapore (Last Visited on 2 January, 2019)

19 Available at http://hkiac.org/arbitration/why-choose-hkiac (Last Visited on 2 January, 2019)

20 Available at https://iccwbo.org/dispute-resolution-services/ (Last Visited on 3 January, 2019)

21 Available at http://www.lcia.org/Dispute_Resolution_Services/LCIA_Arbitration.aspx (Last Visited on 2 January, 2019)

22 Arjun Gupta and Vyapak Desai, "Blessed Union in Arbitration – An introduction to Joinder and Consolidation in Institutional Arbitration" IV(2)IJAL134-144,2016

23 Available at http://icadr.nic.in/file.php?123?12:1475756936 (Last Visited on 9 January, 2019)

24 Available at http://nparbitration.in/arbitration.html (Last Visited on 9 January, 2019)

like FICCI[25]. Recently, the Government of Maharashtra and the domestic and international business and legal communities have set up a non-profit centre called the Mumbai Centre for International Arbitration (MCIA)[26]. International Institutions, SIAC, LCIA, ICC and KLRCA also have set ups in India. SIAC has a liaison office in Mumbai[27] and ICC in Delhi[28]. LCIA did start a facility in India but recently its closure was announced[29]. There are other micro level institutions as well functioning to promote arbitration. However there is no single arbitral seat or institution in the country which is a centre with global repute".

Step II: Upgrading Institutional Infrastructure

The effectiveness of arbitral institutions is the next significant consideration. The facets with which arbitral Institutions should be build are credibility, independency, efficiency and transparency. These institutions should be imbibed with leadership of well supported staff for qualitative arbitration along with physical and technological infrastructure. Use of technology for facilitating the arbitral process should be imperative for e-filing, creating database of cases, big data analytics, Online Dispute Resolution, video conferencing. Benefits of technological upgradation are many such as no adjournments, on-line registration, transmission of voluminous papers, recording of expert witnesses etc. These arbitral centres serve as think-tank for discussions so their credibility is really important. This would help development of arbitration journals, on creating a bar, evolution of best practices overall contribute significantly towards soft law on the subject[30].

Step II: Scaling Human Capital

The professional with attributes of capability, Independence and impartiality would be the right blend for bringing in a super powerful arbitral institution. The pool of arbitrators should be technically sound and experts in their field.

As on date, "Indians are placed extremely poor in appointment as international arbitrators. As per LCIA data for 2015, out of 449 appointments of arbitrators last year, there were no Indians[31]". Similarly, even though most Indian arbitrations are seated in Singapore, "SIAC report for 2015 records that out of 126 arbitrator appointments, only 3% were Indians[32]. This clearly shows that Indians are not included as the right choice for setting of arbitral disputes at international regime".

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25 Available at http://www.icaindia.co.in/htm/about-us.html (Last Visited on 9 January, 2019)

26 Available at http://mcia.org.in/about/(Last Visited on 9 January, 2019)

27 Available at http://www.siac.org.sg/2014-11-03-13-33-43/about-us/siac-india-representative-offices (Last Visited on 9 January, 2019)

28 Available at http://www.iccindiaonline.org/(Last Visited on 9 January, 2019)

29 Available at http://www.lcia-india.org/(Last Visited on 9 January, 2019)

30 Dr. Abhishek Manu Singhvi, "Memoirs of a Personal Journey through Indian Arbitration" IV(2) IJAL14-27,2016

31 LCIA Registrar's Report 2015. Available at: www.Icai.org/LCIA/report.aspx (Last Visited on 9 January, 2019)

32 LCIA Registrar's Report 2015. Available at www.siac.org.sg/images/stories/articles/annuals_ report/SIAC_Annual _ Report_2015/pdf (Last Visited on 9 January, 2019)

There are five mandates which should be focussed upon in order to bring in preferable arbitral qualities. "Firstly training of arbitrators who are from non-judicial background so that awards passed by them can withstand judicial scrutiny. Secondly blacklisting of arbitrators who encroach upon issues on which they do not have expertise. Thirdly establishment of dedicate bar, fourthly establishment of specialised arbitral tribunals in the same manner as commercial benches of courts at district and high court level and lastly designated place for appointment of arbitrators. For instance, in California there is an arrangement where every Court has a panel of Arbitrators attached with it. India can follow the above model or alternatively judicial academies in India can maintain a panel of trained arbitrators that can work at grass root level with the Courts[33]."

Adapting best practices world-wide would lead towards becoming a preferred destination for arbitration. For instance a mixed blend of experts and judicial members in the constitution of the arbitral institution would facilitate better awards. Taking example of Singapore where young budding lawyers and case manager experts from different countries are part of SIAC exposing them to cross cultural inputs and experiences and it is they who are the front line soldiers.

Step III: Institutionalising Arbitration

As per the 246th Report of the Law Commission of India discloses that India is too accustomed towards conducting ad-hoc arbitrations which are not structured arbitrations and these arbitrations are conducted in a formal court like manner leading towards frequent adjournments.

Therefore it is suggested that a structured approach is the need of the hour promoting Institutional Arbitration with permanent facilities leading towards better administration of arbitral process. These Institutions would be expected to have uniformity of practices, at the same time maintaining the party autonomy. Expectation from these institutions would be list of qualified arbitrations, fee structure, mode of submission of documents etc. Institutions should also have some level of governmental control and at the same time, some immunities and privileges. Last consideration has to be made with respect to the central Intuitions or multiple. The domestic set up required for Indian arbitration is huge whereas concerns should be made for International arbitration which are migrating outside India. For instance, in Hong Kong the arbitral mechanism is installed by the business houses whereas in Singapore it is a government initiative and in Malaysia it is an international body.

Step IV: Setting up a Dedicated Bar

One of pillars for setting up of world class arbitral Institution is establishment of a dedicated arbitration bar. Competent bar would aid viable arbitral services. Consolidated arbitration procedural rules would facilitate adherence if strict time –lines. Leading Example of an established transnational bar is International Bar Association Arbitration Committee (The IBA Committee) which provides best practices, laws and procedures relating to International Arbitration. India has also

33 Gary B Born, International Commercial Arbitration, Second Edition, (131) 2016, Wolters Kluwer

recently codified and enacted rules for Insolvency Professionals and Insolvency Agencies under the Insolvency and Bankruptcy Code 2016[34]. Taking inspirations from IBA Committee and the Insolvency Code what is much needed is an strengthened set bar for arbitration in India. This would help in not only having specialised professionals but would also ensure that arbitration does not take a back seat as compared to litigation in court[35].

Step V: Awareness Generation

Promotion of Arbitration as a dispute resolving technique would also lead towards a strengthened arbitration. This would prevent private commercial players from resorting to court mechanism without first invoking towards the arbitration clause mentioned in the contract. The implementation can be brought by better understanding of commercial matters and building an eco-system where the awards passed are neutral and they ensure a win-win situation for stakeholders leaving limited scope for its challenge.

II. Strong Legislative Support:

Laws incorporating updated legal principles which are certain and at the same time flexible are the core factors for deciding the seat in international arbitration. The 2015 amendments in Arbitration and conciliation Act, 1996 has done the requisite on the legal front making India step forward towards becoming a preferred International arbitral seat. The legal fraternity has realised the importance of keeping the arbitration laws abreast and has consequently proposed the much needed amendments in 2018.

III. Need For Judicial Support

The right balance between the law and the judicial interpretation of the same is the remedy for making a good Institutional seat for Arbitration. The judiciary plays a pivotal role in practising supervisory jurisdiction over the arbitral process in a country. Though Party autonomy is the Grundnorm of Arbitration but a system cannot work successfully in isolation. The right Judicial support is vital to give effect to lay down the best practice culture[36].

Interference by the court in India was seen as one of the most important impediment towards establishing a strong arbitral structure. "An award in *White Industries Vs. Republic of India* in 2011, is a case in point. In this matter, an Australian company successfully claimed compensation, equivalent to the amount of award, from the Indian government on account of judicial delay. There are two issues that emerge from the above award: one is interference by courts and two delay in arbitration. With respect to interference by courts, it is well debated and agreed that judiciary should minimize its intervention into the arbitration, as is

34 Insolvency and Bankrupcy Code, 2016: Available at: http://www.mca.gov.in/Ministry/pdf/TheInsolvencyandBankruptcyofIndia.pdf (Last Visited on 9 January, 2019)

35 Justice R.V Raveendran. "What Ails Indian Arbitration. (2013)1 SCC(J)J-47.

36 Tushar Kumar Biswas, Introduction to Arbitration in India: The Role of Judicicary, (Wolter Kluwer, 2014)

being done in various other jurisdictions. In China for instance, the Supreme Court alone can interfere in arbitration matters. This helps in lowering and limiting the impediments in arbitral awards."

Another drawback which is a cause of concern for Indian arbitral regime is lack of uniformity and consistency of decision making by judiciary and arbitral authorities. The reason can be the federal structure of states. The approach of individual court as to the objections filed for challenging the awards varies as per the local scenario. This raises an alarm and alertness is required at the part of judicial academics. Training of judges on how to deal with arbitration cases specially with respect to challenging and setting aside of award, besides ensuring that besides ensuring that frequent transfer of judges holding such courts should be avoided.

Appointment of retired judges has become a norm in India. "This affects the proceedings in two ways. One, it is believed that with retired judicial members as arbitrators, the case acquires a rather languid pace, with traditional hierarchy taking precedence in the matter. Coupled with this is the exorbitant fee charge for arbitration by retired judges which is seen to have a discouraging impact on the parties. It has been suggested that fixing a lump sum fees for the Arbitrators instead of provision of per hearing remuneration would perhaps be a solution to this issue. Presently, the law is silent on this issue as to who can be appointed arbitrator; Generally arbitrators are being appointed from judicial background. There is a need to expand the base of arbitration not only from judiciary but members of Bar should also be involved in this field."

Another area of concern is low promotion of lower civil court and reference of the matters for arbitration. Sensitization of the judges and the consumers of justice is required .It should be made to realise that the parties should be bound by arbitration and there is need to enforce trust in arbitrators[37].

Conclusion

The Eco-system in India can flourish as the country is diverse and is having useful resources in law along with other discipline which can help and sustain arbitration. Moving in the direction for strengthening Arbitration regime would be facilitated by required legal reforms. These legal reforms need support from other aspects as well. Primarily there is an urgency to decentralise dispute resolution as a private market based solution where parties could resolve privately through constituted tribunals without going to the courts. This vigilance would come to the parties if there is a vibrant arbitration bar as well as respected, competent pool of arbitrators who would inspire the confidence in the litigants to prefer arbitration as a dispute resolution rather than the laggard procedure

37 Section 89 of the Civil Procedure Code (CPC) provides: "Where it appears to the court that there exist elements of a settlement which may be acceptable to the parties, the court shall formulate the terms of settlement and give them to the parties for their observations and after receiving the observations of the parties, the court may reformulate the terms of a possible settlement and refer the same for – arbitration, conciliation, judicial settlement including settlement through Lok Adalat; or mediation".

of the courts. If presence is what arbitration regime desires of then the level of inspiration need to increase. The litigants would be inspired by the field time practice of arbitration, for it separate administrative panel are to be developed which will handle arbitration matters efficiently. These separate panels would be the Arbitration Institutes where not only arbitration is practiced but it also aids in conducting arbitration events, training and organising National, International conference on the subject matter. It is time to show to the world that Indian Arbitration Institutes are also based upon International best practices and are not in opposition to deliver effective arbitration with lower costs and International enforcements. Indian Infrastructure such as communication and transport is in a position to facilitate International Arbitrators. Taking inspiration from leading Arbitral Institutes such as SIAC, India needs to provide arbitration facilities which are less time consuming and more cost effective. Primacy needs to be given to the arbitration agreement meaning where by not only enforcing the arbitration agreement but at time same time implementations of the arbitration awards as well expect on public interest considerations.

The fundamental conditions for making India an international arbitration venue has been realised by the legal community. Regular amendments in the arbitration laws will keep laws updated with economic changes. India has already taken measures for upgradation of laws. What is now left is the right implementation of the legislative changes by the Judiciary along with building arbitral Institutional structure in the country. Only then would we be able to “resolve in India”.

Accumulative Harms of Improper Sanitation in India: An Appeal for *Swachh Bharat*

Swati Bajaj*

Abstract

Sanitation is the key requisite for the healthy and dignified survival of any living being. The ignorance towards this has hauled India in the list of countries having poor sanitation. The "United Nations Children's Fund (UNICEF)" and the "World Health Organization (WHO)" in their Joint Monitoring Program (JMP) popularly known as "WHO/UNICEF Joint Monitoring Program for Water Supply and Sanitation" have focused on the condition of Indian sanitation and the problems it has ensued further. According to their report, India has continued to be in the list of countries having less than 55 % of population access to proper sanitation[1]*. Also, according to the Census conducted by the Government of India in 2011, 53.1% of Indian families were not having latrine facilities at their homes; this rate was 63.6% in 2001*[2]*.*

The present paper focuses on the factors responsible for poor sanitation in India and its predictable and seen brunt on society and the nation's economic growth. Further, the paper also discuss the Indian Government's and the Indian Judiciary's initiatives towards improvising sanitation amenities. The paper also endeavours to give some suggestions. The whole study will be based on doctrinal research methodology and will be a compiled study of different data available on Indian scenario of sanitation since 70 years of Independence.

Introduction

Witnessing people allaying themselves on the corner of clumsy roads; watching them openly defecating in the bushes; lobbing waste on the roads; etc. and soon are something very ordinary to find in India. According to "Joint Monitoring Programme" (JMP) conducted jointly by "UNICEF (United Nations Children's Fund)" and "WHO (World Health Organization)", India is the second largest population based country without having 'access to safe and secure drinking water sources'[3]. According to the JMP – Estimated Trends of Sanitation Coverage report, in 2015 – 44% of total Indian Population were using open defecation for relieving themselves. The percentage was 75 in 1990 which means in the span of

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1 UNICEF/WTO, "25 years progress on Sanitation and Drinking Water", (2015) update and MDG assessment, Available at <http://www.wssinfo.org/fileadmin/user_upload/resources/JMP-Update-report-2015_English.pdf>, (Viewed on 25th October, 2018)

2 Census of India (2011), Available at <http://censusindia.gov.in/2011census/hlo/Data_sheet/India/Latrine.pdf>, (Viewed on 21st October, 2018)

3 UNICEF/WTO, "25 years progress on Sanitation and Drinking Water", (2015) update and MDG assessment, Available at <http://www.wssinfo.org/fileadmin/user_upload/resources/JMP-Update-report-2015_English.pdf>, (Viewed on 25th October, 2018)

complete 25 years the country could only made it possible to reduce the problem up to 31% of population.

According to the United Nations, around 2.5 billion people are still far from the access of proper sanitation. Though, no doubt the case of open defecation has been reduced from 24% in 1990 to 15% in 2011[4]. Among the other nations, India leads the countries having improper sanitation facility followed by China, Indonesia, Nigeria, Pakistan, etc.

The UN General Assembly passed resolution 64/292 in the "Stockholm Declaration of United Nations on Human Environment, 1972" which confirmed that, the access to proper sanitation is a "human right" which is "inextricably linked to the highest standard of physical and mental health, as well as the right to life and human dignity"[5].

According to the Census of 2011, it is only 32.7% urban Indian population which used piped sewer system and 50 million people still defecate in open[6].

Impact of poor sanitation: A grave damage

Sanitation or *swachhta*, beit the hygienic environment, safe drinking water, or disinfected food, is not only the need of time; indeed, it is the need of a dignified and healthy life and for sustainable development. The "World Health Organization (WHO)" characterizes sanitation as *"the stipulation of facilities and services for the safe disposal of human urine and faeces"*[7]. Improper sanitation leads to unhealthy environment and causes several diseases like diarrhoea, malaria, typhoid, dengue, Nausea, abdominal pain, gastritis, hypochlorhydria, etc. The dumped waste outside streets or in the public places causes the problem of un-easy-breath and also facilitate in increasing diseases. Poor sanitation also leads to premature mortality[8]. Besides, the discharge of untreated excreta affects human health through various mechanisms such as by polluting drinking water, by providing breeding sites to flies and insects which further infect food and people and lead to various lethal diseases.

It not only affects ones' well-being but also affects nation's economic development. According to a Flagship report[9], due to improper sanitation the

4 International Decade for Action 'Water For Life' (2005-2015); United Nations Department of Economics and Social Affairs; Available at <http://www.un.org/waterforlifedecade/sanitation.shtml>, (Viewed on 24th October 2018)

5 Available at <http://barandbench.com/wp-content/uploads/2017/06/toilets-himachal-pradesh.pdf>, (Viewed on 1st December, 2018)

6 Twelfth Five Year Plan, (Vol. I), Available at <http://planningcommission.gov.in/plans/planrel/12thplan/pdf/12fyp_vol1.pdf>, (Viewed on 25th October, 2018)

7 World Health Organization, Available at <http://www.who.int/topics/sanitation/en>, (Viewed on 22nd October 2018)

8 Economic Impact of Improper Sanitation in India; Flagship Report, Water and Sanitation Program (2011); Available at <https://www.wsp.org/sites/wsp.org/files/publications/WSP-esi-india.pdf>, (viewed on 22nd October 2018)

9 Economic Impact of Improper Sanitation in India; Flagship Report, Water and Sanitation Program (2011); Available at <https://www.wsp.org/sites/wsp.org/files/publications/WSP-esi-india.pdf>, (Viewed on 24th October 2018)

death rate and the health related issues in India have become so enormous that they are enticing much expense and ultimately affecting the nation's economy. According to the report, India would have been at profit if had spends money on improving sanitation as it cannot afford the consequences of improper sanitation.

Unhygienic public toilets cause several unwanted problems, especially in the women and children. According to a study on "Sanitation and Hygiene for Women and Girls", due to improper sanitation or unhygienic environment the child mortality rate is so high that the children use to die before reaching at the age of five. Further, this sanitation problem also causes rigorous diseases in women especially during the time of their pregnancy and menstruation[10]. Female safety is at risk because of unavailability of private use of toilets. They are compelled to defecate in open which increases the chances of attack on their well-being. According to the report, due to the unavailability of sanitation facilities in schools, the girl's attendance get reduced and ultimately vanished[11]. The High Court of Himachal Pradesh made certain suggestions for recognition of rights of sanitation, especially on highways. The court cited that, "Public toilets must be constructed at places, which can be easily located by the individuals along with the sign boards of Public Toilets or Private Toilets to be displayed on them; further, free services can be provided in cases of public toilets and charges can be prescribed for private toilets and in all toilets, staff should be provided to take care and maintain the same; the toilet facilities must be easily accessible by the ladies, and toilets must not be located at any dangerous or inconvenient place; the facilities must have proper disposal system for disposal of sanitary napkins"[12]

In India, the death rate is majorly because of the poor sanitation. In 2008, around 40% of the world population was not having sanitation facility and India was the part of that. Around 1.5 million deaths of children were caused due to diarrhoea[13].

Dumped garbage also contributes in increasing the ill-effects of poor sanitation. Due to improper disposal of house garbage and because of creating an acre land into a dumping land, the near-by people suffer from grave health issues which not only handicap the person but also his coming generation. The problem leads to malnourishment. Lacking food is not the only cause of malnourishment; indeed, lack of proper sanitation expose children to a bacterial brew that often appal them and leave them unable to gain or retain a require body weight. They

10 We Can't Wait; A report on Sanitation and hygiene for Women and Girls; Domestos Water Aid; Available at <http://worldtoilet.org/documents/WecantWait.pdf>, (Viewed on 23rd October 2018)

11 Isabell Pugh & Dr. Ellisa Roma; "Toilets for Health; A report by the London School of Hygiene and Tropical Medicine in Collaboration with Domestos", Available at https://www.unilever.com/Images/sd_toilets-for-health-141113_tcm13-387337_tcm244-409783_1_en.pdf, (Viewed on 27th October, 2018)

12 Judgment delivered by High Court of Himachal Pradesh on 19th May 2017, Available at <http://www.livelaw.in/right-sanitation-fundamental-right-himachal-hc-directs-state-provide-public-toilets-highways/>, (Viewed on 27th November 2018)

13 Mudit Kumar Singh, "Sanitation in Rural India; International Journal of Research in Humanities", Vol. 2 Issue 5, May 2014, Arts and Literature, Available at <file:///C:/Users/Dell/Downloads/2-11-13987542314.%20 HumanitiesSanitation%20in%20 Rural%20India-Mudit %20 Kumar%20Singh.pdf>, (Viewed on 27th October, 2018)

use their maximum energy in fighting with the diseases and infections and hence contribute almost nil towards the development of their body and brain[14].

This also causes serious issues for those who have been employed for removing and cleaning the human excreta. To deal with this, the Government enacted the "Employment of Manual Scavengers and Construction of Dry Latrines (Prohibition) Act, 1993" but unfortunately the act was never implemented[15]. There were estimated 577,228 manual scavengers in the country and these people were treated like untouchables. Ultimately, the Supreme Court of India banned 'manual scavenging' in a Public Interest Litigation (PIL) filed under Article 32 of the Indian Constitution soliciting for the issuance of writ of mandamus[16]. After the directions of Supreme Court, the government again enacted the "Prohibition of Employment as Manual Scavengers and their Rehabilitation Act, 2013". The Supreme Court ordered for the rehabilitation of the manual scavengers and banned the manual scavenging. The court also made the act of manual scavenging as a punishable offence.

In the preamble to the Act the reason for the enactment of the Act is stated as:

> *"to promote among the citizens fraternity assuring the dignity of the individual as enshrined as one of the goals in the Preamble to the Constitution; to provides that the State shall protect the weaker sections, and, particularly, the Scheduled Castes and the Scheduled Tribes from social injustice and all forms of exploitation; to eliminate dehumanising practice of manual scavenging, arising from the continuing existence of insanitary latrines and a highly iniquitous caste system which still persists in various parts of the country and the existing laws are proved to be adequate in eliminating the twin evils of insanitary latrines and manual scavenging; to correct the historical injustice and indignity suffered by the manual scavengers, and to rehabilitate them to a life of dignity."*[17]

According to an article, for the manual scavengers, sanitation means:

> *"being forced to clean up the faeces of other people. It means cleaning up dry latrines in houses or public spaces, railway tracks, sewage drains or septic tanks".*[18]

Factors responsible for poor sanitation: Root cause

In an article published in *Economics and Political Weekly*, the writer said that 'caste' is one of the major factors responsible for poor sanitation. The article emphasised that *Swachh Bharat* cannot be made without eradicating caste discrimination. The highlighted words of the article are that, "Caste culture is pervasively reflected in

14 Gardinner Harris, "Indian's poor sanitation linked to malnutrition", *The Times of India*, 18th July 2014

15 Kranti Pratap Singh, "Manual Scavenging in India – A Stigma"

16 *Safai Kramchari Andolan & Ors.vs. Union of India & Ors*, (2011) 15 SCC 611

17 Preamble, Prohibition of Employment as Manual Scavengers and their Rehabilitation Act, 2013

18 Editorial, "Cleaning Human Waste: Manual Scavenging: Caste and Discrimination in India", *Human Rights Watch*, August 25th, 2014

the behaviour of Indians. This philosophy persists despite the increase in access to education, despite the economy becoming globalized and urbanized. Although, the world over people have take in a civic sense and also stand and accept the responsibility to maintain cleanliness, however, simultaneously relying upon sanitary workers people derive a sense of (upper-caste) superiority in littering the place, expecting it to be cleaned by the lower-caste scavenger. If a small community of these scavengers, treated worse than shit and exploited to the hilt, is vested with the responsibility of clearing the filth generated by 1,250 million people with impunity, the country is destined to remain unclean".[19]

Other factors responsible for 'improper sanitation' are:

Ignored Sector

After independence, in 1947, rural sanitation was one of the prime concerns of the Indian Government, however, with the passage of time, the rural sanitation becomes rural development and the rural development becomes the development of overall sectors but not the sanitation. According to a study, in 2006 around 6.4% of Indian Gross domestic product (GDP) was the cost incurred by India on improving inadequate sanitation. Diseases like diarrhoea, respiratory infections were in large numbers and caused health-related issues to the Indian economy[20]. Though, the sector is not only ignored by the government but also by the people. They behave reluctantly towards any new advent in their life. They are in a habit of using open areas for defecating. Not only these, orthodox people have the myth that having a toilet in their home will cause impurity; henceforth, the awareness of building lavatories in their home is certainly hard to get accomplish.

Inadequate infrastructure

On the construction sites, the labour working their often build up temporary toilets for their use (common for male and females), which don't have proper sanitary work and facilities for its disposal. Public toilets constructed by the government are in a wicked situation, they have not been washed properly; they are also lacking water facilities. Public toilets have become almost impossible for use by the woman due to improper locking facility, lack of water, lack of hygiene, etc., ultimately causing serious health problems in women.

At various public places like highways, recreational areas used for building tents for parties, marriages etc.., don't have toilet facility and because of that people use sheds and fields to defecate. Not only public toilets, in fact, there are places where people do not have toilet facilities at their home. It has been noticed in few crowded areas like the Muslim community in Navada; people living there defecate on the cement floor of a fly-infested partition usually separated only by a curtain from the rest of the house[21]

19 Anand Teltumbde, "No Swachh Bharat without annihilation of caste", Economics and Political Weekly, Vol. 49, No. 45, 2014, p.11

20 Ganesh S Kumar, et al, "Health and environmental sanitation in India: Issues for prioritizing control strategies", Indian J Occup Environ Med. 2011 Sep-Dec; 15(3): p.93–96

21 Editorial, "Toilets and Jobs in India" *The Economist*, Oct. 9, 2012

Inappropriate technology used in the construction/designing of toilets and absence of any kind of cooperation from both the people and the government[22].

Carelessness towards sanitation

At various food stalls, one will fail to find dustbin to throw used plates, etc. Vendors use open roads to deposit the used plates, etc.; Public throw rappers carelessly outside their car windows or we have also seen that they park their cars at the road side and very cleverly dump the rappers on the side, stupidly showing that they don't want to throw in between road.

The government has provide the facility of dustbins on the road, railway station, bus stops, highways, etc.., however, the same get fill within few days and the municipal authorities do not bother to clean and clear it and then the people start dumping waste near the dustbin and making the road full with dumped and smelled waste.

Illiteracy and ignorance

Lack of understanding in the society regarding the problems caused from improper sanitation is the key factor behind this unending situation; People living in rural areas are uneducated which make them careless in their duties towards the society and its nature; In slum areas, the waste and damaged products can easily be seen on the roads. People are in habits of dumping their home waste in the open places.

Careless mechanism for disposing of waste/dumped products

The waste/dumped material usually called as *kudda/ kachra*, which the people throw out from their houses is taken by the sweepers or by the municipal corporation authorities is dumped on the large vacant land. In places like Delhi, where geographically there is not mountain, there people get to see huge mountain of garbage dump.

Places like Delhi and Mumbai has witnessed its several lands to be turned into garbage dump land like Deonar, Mulund, Kanjurmarg (agency responsible for clearing it is Shiv Sena Brihanmumbai Municipal Corporation), Ghazipur, Okhla, Bhalswa (agencies responsible for clearing it East Delhi Municipal Corporation, South Delhi Municipal Corporation, North Delhi Municipal Corporation, respectively)[23]

Judicial Dealings with the issue

Right to proper sanitation is a part and parcel of the fundamental right i.e. right to life. Improper or poor sanitation is turmoil which can snuff out the signs of human existence from the earth. It is the violation of basis human rights. In India, public interest litigation (PIL) is an instrument in the hands of people of

22 Manjari Manisha, "Multidimensional impact of Inadequate Sanitation in India: Situation Analysis", *International Research Journal of Social Sciences*, Vol. 4(6), 2015

23 Editorial, "Waste Lands of India: Here is how metros manage their trash" *The Indian Express*, 2016

India, by using which they can appeal the court to protect their right. M C Mehta is the famous personality moving the court in motion by filing various PILs for safeguarding the environment.

In invoking the legal rights of sanitation, the Supreme Court of India in its landmark judgment passed in 1980 clearly recognized the brunt of a flagging urban environment on the poor. The court also linked basic public health facilities to human rights and obliged the municipality to provide proper sanitation and drainage[24]. Perhaps, this case was considered as the ultimate case of "jurisprudence" on right of proper sanitation.

In, *Milun Saryajani Through Editor vs. Pune Municipal Commissioner*[25], the Division Bench of Bombay High Court cited that:

> *"Right to life, given in Art. 21 of the Indian Constitution, includes civil amenities and medical aid. In fact during the time of travel by whatever means of transport in the State or the National Highways the right to sanitation is require to be recognised as a fundamental right like the other rights to clean environment, to water, to education, etc. "*

The court also said that, *"sanitation is the bare necessities of life because the practice of open defecation with polluted drinking water and unclean environment cannot be considered as a dignified life as understood in the context of right to life under Indian Constitution"*.

The Supreme Court while dealing with the case of *State of Maharashtra vs. Chanderbhan Tale*[26] discussed about the bare necessities of life. The court said that:

> *"The State is under an obligation to provide basic amenities to all the people of the country along with ensuring that their right of sanitation is not defeated. Certainly, citizens travelling on the State/National Highways need to be protected from open defecation, untreated disposal of waste into streams and contamination of water supplies, which could be caused due to proper amenities in the State. Lack of sanitation impacts our environment. It consigns people to the inappropriate and unsafe practice of open defecation/urination and inefficient waste management which in turn causes serious health and hygiene issues."*

Government's initiative to improve sanitation in India: A step towards dignified life

According to the Twelfth five year plan 2012-17, the planning commission of India has projected financing in various infrastructure and the same for water and sanitation was projected as 2,55,319 Crore[27]. Indian government initiated *Swachh Bharat Abhiyaan* on 2nd October 2014 in order to pay a tribute to the nation's

24 *Municipal Council v. Shri Vardhichand & Others, Supreme Court of India*, AIR 1980 SC 1622

25 AIR 2016 (NOC) 261 Bom

26 (1983) 3 SCC 387

27 Twelfth Five Year Plan, Volume I, Available at <http://planningcommission.gov.in/plans/planrel/12thplan/pdf/12fyp_vol1.pdf>, (Viewed on 2nd Nov. 2018)

beloved father Mahatma Gandhi. It is a restructured version of *"Total Sanitation Campaign"* (TSC) which was launched in 1999. The Prime Minister Narendra Modi also gave a mantra to nation *'Na gandagi karenge, na karne denge'*. This message of Clean India Movement was spread by him in various places like Varanasi to clear river Ganga[28]. The *Swachh Bharat Mission* has been set to be achieved by 2nd October, 2019.

Besides this, the government has launched *Central Rural Sanitation Program* in 1986; the Program was initiated by the government in order to improve the quality life of the rural people. Other key areas focused by the program were construction of individual household latrines, women sanitary complex, school sanitation, rural sanitary marts and production centres, etc.

"Nirmal Bharat Abhiyan" is again a restructured version of *"Total Sanitation Campaign"* (TSC). It was launched in 2007 which emphasized on information, education and communication. It basically aims to cover rural community through renewed strategies and saturation approach; to encourage cost effective and appropriate technologies for ecologically safe and sustainable sanitation[29]. The program aimed to eradicate open defecation till 2019.

"National Urban Sanitation Policy" (NUSP) was launched by the *"Ministry of Urban Development, Government of India"* in the year 2008. The objective of the policy was to renovate Urban India into "community–driven", "totally sanitized" and a "healthy city". The policy focussed on the key issues like poor awareness, fragmented institutional roles, limited technology choices, urban poor communities, etc.[30]

States declared 'Open defecation free'

The objective of *Swachh Bharata Mission* is to make the country 'open defection free' till 2019. In 2016, Himachal Pradesh was declared 'open defection free'. It was the country's second state after Kerela to get such status under *Swachh Bharat Mission*. Recently in *Times of India Newspaper*, it was mentioned that Assam's rural area are soon to be declared open defecation free[31]. The Union Minister of Drinking Water and Sanitation' Mr. Parameswaram said that, *"Assam and Tripura are the only two north eastern states where rural areas are yet to become ODF, while the remaining six states in the region have already achieved it much ahead of the October 2, 2019 deadline"*[32]. According to a report in same newspaper, Jharkhand has also been declared as Open Defecation Free by Mr. Raghubar Das, Chief Minister, Jharkhand. As per the report of *The Economics Times*, till date 11 States in India have been declared open defecation free. These include Sikkim,

28 Editorial, "Towards a Swachh Bharat"; Available at <http://www.pmindia.gov.in/en/government_tr_rec/swachh-bharat-abhiyan-2/>, (Viewed on 2nd Nov. 2018)

29 Swachh Bharat Mission - Gramin; Ministry of Drinking Water and Sanitation; Available at <http://tsc.gov.in/TSC/NBA/AboutNBA.aspx>, (Viewed on 4th Nov. 2018)

30 National Urban Sanitation Policy, Ministry of Urban Development, Available at <http://moud.gov.in/sites/upload_files/moud/files/NUSP_0.pdf>, (Viewed on 4th Nov. 2018)

31 Editorial, "Assam's rural areas to be ODF by year-end" *The Times of India*, 16th November, 2018

32 *Ibid*

Haryana, Uttarakhand, Himachal Pradesh, Andhra Pradesh, Kerela, Chhatisgarh, Meghalaya, Gujarat, Chandigarh and Daman and Diu (UT)[33].

Areas which need to focus upon for improving sanitation:

A little step results in giant coverage

Spread awareness: It should be the prima facie concern of the government. Without having the knowledge regarding the ill effects of improper sanitation, people would not be able to have strong determination for keeping their surroundings clean and safe. It is generally seen that the root cause of almost 80 % of problem is because of the unawareness and ill-mind of the people. Sanitation awareness programs should be launched at the primary level of education.

Ownership of cleanliness: People are require to take responsibility to keep their surroundings clean and keeping it like their own house. Responsibility makes a man mature enough to deal with problems. The same principle can be used for keeping our nation clean and proper. Policies cannot achieve the aimed target unless it is coupled with the commitment and determination. It should be merged with the people/society so that targeted sanitation improvement can be achieved. According to an article published in *Economics and Political Weekly*, the poor people are more inclined towards a clean atmosphere around them rather than rich people. Richer depends on the poor for clean surrounding areas around them. The article also says that the reason behind the inclination of poor people is that they try to prevent illness caused due to uncleanness as they cannot afford treatment for that.[34]

Clean public toilets/adequate latrine facility: Proper arrangement of toilet can help the nation to achieve gender equity, educational advancement, eradication of poverty, reduction in child mortality, reduction in economic burden, mitigation of urgent climate change, etc. Latrine facility should be given to both urban and rural areas. However, latrine should be of "improved source" for example, "flush/ pour-flush", "piped sewer system/septic tank/pit latrine", "ventilated improved pit latrine", "pit latrine with slab" and "composting toilet" etc.[35].

Proper arrangement of dustbins in public places: Though governments are supposed to make arrangements for proper dustbin facilities all over the city, the people are also supposed to throw garbage in the dustbin and not outside it. It has been seen that due to the careless nature of the people, they don't even bother to throw waste in dustbin if it's little bit far from the place you are. Indeed, people should also keep dustbins outside their houses so that the passer-by can use it instead of throwing waste on road.

Prohibition on industrial waste: Industrial waste create health hazard by seriously polluting our lakes, streams etc. It also blocks streams causing sewage

33 Editorial, "11 states are now open defecation free" *The Economics Times*, Feb. 8, 2018

34 Anand Teltumbde, "No Swachh Bharat without annihilation of caste", Economics and Political Weekly, Vol. 49, No. 45, 2014, p.11

35 Manjari Manisha, "Multidimensional impact of Inadequate Sanitation in India: Situation Analysis", *International Research Journal of Social Sciences*, Vol. 4(6), 2015

problems. Though the government has banned manual sewage clearance but even though it creates health problems for the people dealing with it. Industrial waste also increase environment degradation problem. The government should adopt proper on-site as well as off-site mechanism for the dispose of the waste coming out from the industries as well as household waste.

Proper mechanism for re-cycling and re-use of "human excreta" (faeces and urine), "solid waste" (trash or rubbish), "collection and management of industrial waste", "drainage of storm water", etc. should be made by the government and the authorities.

Strict vigilance on the responsible authorities: The government should also make proper vigilance mechanism for keeping an eye on the authorities responsible for keeping environment friendly. Proper penalties should be imposed on the person creating un-friendly environment. Moreover, NGOs and Corporate (through there CSR initiatives) should be motivated to lead cleanliness program and also monitor its progress on regular basis.

Conclusion

Earth is only planet in whole solar system where life was found possible. Due to immense water facility on this planet it was given the name of *'blue planet'*. Nonetheless, instead of rewarding back this planet, the human beings have filched its natural beauty.

"Sanitation is more important than political independence" – as said by Gandhi Ji, who has always shown his concern towards the emerging need for improving sanitation in our nation. Although, the government has taken initiatives for improving toilet facilities, etc., but still the target is far to reach its destination. The 'Swachh Bharat Abhiyan' started by the Prime minister of India Sh. Narendra Modi in 2014 aim to achieve the target of clean and healthy India till 2022. However, considering the pace of improvement in sanitation, the government not only need to adopt policies but also need to focus on its implementation so that it can serve best to the society. Moreover, only the government or the court are not responsible for improving sanitation, people of India are also responsible and hence, the problem require public-private partnership to eradicate the problem from its root.

Engendering Competition in a Multisided Platform Economy

Rakesh Kumar Sehgal*
Dr. R L Koul**

Setting the Context

The progressive march to human civilisation has been characterised by the Industrial Revolutions and while the first Industrial Revolution in the eighteenth century was characterised by 'use of steam power' for a mechanised revolution; the second revolution of early twentieth century was linked to 'mass production techniques' and the *'digital revolution'* through shift from analog to digital technologies and powers of computing brought in the third Industrial Revolution.[1] We are now witnessing the fourth Industrial Revolution which; while using the technologies of third revolution; is characterised by increased computing power, data analytics and integration of artificial intelligence and 'Internet of things'which has brought in new business imperatives and business models and structures which move on increased power of innovation driven by value of data.

The conventional 'brick and mortar' economy has paved way for a radical economy based on power of 'clicks' in a resultant 'multisided platform' or 'hub economy' based on 'data' and has changed the landscape of business models which are characterised by 'use of Internet' and 'digital technologies' and have disrupted the conventional business models across industries on the basis of real-time transactions and are also commonly referred as the *'gig economy'*, *'collaborative economy'*, *'peer economy'*. Traditionally the electronic transactions on platforms were confined to B2B or B2C transactions with the platform acting as the marketplace; there has been metamorphically shift of such business models to newer transformational models of B2B (depicting online sales including outsourcing and off shoring transactions) or B2C transactions (facilitated through platforms like e-commerce, mobile apps, social networks and like). The platform economy through digitisation has catapulted newer mutative formulations like C2C (direct consumer to consumer transactions) e.g. transactions on platforms like eBay, G 2B (government to businesses transactions) like e-procurement, G2C (government to consumer transactions) like in the case of digital payments to below poverty line population in India for being beneficiary of direct transfer under government schemes, C2B (consumers to businesses – bringing the freelancers in a gig economy to render task oriented services). An UNCTAD 2015 study has estimated the B2B and B2C trade to be creating USD 25293 billion[2].

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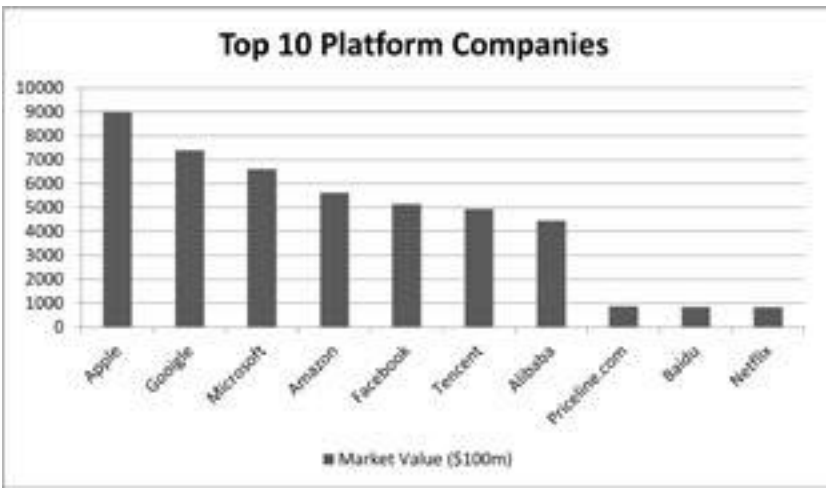
1 The Fourth Industrial Revolution, Klaus Schwab, World Economic Forum

2 E-Commerce: Global trends and developments, Sven Callebaut, session on the E trade for all initiative, Regional Workshop on E-Commerce and Emerging Digital Trade Agenda,2017

While such disruptions through continued spate of innovations are making transformational changes in the landscape of the businesses; they having emerged as sustainable and perpetual business models represent the *'will and desire'* of mankind. As World Economic Forum Report points out; the digital imperatives arising out of multisided platforms have transformed the business landscape from an *'ownership-based model'* to *'access-based model'* e.g. for hiring automobile instead of owning one for consumption needs; platform economy provides for myriad range of car hiring/leasing opportunities exemplifying similar business opportunities which through their sheer dynamism are responsive, adaptive and highlight the imperatives of rise of *"on demand economy"*. The World Economic Forum study points out that by 2020, new digital business models will account for 30% of the industry revenues and such business models are made possible through use of digital platforms as 'HUB economy'; another nomenclatures for the multisided digital platforms providing for an ecosystem of emergence of newer avenues to both consumers and businesses alike in process providing for substantial value leverage in four C's namely cost, choice, convenience, control and satisfaction. Also whereas it took two decades on an average for a Fortune 500 company to reach valuation of USD one billion; the platform economy has hastened this process to 4 years now. The same report further estimates unlocking of dollar ten trillion of socio-economic value by 2025 through the digital transformation unleashed by the multisided platforms[3].

A study by Pwc points out that out of 20 Top Global 100 companies; more than a half account for the largest increase in market capitalisation. Further, 10 companies have a market capitalisation of around $ 4100 Billion during 2017-18 and included brands like Amazon, Tencent, Alibaba, Microsoft, Alphabet, Apple and Netflix amongst others. Exhibit I highlights the market value ($100m) of top ten platform economies vis a vis top ten multinational companies as on December 2017:



3 unlocking dollar hundred trillion for business and society from digital transformation, digital transformation initiative in collaboration with accents are by world economic Forum, May 2018

These companies demonstrated increase in market capitalisation on year to year basis ranging from 13% -100%.[4] Further during period 2009-2018, fifteen technology companies demonstrated a 433% change in market capitalisation outperforming the industry benchmark of 322%. A press release by PwC estimates the size of the 'shared economy'/multisided platform economy to grow to Dollar 335 billion by 2025.[5]

A study by JP Morgan Institute on the basis of study of one hundred twenty eight platforms in USA highlights that the 2.3 million families which participated in platform transactions resulted in 38 million number of payment transactions between 2012-2018 evidencing an increasing trend by the end-users to rely on platform economy as a reliable and sustainable marketplace thus resulting in exponential growth of e-commerce through multisided platforms. The said study characterises the platform economy into four major sub-segments namely *'transport sector – to transport people/goods/services'*, *'non-transport sector – platform for service providers offering labour services/jobbing assignments'*, *'selling sector – traditional buying/selling of goods through platform' and 'leasing sector – dealing with leasing of different asset classes'*. The study points out that 'easy entry and exit routes' is the prime factor for the success of the multisided platforms both for the buyers as well as sellers to come to the said marketplace and this has also resulted in multi-homing capabilities causing the market players/consumers to switch to another comparable platform. However, with the markets getting characterised by monopolistic tendencies; such switching sparsely results in affecting the platform due to concentrated nature of the market; also such defections are rare on account of the countervailing power available with the platform to negotiate the terms of trade on a calibrated scale largely in its favour. The said report also highlights the platform economy resulting in additional income to informal employment – employment as jobbers in addition to traditional jobs accounting for additional income to such 'gig workers' – highlighting the freelance work.[6]

4 Global Top 100 companies by market capitalisation, Pwc (31st March 2018)

5 *five key sharing economy sectors could generate pound nine billion of UK revenues by 2025*, PwC,2014

6 *The Online Platform Economy in 2018, Drivers, Workers, Sellers and Lessors*. Diana Farrell et.al JP Morgan Chase and Company Institute

While the platform economy showed green shoots of democratisation of businesses by bringing in intrinsic value through establishment of *end to end value* chains on real-time basis providing for significant opportunities to consumers for better prices and ease of availability through a centralised digitalised platform; increased concentration of market power by bringing up substantial mass of players either as service seekers or service providers at either and of the platform has enabled handful of such platform companies to rise to gigantic proportions as compared to the traditional market operators. What was seen to be a boon for the consequences resulting out of platform economy is now threatening the competition landscape for the distortions to the competition caused by the platform operators which has caused a situation where the *"competition in markets"* has paved way for *"competition for markets"* demonstrating the perils of amassing concentration through the disproportionate business opportunities to select market operators thereby threatening the competitive ecosystem and forestalling the competition altogether through such oligopoly resulting in monopolistic operations[7]. To highlight the disruptions to the market ecosystem, the platform economy has altered the scale, magnitude and the manner in which the industry has started getting the evolutionalised by use of digital platforms e.g. some of the hitherto markets such as financial advisory services which were rendered hitherto by professionals are now available online through platform dealing in financial product and services.

Characterising the platform economy as *'the market'*

Also referred to as the 'sharing economy', the multisided platform economy is in the nature of a 'hub economy' and can be compared to a 'web' as an aggregator/ consolidator where each new value chain partakes the character of a 'node' with the dynamic integration of bringing in the 'service providers', 'service seekers' on the same platform (like an app) and thereby resulting in providing 'interaction connectivity' from 'end' to 'end' in the value chain of the transaction resulting in increased value creation through increased use of data through underlying 'infrastructure of technology'. The multisided platform economy while being reflective of 'increased concentration' through the market power induced by 'network effects' also provides for 'contestability' bringing in varied nature of businesses as service seekers/service providers to the same platform. The network economy is different from a traditional economy as while dealing with the same segment of products/services; it differs in its operational approach to operationalizing business strategy which is through commercial tapping realisation of assets generated through network-based effects namely the 'data' which is used by it for entering a new market. Therefore in a competitive setup; it may result in ever increasing dynamism wherein the existing products/services have to continuously keep on updating themselves for being relevant in the market.

So far the platform economy/shared collaborative economy has evidenced three business models namely the 'subscription model' where in consideration of taking

7 Marco Iansiti and Karim R Lakhani, *Managing our Hub Economy*, Harvard Business Review, September – October 2017

a service, the users pay for it (like in the case of channel subscription), model based on indirect revenues through enabling 'advertisements on the platform' wherein the users indirectly make use of a service for free and 'an app-based model' wherein the developers pay for reaching out to the end-users (like the android applications on Google). As Thomas Hoppner points out that from the perspective of defining relevant markets, the 'search engines' which enable such search services demonstrates three-way transactional arrangements/ agreements; one between the advertiser and search engine, second between the search engine and the customers who use Internet by agreeing to the terms and usage of its services and an arrangement between the search engine and the websites intertwined with the search engine for access[8].

Building up multi-sided platform requires reasonable gestation period and is a capital intensive investment in setting up infrastructure with technology interface as also continued innovation and technological upgradation is again a capital intensive effort. Further, while they operate their main platform like in the case of Amazon, Google and Microsoft by offering their services to start-up economy by allowing them to offer their services on cloud; they also bring such Players on their main platform, thus increasing the number of nodes in the network and increasing the market power of the digital platform with more and more increased concentration allowing the digital platforms to operate at zero marginal cost through network induced effects exemplifying the Metcalfe's Law which held the value of the network to be increasing with number of nodes. The networks are then used by the multisided platforms for entering into sometimes auxiliary and many times into non-related market segment altogether causing such markets to tip in favour of few players and as a result the operators in the traditional markets are minnowed by the sheer network induced 'domino effects' and concentration of market power with the platform. It is also an empirical evidence that less than 1% of the start-ups finally become a $1 billion companies and others tend to be "bought for consideration or merged as part of an existing entity". This highlights the predatory nature of the digital platform whereby the platform keep on cannibalising ancillary businesses as part of its business strategy resulting in competitive bottlenecks.

To understand the multi sided platform economy in larger details, it is important to highlight the perspective brought in by Jonathan Haskel and Stian Westlake who pointed out that the market of intangibles is devoid of physical assets and the intangible economy runs on a different paradigm altogether characterised by *a sunk cost* (it vanishes if business model does not go well); may characterize abnormal/exponential cost for initial offerings and zero marginal cost for subsequent tranches; 'creates spill overs effects '(allowing for free pillion riding by rivals making use of the intangible infrastructure created by the platform), has a 'larger magnitude of scalability' in comparisonto traditional brick and motor economy. It has the propensity for drawing analogous product/services due to their nature being complementary like ipod and music, Google and GPS navigation, fitness app vis a vis linking it to eatery options available and alike.

8 *Defining Markets for the Multisided Platforms: The Case of Search engines*, Thomas Hoppner, 38 World Competition Law and Economics Review

The point which they drive home is that the *rules of trade* which governed the traditional market are possibly extinctive now and the ecosystem of competition laws, trade mark and patents regime, taxation regime; which provides for protection of rights and interest of business players, intermediaries and consumers alike; has to be transformed and made in sync with the realities of digital trade over multisided platforms which have so far proved that they are not mere asset bubbles but are here to stay. Therefore, the realignment in the legislative and regulatory framework is called for regulating their operational aspects in tandem with the existence of other economic activities.[9]

How the network effect gets induced

In a platform economy; various networks criss-cross each other since the same platform acts as a integrated hub, it becomes an avenue for very nature of independent as well as interlinked transactions; providing for an effective venue for communication exchange amongst the market operators. The platform triggers inducement of 'network effects' whereby one completed transaction on a 'node'; may become an intermediary transaction on another 'node'. The sustainability of the platform lies in increasing the network induced effects bringing in multitude of service seekers and providers on the same platform signifying substantive changes in the business structures. Network economy also demonstrates cross network effects whereby proliferation of numbers amassed at each side of the platform, on one side brings the intermediary/the reverse interest group becoming interested to that platform for being provider of captive audience of service seekers/service providers. Only such platforms who are able to evidence an increased concentration of numbers as 'thick market' on either side of the platform are able to have longevity and sustainability to their business operations attracting more and more number of niche business transactions.

Success of multisided platforms lies in their providing disruptive business models for example Google is not only a search engine but allows itself as a platform to be used by the other operators and the multisided platform economy is also described as 'shared economy'. Albeit, the adjective 'shared' has been contested by US Department of Commerce to be a misnomer giving an impression that it is a philanthropic activity wherein the market operators are using said platform-based assets for commercialising and channelizing their assets into monetisation through commercial activities[10].

In order to provide for the successful platform with *thick* concentration of both buyers and sellers at either end of the platform, the platform operators start with approach is guided by ingenuity as they face dilemmas of attracting sufficiently larger base of both suppliers as well as buyers for completing complex heterogeneous transactions which may depict a broad matrix of many product offerings at differing commercial prices based on the value proposition; each

9 Jonathan Haskel and StianWestlak, *Capitalism without capital: The Rise of the Intangible Economy*, Princeton University Press, 2018

10 Rudy TellesJr, *digital matching firms: a new definition in the "sharing economy"*, office of Chief economic, US Department of commerce, issue brief#01-16 (2016)

of such product or service may have to offer. Uber addressed this problem by offering premium discount offerings to its riders however that would have had meant Uber to forego its part of profits which it did by allowing the drivers to collect the entire fare. Similarly when Uber decided to have on its panel more number of drivers; it offered a scheme of higher value to such drivers per ride; and while a prudent analogy would have required it to recover it from the consumers and if it had done so, it would have lessened demand for its brand. Uber addressed this aspect by aggregating demand and supply side along with dynamic variable pricing to keep its model of business sustaining one. Uber is not a third-party car-rental agency but offers a network of other products or services like payment models, eateries and the like are businesses by making use of data which the platform provides along with its business model and the power unleashed by digital platforms has been formidable as they have been able to overtake the conventional business model of industrial activity through e-commerce driven by power of structured data and its analytics bringing together the producers and customers through network induced effects.[11]

What it beholds for competition

Typically a violation through the anti-competitive conduct of market operators in the platform/shared economy could either happen through a unilateral action resulting out of abuse of dominance or power of horizontal players acting in collaboration for concert or business combinations like merger. In either of these scenarios; it presupposes a 'dominant market power' whereby through its actions in the market, the market operator could *"materially affect"* the terms of trade/trading conditions in its favour causing the resultant harm/injury to the competition. It also presupposes deep and over concentration through a thick market and one of the differentiating points between the traditional economy and the platform economy has been the extent of concentration wherein the platform economy has evidenced substantial powers accruing to such platforms who as already discussed above hold the position of 'gatekeeper'.

The platform economy has had ushered in indirect effects of competition by providing a sustainability model of 'inclusion' to the small and medium enterprises to come on the platform by being 'start-up entities' and find a potential avenue for their products/services as a transformational initiative resultant out of power of disruptive business models driven by innovation and resultant characterisation of emergence of new generation of entrepreneurship to be part of the newer value chains. This has been made possible through integration of algorithms of software, hardware and innovative ideation unleashing their power through platform economy and getting catapulted through the network induced effects which keep on multiplying the outreach of such business models to various segments.

Technological Innovations and Advances in Cloud Computing and Social Media is increasing the outreach of organizations to newer markets and networks as also

11 Martin Kenney, John Zysman, *The Rise of the Platform Economy*, Issues in Science and technology, Volume XXXII, Issue 3, (2016)

promoting collaboration including the unlocking of commercial value of non-commercial assets which hitherto were not segmented as products/services for commercial exploitation[12].

Increased concentration results in market power to manoeuvre: Conceptually and operationally the platforms operate in a multisided market; on one hand they would act as a aggregator/consolidator for different service providers and simultaneously they would also attract customers to make use of their platform while sourcing their superfluities by making use of their platform. In order to maintain loyalty amongst the service providers as well as the buyers of such superfluities; to reduce the defections at either end; the platforms vie with each other in increasing their dominance through continuous innovation, upgradation in terms of trade offerings and other features of the platform vis-à-vis the other platform players to keep one-upmanship and can be construed to be playing the 'role of a gatekeeper' albeit by changing the conventional business models; they have changed the very landscape of labour market as well by promoting a 'Gig economy'.

With growing entanglement of increased number of 'nodes' implying increase in the number of consumers tapping the platform for accessing their requirements as also the service providers start demonstrating the fillip side to competition by such platforms being a forum for more and more increased concentration on that platform. Such increased concentration on a particular platform results through the 'leadership of the action created by first mover advantage' and resultantly build in inducing and'creating entry barriers' for the new competitors and 'foreclosure of competition' amongst the existing players and thereby resulting in a scenario of *'winner takes all'*.

The first mover advantage, as highlighted and discussed above perpetuates extinction of competition as it allows the originator of the disruptive commercial ideation to make a head start and cannibalise the competition which allows it to move from a oligopolistic market to the status of a near monopolist whereby it can distort the terms of trade to amass substantial private gains by increasing in anti-competitive practices in the absence of an effective competition to combat its business overtures.

Delineating relevant market for the multisided platforms: The challenges for the anti-trust enforcement authorities lie in not only detection of the 'market power' induced by such platforms but also the delineation of 'relevant market' as with the network effects it is not able to identify as to the exact nature of segment in which the entity is operating. Such delineation of the relevant market would imply filtering down to both the product and the geographical market in context of the stakeholders affected by the business action of the platform operator in terms of providing 'substitutability' of such actions[13]. Uber has a classic characterisation problem when the European authorities are unable to address its dominance as a

12 Supra 11

13 Commission Notice on the definition of Relevant Market for the purposes of Community Competition Law, Official Journal C372/5 (1997)

rental cab provider as a data agency; since such businesses thrive on application of data; the challenge lies in defining the relevant market which is being affected by the anti-competitive practices of such platform operators.

How the platform usurp the market power

While attempts to 'gatecrash' through sporadic offerings by the new players does happen however with the innovation/offerings getting stabilised; as also there is an attempt by parallel players in the market to match such offerings and therefore in order to remain relevant; the platform economy is witnessed by constant upgradation and innovation in technologies and infrastructure for attracting the 'seller side' and bringing in new models of value creation largely to the 'buyer side' to keep loyalty to the multisided platform 'intact' both from the end of 'sellers' as well as the ' buyers' for the sustainability aspect of the digital platform.

Non-inter portable data induces power: With the increase in the 'seller side' and 'buyer side' at the platform; such platform starts raising its dominance in the market and through a unilateral action may consequentially start resulting in abuse of such dominance thus 'restricting' or 'lessening' the competition. The key to the success of the platform is the privacy of data and as such data is privy to a particular platform; other platform players cannot have access to that data easily and thereby with their head start in technological innovations and other trade offerings; they are able to retain their dominance from the perspective of both the 'buyer side' as well as the 'seller side' due to absence of interoperability of the data.

Standard Essential Patents and violation of FRAND terms: Another challenge to the competition enforcement has been lack of clarity and detailing on the FRAND (fair, reasonable and non-discriminatory) terminology for its effective enforcement; with the increased tendency amongst the Internet service providers to exploit their virtual 'gatekeeper position' and platform economy by declining access to their technologies and infrastructure by using Standards Essential Patents and patents injunction. More than an actual harm through the violation to the rights of the patent holder; the competition scenario is marred by foreclosure of acccess to the technology by the Internet service provider by denial of its usage to its competitor and the situation is characterised by 'lack of legal certainty'.

Addressing a scenario where the platform integrates vertically as well: A platform would entail distinct set of buyers and sellers for completing a transaction under a model proposition however in a scenario where the platform hires vendor/service providers to service its customers; how and in what manner the competition is going to be affected through this vertical integration as the platform would have had many horizontal suppliers of substitutable products/ services with the platform acting as a forum/marketplace for execution of such transactions and in the scenario when the platform also integrates vertically and starts competing; the perils of such conduct would definitely be having a cascading anti-competitive effect through foreclosure of the competition resulting through such vertical integration.

Competition issues in 'zero price' markets: One of the reasons for demonstration of actual/potential harm to competition through the anti-competitive conduct lies in price manipulations/distortions arising through unilateral or concerted action by the market players having dominant power in the market. Can there be a concept of harm to consumers when products/services are offered for free, like in bundling/tie in arrangements and when applied in context of the multisided platform; can the consumer ought to have suffered harm/injury by an anti-competitive conduct when such products/services were provided free of cost.

The anti-trust enforcement has recognised that a typical platform operator offers products/services as part of its operational and sustainable business strategy and such gratitous action is a pure operational and business strategy as it allows the digital platform to amass concentration of service seekers and providers on either side of the market. Such concentration resulting in increased market power for the platform operator allows it to alter its conditions of trade in the relevant market to leverage its transactional power for its gains in the relevant market. While the consumer in such markets does not pay directly, the issue remains that he is paying through the 'attention costs' in terms of his spending time as also 'indirectly paying' by way of sharing of 'personal data' which for the platform operator otherwise would not have been possible to seek in terms of his behavioural tendencies, preference style for certain commodities/markets and given the power of such customised data in an economy which survives and thrives and draws its market power on the buyers and suppliers at either and of the platform and their usage specific information on behavioural/consumption traits, which allows the platform to make use of them for future potential transactions The direction of anti-trust enforcement to such 'anti-competitive violations to competition space through actions/practices by platform operators in 'zero price markets' is yet emerging.

What Multisided platform economy has to offer

Having said that the platform economy provides for avenues never seen before even to players who have not been in the market but have an 'idea' or an 'innovation' which could be capitalised through commercial exploitation; has catapulted the expansion of trade on multisided platforms as reverse engineering as well whereby distribution channels such as C2 B which were unheard of; have been facilitated through the power of multisided platforms. Similarly small and medium enterprises which form the backbone of the formal and informal Indian economy have been able to find an avenue through the power of digital platforms for finding markets for their products and services. As far as the consumer is concerned; he has the added advantage of larger freedom of choice to choose amongst many alternatives, at the click of a button which hitherto in the 'brick and mortar economy' was unfathomable.

While this provides for the positive side to the power of the multisided platforms providing for a medium of exchange for buying and selling of superfluities using the imperatives of a digital economy; as already discussed above; the market power enjoyed by the platforms who have been rightly said to be the 'gatekeeper' through increased concentration of the 'buyers' and 'sellers'; a situation arises

wherein they lock both the ends which gives it an invincible power as compared to other platforms; resulting in increased dominance and market power near to being a monopolist. In order to enhance the private gains to the platform operators; there has been a tendency to perpetuate abuse of such dominance by indulging in trading conditions which annihilates the competition by foreclosure of competition through creating entry barriers for the newer entrants as also the other platform operators.

From the competition law enforcement perspective; while providing for 'legitimate goals' of promoting competition, competitiveness, freedom of choice and prices to consumers and market operators; the role of the enforcement has been to meet the legitimate objectives of ensuring freedom of trade and enhancing competition without taking recourse to any such regulatory interventions which have a 'chilling effect' on the state of competition.

Raising red flags for conduct of platforms

The anti-trust enforcement as vanguard of safeguarding the market, competitors, consumers and competition from the anti-competitive effects of trade practices of traditional as well as digital markets through multisided platforms is dependent upon making an ecosystem which promotes competitive rivalry between market operators by regulating and addressing the impact of threat to bargaining power of buyers/suppliers, threat to entry of new players and substitutability of products/services.[14]

As the evolution of anti-trust laws or competition laws have evidenced that the regulation on the market players/economic enterprises has shifted from controlling the 'concentration' arising through structure; to a stage of regulating the behavioural practices of the market operators evidenced through their trade practices at controlling the effects of trade restraints resulting in 'structure–conduct-practices' induced parameters. The earlier school of thought emerging from 'Chicago influence' that a *laissez faire* wherein the market is left to correct for itself; has been replaced through emergence of trade regulations on conduct of economic enterprises.

A multisided platform as a marketplace is a complex web of interlinked market operators and intertwined digital transactions on 'end-to-end' basis; evidencing a honeycomb formation wherein the study had demonstrated the plate formed to be a complex web of 16 sectors, 40 subsectors and 280 platform within this categories.[15] And given the pace of disruptive innovations; they represent ever dynamic markets which are under transition and morphing into newer formations resulting into newer forms of trade imperatives calling for 'competition regulations fit for purpose' by demystifying the dynamics of these complex markets, regulatory framework for maintaining and promoting the competition for benefit of market operators as well as consumers alike. While the shared economy provides for newer forms of entrants, newer forms of products; it also

14 Karen Webster, *Michael Porter's five forces and payments innovation* as available online at PYMNTS.com

15 Jeremiah Owyang , *Honeycomb 3.0: the collaborative economy market expansion*, 2016

brings along vulnerability of the shared economy to infliction of anti-trust injuries to the consumers

Paradoxically, any era of anti-trust enforcement which is intended to promote rivalry through competition between the market enterprises; in the platform economy ultimately results in phase resulting in 'lack of competition' from an extant stage of hitherto controlling rivalry in the traditional market characterised by excessive competition. Amongst various manifestations of anti-competitive practices; it results in a scenario wherein the abuse of dominance by the multisided platform 'as an unfair competition' results in stage of 'competition for market' from the cherished goal of 'competition in markets' as envisioned by the anti-trust enforcement. The platform economy also demonstrates discriminatory pricing as it part of dynamic pricing leading to violations of price discrimination. This apart; there cross-border nature of operations is calling for development of e-commerce rules at the WTO level. The behaviour of multisided platforms through conduct and practices in the marketplace results in contrivances and infringement to the competitive space through the perils of its anti-competitive conduct which the anti-trust authorities intend to curtail through adjudication and enforcement measures.

Jack Ma, CEO of platform giant Alibaba has quipped *"7 to 12 years regulatory policy timelines do not reflect the speed of the Internet"* and has advocated for 'just right regulation' so that it does not inhibit the growth of the industry and therein lies the challenge for the anti-trust enforcement as it has to grapple through e-commerce from the multisided platforms having causative effects of 'anti-competitive practices unleashed through unfair competition' infringing upon the consumers freedom and liberty for goods and services at the right prices and quality which becomes extinct in an era characterised by lessening of competition through the market power amassed by the multisided platforms.

Similar views are shared by the FTC Staff Report 2016 on the *'Sharing Economy'* wherein the report inter alia highlights the need for regulation of shared economy and further many of the regulations which were designed to govern the traditional marketing space or not fit for the emerging landscape of digital trade through multisided platforms as part of shared economy[16]. It simultaneously presents another dimension wherein it questions the objectivity behind the platform operators being subjected to newer rules of competition and regulation and in process by passing the regulatory framework that applies to the traditional market incumbents thus providing for a discriminatory framework of regulation which will be against public policy. The report further argues that by providing newer set of regulations for the platform market operators; one is by passing the concept of level playing field by picking up the winners through the change in the rules of the game. On the contrary, any pre-emptive measures which are likely to impede and stifle the innovation and competition in itself would act as a entry barrier. The report points out the need for achieving legitimate outcomes of public policy for maintaining competition and in process having framework

16 *The "Sharing" Economy: Issues Facing Platforms, Participants, and Regulators,* An FTC Staff Report, Federal Trade Commission, November 2016

of regulatory arbitrage which has least competitive restrictive measures so as to not over jealously guard and maraud the innovation and dynamism of a shared economy/multisided platform economy. Effectively it leads to a scenario wherein the best approach to competition regulation would be to achieve the public policy objectives of not only protecting the competition and in turn providing for a regulatory arbitrage for the protection of competitive as well; but to cause a framework which results in the consumer empowerment and enhanced freedom and liberty to trade. Interestingly the FTC in the case of Google had inferred that its primary duty is to protect the competition and not the competitors.

Direction of Antitrust Enforcement- Some examples

That GAFAM (acronym for Google, Amazon, Facebook and Microsoft put together) are under radar of anti-trust enforcement agencies globally has been a development of recent years. A 2017 study highlights that 73% of online advertising share belongs to Google and Facebook put together and Microsoft accounts for 8% of the online advertising share. Further in respect of online search market; Google enjoys 90% of market share of online searches through its Google search engine; such dominance in the market highlights the consequences of any actual or potential violation which may be resulting in lessening of the competition. In US market, Google was accused of perpetuating anti-competitive practices by premeditating its search platform to be coloured by 'biases'' which were disadvantageous to vertical websites as also entering into exclusive dealing arrangements with the desktop and mobile manufacturers for uses of the Google search engine on their platforms. It was seen that through the 'search bias' that Google had projected through its search had a chilling effect on competition by giving premeditated outcomes depicting the relatively better offerings from its competitive platforms intentionally by guiding its search engine. The Federal Trade Commission (FTC) investigating into the case found indulgence by Google into such practices which provided a relative advantage over other Internet search providers. While it was concluded by FTC to enter into a consent agreement with Google on the basis that it did not have enough evidence in the matter to indict Google and the steps taken by the could be out of its overzealousness promote its own innovation; on the basis of concerns expressed by FTC with regard to such practices having effect of harming the competitors; Google concurred to take measures in regard to its business practices adopted which were seen to be having potential effect of stifling the competition. Google also agreed to provide toadvertisers on its platform to also advertise on its rival platforms. It also promised to stop prioritasion of its search algorithm to depict results which were not reflective of actual position and therefore held to be pushing to misleading results.[17]

The FTC also came to conclusion that Google had violated its commitment on FRAND terms whereby it was required to provide access to standard essential patents to its rivals and in turn had threatened its competitors for invoking injunctions to block them from using Motorola mobility technology used for inter-

17 Press release, Google agrees to change its business practices to resolve FTC competition concerns in the market for devices like smartphones, games and tablets and in online search, January 2013

portability of its device/technology network. As a part of the consent agreement, Google agreed to not to seek injunctive relief against its rivals from using such patented technologies which it was duty bound to honour under FRAND commitments. While the said judgement may hold the judicial construct that monopoly per se is not bad and illegal and the very fact that FTC had not enough evidence to demonstrate anti-trust violation on part of Google led to the legally binding consent agreement for corrective measures by Google for future.

In another case involving Google in European Union, in July 2018; the European Union had found Google to be guilty of effecting anti-competitive restrictions through any search effected on android devices and network operators to be going compulsorily to Google search engine whereby it has resulted into dominance of Google search engine ahead of the competition to maintain its monopoly position. By doing so the consumers in the European Union have been denied the benefit of effective competition which in EU was held to be illegal and therefore Euro 4.3 billion fines were imposed on Google.

The above construct by European Commission appears to be in a sequel of its earlier case involving Microsoft wherein it was charged Euro 561 million for the anti-trust violation of causing reduced consumer choice by bundling its Internet Explorer browser with its Windows software; at that time as well the Commission had held Microsoft to be promoting unfair competition through tie in arrangement and thus to the detriment of its competitors in the market were dealing in comparatively similar products by using its dominant position in the market[18].

The Competition Commission of India (CCI) 2018 had also held Google to be abusing its dominant position in online general web search and Web search advertising services by promoting its own services and those of its partners ahead of its competitors and had imposed a penalty of USD 21 million. The CCI had found search bias afflicted by Google by integrating its own specialised programs/ options which when juxtaposed with its specialised search features like universal results and commercial units etc resulted in favourable rankings display on the Search Engine Results Page (SERP). While indicting Google for its said violations in displaying premeditated search priorities afflicted through its search algorithm on the search engine led to misleading results/outcomes and the consumers were devoid of fair choices through such misleading outcomes through its universal results/searches under commercial unit. It was seen that only Google prioritised searches were displayed and those of the competitive rivals search engines were not displayed and therefore such practices had the impact of restricting and preventing the intermediaries from entering into arrangements with other competitive platforms and resulting in appreciable effect on competition.[19]

An article Amazon's Antitrust Paradox[20] points out that Amazon business strategy is centered around expansion in different markets by providing infrastructure

18 Microsoft Corp versus Commission,T-201/04

19 Case no 07/2012 and case no 30/2012

20 Lina M. Khan, *Amazon Antitrust Paradox,* 126 Yale L.J (2016)

and its presence is into a varied domain; be a predominant retailer, a marketing platform, provider of logistic and network services, book publisher and into entertainment industry as well amongst its other forays making it a truly diversified conglomerate. The company by following very competitive pricing models has been able to avoid antitrust scrutiny albeit its dominance coupled with its largely predatory pricing has the effect of foreclosing the competition.

In the context of the existence of multisided platforms as shared economy, the concept of ultimate policy objectives to be propagated and achieved through competition law enforcement is yet to be fully empathised. While Robert Bork in his seminal work "The Antitrust Paradox"[21] had stated maximising consumer welfare to be guiding standard; the recent approach by FTC while dealing with the case of Google had stated its goal to be preservation of competition and not focusing alone on the affects to competitors. The article Amazon Antitrust Paradox contradicts such view by highlighting that The Sherman Act was intended to combat the perils of a structure based approach and whether or not this is required to be replaced by affect on price competition.

Accordingly, what is the treatment to be accorded to vertical restraints and more particularly behaviours such as predatory pricing and tie in arrangements needs to be assessed? The author has highlighted that the current antitrust framework does not fully reflect the perils of predatory pricing coupled with ever increasing dominance in related as well as completely newer line of business verticals as demonstrated in the case of Amazon and therefore suggest for a approach which promotes serenity in the market through competitive processes.

Whither to antitrust enforcement

The emergence of digital trade through multisided platform is here to stay. The evidence of last decade or so has highlighted that the offerings which have come in through digital platforms as hub/shared/multisided platform economy has been substantial and more than the pricing considerations; as compared to a traditional market; it has provided the virtues of freedom and liberty to choose due to easy entry and exit option available through multisided platforms. While this may be a partial view from the perspective of consumer; from the perspective of a competitor; the competition benchmarking requirements in terms of sustainability and relevance of businesses have been pegged very high as they need to continually innovate and remain competitive.

More than traditional products/services; the multisided platforms have provided for an avenue for commercial exploitation of power of idea/product/services, thus bringing in the hither to marginalised business operators from the small scale sector into main stream economy.

The above have been the green shoots of newer paradigm of a platform economy; albeit there has emerged a tendency of concentration with platforms resulting in material market power which is abused or have the potential to be abused for effecting trade conditions to the favour of a platform operator by putting in

21 Bork, Robert H. 1978. *The antitrust paradox: a policy at war with itself.* New York: Basic Books.

exclusive dealing, tie in, rpm and other restraints which may affect the competitive dimension and result into competitive bottlenecks caused by unilateral action of platform operators to exercise vertical restraints, abuse of dominance and their non compliance to FRAND obligations arising out of standard essential patents which might have accrued to them for their being the innovation catalyst.

The competition in the multisided platform markets has all along shown that it becomes 'competition for markets' rather than 'competition in markets' through the anticompetitive practices by the platform operators.

Regulatory/judicial construct and actions over platform giants like Google, Facebook, Microsoft and alike have shown the direction of antitrust enforcement wherein the competition authorities have indicted them for their tenacity to annihilate competition and in process highlighting that while dominance per se would not attract regulatory traction; its abuse will definitely.

It all ultimately leads to the ultimate public policy objective which is intended to be achieved through antitrust enforcement. Is it to promote and sustain competition or is it to protect consumer for the harm inflicted on them or is it for protecting the competitors. In the context of the platform economy; which is going to the predominant model for conduct of businesses with lesser skewed bias towards traditional markets; the implication for public policy direction which can be drawn for the future is that it has to be a fine calibration between consumer protection, maintaining regulations to competition for ushering fair competition and thus overall consumer welfare and sovereignty. They all being inter twined dynamic variables; a perceptible bias towards one of the standards may cause mutations in the overall antitrust enforcement objectives.

The direction of antitrust enforcement in multisided platform has to be promoting competition in the markets which ultimately would result in fair play and enhancing freedom of trade and liberty to all the market participants.

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