

**INTERPRETING PROPERTY THROUGH GANDHI:
BALANCING RIGHTS AND OBLIGATIONS**

*Thesis submitted to Jawaharlal Nehru University
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DOCTOR OF PHILOSOPHY

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Declaration

The Thesis titled "*Interpreting Property Through Gandhi: Balancing Rights and Obligations*" submitted by me for the award of the degree of Doctor of Philosophy, is an original work and has not been submitted so far in part or in full, for any other degree, diploma of any university or institution.



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Certificate

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Introduction

*“My language is aphoristic, it lacks precision.
It is therefore open to several interpretations.”*

m.k. gandhi¹

The discourse on Property is foundational for social, political, economic and legal institutions, and for the development of its structure, contributing towards a progressive evolution of society through the times. The understanding of property as an idea has changed over the course of time, but this change has never been linear in its process, adding complications contributed by different philosophical thoughts, growing into uncharted territories of ideas. Property has never been absolute or perpetual. A strong property right regime where it gave impetus to innovation and economic growth, at the same time was also a source of economic, social and political divide and an instrumentality of violence. It in a way it created a maze of relationship which is quite difficult not only to define but because it is constantly evolving, understanding the contours of property rights is a challenge. The notion of property rights create obligations, questions the entitlements such a right carries with itself and contributes in defining the idea of property. Even a claim to exclusive title does not manifest in exclusivity. At the same time, if property doesn't carry with it a right to exclude, then the core value of the property tends to disappear and property becomes conditional in its existence. The notion of private property and ownership which derives its existence from the idea of property creates entitlements which in its small domain try to create exclusivity. Such exclusivity, had been a fundamental element for protection of rights, and it creates a very conducive environment for the state and the individuals to demarcate different rights and obligations; this exclusivity had also been the cause of conflict of rights, interests and divide between people, their culture and ideologies, and between nations. It had been a constant source of violence.

¹ Gandhi, M.K. “Discussions with Dharamadev.” Collected Works of Mahatma Gandhi (CWMG) (Delhi: Publications Division, 1972), 53, 485

Twentieth century has seen considerable economic growth which in a way has been sustained by private property and by its exclusive character. This economic growth of some, at the cost of others went also to an extent of exploitation and violation of basic rights of people, their culture and their society. In the process where countries became rich it also cost certain communities like aboriginals of Australia or red Indians of America to ruins and extermination of their culture and the very existence of their individuality. This growth based on acquisitive tendencies of some at the cost of others created great discontent between people and between nations. Whether it being the colonization of countries or exploitation of people based on race or gender, by denying people their basic rights, it created a state of ferment and conflict which had continued through years in one form or other in the society. Among a host of people who constantly fought the growth based on exploitation through grant of exclusiveness of property rights was, Gandhi. For Gandhi this exclusiveness of property does not mean possession of an equal amount of worldly goods by everyone.² To him the model of endless growth based on exclusivity was perceived by him was unsustainable and immoral. Gandhi considers the cycle of acquisition to be an endless endeavor where the wants of consumers do not have an end and where material wealth becomes the focus of life, alienating one from ethical and moral values. To Gandhi, the central and fundamental idea revolves around the freedom of the individual. The connection between individual sacrifice and society's problems was always central to Gandhi's approach. Gandhi saw in the pursuit of wealth to the exclusion of others a concern which amounts to debasing of the values of society and ultimately the human soul. This seemed to him of having an impact of erosion of moral and ethical ideals from one's life, corroding and debasing the very value of life. Over a period of time the philosophy of Gandhi though was appreciated but was not found worthy enough to be emulated as the society moved towards urban life, material wellbeing and creation of wealth.

The foundation of Gandhi's ideology and his philosophy was considered as vague devoid of a theoretical foundation and utopian in its outlook. Hence, Gandhi has been given limited attention as a source of theory building. When one considers the overlap of economics, ethics and social values in developing a legal framework,

² Gandhi, M. K. "*Constructive Programme*." 2nd edn., (Ahmedabad: Navajivan Publications, 1945), 20-21.

the omission of Gandhian principles comes as a surprise. It could also be argued that the attempt to situate Gandhi in a philosophical thought or a particular tradition is to side-step the issue of method, and the systematic structure of his thought. It has been a contention that Gandhi did not have any such systematic theory, and to attempt to fit him into one would be to confine him to the dogmatic. Gandhi on one side when he criticizes the fundamental approach to modern nation building, he also attempted to transfigure everything about tradition. Gandhian philosophy imbued terms with new meaning, potency and use, and critiqued certain aspects of tradition and its practices relentlessly. With the touchstones of reform, non-violence and experiments with truth, Gandhi sought to achieve his goals of welfare of all in conflict with the principles of authority and authenticity imposed by orthodoxy and tradition. Hence it becomes difficult to put Gandhi as just a critique of modernity but he was also a reformer of traditions and orthodox thinking.

Gandhi saw clarity in the abstractness of truth. Generally the question of the possibility of establishing the truth of a particular theory, as we do in the case of scientific theory, i.e. a matter of proof or the relation between theory and practice exists, but Gandhi saw it in a different scheme. In a way, it was futile to compare social science theory with scientific theory as recognized as unlike the latter, the former witnesses contesting theories each with some element of truth in them, and no one theory disproves the other.³ Moreover, in the case of social science theory, the normative factor significantly influences our determination of truth. In contemporary political theory, this debate continues for instance with Cohen and Rawls disagreeing on the relation between facts and normative principles, with the latter arguing that they must be fact sensitive, and the former that they cannot be so, and indeed are not so.⁴ Gandhi sought to evolve a theory which is flexible and principled where ethics and morality has a strong foundation and it is inclusive of marginalized people.

Gandhi is considered as an idealist philosopher and an activist or strategist intends to put his idealism to good use, and has immense faith in non-violent action, but lacks theoretical foundation in his ideas. The lack of a theoretical framework in

3 MacIntyre A. "The Indispensability of Political Theory." In *The Nature of Political Theory*, edited by D. Miller, and L. Siedentop, L. (Oxford: Clarendon Press, 1983).

4 Cohen, G. A. "Facts and Principles." In *Contemporary Debates in Political Philosophy*, edited by Christiano, T. and Christman, J. (Oxford: Wiley Blackwell. 2009).

achieving his goals also has shadowed the question of following Gandhi's path as an alternative to the existing ideas. In a way it has led to a presumption that non-violence remains a matter of policy, and strategy, or at best a personal creed and code of conduct, and not a matter of theory and method. Hence the thesis intends to analyse how property can create violence and suppression, whether it is having legal or economic or cultural consequences. Thus the question also creates a need to understand Gandhi in terms of his philosophy and its application or the limits of its application.

Therefore, while on the one hand Gandhi was wary of the principles and theories on which modern civilization was built, on the other hand, he was equally wary of many elements and aspects of tradition, religion and culture. After almost more than seventy odd years of Gandhi's death we can very well argue that, we have reached a state where instead of growth serving life, life must now serve growth. Even religion tradition or culture has become an element of commerce and human existence has no moorings apart from material wellbeing. It has become an ironic reality perverting the very purpose of human existence in the process of which moral and ethical questions are overlooked. Hence, a need to revisit Gandhi could serve to create a broader understanding in resolving the conflicts or building up a strategy. Nandy argues that even under a state where democratic principles and constitutional supremacy prevails Gandhi's theory of swaraj, as a theory on sovereignty of the people, as opposed to that of the state, has a significant perspective and contribution to make where swaraj could address the inherent contradictions between the goals of freedom of the individual and the power of the state, and the separation of private and public spheres in liberal theory.⁵ Swaraj gives us a space for resistance and refinement.

Gandhi in his struggle of social reform has dealt with the idea of property and recognizes that the property institutions plays a key role to provide access, ownership and distribution of property, which in a way is an attempt to mitigate the divide and conflicts arising in the society. Fundamentally and structurally, though the laws and legal framework was formulated to mitigate those conflicts and to harmonize the

5 Nandy, A. "Gandhi after Gandhi after Gandhi." *The Little Magazine*. Vol. 1, Issue1(2009)

conflicting interests, they were based on the problematic premise of infinite private property rights with only few checks and balances, and have expanded the domain of property to newer areas. Throughout last several centuries' though property has been a source of conflict, but now its form and shape has changed and developed in both complexity and depth with the underlying nature of the conflict remaining the same. It had been the constant endeavor of various philosophers and theoreticians for the last couple of centuries to understand this conflict and to moot an amicable way out of this friction. This friction in society had also been a fundamental problem faced by people like Gandhi in their endeavor to reform the society through a peaceful and a nonviolent process. Gandhi through his various social experiments mooted the ideals like trusteeship, non-violence and non-possession which gave a different perspective on the idea of property and how we see property as a tool of economic growth and well being. The attempt to mitigate the conflict of interest produced by the exclusive nature of the property though was not an easy task, nevertheless gave an opportunity to experiment and travel through off the beaten tracks. More importantly, the attempt was also to find an ulterior value to the rights attached to property, a moral duty and creation of obligation where the property would not lead to the betterment of the holder alone, but of the entire world. The world is interconnected as one cannot ignore ones' neighbor and can be an island of happiness, but carrying all together and finding happiness in others happiness is a significant element for a society to grow and to create an environment of fulfilling life. Hence, Gandhi saw the entitlements signifying a duty and an obligation as an opportunity to bring positive change in the society and not as a cause of conflicts alone. Entitlement as a tool of privatization, as a cause for violence and subjugation and as a barrier for well being and a fulfilling life has been a serious concern for him and the prediction that it could lead to more conflicts of interests than harmonization of such conflicts has emerged to be a thought which is not misplaced. Gandhi opines in *Hind Swaraj*⁶, "privatization seeks to increase economic well-being and it fails miserably even in doing so", indicates his skepticism and creates a need to rethink on the dimensions of property regime.

Gandhi's rejection of modernity is criticized by Terchek to have an effect on the autonomy of the person as constituted by liberalism with its emphasis on reason,

6 Gandhi, M.K. "*Indian Home Rule or Hind Swaraj*." (Ahmedabad: Navajivan Publishing House, 2008). 30

productivity, progress and technology.⁷ It is criticized to have an effect of extreme form of idealism, impractical and sometimes inconsistent with Gandhi's own use and appreciation of some of the amenities that modern technology had made possible such as the printing press and the railways.⁸ It is also argued that Gandhi's critique of modernity was selective. When Gandhi appreciates the scientific inventions as a necessary process of human development but equally he is critical of the methods it adopted such as vivisection and machine as a tool of subjugation and violence. Gandhi in his *Hind Swaraj* gives a narrative where he warns us of the problem of modernity but also at the same time accepts inventions and innovations as a sign of the progress of civilization. It is also considered by Hardiman as a romanticization of the rural, or presenting a just, economic, and ecologically viable alternative, based on a difference of scale in modes of production. However, Gandhi never considered it as a conflict and as the crux of the issue, for him, it gives a space and creates a difference in world view and life world based on principles of non-violence, rather than any specific opinion about the rural, or modern methods of production. His concern was creation of divide based on exploitation of people as well as resources demarcating the village and the city. Gandhi indicating his ideas states that:

You cannot build non-violence on a factory civilization, but it can be built on self-contained villages. Even if Hitler was so minded, he could not devastate seven hundred thousand non-violent villages. He would himself become non-violent in the process. Rural economy as I have conceived it eschews exploitation altogether and exploitation is the essence of violence. You have therefore to be rural minded before you can be non-violent, and to be rural minded you have to have faith in the spinning wheel.⁹

Protecting the property rights means giving the rights to create certain charges. To rent, to license, to create contractual obligations in case of private property and in cases of public property like railroad or a public service by the state to create charges by way of tax, fee or duty and obligations to access it on conditions. Hence, the ownership determines the future distribution of the goods the individuals shall acquire. By the power of drawing revenue it also creates a relation of duty and

7 Terchek, R.J. "*Gandhi: Struggling for Autonomy.*" (New Delhi: Vistaar Publications, 2000).

8 Hardiman, D. "*Gandhi: In His Time and Ours.*" (Delhi: Permanent Black, 2003).

9 Gandhi, M. K. "Discussions with Executive Members of Gandhi Seva Sangh- I." CWMG, (Delhi: Publicaitons Division, 1972) 77, 52.

obligation on others, especially, who are economically dependent, creating a space for political sovereignty. It creates considerable concentration of power in the hands of state and subjects who control property, which not only decide how they need to use their rights but also has the indirect influence on others. The modern state and capitalist decide what people may buy and use, by standardizing and branding products and services. Hence Gandhi intends to point out that we must not overlook the actual fact that dominion over things is also imperium over our fellow beings.

The power of modern state and the owner of capital which creates a need, a necessity of buying more and more of material goods are a significant phenomenon for a moral philosopher like Gandhi. As recognition of private property as a form of sovereignty is not itself an argument against it as some form of government is always desirable, but it also creates a space for trusteeship doctrine to evolve and regulate without the force of law and the state.

Gandhi's approach to economics is an attempt to create a space by developing a theory of resistance against dominion over things and people in the form of doctrine of trusteeship¹⁰, which in its very essence is non violent and non possession oriented. Non Possession indicates the nature and source of property rights emanating from commons property.¹¹ Gandhi has described a trustee to be a person who is capable of discharging the obligations of his trust faithfully and in the best interest of his wards¹². From a legal perspective it has significant legal connotations. Though, in the science of law the definition of trusteeship is one of an obligation arising out of control over a property.¹³ The obligation is primarily towards a beneficiary, which is benefit to accrue is not for the trustee. The property under question may or may not be that of the trustee. Trusteeship creates a legal relationship in law at least a fiduciary relationship in its endeavor. The notion of trusteeship can be an attempt to harmonize the debate between commons and private property which will be dealt in the coming

10 Gandhi, M.K. "*Trusteeship*." (Ahmedabad: Navajivan Publishing House, 2011).

11 Commons property is regarded as the residual category that theorists use when they describe a regime that is not private or state property. See James Roland Pencock in "*Ethics, Economics and The Law*." edited by James Roland Pencock and John W Chapman, (New York: New York University Press, 1982).

12 Gandhi, M.K. "Interview by Margaret Bourke- White." CWMG 90, 521.

13 Ford, H.A.J. and Lee, W. A. "*Principles of Law of Trusts*", 2nd edn., (Sydney: The Law Book Co Ltd, 1990).

chapters in detail. However, understanding the notion of commons property, in linkage with private property and ownership is necessary which would reflect on many facets of the idea of property, negating an objective view of property. The picture of property rights that have emerged so far, and which will be discussed in the subsequent chapter, would be an attempt to locate the justification for property in a pluralist scheme that knits together utilitarian considerations, considerations of justice of a roughly Kantian or Rawlsian kind, and considerations of desert labor theory by conventional theorists. This pluralist scheme though attempts to justify property nevertheless does not justify unfettered private ownership. It does uphold a constrained system of private property whether under capitalism or some form of socialism. In such a schema, we can see that where philosophers like Locke appeals to Labor; Bentham rests his case on Utility, Marx protests the evil of alienation and Gandhi's thrust is on Morality and Duty.

Undoubtedly, any single theory has not been able to explain the rubric of property and this fact is reflected in the property institutions which had developed across the world. The class conflicts which find voice through different mechanism and the legal framework which analyses the conflict in terms of contractual obligations or in terms of applying even principles of tortuous, criminal or corporate liabilities finds the friction or conflict a riddle, surfacing every now and then. As such, this thesis endeavors to understand the nature and framework of property rights which govern the dynamics of rights and obligations through the schema of Gandhian principles. Gandhi's experiments with different institutions and ideas can also be viewed to understand the nature of property which is in perpetual conflict with itself. Significantly for Gandhi it also addresses the question of entitlements as a claim right when spread across a class of people. In such cases the nature of claim right itself is questioned, as some times it changes its nature of claim right to that of privilege, power and immunity as is envisaged by the analytical framework of Hohfeld. This scenario has its moorings in the nature of legal framework especially, in case of the soft laws where the legal framework creates barriers to establish claim rights to a class of people.

Gandhi makes an unconventional attempt in the property discourse, significantly different from classical theorists to the modern law and economic

theorists who have worked on the nature of property. Various Scholars have engaged themselves with the debates on property and has focused on certain specific criteria like Blackstone¹⁴ who takes private property as a sole and despotic dominion; Garrett Hardin¹⁵ who brings the concept of tragedy of commons to elucidate the notion and later by people like Michelmen¹⁶ who saw acquisition and re-assignment as the focal point of private property.

The concept of collective ownership on the other hand though represents a robust claim, much work is needed to chart out the contours of collective ownership as a legal relation validated by law. But, if the rights with regard to right to livelihood and work, for example could come to hold quite powerful property rights in particular things, including rights that persist indefinitely and are transferable by gift, sale, and bequest then the collective rights need such requisites to establish itself in the eyes of law as a valid legal claim. So, even if the premise relating to self ownership to collective ownership were true, one would need to ask many questions before endorsing such arguments as Locke has argued that “Though the earth, and all inferior creatures, be common to all men, yet every man has a property in his own person: this nobody has any right to but himself.”¹⁷ This leads us to various questions which would encourage one to think of what body rights are being exercised in laboring. What kind of interactions between persons and the world could generate property rights and the legitimacy in the eyes of law? What are the contours of such property rights and what is the impact on holders in terms of personality, control, privacy, individuality, morality and power? What impact, in these respects, do they have in a collective ownership? Till one doesn't think over such questions, it would be problematic to an extent to validate claim rights from self ownership to collective ownership.

14 Blackstone, William. “*Commentaries on the Laws of England*”, 1765-1769, (Oxford: Clarendon Press), Accessed February 12, 2015. <https://archive.org/details/BlackstoneVolumeI>

15 Hardins, Garret. “The Tragedy of Commons.” *Science* 162 (1968): 1243-2148.

16 Frank I. Michelmen, “Ethics Economics and the Law of Property”, in *Nomos, XXIV, Ethics, Economics and the Law* edited by J Ronald Pennock & John W. Chapman 3. 5, (New York: New York University Press, 1982).

17 Locke, John, “The Second Treatise of Civil Government.”, *Of Property*, para 27, Accessed September 22, 2016 <https://ebooks.adelaide.edu.au/l/locke/john/l81s/complete.html>

The attempt of this thesis would also be to understand the notion of property and the regulation and distribution of property rights so that it can essentially be linked to our understanding of the problem of growing inequalities and conflicts. The notion of property and the rights and obligations attached to it can bring in social and economic equity which is sustainable under a Gandhian Schema requires much analysis. In its process it also calls for analysis of different disciplines in linkage with one another in understanding the problem of gap in equality and uneven developmental disparity and to reduce the cleavage of inequality and development¹⁸. The simple mechanism like the role of contracts in commercial enterprise which is used as a mode to determine rights of the parties to the contract creates externalities like industrial pollution or utilization of water sources which pervades into the space of commoners property by either appropriating it or by causing a fall out. In more perceptible and economic framework like antitrust laws these tendencies can be observed by way of anti-competitive agreements, abuse by dominant enterprises or in case of monopolistic tendencies resulting in adverse impact on other market participants and ultimately on the economic growth of the market. An individual's right in clean environment to fundamental rights cast responsibilities even on legal entities like corporations as their actions has with passage of time been significant in its impact on the society, which becomes difficult to establish and sustain because of lack of clarity on priorities. The tussle of property rights in areas like corporate governance traces significant changes in the way the property rights are assigned in free market economy as it acknowledges the umbrella of governance to be encapsulating not just the immediate stake holders but by the society too. In this scenario, the notion of property which was described by Gandhi by using principles like trusteeship, non-violence and non- possession, can be an attempt to bridge the gap of inequalities and to achieve economic growth and prosperity giving an impetus to rule of law. The process also leads us to understand the legal norms by analyzing the dynamics of property rights and to see how the Gandhian concept of property rights can be effective. The framework also attempts to see the contours of property rights in a structural form of laws, flexible state of contractual relation and in a quasi contractual state of legal relation like torts or delicts.

18 Stiglitz, Joseph E. *Price of Inequality: How Today's Divided Society Endangers Our Future*, (New York: W.W. Norton & Co, 2012).

Charting the contours of property

The conflict of interest of firms or individuals reflects the tussle of property rights which dominates the jurisprudence as the core question remains one of balancing rights and obligations. The spectrum of law whether it is soft law or law which is more structured, plays a part in allocation of property rights either by creating rights or creating obligations. The norms which are being created may not settle the property rights paradigm but are necessarily a process which one cannot avoid. The understanding from the perspective of rights in context to the duties and an effect on such an analysis on the economic welfare has to be seen to balance the individual rights Vis-à-vis the society's interest. Hence, the pertinent issues in such cases forces one to address the following questions.

1. In cases of enforcement of collective rights, often the use of tortuous liability or social responsibility is relied on where implied contractual obligations are used for narration. Does this indicate limitations of the idea of property? If so, what are the limitations?
2. How do we explain property rights where the conflict of class rights need to be harmonized with individual interests especially when we consider property to be subjective issue analyzed from different perspectives?
3. If property is regarded as the core element in distribution and allocation of entitlements then how does the conflict leading to ethical and moral dilemma can be resolved in a scenario where the society is moving from collective ownership to private ownership.
4. How does Gandhi contribute in theorizing or strategizing property as a mechanism to bring social, economic, political and legal reform? Does a Gandhian perspective help us to understand the schema of property through a rubric of morality and ethics?

To answer these fundamental questions we need to first understand the following set of questions and this thesis would attempt in the process to understand the conjectures below.

1. The notion of property rights as conventionally understood as a bundle of rights has led us to believe that the right inherently allows the holder to exclude others and without exclusion such rights become meaningless. But, the rights flowing from commons property or a contractual obligation also may have externalities attached to it and no exclusion rights. In this context, traditional notion of property rights fails to explain or to provide remedy to the affected third parties. Why the notion of property rights as a bundle of rights does does become insufficient to explain the situation or provide remedy. Whether in such cases Gandhi's notion of Property rights can be juxtaposed with the notion of property rights as a bundle of rights in understanding or explaining the premise of property rights.
2. The property rights which flow from contractual obligations as is in the case of anti-trust issues of anticompetitive agreements or intellectual property rights or even torts result in redistribution of property rights with significant impact on the free market. A contractual obligation which leads to right in rem affects the non participating entities. How can the non participating entities get a remedy in case of an externality and what are remedies available. Can the notion of trusteeship help the non participating entities to get a remedy?
3. The commons property rights bring to fore conflicts in property rights even in cases of regulatory laws. To understand the dynamics of property rights in reading a tortuous or contractual liability into such scenario or to propose a solution to conflicts may not always be easy. In such cases how can the property rights can be read in tandem with the Gandhian principles so that the conflict arising out of the conflict of private property versus the commons property can be harmonized more appropriately.

To do an intense study of the area proposed one need to understand the notion of property as a set of obligations whether it is legal, moral or ethical, and an

understanding of such a notion across the spectrum of different ideologies. Hence, the next chapter would be devoted to understand the various theories of property, property right, private property and collective ownership as has been understood and the notion of property as a bundle of rights.¹⁹ An understanding of the morality of law and law as a source of obligations and its ethical and moral dimensions in contrast to how Gandhi sees the notion of property in conjuncture with different ideologies and its morality will be discussed and analyzed. The second chapter will make an attempt to understand the dimensions of property as Gandhi perceives and how one interprets Gandhi's reading in the context of moral and ethical aspects of property. The third chapter will explore certain experiments which Gandhi has attempted, like property dimensions of copyright or economic dimensions of free market as one can interpret through a Gandhian philosophy. The fourth chapter will explore the constitutional dimensions of property and its evolution and to what extent one can trace Gandhi from a constitutional perspective. The fifth chapter would be a concluding chapter which would attempt to evaluate a set of conclusions drawn out of the previous chapters. In a way the study attempts to understand whether there is a shift in the conflict which is emerging out of the private public tussle of property rights towards a tussle of property rights which can be called intra private property rights paradigm. This shift whether it can at all be observed is resultant of the emergence of a class of market economy which is led by the developing countries and the emergence of what can be called weightless economy, that is privatization and commodification of ideas, information and knowledge driven property rights. Hence the study would be an endeavor to suggest possible ways to harmonize the conflicts generated by property rights, its distribution and to understand the notion of property rights with clarity. The study would hence analyze whether Gandhi gives us a solution in our choices between liberal commitments and the economic and social benefits available in a commons given the ever widening contours of property rights.

19 Hohfeld, Wesley N. "Fundamental Legal Conceptions as applied in Judicial Reasoning and other Legal Essays" 26 *Yale L.J.* (1917) 710.

Chapter 1 Spectrum of Property

“Certainty is generally an illusion, and repose is not the destiny of man”

Justice Holmes²⁰

The origin and development of property has close association with the law of obligations which is generally used to describe the law of contract, tort and restitution. A historical understanding of law of obligations and its evolution is desirable. Especially when the endeavor here is to analyze the theories of property and to get clarity and sense, the way it is used here. Generally, the law of obligations as can be traced back to roman origins is a category consisting of *actiones in personam* or personal actions. It was a subcategory of law of things or *res*. Today law of obligations is seen as a category containing personal rights while law of property is reserved for real rights²¹.

Roman law understands the notion of obligations as legal bond. It's dependent on law of the state where the relation gives an obligation positive or negative on the person. In the modern world obligation creates a legal relationship like in case of any commercial contracts giving rise to obligations under mortgage, sale or even pledge or a lien. The component of legal bond is an important aspect as it creates a legally tenable obligation. Obligations are thus a category of law concerning with legal claims between individual legal subjects.

The recognition that property could be tangible or intangible, existing only in law like a debt gives rise to creation of different kinds of obligations. Obligations which were derived out of two major sources which were contracts and delicts or commonly known as torts in common law. But these divisions were at times

²⁰ Holmes, Oliver W. “The Path of the Law”, 10 *Harv. L. Rev.* (1897) 457, 466

²¹ Samuel, Geoffrey. *Law of Obligations and Legal Remedies*, (London: Cavendish Publishing Ltd, 2001), 2

unsatisfactory because they can be considered as soft law where explicit obligations couldn't be created in absence of an agreement or specific wrong which could fit-in in any of specific category of obligations. This led to the development of quasi-contracts and quasi- delicts, where the idea of unjust enrichment was developed to justify the obligations created out of quasi-contracts. If one person wrongfully detains a profit earning chattel belonging to another, the latter might well be able to reclaim any lost profits from the former on the basis that the former has acquired an unjust benefit²². Though primarily it's a rule of commercial law and hence where the claimant is a public body, it may only claim nominal damages a remedy. Hence in cases of torts property problems were handled without legal recourse to the definition of ownership. In common law, especially in cases of torts protection of property rights didn't depend on the definition of ownership, by using remedies in the law of tort in place of action in rem and *possessio* in place of *dominium*. Even an action for damages was available for trespass, negligence and conversion in cases of interference with a person's possessory rights to a moveable property.

The law of things consisting of property and obligations was about the existence or non existence of a legally justifiable action resulting from a legal relationship. Establishing an action was dependent on facts and law and general principles of rules which can be applied to the given scenario. At the same time one can apply relations, rules and doctrines that are relevant for remedies arising out of the obligations, since law is not just about relations between people and things, but also about remedies created out of obligations.

The phenomenon of property

Property as relations with varying degree of legal enforceability having multidisciplinary concerns makes property difficult to crystallize. The requirement to understand the various dimensions of property for different disciplines, especially here, for economics and law makes property a unified concept, a single idea, a meeting point of various disciplines makes it a unifying element both for an economist and a lawyer. The Phenomena of property has been a contentious issue

²² *Strand Electric & Engineering Co Ltd v Brisford Entertainments Ltd* [1952] 2 QB 246.

since from the time the concept evolved and the existence of different property institutions across countries have led many to inquire what would constitute property rights and what kind of rights are justifiable. This leads us to evaluate critically the existing fabric of property institutions. As the time has advanced, the notion of property has gained more complexity and volatility. From justification of the idea of property to understanding its borders and structures, to give effect to it in a given society, the idea of property has been in great ferment ever since.

The idea of property has been justified by various theorists and philosophers from different vantage points. Still presupposing that the notion need not be a subject in need of justification and evaluation would be an underestimation of the challenges. The existing institutions of property vary from one another drastically that a comprehensive investigation would be difficult, but still it is important to see how an abstract justificatory theory applies in practice. Hence, certain features of property institutions like ownership, collective ownership, and control of entitlements through private and collective ownership, government taking and regulation of private property by way of legal and real person; and enforcement of entitlements through contracts and torts is deemed to be necessary.

There had been two strands of thought one an older view and other the newer view which made an attempt to define what a property is. The older view which developed somewhere before 1800's and emerged from the common law is associated with John Locke and replaced gradually by newer view after 1800's and is associated with Jeremy Bentham. The older view saw property as objects and its relation with people, where ownership was centered on possession, use and disposition. The newer view defines property as right to control and is a relation between people and other people over objects and where there was a different property right for every specific use of the property in question. But various theories have dominated the debates on property from time to time and it is pertinent to see the basic tenets of these theories to understand and analyze the theory of property when Gandhi came.

The prevalent theories of property whether it is propounded by Locke which appeals to labor or that of Bentham which appeals to utility and whether that of Marx and Hegel whose theory is founded on the evils of alienation under the system of

capitalism; all these theories are generally criticized as they are seen as an attempt to reduce too much to a single perspective. Though each of these thinkers had contributed enormously to the understanding of the notion of property, but at the same time to an extent they have been successful in obscuring the validity of other theories. An alternative could also be an attempt to combine these perspectives into a coherent framework which would consider every other theory and would provide a multidimensional perspective. Such a coherent theory should also ultimately reflect the reality and should help advance the cause of human beings in sync with the nature. It should be able to cultivate a human life where the faculties of human being can be better utilized giving each and every individual basic opportunity and quality and where the benefits and burdens of life is justly shared among men.

A world without property private or public may be unimaginable now. We have come a long way from a situation where property belonged to none or where property as a concept was limited to a tangible thing. In such a scenario the notion of property and its understanding was limited. In its earliest form, property has been associated with “things” but later intangibles like copyright, patents and trademarks were also brought under the status of property. A more technical and legal understanding which later on developed was property as “relations”. Property is understood as a bundle of rights or arrows in a quiver, each arrow holding a specific right in respect of the property. Hence, when we talk about a right in association with property we might be talking about a particular straw or an arrow from the bundle of rights or quiver, which is about a specific relation between persons in respect to a thing which is signified by perhaps a contract. Rights of an owner of a house, a right of a tenant of the house, a right of a creditor with respect to the house kept as a security for a loan etc., are relations created with different people in respect of a property. However, the property also includes less powerful collections of elements that do not rise to the level of ownership or can be termed as limited property. For example,²³ an easement involves primarily a claim right to use the land of another and also to compel the enforcement of that right, or neighbors right to not to allow the property in a way which infringes their enjoyment of their property. It would be usual to classify an easement as property or a property interest though it may not amount to

23 Bailment, license, franchise etc also can be called as limited property.

ownership. This primarily suggests that the idea of property will remain open ended until one lists the kinds of things open to ownership which practically may be quite difficult or near impossible. As new relations can be created with respect to a property which can strictly be called property rights or arising out of a quasi contract or can even be categorized under limited property. Even with a list of own-able things, the idea of property is indeterminate as the boundary of property is ever widening. For example it may be difficult to separate rights of property in cases of contracts. Technically, in law that may not be required and would suffice legally whether the legal relation of the person can be established or not.

The idea of property is broader to that of property rights. Property rights generally may involve advantageous incidents as far as right holder may concern but not necessarily so. The duty that comes along with the right can be construed as disadvantageous for the right holder, as the rights are always attached with obligations, restrictions or duty. The duty, disability and liability come as disadvantageous as the law creates obligations. There are instances where the right holders or owners may be large group or society, trust or state. Where the notion of private property is replaced by what is called public property. That is, it can be said that if the owner or the right holder is identifiable from a group of people the right holder can be called as an owner with regard to a private property as specific relation and rights can be construed. Contrasted with this private property are various forms of public property. Even a mixed form of private and public property may exist.

The notion of property is too fragmented especially when we consider property as something beyond a normative structure as Jeremy Bentham puts it “Property is nothing but a basis of expectations”²⁴ For example the right holder is bestowed with a right or has reasonable expectation to occupy and use the premise under his ownership; privileges and powers to exclude others; to mortgage or lease the property, and to transfer it to others or immunity from government and public interference and so on. Otherwise the right holder have expectations regarding the advantageous items and would expect certain things regarding the disadvantageous items like liability in case of payment of property tax and duty not to use the property

24 Jeremy Bentham, *The Theory of Legislation*, edited by C. K. Ogden (London: Routledge & Kegan Paul, 1931), 111

in a way which infringes the rights of others. In a way it gives us an understanding about the psychological and social or even moral dimensions of property.

A study of property hence has been difficult and now more even so because of the varied dimensions or some call it disintegration of property.²⁵ Thomas Grey argues that the argument for this disintegration has been the transition of the concept of property as material “things that are owned by persons”²⁶ to a concept of property as a bundle of rights and as including intangibles like patents and non-traditional trademarks like smell mark and sound marks.

The usage of the word property has been different for a lawyer and for an economist. Generally economists view property as an entitlement whose purpose is to advance allocative efficiency. Whereas legal theorists conceive property as including not only private law rights but also public law entitlements such as instrumentalities of welfare. Grey argues that the capitalism of the industrial revolution and Marxism traditionally have been considering property as tangibles like land machinery money mines *et al.* But today's economic growth is more and more based on intangibles rather than tangibles²⁷.

Somewhere between the tangibles and intangibles also lay the volatile area of body rights which brings us to a difficult terrain of inalienability of property rights. The right to hold property is considered to be inalienable in traditional liberalism, where as property rights themselves are presumed to be or is desirable to constitute alienability as a core element, and inalienable property rights are exceptional, conditional and invites complexity. As is observed by Margaret Radin²⁸, in conceiving of all rights as property rights that can be alienated in markets, economic analysis has invited markets to fill the social universe. It has invited as to view all inalienabilities as problematic. The characteristic rhetoric of economic analyses is morally wrong when it is put forward as the sole discourse of human life. Hence it is suggested by Radin that a non ideal, pragmatic evolution of market inalienabilities based on

25 Thomas C. Grey, “The Disintegration of Property,” in *Property* edited by J. Roland Pennock and John W. Chapman, (New York, New York University, 1980), 69-85

26 Grey, *Property*, 69-85.

27 Grey, *Property*, 69-85.

28 Radin, Margaret Jane, “Market Inalienability”, *Harv LR*, 100:8 (1987)

conception of personhood or human flourishing that differs from that of traditional liberalism or economics is desirable. It is suggested that the concept of inalienability should be taken as an important counter current to the market orientation, where the rhetoric of commodification²⁹ has led us to into an unreflective use of market characterizations and comparisons of almost everything people may value, and hence into an inferior conception of personhood.

Market rhetoric, if adopted by everyone, and in many contexts, would indeed transform the texture of the human world. This market rhetoric leads us to believe that probably politics is just rent seeking, reproductive capacity is just a scarce good for which there is high demand, and the repugnance of slavery is just a cost. To accept these views is to accept the conception of human flourishing they imply, one that is inferior to the conception we can accept as properly ours. An inferior conception of human flourishing disables us from conceptualizing the world in a better perspective if that is a possibility. Market rhetoric, the rhetoric of alienability of all "goods," is also the rhetoric of alienation of ourselves from what we can be as persons capable of human characteristics. Universal market rhetoric transforms our world of concrete persons, whose uniqueness and individuality is expressed in specific personal attributes, into a world of disembodied, fungible, attribute-less entities possessing a wealth of alienable, severable objects. This rhetoric reduces the conception of a person to an abstract, fungible unit with no individuating characteristics.

It is easy to suppose that, if one had a theory of property that adequately addresses tangibles and intangibles then one would have a somewhat satisfactory theory of property. Now the question remains where will be the body rights accommodated. Do we have property over body and are they alienable. Can body be owned? Is slavery just? Considering body as property is demeaning to the very existence of human being, especially when we can agree that animals can be owned; then why not humans. If we don't permit body rights won't it affect the very existence

29 Kopytoff, Igor. "The Cultural Biography of Things: Commoditization as process", *In Social Life of Things: Commodities in Cultural Perspective* edited by Arjun Appadurai, (Cambridge University Press, 1984), 68-69. Igor explains a commodity as a thing that has use value and that can be exchanged in a discrete transaction for a counterpart, the very fact of exchange indicating that the counterpart has, in the immediate context, an equivalent value. The transaction of commodity is discrete as the primary and most important aspect of the transaction is to obtain the counterpart value.

of human beings? Proudhon³⁰ philosophically points out that if some were to ask him what is slavery he would say its murder then with same measure if some were to ask him what property is, he would have to say its robbery. This comment points out the dilemma which the concept of property faces. Some like Stephen Munzer³¹ argues that as it would be difficult to bestow a complete body rights and it would be unfair to say that there is no body rights at all. Then there is a need probably to recognize limited property rights with a division of such rights into personal and property rights. As Igor Kopytoff³² points out that in early history people has categorized the sphere of exchange in three categories for example Tiv of Central Nigeria. The first sphere belonged to subsistence items like agricultural products tools and physical objects; second sphere was made of prestige items like cattle, slaves, medicines and brass rods; third sphere is of rights in people, wives, wards and offspring where brass rod was taken as a measurement for exchanging goods from one sphere to another. But as the society progressed and the number of goods for exchange increased exchange became complicated. Hence a clear background of psychological, social, ethical, moral and partly normative theory of property for understanding in depth the complications of addressing body rights to property rights became a necessity. Therefore, whether ownership of body can be denoted as ownership or is it a kind of limited property rights and whether all body rights can qualify as property rights or not are questions which needs to be analyzed in depth.

As persons have interests and make choices, so they are regarded as the potential bearers of rights. But whether these rights amount to ownership, limited ownership or something else is a matter of debate depending on the nature of right and the legal system involved. The law generally disables a person from selling himself or another person into slavery. It also prohibits one from attempting suicide. The law does not allow persons to consent to murder or criminal assault. It prohibits prostitution. Persons have right to use their bodies as they wish so long as they do not harm others. They may donate part of their bodies while alive, and by will or contract they can even bestow rights over their bodies to medical institutions upon death. The

30 Proudhon, Pierre.J. “*What is Property? An Inquiry into Principle of Right and of Government.*” (Princeton: Benj R Tucker, 1876), 3

31 Munzer, Stephen R. “*A Theory of Property* , Cambridge Studies in Philosophy and Law.” (Cambridge:Cambridge University Press, 1990), 37

32 Bohannan, Paul. 1959, “The Impact of Money on an African Subsistence Economy.” *Journal of Economic History*, 19 (1959) 491-503

restrictions on the aspect of transferability, and the absence of unconditional liberty to consume or destroy indicates that persons do not own their bodies in the sense they own physical things. But, the law also on the same footing permits or enables people to do with their bodies certain limited exchanges, it would be absurd not to bestow property rights in them. Hence, one is forced to draw a conclusion of limited property rights in relation to body rights. In any case one cannot avoid the gravity of underlying moral issue of what body rights persons should have and to what extent. Even the debate to euthanasia to suicide and right to receive hormone treatment for transition in case of gender re-assignments all pertains to the contours of property rights over body and is an extension of the legal, moral and ethical dilemma of body rights.

Though body rights can be said as those rights in relation to using, managing disposing of, transferring, excluding others from, and so on, a body which is various parts of the bundle of rights. As these different elements of rights may have different dimensions to it, hence, the whole bundle cannot be seen in terms of absolute rights but only may be limited. Unlike the imperial view, which holds that all body rights are property rights as such rights can be classified under the empire of property.

The case of free speech and expression, which is a constitutional right universally generally finds it difficult to be classified as property right³³. This right is centrally a privilege and immunity, protected chiefly by a disability on the government, regarding the use of one's mind and vocal cords to express ones opinions. This right can be said as a body right. In general legal parlance one may hardly think of free speech as a property right. Neither prohibition of assault is generally understood as property right. But one can effectively argue that these rights can be brought under the ambit of body right. If right to reputation is partly body rights then tort law protections against libel and slander qualify to a large extent as body rights³⁴. Still, few leave alone the courts, would see them as property rights. The lack of understanding or clarity of thought hampers not just the process of justice but fundamentally the concept itself.

33 Wesley J Liebeler, "A Property rights approach to Judicial Decision Making." *Cato Journal*, 4 (1985) : 783-804

34 *Paul v. Davis* 424 US 693

One of the major problems is transferability criterion to classify body rights to be called property rights, especially if we consider the right associated with persons. This analysis is linked up with interest theory and will theories of rights. The interest theory holds that the central function of rights is to protect individual interests whereas the will theory holds that the central function of rights is to protect individual choices. The body rights which are again divided into personal rights and property rights creates twin interests where personal rights indicates a protection of interests or choices other than the choice to transfer whereas property rights creates an entitlement where the body rights protects the choice to transfer. A further subdivision can also be made of the property rights in the body into weak and strong rights. A weak property rights involves only a choice to transfer gratuitously whereas a strong property right indicates a choice to transfer for value. This indicates that as what a right protects increase in importance, its relative waivability decreases. Transferability of property is a core element of property and it becomes a point of contention in case of body rights as it has close connections with the principle of autonomy and the capacity of human being to consider body as property rights in all its core features. Hence it is required to assess the importance of an interest or a choice.

The claim that often the property discourse generally tend to depict people as things or commodities does not ground an argument that will survive examination. This claim may overlook the fact that persons do have physical bodies, and may overemphasize the popular conception that property is thing. The conception of property as a bundle of normative incidents which creates different relations allows for exchange as a core function, powers to which equally applies in case of blood or that of chair. If we agree to this proposition, then we might feel that the property discourse in a way demeans people by undercutting their autonomy. If we further agree that autonomy being the capacity to govern oneself, and if this capacity underlies a moral right for property in body rights to be treated as self governing then to make the claim a justifiable one it would be necessary to show that a morally justifiable property right in the body undercuts autonomy.

James Tully argues that body rights are inherently subject to moral conditions. For him according to “workmanship model”, human life is defined by our god given property in ourselves³⁵. We have ownership in ourselves precisely because no one owns us and we are by nature born free that is not subject to a dominion of any other human being. But this ownership is nevertheless conditional as one has an obligation to preserve and not to ruin especially the gift of life. The limitations are hence naturally a prohibition against murder, suicide or voluntary bondage. The justification of ownership which stems from the mixing of some effort from ourselves with the natural world and the consequence of controlling the physical property that is the body is subject to all the same custodial terms according to which we originally own ourselves.³⁶

The ‘right’ to property is as we see is inextricably bound up with a notion of moral duty which is co-relative. All this indicates that rights convey reciprocal entitlements and responsibilities. To understand the conventional ideas of property and to critically analyze it is a necessary exercise to go beyond the basic debates on what constitutes property and hence in the next section an attempt is made to understand the theories of prominent theoreticians or philosophers who had an influence on how we analyze the notion of property in the contemporary world.

Identifying theoretical spectrum of property

One of the earliest of philosophers whose body of work include discourses on property is that of Aristotle and Thomas Aquinas. In *Nicomachean Ethics*, Aristotle states that human flourishing can be achieved only if we consider man in a community as humans are by nature a political animal. For Aristotle the best way of ownership regime is one where the land is owned individually but crops are communally used. The other lesser preferred regimes are where land is owned and farmed communally and crops are distributed for private use and the third being land

35 Tully, J. “*A Discourse on Property: John Locke and His Adversaries.*” (Cambridge: Cambridge University Press, 1980) 14

36 Tully, *Discourse on Property*, 131-145

communally owned and used.³⁷ Aristotle believed that private ownership should foster generosity, friendship and moderation.

St. Thomas Aquinas further took Aristotle's Ethics and elaborated a conception of property focused on virtues and human flourishing. Aquinas believed that property exists in order to promote human wellbeing, hence, property rights are subordinate to the human goods that constitute human flourishing. That is, though property can be privately owned, but its use should remain common and owners should be ready to communicate then to others in their need.³⁸ Hence, for Aquinas even theft in a situation of dire need is not theft. Property rights are instrumental to deeper and more fundamental human good.

The Aristotelian and Thomistic conceptions of property had played an important role in laying the foundations for non-utilitarian theory of property.³⁹ The reason of private ownership is though a much debatable issue, but the various theories suggest some ground for us to conceptualize the much needed framework to build on.

The common ground for many to begin with, is an analysis and debate of private property which had originated from commons property or state of nature⁴⁰, one like Locke describes, where property belonged to none, but, all. Private property which originated from the commons gained popularity as an idea because of the drawbacks or externalities caused by over use of wastage of commons property. The benefits of the private property had been debatable as the mismatch between the benefits of individual ownership and the consequences of individual choice had caused enormous inequalities. The major issue of common resources had been that of a free rider problem. The threat of free riding discourages anyone from doing his fair

37 Aristotle, "*Nicomachean Ethics*." trans, Martin Ostwald (1962) (Indianapolis Bobbs Merrill, 2012)

38 Aquinas, Thomas. "*Summa Theologica*." trans, Fathers of the English Dominican Province, (London:Burns Oates & Wash Bourne Ltd, 1920). Accessed March 21, 2015
<http://oll.libertyfund.org/titles/aquinas-the-summa-theologica-of-st-thomas-aquinas-part-i-qq-i-xxvi-vol-1>

39 Gregory S. Alexander, "The Social Obligation Norm in American Property Law.", *Cornell L. Rev* 94 (2009): 745

40 Locke, John. "*The Second Treatise of Government, Second chapter 'of State of Nature*." Para 4-15 Accessed March 21, 2015, <http://www.earlymoderntexts.com/assets/pdfs/locke1689a.pdf>

share. Rational individual will stand by without putting any efforts while others do the work and they would step in at the final moment.⁴¹

First strand of the spectrum of the property theory can be taken up from the tradition of utilitarian economic analysis of property rights, which explores different facets of ownership. Institutions do determine whether some particular change in the system of property rights, large or small, would be utility enhancing. This approach has been associated with a conception of property rights that takes the popular view of property as a bundle of sticks, that is, as a discrete and flexible set of specific rights with respect to things, the precise content of which is largely indeterminate and subject to constant re-evaluation.

The question of understanding the contours of bundle of stick and how to allocate them is debatable. As Guido Calabresi and Douglas Melamed suggests that entitlements should be allocated to the person who values them most highly.⁴² This view has been justified as they feel that the market will not be efficient in reassigning the entitlement effectively. One of the major reason is where a possibility of high transaction costs exists, which would eventually create uneven distribution of property rights even after a system of private property is established. Hence they suggest a liability rule whereby entitlement is transferable without the consent of the holder of such property upon payment of some amount of compensation.⁴³ With a bundle of sticks how to allocate any particular property right and once allocated, whether to protect that right with a property rule or liability rule is an open question and subject to analysis. Using market methodology, Calabresi and Melamed argue that external costs might explain or justify inalienability rule. One category of external cost that might be prevented by inalienability is large-scale social cost that sellers can inflict on the public such as pollution of water sources. Calabresi and Melamed use pollution as an example, but their reasoning could just as well apply to the use of heroin, or cigarettes. The real issue is whether a market under what circumstances can become self defeating and if so whether the intended results can be achieved by other

41 Acheson, James M. *"The Lobster Gangs of Maine."* (London: University Press of New England, 1988).

42 Calabresi, Guido. and A. Douglas Melamed, "Property Rules, Liability Rules, and Inalienability: One view of the Cathedral.", *Harv L, Rev* 85 (1972) 1089.

43 Calabresi and Melamed, Property Rules, 1090

means and if so how. If we consider the rights of citizens or persons like voting rights as alienable commodities are market types of harm could be categorized as external cost. These problems which cause external cost can be justified with inalienability rule is something open to debate.

Locke who is another foremost philosopher who has contributed much to our understanding of property, here we could consider his theoretical analysis to be second strand, who gave a labor based explanation to the theory of property. Locke's argument for private property differs in fundamental ways from the utilitarian approach, which is built around notions of moral desert.⁴⁴ His argument rests on these interrelated stages of human existence. One being the state of nature,⁴⁵ where property belonged to none but to everyone. Consequently the notion of private ownership develops in second stage and the introduction of money creates accumulation of wealth leading to inequality in the possession of property. Subsequently there arises a need to regulate as conflict with members of society due to inequality creates an need to form an authority who is capable to diffuse conflicts and in third stage communities form government which regulates and formalizes property rights in an attempt to avoid conflict between members of society. The fundamental justification for Locke comes from labour one puts into which creates a relationship between the property and the person which is legally tenable and hence creates a right for him to assert that can be classified as property right. Locke says,

Though the earth, and all inferior creatures be common to all men, yet every man has a property in his own person. This nobody has any right to but himself. The labour of his body and the work of his hands, we may say, are property his. Whatsoever then he removes out of the state that nature hath provided, and left it in, he hath mixed his labour with, and joined to it something that is his own, and thereby makes it his property. It being by him removed from the common state nature placed it in, it hath by this labour something annexed to it, that excludes the common right of other man.⁴⁶

44 Munzer, *Theory of Property*, 255

45 Locke says men living together according to reason, without a common superior on earth, with authority to judge between them are properly the state of nature. The state of nature is, a state of equality, where in all the power and jurisdiction is reciprocal, no one having more than another. See, Locke, *Two Treatises of Government*, para 4-16

46 Locke, *Two Treatises of Government*. Para. 27.

Locke's labour theory is based on the justification that the appropriation of commons property is tenable and the right of the commoners is not violated by annexation, by the acts of private appropriation on the condition that no one may appropriate more than he can use. The condition leaves lot of leeway as to what is the limit of appropriation and what his just especially when people desires have no limitation. Locke says any appropriation beyond ones need, is more than his share, and belongs to others. If property perished, in one's possession, without putting it to proper use or due to wastage, the appropriator offended against the common law of nature, and was liable to be punished, for he is to be regarded as if he appropriated his neighbor's share. This casts a liability and a limitation on one's need and such need is justified by its use and not misuse. Further for Locke, he puts a limitation on the appropriation and says that appropriation is permissible only where there is enough, and as good left in common for others.

Locke says that justice gives every man a title to the product of his honest industry, and the fair acquisitions of his ancestors descended to him; so charity gives every man a title to so much out of another's plenty, as will keep him from extreme want, where he has no means to subsist otherwise. Locke contemplates legal relation which flows from succession rights over property of one's ancestors and also in case of charity which gives one title, a legally enforceable right and especially where one has no means to subsist otherwise. Hence the framing of rights or enforceability is justified on moral grounds and also based on equity. Again as it can be argued that at least some fundamental acts of use and appropriation are necessary to human survival, the principle of charity requires human beings as collective owners of communal property rights. The source of legitimacy based on charity requires the understanding that after all everything belongs to everybody. To acquire the property to the private use and appropriation sought by individuals seeking the resources they need to survive is hence natural and fair as they belong to the community and as part of the community certain rights accrue to them at least for given limited period of time in a limited way.

With the introduction of money as a store value accumulation became easier without ever resorting to wastage of physical objects without being used. As property in the form of money gave legitimacy to accumulation of wealth without the property

being allowed to perish hence wealth became a component to hold property in perpetuity. As allowing perishables to spoil while in one's possession violates the natural rights of others to enjoy the fruits of earth, hence Locke says that an appropriator can voluntarily exchange his wheat for gold and vegetables for wool and keep those by him all his life without violating any one else's rights.⁴⁷ Thus money leads to accumulation of wealth and breeds inequality and conflict. The introduction of money made possible the accumulation of money as such. Thus, once money arrived and facilitated accumulation of wealth it also created uncertain environment where conflict over property became more common and ownership more insecure. In a way this accumulative function of money also triggered tendency of men to aspire beyond ones need.

Locke also acknowledges that the aspiration for gain or profit, however questionable its merit might be, encourages productive behavior too. In a society it contributes to a material abundance in monetary, commercial societies which otherwise could not be achieved without the opportunities that money unleashes. Locke says that money changed the intrinsic value of things which originally depended on its usefulness to the life of man, but this yellow metal (gold) came to be equated with food and service. In a way it destabilizes the existing property regime which was harmonious to a large extent. This created a scenario where one's labor left him enough in nature to appropriate without ever being detrimental to others interests. Locke also expresses doubts about the ultimate value of this prosperity and also repeatedly notes that the consequence of introduction of money puts us into a cycle of acquisitiveness and conflict. The conflict which arose out of the acquisitive tendency created an imbalance in the property regime consequently arousing a need for regulation and conflict resolution mechanisms. Hence, the intrinsic value of money is questionable and so is the wisdom of those who labor in order to heap up and hoard.

Locke states that the conflict generated by introduction of money leading to acquisition of wealth created conflicts, a situation where the state of nature becomes incapable in terms of dispute resolution. This legal shortcoming created ownership of property insecure and instable. This insecurity created a need for a regulatory

47 Waldron, Jeremy. *God, Locke and Equality: Christian Foundations in Locke's Political Thought*, (Cambridge: Cambridge University Press, 2002)

authority which resulted in the system which can be called government. Since the government always draws its authority from the people, the basic condition which a government needs to satisfy is to comply with the laws of nature which existed prior to the formation of civil government which was an arrangement for regulation and conflict resolution. In context of property rights, the state power is therefore limited by natural rights of the property which exists at the time and prior to that of the government formation.

Hence, the state power is limited and not unfettered; unless the owner consents to waive his rights in respect of rights associated with property the state's power is limited. And the consent should be subject to the laws enacted by the governing majority since he is a part of the government; he is under an obligation to everyone of that society.⁴⁸ Though the majority might legitimately weaken someone's property rights by regulation or taxation, but this does not mean that the majority can deprive someone of the right to acquire for herself the means of subsistence. The obligation to work for one's subsistence is an essential component which Locke considers as non-derogable and inalienable.

For Locke if a system of property is not to violate the right and duty of self preservation in a context where it is not possible to appropriate the means of subsistence from the commons, the state must ensure that jobs exist for everyone willing and able to work or supply some other means of subsistence. One of the interesting criticisms of Locke is put forth by Robert Nozick against Labor Theory where he questions the logic by asking that if a person mixes his Tomato Juice in ocean can he claim ownership over the ocean⁴⁹. The parallel of Locke's idea that by mixing one's labor with another's or commons property one can claim full ownership over the piece of land.⁵⁰ James Tully while interpreting Locke's idea explains that the principle of maker's right could be a justification for labor theory. Locke's appropriation argument is that the principle one owns what one makes helps to explain not only why productive labor would confer ownership rights over the thing made, but also the premise on which Locke interprets his labor theory is that we own

48 Stevens, Jacqueline. "The Reasonableness of John Locke's Majority." *Pol. Theory* 24 (1996): 423

49 Nozick, R. " *Anarchy, State, and Utopia*." (New York: Basic Books, 1974).

50 Nozick, *Anarchy State and Utopia*, 175.

our labor in the first place. Labor is a self generated, intentional action, which one exercises full control and something which the person makes through the exercise of her intellect and will.⁵¹

The contribution of the individual laborer is significant and its an addition of value to the physical object then the raw materials taken from the commons, the juice in the ocean comes to resemble soup in a pan. Hence, the law should recognize as superior the laborers claim of ownership, even though the laborer did not own the original item of personal property. For example a literary work which is assembling of words which already existed in a dictionary resulting in a product which is classified as a literary work is a labor one puts and creates a story or a narrative out of words which are existing independently. This creation is a labor and intellectual one, albeit forms as a basis for justifying copyright over a work. But it is quite difficult to say what one's contribution is and what are natures or others contribution upon which one has labored. Under Locke's theory it is difficult to ascertain the incidents of ownership and the contours of property rights as he doesn't establish or defend a robust system of property rights.

A historical evolution of Locke's theory suggests that his theory of property was deployed in 18th and 19th century primarily in support of populist argument to help English colonial activities in North America. The use of Locke's theory was made to undermine Native Americans claim over their land.⁵² Later, in the wake of industrial revolution, the interpretation of Locke's theory underwent a dramatic shift where in England the theory was used in support of the efforts of industrial property owners. The argument was made to resist state regulation and redistribution at the hands of majority. The focus was to emphasize Locke's defense of property against arbitrary governmental power and to downplay the majoritarian political theory. Twentieth century interpreters began to point a picture of Locke as a defender of capitalist accumulation and rights of property⁵³, where his idea is taken as a classic doctrine of 'spirit of capitalism' in which limitless and self interested accumulation is

51 Srinivasan, Gopal. *The Limits of Lockean Rights in Property.*, (Oxford: Oxford University Press, 1995), 65-5

52 Arneil, Barbara. "John Locke and America: The Defense of English Colonialism." Oxford: Clarendon Press 1996; David Armitage, "John Locke, Carolina and the two treatise of government." *Pol. Theory* 32 (2004): 602

53 Strauss, Leo. *Natural Rights and History.*" (Chicago: University of Chicago Press, 1952), 246.

both just and desirable.⁵⁴ On the contrary as we approach 20th century Gandhi points out the drawback created by the spirit of capitalism and the justification of private property which had been conditional on various criterion like moral consideration and commons right, has been ignored. Private property has become the norm and Gandhi in a way tries to revisit the justifications for private property rights which emerged out of commons right. The sanctity given by Locke to human efforts and sustenance and interest of commons becomes a common link between Gandhi and Locke.

Though it is quite evident that labor theory contains much substantial truth but the real justification for Gandhi is whether labor theory encourages the greater efforts at productivity by ensuring that labor distributes the property in a equitable manner or not. Again, good things can be produced at an unjustified expense and all things produced may not be good enough for human life, Gandhi indicates that one need to think of principles beyond labor or productivity for justifying any system of property law. We also need to consider that concentration of property accrues to those who are not productive and it is not necessary to accrue rewards in terms of property either. Hence for Gandhi in contrast to Locke the first claim on property is by the man who needs it rather than the man who has created it. And hence, to justify the principle of distribution of property according to labor is conditional upon the benefit to larger community.

A third strand of property thought is based on the ways in which property contributes to the development of the self, or personality. The earliest major known contribution is that from Georg W. F. Hegel. The personality theory of property or personhood theory can be traced to the discussion of property in the work philosophy of right.⁵⁵ Hegel's account of property, unlike that of Utilitarians' seems to be a right based theory rather than a consequentialist theory. Its jurisdiction for property has nothing to do with promoting a collective good or social utility but its philosophy is rooted in a concern with the individual's free will. Somewhere Hegel's theory brings

54 Macpharson, C. B. "*The Political theory of possessive individualism: Hobbes to Locke.*" (London: Oxford University Press 1962), 194-262

55 Hegel, Georg W. F. "*Hegel's Philosophy of Right.*" trans, T. M. Knox, (London: Oxford University Press, 1952).

similarity with libertarian account of property in their fundamental concern with promoting individual freedom.⁵⁶

Isaiah Berlin famously commented that the difference between Lockean and Hegelian conceptions of freedom is the distinction between negative and positive liberty.⁵⁷ It shows that Locke contemplates an absence of interference or constraints from third party whether it's state or individuals and for Hegel it means an action which gives one the freedom to act enabling a person to control one's own life and his decisions where by his actions gives voice to his experience of self realization. For Locke and Hegel it reflects concerns of freedom but the focus for Locke is solely on the enjoyment of a sphere of non-interference, where as for Hegel, freedom is inextricably linked with personality. Hegel contemplates person's freedom where one is aware of its sheer independence. That is, a person is able to develop a consciousness of self awareness. This consciousness gives one the opportunity to detach one's self mentally from one's needs and wants in such a way that one is able to regard these at one's own, at least not entirely.

A person is a subject who self consciously realizes freedom by realizing her needs and wants as chosen rather than given. A will that is free for itself is a will that makes choices with freedom as the purpose of such choices. This was not an abstract concept for Hegel. The whole point of his theory of personality and freedom was to show how a person develops into a member of an ethical community in the actual world and how he can create property as an embodiment of his personality. Personality for Hegel was self-actualization of the individual through acts of will. Personality is also a capacity for the rights and constitutes the concept and the basis for the system of abstract and therefore formal right. So the significance of right is being a person and respects others as a person.⁵⁸ Hegel believed that the will that is free for itself is intelligible only in the context of concrete human existence.

Hegel seems to reject the entire social contract tradition. He explains, "(T)he intrusion of this contractual relation, and relationships concerning private property

56 Berlin, Isaiah. "Two Concepts of liberty." In *Four Essays on Liberty*, (Oxford: Oxford University Press, 2002), 129-30

57 Isaiah Berlin, *Two Concepts of Liberty*, 135

58 Knox, *Hegel's Philosophy of Right*, para 36

generally, into the relation between the individual and the state has been productive of the greatest confusion in both constitutional law and public life”.⁵⁹ Although he does share with Locke a desire to establish a theoretical basis for a commitment to the individual's sovereignty over things required in isolation. Hegel defines right as freedom as idea. An idea in Hegel's sense is what a concept comes to mean for us as we encounter it in real world. Hence, right is some phenomenon in the actual world that embodies free will. Hegel believes that right is sacrosanct as it is the embodiment of self conscious freedom. Right is a necessary condition for personality and to develop and sustain the free will. For Hegel the imperative of right is 'to be a person and respect others as a person'.⁶⁰

Free will for Hegel develops three stages. In the first stage right is abstract. It is abstracted from particulars of human lives and from the contents of their will. It includes only what is necessary to maintain the personality of the subject holder of the right. In this form right is essentially negative in the sense that it protects the will's capacity to detach from particular aspects of the actual world. At this stage the right is only a capacity for engagement with the actual world. Only in later stages of the free will's development, which Hegel called 'Morality' and the final stage of 'Ethical life', does the individual become fully integrated with all of the concrete details of her life. But it is through property a person goes about the process of translating bare universal freedom into the actual. And so is the personality develops from the cold abstract form into a form that is concrete and which is a necessary medium from where the process of individual and social development occurs.

Penner who holds a similar view also says that, 'Property is the relation of personality to the external sphere of things, understood in terms of free will'.⁶¹ A fundamental element of Hegel's theory similarly says that the free will of person, at every stage of its development, necessarily is embodied in something like in possessing, controlling and owning material goods. Hence, Hegel famously states “a person has as his substantive end the right of putting his will into any and everything making it his, because it has no such end in itself and derives its destiny and soul from

59 Knox, Hegel's Philosophy of Right, para 75

60 Knox, Hegel's Philosophy of Right, para 36

61 Penner, James. E “*The Idea of Property in Law.*”, (Oxford: Oxford University Press, 2000), 12

his will".⁶² The 'any and everything' are things like physical objects with no will and hence no ethical status. In Hegel's philosophical idealism, nature and all the external worldly things, has no reality apart from its reality for individual subjects' mind. The world for a natural person is subjective and hence the existence of a contractual relation reflects a will. The contract also brings into existence the property whose external side, its side as existent, is no longer a mere 'thing' but contains the moment of a will. It's only through alienation in contract that property becomes fully externalized.⁶³ Likewise it is also apparent that certain interest internal to the self cannot be things as they cannot be alienated. Hegel states, [T]hose goods, or rather substantive characteristics, which constitute my own private personality and the universal essence of myself consciousness are inalienable and my right to them cannot be subjected to alienation by way of prescription like freedom of will, ethical life, religion.

For Locke when one mixes ones labor with unowned things the person is bringing an aspect of herself into the object where as for Hegel the external thing is internalized by embodying her will through self appropriation. For Hegel possession is an important element by which one embodies one's will in the object.⁶⁴ Possession can be made possible by grasping it, forming it or by marking it.⁶⁵

Hegel points out that there should be a use of the thing to bring legitimacy to the appropriation of the thing, which can be by a positive or a negative action. Action indicates externalizing the will and creates the will's relation with the object. Even the United States Supreme Court has rejected the property rights on the ground that the aboriginal Indians and their possession of land can't be considered to constitute property rights in its full sense as they lack the intention or will to own.⁶⁶ The action positive as well as negative signifies projection and incorporation that is gathering the food and incorporation by eating it. Hegel's contribution to explaining and justifying private property is quite distinctive in itself. As Alan Ryan states, "the attractions of Hegel's development of the concept of property depend on our everyday feelings

62 Knox, Hegel's Philosophy of Right, para 44

63 James Penner has trenchantly criticized Hegel's error here in conflicting *in personam* and *in rem* rights, rendering all of them as *in rem* rights. See Penner, The Idea of Property in Law, 177-178

64 Knox, Hegel's Philosophy of Right, para 53

65 Knox, Hegel's Philosophy of Right, para 54

66 See *Jhonson v. Mintosh*, 21 US 543 (1823); *Tee Hit Ton Indians v. US*, 348 US 272 (1955).

about our need to identify with and express ourselves in things that we make control and use".⁶⁷ His greatest contribution to our understanding of property seem to be not just in showing how property anchors one's free will in the actual world of objects, but more fundamentally explains us how property helps in establishing social relationships. This aspect of considering property right as contributing to developing social relationships is significant as it takes property rights into a realm of developing social relations. The whole point of the self becoming realized is movement toward high stages of ethical development that lead to membership in ethical communities like family, civil society and eventually the state. Hence property acts as the foundation for socialization with others.⁶⁸

Two important aspects of Hegel's theory had been fundamental, that it provides the basis for both justifying and limiting private ownership of property in the idea of self development and; secondly it establishes a constitutive relationship among private property, personal identity and community. We can see that Gandhi also takes these two aspects as important that is property should be inherently a mechanism for self development and not a tool to subjugate others and property fundamentally should facilitate communal relations where property and any right flowing from it should be subject to the welfare of the community which he tries to develop in trusteeship principle.

Unlike utilitarianism, Hegel's theory allows ownership to the common good of the community and also allows modifications of property rights in service of the common good consistent with preserving property as a right. That is, possession, use and alienation are property rights that exist prior to the common good and to public regulation. For Hegel, so long as legal system doesn't undermine the existence of the property right itself, modification in the interest of community is permissible as part of an ethical community one is obligated to the community's general well being. In Hegel's theory the prominence is given to property rights over the community interest where as in Gandhi's schema the property rights are subject to the interest of community where ethical interest has a prominent role and not legal regulation. For

67 Ryan, Alan. "*Property and Political Theory*.", (Oxford: Basil Blackwell Publishers, 1984), 131.

68 Stillman G Peter, "Property, Freedom, and Individuality in Hegel's and Marx's Political Thought." in *Property*, edited by J. Roland Pennock, (New York: New York U. Press, 1980), 130-67.

Gandhi, the primary criticism that property can create a limitation on freedom as private property law do not guarantee a minimum of subsistence or provides the necessary tools of freedom to everyone. So far as property regime fails to do the latter it rather compels people to part with their freedom.

Gandhian idea of property criticizes the regime of right of property when it becomes a manifestation as individual's right to act as a free personality where one can have a sphere of self assertion. Though it can be argued that metaphysical idea of freedom to empirical legal acts may create the notion of personality a vague idea, it can also do little to understand the legal consequences of our action. When on the other side the justification of property where physical possession over things which are fundamental to human existence is desirable but it has also an effect of limiting freedom on a large scale as property law do not guarantee a basic subsistence or basic freedom for everyone which is necessary. Hence Gandhian perspective justifies private property only where it does not fail to promote basic sustenance, and do not compel one to part with their freedom. Though the personhood theory argues for a regime where everyone has a definite sphere of rights and duties, but what the limitations of it are an open ended question. For Gandhi the principle of freedom of personality may not justify a legal order when a few could compel others to work under degrading and brutalizing conditions by virtue of monopoly over resources.

Hegel tries to justify private property in general terms but what are the contours of such rights and what kind are the types of private property that ought to exist is question which is left open. Nevertheless, Hegel had advanced the idea of property beyond individual by relating with the community of which he is a part. Hegel says property is the beginning of legal, and formally ethical, enjoyment and possessions.⁶⁹

With the passage of time societies developed a social division of labor, where relations of mutual dependence emerged which enabled members to satisfy their needs. These function as a material basis for universal equality, although this equality

69 Hegel. "System of Ethical Life." In *System of Ethical Life and First Philosophy of Spirit*, edited and translated by H. S. Harris and T. M. Knox, (Albany: State University of New York Press, 1979), 99–177

does not appear as such, but is “reflected in the thing” as equality of “value.”⁷⁰ People are forced to engage in producing this form of equality through the exchange process, due to their lack of means to satisfy needs on their own. For a farmer if he needs an agricultural weapon he has to exchange something of value to the blacksmith and blacksmith when he needs agricultural products he has to exchange in return something of a corresponding value developing mutual dependence. This exchange led to development of commodity relations and mutual recognition through the exchange process via the mediation of value: “This is exchange, the realization of the ideal relation. Property enters reality through the majority of persons involved in exchange and mutually recognizing one another.”⁷¹ The ideal relation of equality presupposed by the right to property becomes “real” as value in the exchange process, in which possession is also transformed into a property and a reflection of personhood.

When Hegel and Locke in some sense see’s property as an extension of the person, Kant considers property in terms of individual freedom. Kant’s thought is primarily concerned with the question in terms of what property is, how free persons can interact with one another in using and possessing property at the same time remaining independent. Respecting and protecting individual freedom to choose is paramount. It’s not a means but an end in itself. For Kant 'Any action is right if it can co-exist with everyone's freedom in accordance with a universal law, or if on its maxim the freedom of choice of each can co-exist with everyone's freedom in accordance with a universal law'.⁷²

For Kant freedom is the only innate right. The innate right poses a limitation on individuals where it doesn’t entitle men to pursue their goals through external things, such as objects of property, actions of others etc. The need for wider entitlements can only be realized through acquired rights.⁷³ A right to some external object is a mode or a means to some personal end rather than a right to use that object or having ownership of that object. The problem though is unlike using one's own

70 Harris and Knox, *System of Ethical Life*, 121

71 Harris and Knox, *System of Ethical Life*, 124

72 Kant, Immanuel. “The Doctrine of Right.”, in *The Metaphysics of Morals*, trans. and edited by Mary Gregor, (Cambridge: Cambridge University Press, 1996), 238.

73 Kant, *The Doctrine of Right*, 237

body, any external object of choice could be yours or it could be mine that is it could be in the realm of commons property. For Kant the primary question is who can constitute an affirmative action which would qualify the right to be considered as acquired right. He formulates his approach from the problem of who performed the requisite affirmative action.

Unlike Locke, Kant focuses on what it means to have objects as your own rather than on how to acquire them. Kant sees it consistent with the freedom of others to having objects at one's own disposal as means to pursue ones goals. Kant believes property requires full ownership, where possession and use are the basic components to satisfy ownership. Possession can be sensible and intelligible where, sensible possession being bare physical possession and intelligible possession as possession of an object without holding it. For Kant Intelligible possession seems tantamount to ownership.⁷⁴ The distinction between sensible and intelligible possession reflects a more fundamental point at the core of Kant's theory of property.

In Kant's terms property is a noumenon, not a phenomenon. This means that property is not a fact that can be empirically discovered or established. Reason alone establishes its reality. What perhaps Kant means is that property is not an object but an institution that regulates relationships between and among persons. For Kant the external things are objects of choice that are possible subjects of acquired rights. Such external thing can be a physical thing; other person's freedom of choice regarding performance of an act (contracts); and other people's status in relation to me.⁷⁵

In Kant's schema the property is not merely relational. If I own an object, your duty with respect to the object I own is negative, that is not to interfere with my opportunity to use the object as I wish. With property rights, duties are negative. Unlike Locke, Kant believed that acquisition and appropriation cannot be the basic and normative theory of property; it can only serve to identify which objects get into the system of property. Appropriation of a physical object predominantly brings into focus the relation between the object and the owner but its impact on others and its legitimacy as far as other are concerned are not addressed. Such acquisition doesn't

74 Howard Williams, "Kant's Concept of Property." *Phil Q.* 27 (1977): 32.

75 Kant, *Doctrine of Right*, 248

explain the legitimate constraint others face. Locke's error, Kant believes has to confuse necessary and sufficient conditions of original ownership acquisition. For Kant, conclusive ownership in unowned objects cannot be acquired without authorization by some public right. The public right brought in the argument for the rational necessity to recognize and respect the right to intelligible possession culminating into a civil constitution. This duty to respect others right even generates an authorization "to constrain everyone ... to enter with us into a constitution."⁷⁶ The idea of the social contract thus serves as the measure of the legitimacy of the state, although Kant regards actually signing such a contract to be superfluous.⁷⁷ Hence, some form of social contract or civil constitution becomes imminent and so is the system of state.

Challenges to Invisible Hand

Adam Smith's *Lectures on Jurisprudence*⁷⁸ speaks of five sources or grounds of a property right: occupation, tradition, accession, prescription, and succession. Apart from Occupation and Prescription the three sources doesn't pose problem as they are situations when already property rights have been vested in a person. Occupation means the first instance of taking possession of something that was not previously the private property of anyone, where as Prescription refers to an exclusive usage over a long period of time. To analyze the grounds he uses a metaphor like Locke which he terms as impartial spectator and mostly referred as spectator. Where Locke's discussion of the rights of property in his *Second Treatise: Of Civil Government* indicates acquiring of property by 'mixing one's labor' with things in a natural state, Smith says that the ground of the first possessor's right is his reasonable expectation; and the expectation is reasonable because he has spent 'time and pains' on acquiring the fruit. So in the end Smith's explanation is a labor theory, but jurisprudentially superior to Locke's because it does not introduce the confusing metaphor of 'mixing' one's labor and treating the work of one's hands as an extension of the hands but creating a legal relation where appropriation is justifiable. The

76 Flikschuh, K. "*Kant and Modern Political Philosophy*," (Cambridge: Cambridge University Press, 2000), 283

77 Flikschuh, Kant and Modern Political Philosophy, 286

78 Adam Smith, "*Lectures on Jurisprudence*." (Oxford: Clarendon Press, 1978) 329

acquisition results in an ethical question as to whether the acquisition is self interest driven or is a moral judgment.

Adam Smith's work '*The Wealth of Nations*' was a creation resulting from the challenges posed by great inequality of wealth, by individualism, by social and moral decay and by supposedly rampant greed, that is the problems of a liberal society. At almost the same time as that of Kant, Adam Smith, and the founding father of "Capitalist" Doctrine; wrote in his first book '*The Theory of Moral Sentiments*', an interesting aspect on consumption or consumerism. He said that on both economic and moral grounds, he was a critic of what we would call conspicuous consumption or consumerism, although he also thought those vanities to be unavoidable, even necessary in a commercial society.⁷⁹

Adam Smith believed that the pursuit of wealth and greatness is potentially a self corroding one. People's acquisitiveness of wealth is based on the belief that it will make them happy because others would admire them. It could be a vain pursuit as true happiness consists in tranquility. Still the illusion can be productive if properly constrained and institutionalized. Adam Smith proposes liberal institutional arrangements which would cultivate a virtuous life. If people are to be governed in a free republic, they must free themselves from superstition and fanaticism. Smith believed that liberal political structures support morality and in turn are supported by it. Smith recognizes that religion as an institution is important in the sense that it gives a worker in a big city, a comfort zone, where he is not lost in the anonymity, obscurity and darkness of the growing city. Absence of such an institution would mean that a person could neglect himself and abandon himself to the every sort of low profligacy and vice. Hence, even a sense of community is necessary which would ultimately channelize the pursuits of man, his self interest into creation of wealth.

The self interested are led to labor, to produce, to create though the 'invisible hand' a phrase used only once in each of Smith's two published books- what Smith is pleased to call "civilization". Smith recognized that pursuit of wealth has little to do with gaining ease or pleasure than with vanity. While distinctions arise among classes

79 Charles L. Griswold, Jr. "Adam Smith; Conscience of Capitalism." *The Wilson Quarterly* (1975) 15: 3 (Summer, 1991): 57

and ranks, even the rich in spite of their natural selfishness and rapacity, though the wealthy only mean their own convenience, though the sole end which they propose from the laborers of all the thousands whom they employ, be the gratification of their own vain and insatiable desires, they divide with the poor the produce of all their improvements. Smith further believes that the rich are led by an invisible hand to make nearly the same distribution of the necessaries of life, which would have been made had the earth been divided into equal portions among all its inhabitants, and this without intending it, without knowing it, advance the interests of the society, and afford means to the multiplication of species.⁸⁰

In *Wealth of Nations* Adam Smith recognizes that the invisible hand could also produce bad results, such as business monopolies. He notes “People of the same trade seldom meet together, even for merriment and diversion, but the conversation ends in a conspiracy against the public or in some contrivance to raise prices”.⁸¹ Self interest yields its fruits only when the state provides the proper legal and economic framework. Though, Smith argued the division of labor as a key to prosperity but at the same time recognized with frankness the human cost of economic progress. Smith noted in *Wealth of Nations* that the factory workers might be reduced to “that drowsy stupidity, which in a civilized society, seems to benumb the understanding of almost all the inferior ranks of people”.⁸² At the end workers dexterity at his own particular trade forces him to live a life devoid of his intellectual, social and martial virtues. This is the state into which the laboring poor, the great body of people must necessarily fall unless the state or the government takes the remedial steps. Hence this Smithian paradox brings us to the question that if the desire to better one's own condition beyond the mere necessities of life is based on an illusion, is not the free-market system that encourages this illusion premised on a fundamental lack of self-knowledge? How Smith could justify the contradiction, at the same time when he claims that true happiness lies in tranquility, can also at the same time affirm capitalism?

80 This was part of Smith's controversial reply to Rousseau's *Discourse on the origin of inequality* (1761)

81 Smith, Adam. “*The Wealth of Nations*”(1776) (New York: P. F. Collier, 1902), 207

82 Adam Smith, *The Wealth of Nations*, 516

Karl Polanyi proposes a different approach through ethics in analyzing the self regulating market system. Polanyi who was influenced by Leo Tolstoy opined that the self regulating market dis-embedded the economy from its social base creating cultural alienation. Polanyi analyses the destructive impact of the new economic system by focusing on the transformation of labor and land into market commodities. Labor (Human Beings) and land (natural resources) were commodified though they were never a direct product of human industry. As a result “Nature would be reduced to its elements, neighborhoods and landscapes defiled, rivers polluted... and the power to produce food and raw materials destroyed”.⁸³ Polanyi distinguishes between markets and the market system, that is, the integration of all markets into a single national or international economy. Polanyi vigorously criticizes this self regulating economy, unlike the economic system which was part of the society in close collaboration with the local community. The self regulating economy is unconstrained by society and operating simply according to its own law of supply and demand, which is not embedded in the local community without serving a purpose to the local community.

For Polanyi greater sanity belonged to the earlier phases of human development when economic activity exercised a social function and economic activity was a part and parcel of the local community serving its purpose. Labor was embedded in social relations and the mercantile society as such didn't seek to create a separate economic system as it evolved as an inherent part of the society. But the self regulating market created by state intervention created a counter current, which Polanyi characterizes as double movement. The force of self regulating market supported by owning and trading classes created a friction with the other social forces safeguarding the society that seek to protect the people, their land and their culture.

By this double movement, modern industrialized society despite the newness of the free market remains in continuity with the great social orders of the past. Even a large part of Asia, Africa and Latin America still has the similar kind of economy which is closely embedded with the local community, especially among tribal populations. The creation of divide whereby the economic activity was debased from

83 Polanyi, Karl. “*The Great Transformation*” (Boston: Beacon Press, 1957), 73

the social relations, the free market tore apart the cultural bonds- the values and the inherited institutions- by which people constituted their identity. In fact, the dislocation and marginal existence of third world populations is much better understood with the help of Polanyi's theory that importing western style economic development effectively "dis-embeds" people's economic activity from their social relations, tears the population out of the social matrix that assured their cultural identity, and in the long run may destroy their human self respect. It can be better understood through the commodification of land and is seen most clearly in the colonies of the European empires. It is immaterial whether the colonists needed the land because they wanted the metals and resources hidden under it, or whether they needed the land to organize the production of a surplus of food, for in any and every case, Polanyi argues, "the social and cultural system of native life first [had to] be shattered."⁸⁴

Polanyi insists that the early forms of economic life, defined by reciprocity, redistribution and house-holding, did not include markets at all. Whereas liberal philosophers and economists asserts that humans have been, by nature, barterers and hagglers, that the local markets is therefore the earliest institution and capitalism is the result of its evolution. In criticism to this view Polanyi suggests that historical research uncovers two kinds of markets, the external market, which trades in goods brought from distant lands, and internal markets, which trades in goods produced in local communities. These two markets had different origins and functions and were separate. The external market was non competitive as the goods were unique and not locally produced, and it encouraged use of money or precious metals as a measure of exchange value and was a phenomenon seen in port cities or trading points. On the contrary the internal markets were competitive, local markets was based on bartering and haggling as the goods which were transferred of mostly daily use and available from different sources. In Western Europe, nationwide internal trade was only possible through the intervention of state and was a result of mercantilist policies of monarchs. To trade one had to have access to a charter permitting one to trade. This evolution was not natural and brought about by political power. During the industrial revolution, for the first time in the history, society became an adjunct of the economic

84 Polanyi, *Great Transformation*, 138.

system. For Polanyi it was absurd to interpret the rich variety of traditional cultures simply as a precursor to the supposed higher achievements of the scientific-technological age. We have much valuable and profound human wisdom to learn from these earlier cultures which can give direction to the humanity and which could be enduring and sustainable for a long time to come. Stiglitz says that the inequality of western countries especially that of America is not just a result of market forces but even the government intervention and policies triggered it⁸⁵. Much of the inequality that exists today is a result of government policy, both what the government does and what it does not do. Government has the power to move money from the top to the bottom and the middle, or vice versa. Hence Stiglitz appear to concur with Polanyi when he says that merchantalist policies created such interventions coupled with the idea of free market dis-embedded society from the economic function led to such staggering inequalities in society.

Another thinker who like Polanyi but is an economist who is largely criticized Keynesian approach to economics and leaned heavily in towards smith in understanding the social and human implications of economics was Wilhelm Ropke. Ropke in an article “The Place of Economist's among the Sciences”⁸⁶ says that the economist's has their own occupational diseases, that is, a restricted vision. Ropke notes that the economists generally finds it hard to look beyond their own discipline or even to concede that the economy was a part of larger order about which other disciplines have an equal influence if not more. This provincialism was magnified by the order of economism the habit of viewing everything in relation to the economy and in terms of material productivity, making material and economic interests the centre of things by deducing everything from them and subordinating everything to them as mere means to an end. The drawback of Economic research magnifies when the complexity in a society and dependence of men on other factors influencing their policies and choices are ignored by the economists. Ropke says economism has invariably led economists in the trap called 'social rationalism', the tendency to regard market mechanisms as value neutral methods applicable to any economic or social order.

85 Stiglitz, Joseph. “*Price of Inequality: How Today's Divided Society Endangers Our Future.*” (New York: W. W. Norton & Co 2012), 46

86 Ropke, Wilhelm. “The Economic Necessity of Freedom.”, 3 *Modern Age*, (1959): 227, 234.

Ropke suggests that economists should endeavor to avoid segmenting economic inquiry from the complex character of human nature without any consideration to other factors like ethics and morality. He rejects the neoclassical premise of humans as rational utility maximisers. He says “The ordinary man is not such a *nemo aeconomicus*... the motives which drive people toward economic success are as varied as the human soul itself”.⁸⁷ Even it is not reasonable to premise economic theory on an understanding of humans as selfless creatures.

Ropke believed that attempting to study the individual human choices and actions based on economic considerations would make it a faulty and insignificant process. Economics as a science cannot be understood in isolation without relating it to other disciplines as human beings and their actions are more complex. He defined this tendency as 'Scientism', whereby we understand by science is merely fundamentally the narrow territory of the positivist and exact natural sciences and their technical application.⁸⁸ Scientism contributed disdain among economists' to make contact with sociology, ethics or politics.⁸⁹ In Ropke's view Adam Smith had a humanist spirit in comparison to Keynes, whose *wealth of nation* was a work on cultural history of mankind where economics was a organic part of the larger intellectual, moral and historical life of society. He asserts that Smith viewed social and economic life as the product of an invisible hand and “a living order with an imminent logic of its own which the human mind could comprehend and even destroy but could not duplicate.”⁹⁰

Keynes who flatly rejected Adam Smith’s doctrine of the invisible hand, in the opening paragraph of a 1924 lecture published in 1926 as an essay entitled “The End of Laissez-Faire” declared: The world is not so governed from above that private and social interest always coincide. It is not so managed here below that in practice they

87 Ropke, Wilhelm. “*A Human Economy: The Social Framework of the Free Market*”, trans by Elizebeth Henderson, (1960) (Intercollegiate Studies Institute Books, 1998) 121.

88 Ropke, Wilhelm. “*Civitas Humana: A Humane order of Society.*” trans by Cyril S. Fox. (London: William Hedge and Co, 1948) Accessed on December 13, 2014
https://archive.org/stream/in.ernet.dli.2015.501385/2015.501385.civitas-humana_djvu.txt

89 Ropke, *Civitas Humana*, 79

90 Ropke, Wilhelm. “*Economics of the Free Society.*” trans by Patrick M. Boarman, (1937) (Chicago: Henry Regnery Co, 1963) 224

coincide. It is not a correct deduction from the principles of economics that enlightened self-interest always operates in the public interest. Nor is it true that self-interest generally is enlightened; more often individuals acting separately to promote their own ends are too ignorant or too weak to attain even these.⁹¹ But even Keynes recognized that perceptions and beliefs play a major role in shaping individual behavior, they are even more important in shaping collective behavior, including political decisions affecting economics. Economists have long recognized the influence of ideas in shaping policies which is difficult to quantify, ascertain and many a times quite illogical. As Keynes famously put it, ‘The ideas of economists and political philosophers, both when they are right and when they are wrong, are more powerful than is commonly understood. Indeed the world is ruled by little else. Practical men, who believe themselves to be quite exempt from any intellectual influence, are usually the slaves of some defunct economist.’⁹²

Nevertheless Keynes saw the economy as embedded in larger society. Especially a capitalist system of economy cannot be symbiotic where a mutually advantageous harmonious relationship could exist all the time between those who control property and those who are dependent on others. There would be discordance between production of goods and production of money specifically because community considers goods as real wealth and money is artificial in its existence.⁹³ The production of material goods hence is an intermediary stage which leads to the creation of wealth. For Keynes capitalist economy is a debt economy where money is taken as a unit of account in which debts are created and discharged. Money serves as a link between the uncertain future and the lack of prescience regarding the future gives money the status and credibility.⁹⁴ But the system of capitalist economy was criticized by Marx and he predicted fall of capitalist system giving rise to socialism and ultimately communism. The right of property for Marx is the foundational limitation which eclipses all other rights. The property rights allow each and every citizen the enjoyment and disposition of his rights which is a product of his labor. For

91 Keynes, John Maynard. “*The End of Laissez-Faire.*” [1926], in Keynes, *Essays in Persuasion*, (New York: W. W. Norton, 1963), 312.

92 Keynes, John Maynard. “*The General Theory of Employment, Interest, and Money.*” (New York: Harcourt, Brace & World, 1936), 383.

93 Dillard, Dudley. “The Theory of a Monetary Economy.” In *Post Keynesian Economics*, edited by K. Kurihawa, (New Brunswick: Rutgers University Press, 1954)

94 Dudley Dillard, *The Theory of a Monetary Economy*, 293

Marx this creates friction as every man is in conflict with each other. In order to retain the right of property one must possess property otherwise the right becomes hollow. It also further means that one must accept materialistic goals as the object to secure his personal property and his rights. In absence of one's rejection of these materialistic goals one would be overcome by fellow men who do accept these goals. Hence the other rights are subservient to property rights. When we talk of equality in the eyes of law we expect law to protect property rights. The man devoid of property has no place before the law. The poor laborer is in a similar predicament since even his labor is owned by someone else along with the benefits accruing out of the labor. Hence, for a laborer there is no equality in the eyes of law and the notion of equality itself becomes ironic.

In *Communist Manifesto* Marx and Engels argued for abolition of private property.⁹⁵ After abolition of private property how would the distribution of property be done instead of private ownership or the markets on which private property is exchanged has not been clarified. Marx rejected the idea that private property as the source of capital to spur production is the most effective way to deal with the unavoidable fact of scarcity, the inadequacy of available means for satisfying all human desires. Scarcity implies that some individual or group will need to have the say-so over how any unit of resources will be used. Private property gives the power to decide to the individual. Each individual decides for himself what job to take. The individual or the voluntary association of individuals that has produced or purchased a machine, or a plot of land, decides how to use it. Aside from moral arguments based on individual rights to liberty and property, such an arrangement can be defended on the practical grounds that these are the persons best positioned to use the resources knowledgeably. Private ownership avoids the problem of efficient decision making and channelizing the resources. The private ownership gives the individual incentive to create new resources and to harness the power of existing resources to his maximum ability. Marx considers these arguments as a mere defense of private property and as the selfish misconception that induces the capitalist to transform into eternal laws of nature and of reason the social forms stringing from their present mode of production and form of property. That is, the supposedly essential role of private

95 Marx, Karl and Engels, Friedrich. "The Communist Manifesto." in *The Two Narratives of Political Economy*, edited by Nicholas Capaldi and Gordon Lloyd, (Hoboken, NJ: John Wiley, 2011), 397.

property in producing and allocating scarce resources would disappear once capitalism yielded to socialism and finally to communism. On the other hand Gandhi saw an imbalance in both aspects of property in private domain and property as a domain of the state. Gandhi saw property as a domain of people to be used by people for their collective wellbeing. Property in communism as well as capitalist oriented society becomes ultimately an instrument of violence at the hands of the owners.

Marx argues that the production should be nationalized. Production is to be consciously regulated by associated men in accordance with a settled plan. Hence the production would be centrally planned which could lead to concentration of power and resources, though not by an individual but an association of men. And how, according to what principles, would the nation centrally plan the new conditions of production is an open ended question to be settled. As H. L. A. Hart in '*The Concept of Law*'⁹⁶ argues that even a society of angels would need a system of law and rules not probably because they are otherwise inclined to err, but because they need a systemic guidance in their daily life. Hence, assumption of Marx that individuals in communist societies would function without a possible system to guide than they would under a capitalist system is quite misplaced. Whether there would be a moral or ethical code or conduct in such an economic system and if such code a necessary criteria to regulate people's economic activity. How far morality could govern people and what kind of moral laws should be made applicable is a difficult question to be answered. There is a thin line which divides morality with law many a times, and in an economic system whether its capitalist or socialist the morality of law is a much contested terrain.

Morality of Law

Morality takes us to a terrain where rights of person and the protection extended by the rule of law give rise to certain debates which we shall consider in this section. The conception of formal justice that is the regular and impartial administration of public rules becomes the rule of law when applied to the legal system. But many a time's failure to apply the appropriate rule or to interpret the principles of law correctly leads

96 Hart H. L. A. "*The Concept of Law*." (Oxford: Clarendon Press, 2001).

to subtle distortions of prejudice and bias. The moral principles are general and universal. Moral principles can also be an object of rational choice that is it also should be acceptable to all. When obligations can be accounted for by the natural duty of justice under an institutional set up which applies to all and the duty of justice consequently sustains. When we can explain obligations by invoking the duty of justice what could be the significance of moral principles. As we have a natural duty cast upon us by the constitution or a duty created by the laws regulating property and on the other hand we have obligations to carry out or follow rules of associations or activities we have joined. This creates a need to weigh duty and obligations differently as they do not arise out of a similar context.

The fact that obligations are assumed it is bound many a times to conflict with moral requirements. Rawls in his *A Theory of Justice*⁹⁷ argues that a principle of fairness has to be applied to distinguish between duty and obligations. He says “The term obligation will be reserved, for moral requirements that derive from the principle of fairness, while other requirements are called natural duties”. Lon L. Fuller in his book ‘The Morality of Law’⁹⁸ explains the morality of law by breaking down the concept into morality of aspiration and morality of duty. Where the morality of aspiration starts at the top of human achievement and morality of duty starts at the bottom. In other words the morality of duty engages man with the concept of “*thou shalt not*” and the morality of aspiration to the rules which tries to attain what is desirable like “*tho shalt strive to*”. It would not be easy analyzing each and every conduct through legal and moral standpoint and to justify the morally wrong as legal wrong may not be that easy. Fuller takes the case of gambling to understand and describe the two conjunctions of morality, where a moral legislator needs to have legal reasoning and justification to declare gambling an offense under the law not merely because of it being morally wrong. For a moral legislator Benthamite view of utility would give altogether a different justification. If a man wagers five hundred dollars out of his fortune of thousand dollars of what might be called an even bet, he has not in fact entered into a transaction in which possible gains and losses are evenly balanced. The reason being that if he loses, each dollar he pays out cuts more deeply

97 Rawls, John. “*A Theory of Justice*.” (Massachusetts: The Belknap Press of Harvard University Press, 1999), 303

98 Fuller, Lon L. “*The Morality of Law*.” (Delhi: Universal Law Publishing Co Ltd, 2013)

into his well-being, on the contrary if he gains, the gain would represent less utility to him than the five hundred he would have paid out had he lost. The transaction represents a voluntary act and without any intent to harm one another and yet it's a transaction which is to the disadvantage of both- judged, by the state of affairs just before the dice are actually thrown.

To understand gambling from the standpoint of morality of aspiration, the legislator may not concern himself with the specific harms that may flow from gambling but with the question whether it is an activity worthy of man's capacities. As all creative efforts have an element of risk and that it is right and good that a man engaged in creative acts should not only accept the risks of his role, but rejoice in them. The gambler, on the other hand, cultivates risk for its own sake. Unable to face the broader responsibilities of the human role, he discovers a way of its satisfactions without accepting the burdens that usually accompany it. Gambling for high stakes becomes in effect a kind of addiction. The final judgment that the morality of aspiration might thus pass on gambling would not be an accusation, but an expression of disdain. For such a morality, gambling would not be the violation of a duty, but a form of conduct befitting a being with human capabilities. In such a circumstance, there would not be a bearing of gambling on law. That is there is no way by which the law can compel a man to live up to the excellences of which he is capable. Hence in order to achieve the end law must turn to the morality of duty.

Legal system represents a set of complex rules designed to deliver justice and probably give enough legal justification so that a man who suffers a loss from the blind play of chance can be rescued safely to put him back on the road to purposeful and creative activity. When in transacting affairs with another, a man who pays money under a mistake of fact suffers a loss where the law of quasi contract could compel a return. Under a law of tort, a man could escape the consequence of his acts, except where his acts result in a consequence which is not a foreseeable risk that may be reckoned as an actuarial cost of his undertaking and thus subjected to relational calculation in advance.

In the early stages of law, principles concerning soft law didn't find much of an expression in legal discourse. Their acceptance today represents the fruit of a

century's old struggle to reduce the role of the irrationality and morality in human affairs. Hence, a kind of moral scale or yardstick is envisaged by Fuller which begins at the bottom with the most obvious demands of social living and extends upward to the highest reaches of human aspiration which human beings are capable of. It significantly refers to an invisible pointer as a marking line where the pressure of duty leaves off and the challenge of excellence begins. Fuller indicates that the line or the proper location of that pointer describes a scenario where the basic problem of social philosophy is surfaced. If it is set too low, the notion of duty itself may disintegrate under the influence of modes of thought appropriate only to the higher levels of a morality of aspiration. If the pointer is set too high, the rigidities of duty may reach up to smother the urge toward excellence and substitute for truly effective action a routine of obligatory acts.

As the Gandhian ideology wishes to bring out the capabilities of man in giving him space to utilize his creative faculties in a best possible manner and hence Gandhi argues that a man should own his basic tools of livelihood and village should be the center of decision making. It's only when you share that you live, this philosophy echoes the early Greek philosophers who believed that man is a political animal who had to find the good life in a life shared with others. If we were cut off from our social inheritance of language, thought, and art, none of us could aspire to anything much above a purely animal existence. One of the highest responsibilities of the morality of aspiration is to preserve and enrich this social inheritance.

Economics and Morality

Importance of basic evolutionary instincts has been long recognized in economics like self interest, but in due course it has also been recognized that it is not individual selfishness alone but rather that people will act in self-interested ways, where self-interest can include considerations of the wider good or straightforward altruism. Adam Smith⁹⁹ calls the 'moral faculties' is the capacity for making moral judgments, and that does not operate through a bodily medium. The sense refers to—the eye, the ear, and the taste—is not simply perception through a bodily organ or medium: it

99 Smith, Adams. "*Theory of Moral Sentiments: The Classic Philosophical Work on Ethics and Rights.*" (London: Harriman House, 2010) 86

includes judgment. Whether the moral judgments can drive self interest and what is the relation between both is an open ended and much debatable question. The relation of morality with law is inseparable and significant so is that of economics and morality. If we could say that the heart of economics lies in the principle of marginal utility, the principle by which decides the most effective allocation of resources at our command in achieving whatever objectives we have set for ourselves, and another being relations of exchange appears to pose straightforward question. If a person has no one else with whom he can exchange the fruits of his labor he technically don't have any economic problems until he had to decide how to make the most effective application of the scarce resources at his command, including his own time and energy where an encounter with moral questions can be significant. The decision to plant trees or cultivate the land or to shift the efforts to fishing where one might expect a greater return from his first hour as a fisherman than he would from another hour as a farmer or a planter is one of utility and morality. These situations could help us to draw a striking parallel between these two conceptions of economics and the two views of morality of duty and aspiration.

The economics of exchange poses questions of morality of duty as is governed by utility of scarce resources. The economics of marginal utility puts forth questions of morality of aspiration. The morality of aspiration has to do with our efforts to make best use of our short lives. Marginal utility economics deals with our efforts to make the best use of our limited economic resources. The two are in some ways not only alike in what they seek to do, but also in their limitations. Morality of aspiration necessarily implies some conception of the highest good of man, though it fails to tell us what this is. Exactly the same criticism, with same force, can be directed against the marginal utility principle. The Consumer is viewed by marginal utility economics as seeking to equalize the return for each rupee he spends. When he has spent so many rupees for books that the return from this particular expenditure begins to diminish perceptibly, he may shift his expenditures to some other direction; say for a richer and more satisfying diet. In this shift there seem to be implied ultimate criterion that stands above book clothing and all the other things and services for which men may spend their resources. The marginal utility economists may find it difficult to describe what this criterion is, though, unlike the moralist of aspiration, he has a word to cover his inability to explain, which is 'utility'. It is with this word utility that the

economist draws a veil over his inability to discern some economic good that stands above all particular goods and serves to guide choice among them. The economist's default remains, however, in essence the same as that of the moralist who purports to show men the way to the good life, without defining what the highest aim of life is or should be. For Gandhi the well being indicates well being of the poorest and any decision to understand utility should start from the question of what benefit would the poorest man around would benefit out of the economic conduct, whether it will benefit him and if so how? If it benefits the poorest person then it would benefit the people above the strata of the society gradually.

Duty as a guiding force

Under what circumstances does a duty, legal or moral become most understandable and most acceptable to those affected by it? Fuller¹⁰⁰ suggests three conditions for the optimum efficacy of the notion of duty. First, the relationship of reciprocity which gives rise to a duty should ideally emerge out of a voluntary relation where the parties would themselves enter into a relation based on duty without any external compulsion. Second, the reciprocal performances of the parties must in some sense be equal in value. Third, the relationships within the society must be sufficiently fluid so that the same duty you owe me today, I owe you tomorrow. But in what kind of society are these conditions most apt to be met. Fuller says that it would be in a society of economic traders that these conditions would be most apt to be met with. The economic relationships are largely voluntary in nature evidenced by a contract which is reciprocal and without any external compulsions. As for equality it is only with the aid of something like a free market that it is possible to develop anything like an exact measure for the value of disparate goods. Without such a measure, the notion of equality loses substance and descends to the level of a kind of metaphor.

The economic exchange of goods as a trader puts one in typical scenario where the trader acts as both buyer and seller, reversing the roles frequently. The reversibility of role that characterizes a trading society exists nowhere else in the same degree, as becomes apparent when we consider the duties running between

100 Fuller, Lon L. *The Morality of Law*.

parent and child, husband and wife, citizen and government. This creates a universal principle and dependence on each other which is voluntary and hence can be sustained without external compulsions or legal force.

The economics of exchange which is based on two fixed points: Property and Contract need to be interpreted understanding the boundaries of these concepts. Otherwise the society's efforts to direct its resources toward their most effective use are frustrated by a system of vested personal and institutional interests.

Gandhi and the conflict of property

Significantly differing from the western thinkers Gandhi had a different take on property rights in his schema of social rights and obligations. Gandhi was a product of his time and the colonial India reflected the existing world philosophy which was dominated by the western philosophers. The western powers who colonized much of the third world acted as their saviors by creating the notion of white man's burden, where as the attempt has been to exploit and further the western interests. In doing so, they created divisions in society. The perception of humanity was subject to slavery, human rights were subject to gender and skin color and race, rights and obligations were subject to class, religion and race. Hence, Gandhi in his life time saw and experienced affluence and utter poverty, influence and helplessness, domination and subjugation, war and peace. Gandhi understood how the philosophical thoughts and development of ideas are heavily influenced to create an environment to justify the superiority of the west and inferiority of the east and third world. The effects of industrialization and modernity were a reason for Gandhi to rethink on the existing ideology of his time and to find an alternative. Gandhi's philosophy hence tries to shed light on the darker side of modernity by engaging with property rights and obligations in his own way. In *Hind Swaraj* Gandhi says that machinery is a tool of subjugation. The focus is not to save labor but is driven by greed. For Gandhi the supreme consideration was man and machine should not tend to atrophy the limbs of man.¹⁰¹ Gandhi also criticized the facets of modernism – rationalism, universalism and individualism. Gandhi explains that “Rationalism is a hideous monster when it

101 Gandhi, *Hind Swaraj*, 7-8

claims for itself omnipotence. Attribution of omnipotence to reason is a bad a piece of idolatry as is worship of stock and stone believing it to be god”.¹⁰² Gandhi does not appear to plead for suppression of reason but he wants to understand that reason works with all its inherent limitations. Where modernism stresses much on rationality Gandhi strives to bring factors which are equally important for human personality like love, trust, emotions intuitions, consciousness etc. Gandhi finds it difficult to compartmentalize these factors influencing head and heart, rationality and humanity. Gandhi’s rejection of Universalism was his support for Swadeshi and local production. He fought the centralized tendency of modernism. For him the centralized modern state having monopolistic tendencies is an after effect of modernism. Gandhi remarks “The state represents violence in concentrated and organized form. The individual has a soul, but as the state is soulless machine, it can never be weaned from violence to which it owns its very existence”.¹⁰³ The Universalism encourages concentration of power and in turn violence which can be catastrophic for people and his cultural social and economic diversity.

In his criticism of modernity Gandhi considered dependence over machine as a major concern especially when it becomes a mode of subjugation. Gandhi’s foregrounding of use of technology whether it’s a modern mode of traveling or use of sophisticated machinery was a conscious effort revealed through an active discomfort Gandhi had in utilizing technology. This becomes a way of unmasking what Heidegger calls the ‘essence’¹⁰⁴ of modern technology. Heidegger argues that we are no less than blind if we see technology as a means to an end alone, and therefore means is not neutral but an expression of value.

Gandhi found subtle ways in which subjugation was carried forward by western world where fundamental ideas were viewed only through a binary. Use of Machine either as good or bad, as modern or traditional; obligations and rights for colonizers and for the colonized, for black and whites, diluted important questions

102 *Young India*, 27.06.1939

103 *The Modern India Review*, 1935 p. 413

104 Heidegger suggests that ‘essence’ has the closely related senses of holding sway, lasting or enduring, coming to presence; hence he uses the term ‘essence’ as a verb (‘essencing’, ‘to essence’ and so on) For an indication of what Heidegger means by ‘essence’, see his ‘The Question Concerning Technology’, in *The Question Concerning Technology and Other Essays* (New York: Harper Colophon Books, 1977), 30–1,

and Gandhi saw it as an attempt to engender and hide the violation by the same actors and institutions that claim themselves as protectors. Whether its slavery, colonization or even commerce, the attempt was to legitimize the western interests, which perhaps Gandhi tries to De-legitimize through his actions and thoughts required a broader and multiple perspectives.

Gandhi saw commodification as a serious problem with modernism. Individuals should not driven blindly by their desires but should control regulate and modify them after due consideration. In the absence of application of mind he believed that commodification of goods lead not only to market speculation and food shortages, but also unethical and immoral practices to accelerate and increase the production of food as a commodity and not as a life necessity. Individuals have to formulate their preference according to the characteristics of commodities rather than simply in terms of commodity as such or else it would end up mistaking shadow for substance.¹⁰⁵ Explaining further Gandhi says that this consumer acquisition may be symbol of material progress, but does not add an atom to our happiness.¹⁰⁶ For Gandhi these were obvious violations of rights to life that escape the classical paradigm of rights, the rights of people. For Gandhi the term commodification is not a narrow construct of a legal permission to buy or sell, but a broad term, where commodification includes not only buying and selling but also market rhetoric, the practice of thinking about interactions as if they were sale transactions, and market methodology, the use of monetary cost benefit analysis to judge these transactions.

The commonsensical view is that, certain things and rights to those things and produced, exist and can be seen to circulate through the economic system, which are also used to exchange for other such things, generally in exchange for money. That is, thing with use value that also has exchange value. For Gandhi, the process of commodification was problematic for eg., from a cultural perspective. Process of commodifying can be a cultural and cognitive process as it is necessary to mark the commodity culturally as a thing which can be commodified and which everything cannot be. At the same time to mark a thing as commodity by a person can be disputed by someone else. It also reveals in its process a moral economy where such

105 CWMG 60, 464

106 CWMG 13, 315

shifts and differences are difficult to be perceived in an objective economy of visible transactions. For Gandhi the western thought takes it for granted that things and rights attached to them represent the natural universe of commodities.

Apart from problem related to commodifying of legally or morally permissible exchange, such transactions which officially monetize non-monetary interests like compensation of torts poses conflicts whether its governmental action or externalities emerging from commercial activity. When all things termed as commodity can be expressed in terms of exchange or market value indicated by money, it makes all social value a commodity, capable of being expressed in money terms. When all such commodity is regarded as fungible, it makes it capable of being reduced to money without changing in value and completely interchangeable with each and every other commodity in terms of exchange value. The holder of a commodity - that is, the person viewed as commodity holder is defined as being indifferent among holding that particular commodity some other commodity of equivalent value to one in money or the sum of money itself. Hence, under universal commodification, all things of value to the person - including personal attributes, relationship and philosophical commitments - are described in monetary terms and are in principle alienable. This understanding of commodifying of social values is negated by Gandhi when he argues against universalism and modernism. It leads to Universal commodification where anything can be categorized as a commodity to sell and buy creating a market space for people to transact and commoditize goods which otherwise may not be possible. It also seems to suggest that everything people need or desire, either individually or in groups, is conceived of as a commodity. "Everything" includes not only those things usually considered goods, but also personal attributes, relationships, and states of affairs, even the functions of government, wisdom, a healthful environment, and the right to bear children are all commodities in a free market world.¹⁰⁷

The issue of commodification is also an attempt to control knowledge by commodifying it, which has been a characteristic of the twentieth century. Gandhi

107 A. Alchian & W. Allen, "*Exchange and Production: Competition, Coordination and Control.*" (New York: Wadsworth Pub Co, 1983) defines "economic goods" to include "all things that we would like to have friendships, cleanliness, health, honesty and the like and not merely marketable things like milk, shoes, and cars"

saw it as an attempt to strike at the fundamental fabric of a society whereby even the concept of basic right was interpreted to legitimize the subjugation and exploitation through colonization in which commerce was a legitimate partner. The individualistic nature of modern life is criticized by Gandhi and he says that “A drop torn from the ocean perishes without doing any good. If it remains a part of the ocean, it shares the glory of carrying on its bosom a fleet of mighty ships”.¹⁰⁸ Hence, the rights paradigm largely a product of political theory and the philosophy of law took ethics as a peripheral issue in the individualistic nature of modern society. The property discourse and its direction to rights discourse took is not predominantly a legal question but equally an ethical and moral one, as human are nonetheless an ethical aspect. For example, racism as a category classifies and ranks people, making them desirable or undesirable, and turning them into bare or dispensable lives.

Gandhi disputed and abandoned the western distinction and separation between the natural and human order and also the interests of industrialized and developed western countries in which the paradigm of rights were getting shaped. From Gandhi’s perspective the rights of individual and his obligations towards nature are intertwined; violation of the obligations towards harmonial existence with nature amounts to a violation of individual’s rights and therefore of basic rights where much is guided by how we define the rights like property.

Gandhi’s perspective seems to negate development and economic growth as foundations of well being and even of freedom by neglecting spiritual development and he says “I believe in *advaita*, I believe in the essential unity of man and for that matter of all that lives. Therefore, I believe that if one man gain spiritually, the whole world gains with him and if one man fails, the whole world falls to that extend”.¹⁰⁹ Respect for life rights, both human and nature, will not be effective if we consider that development is always good and wealth accumulation is necessary for wellbeing and happiness. The shift which Gandhi intends to bring is life rights cannot be sacrificed at the altar of development as what is important is life and not development at the cost of life rights. Gandhi wanted the colonized world to unlearn and relearn the Indian philosophy of life with nature. Hence, Gandhi’s attempt is probably to save

108 *Harijan*, 23.03.1947, 78.

109 *Young India*, 4. 12. 1912, 398.

the idea of rights from a pure western categorization and to bring in a Geo-political shift in approach.

Gandhi having witnessed in his life time world wars, racial discrimination, slavery, effects of colonization, genocide, pain and suffering due to dropping of atom bombs and mass murders all of which were a consequence of modernity and acquisitive tendencies. The western society in their tendency to find new market, access raw materials and to subjugate others kept command over knowledge and people. In contradiction to their claim of superiority they also became perpetrators of crime against life and property of people around the world for their own narrow interests. Gandhi wanted to undo the consequences of the rhetoric of modernity and the logic of coloniality. Hence, for Gandhi, non violence and Swaraj became prominent motto. Gandhi also gave much emphasis on ethics and morality two important aspects which were missing from western discourse on rights.

The expanding domains of rights developed resulting into an undisputed ownership and private property over commons property were legitimized. Hence, violation of basic rights emanating from appropriation of commons property gave an essential dimension of ethical questions, more significantly than that of a legal one. Gandhi saw the significance of private ownership as limited as his perspective was of 'duty' more than a 'right'. Ajith Dasgupta in his book *Gandhi's Economic Thought*¹¹⁰ argues that for Gandhi rights and duties were not just co-relative but rights were derived out of duty. Rights are contingent on performance of duty. The co relation between rights and duties can be understood from the following passage where Gandhi states that:

Every man has an equal right to the necessities of life even as birds and beasts have. And since every right carries with it a corresponding duty and the corresponding remedy for resisting any attack upon it, it is merely a matter of finding out the corresponding duties and remedies to vindicate the elementary fundamental equality. The corresponding duty is to labor with my limbs and the corresponding remedy is to non co-operate with him who deprives me of the fruits of my labor.¹¹¹

110 Dasgupta, Ajith K. "*Gandhi's Economic Thought*." (London: Routledge, 2003), 55

111 CWMG, 45, 339

Gandhi concept of Trusteeship as a duty which he attaches with the private property in using the rights attached to it. The Duty is to use the property rights to benefit the society as a whole and not keeping the right holder in prominence. It may be considered as an ideal but for Gandhi an ideal had to be defined in its pure form however difficult it is to realize those ideals. Gandhi hence was not concerned whether how far practical his ideals can be adopted, what was important for him that it is an ideal to be aspired for. The principle of trusteeship for him combined self interest with benevolence. For Gandhi believed that if was possible to acquire riches without consciously doing wrong.¹¹² Gandhi realized that as natural ability was unequally distributed every one didn't had the capacity to create wealth and taking that wealth away from them by force would be non violent. However, Gandhi intended that the rich should employ their resources in the service of mankind, after satisfying their own legitimate needs. Trusteeship doesn't advocate expropriating or liquidating the rich and so Gandhi firmly believed that the state controlling property rights may not be an ideal way to realize the potential of property. Further any expropriation of property is an act of violence as it is a forceful taking and it could have far reaching consequences. This view of Gandhi is suggestive of the idea that property cannot be understood as a 'thing' or as a right in a 'thing' but a right in relation to person over a thing. It indicates that property needs to be understood as a relation. Gandhi understood the motive of self interest in people and hence he never negated the idea of private property in toto either, and even recognised the role of private property in enriching one's life. To put it in simple terms and to quote E. F. Schumacher, in the forward of the book entitled *Equality Through Trusteeship*¹¹³

(T)he theory of capitalism suggests that the only way to run an economy efficiently is to let everyone pursue mainly, if not exclusively, his own advantage. The theory of communism is that the economy works best when everybody acts according to plan for the public interest. Both theories are plausible enough; but in practice they often do not work. Mahatma Gandhi put forward his trusteeship model as a via media or middle way.¹¹⁴

Gandhi's moral side to the idea of trusteeship and the rights we possess in relation to a property brings connection between property, morality and society.

112 CWMG, 75, 357

113 Mehta, Vadilal Lallubhai. "*Equality Through Trusteeship: An Alternative for Full Employment Along Gandhian Lines.*". (New Delhi: Tata McGraw Hill Education, 1978)

114 Vadilal Mehra, *Equality Through Trusteeship*, i-viii

Gandhi offered trusteeship in conjunction with society and economics to understand social responsibility of business, industry and the wealthy classes, but it is also an alternative to what Schumacher referred to as western capitalism, on the one hand and communism on the other. In essence he seems to be proposing a different outlook on the notion of property rights altogether.

Gandhi's trusteeship is generally criticized as it is regarded as a device to accommodate the owning class, with its shady past and shadier current practices in the framework of the existing order, but it could also be a means of putting an end to that order by transforming the basis of ownership¹¹⁵ and by incorporating ethics in commerce. His understanding of ownership rights was conditional. Honore explains certain conditions which he calls as 'incidents' of ownership which is jointly sufficient but are not individually necessary to constitute ownership. Honore's list of incidents includes, the claim rights to possess, use, manage, and receive income; the powers to transfer, waive, exclude, and abandon; the liberties to consume or destroy; immunity from expropriation; the duty not to use harmfully; and liability for execution to satisfy a court judgment. If a person has all of these incidents or most of them with respect to a certain thing, then he or she owns it.¹¹⁶ This indicates what in a way Gandhi tries to explain as what would constitute ownership which is creating a relation but which inherently rests on trusteeship.

Gandhi promoted trusteeship as a mechanism supporting for individual freedom. Pyarelal explains this concept as a formula for equality. 'All are agreed that there can be no peace in society so long as glaring inequalities exist and wide gap between the high and low, haves and have-nots remains. There are two ways of removing disparities. One is by lopping off from the haves and liquidating the owning class and redistributing the assets. The other is through state action by nationalization, expropriation, and the establishment of a system of steeply graded

115 Vadilal Mehra, *Equality Through Trusteeship*, 631-634

116 Honore, A. M. "Ownership," in A.G. Guest, ed., *Oxford Essays in Jurisprudence*, (Oxford: Clarendon Press, 1961), 108-12. The Qualification "or most of them" is used in the sense as ordinary usage allows ownership to be qualified or conditional. For example, people commonly say that they own a car, even though the car may be subject to mortgage, hypothecation or other restrictions.

taxation with an all pervasive system of controls.¹¹⁷ But these processes are no guarantee that inequalities will be altogether removed owing to the natural differences in the talents and capacity of individuals. Both of these actions represents force and violence hence the dilemma persisted. For Gandhi, violence in all its form, from ethnic cleansing and war to gross economic exploitation and ecological devastation begins with one simple thing: the appetite for more than ones share. Gandhi saw the connection between personal consumption, social injustice, political violence and economic sustainability and how the notion of property can be an interlinking connection between these. But whether effective regulation of property could be done through the idea of trusteeship; in envisaging a new structure of rights and duties and a system of organization based on non-violence, by putting welfare of all, the sharing of responsibilities, fruits of production as well as decision making in forefront, its possibilities are a matter of great dispute. Gandhi's lesson is that in the world of finite resources, equitable consumption can only be limited consumption and hence private property cannot be private in the real sense of the word.

Gandhi points to labor as a source of right over property. when he asserted “A true and non-violent combination of labour would act like a magnet attracting to it all needed capital, and capitalists would then exist only as trustees”¹¹⁸ If capitalist don't consider themselves as trustees then even the large corporations would fail to achieve their objectives. As Berle and Means in their seminal work *Modern Corporation and Private Property*¹¹⁹ explains that the management may not pursue the interest of the shareholders or owners or even labor force and hence the notion of separation of ownership and control was advocated. This was necessary because of the large size of enterprise where the owners themselves cannot take care of their own interests and they require cooperation from different sections. Hence trusteeship and industrial relation has a linkage where capitalist and labor force needs each other's cooperation and the relation is not simple one to earn profit.

117 Nayar, Pyarelal, “*Mahatma Gandhi: The Last Phase.*” Vol. II, (Ahmedabad: Navajivan Publishing House, 1948)

118 Gandhi, M. K.. “Towards a Nonviolent Socialism” *Harijan*, September 1947

119 Berle, Adolf. & Means, Gardiner, “*Modern Corporation and Private Property.*” (New York: MacMillan Co, 1932)

The doctrine of non-possession is another major principle of Gandhian economics. There is an essential linkage between this doctrine and other doctrines such as those of non-violence, non-exploitation and trusteeship. The philosophy of Non-Possession rests upon the idea that no one actually possesses anything, but it doesn't deny the existence of the concept of possession. The concept tries to define the notion of possession and the rights flowing from it as a result of possession. Generally it can be understood that this doctrine poses a challenge to modern society, characterized essentially as an acquisitive society. The doctrine of non-possession is regarded by Gandhi as an inherent element of property right. The voluntary reduction of wants could be construed as a totally negative doctrine. But Gandhi expounded it as a positive doctrine. Gandhi saw an opportunity for the rich to take the initiative in dispossession with a view to a universal diffusion of the spirit of contentment. If only they keep their own property with moderate limits, the starving will be easily fed, and will learn the lesson of contentment with the rich. According to him, the doctrine of non-possession would teach that everyone should limit his own possession to what is needed by him and spend the rest for the welfare of others. He considered this as a desirable non-violent method of reducing inequality of income distribution and Maldistribution of wealth. As J. D. Sethi in his book '*Gandhi Today*' puts it: "Gandhi's call for cutting down demands and his principle of non-possession were designed both to create a quick rate of growth and full employment, less on the basis of individual profit incentives and more on the basis of joint efforts and community advantage."¹²⁰ Moreover this doctrine is based on needs and not on demands. We don't have to create needs unlike demands in a market economy. Tawney in his book *The Acquisitive Society* explains that in an acquisitive society the basic tendency of individuals is to acquire more and more wealth where the basic motive of the public institutions, policy and political thought is to create opportunities to individuals rather than public service. Tawney further quotes that the dominant principle of an acquisitive society is that:

(I)t assures men that there are no ends other than their ends, no law other than their desires, no limit other than that which they think advisable. Thus it makes the individual the centre of this universe, and dissolves moral principles into a choice of expediencies... for it relieves them of the necessity of discriminating between enterprise and avarice, energy and unscrupulous greed, property which is legitimate

120 Sethi, J. D. "*Gandhi Today, Durham.*" (North Carolina: North Carolina Academic Press, 1978)

and property which is theft, the just enjoyment of the fruits of labour and idle parasitism of birth or fortune, because it treats all economic activities as standing upon the same level.¹²¹

Answering to a question in Harijan, whether the idea of trusteeship requires dispossession of the material wealth gained by owners? Gandhi says

The question lies in recognizing the owner's capability with respect to securing the wealth amassed by her. By contrast, if the state takes away the wealth from its owner, society will be the poorer, for it will lose the gifts of the person who knows how to accumulate wealth. The ideal strategy, would be to retain the owners' stewardship over their possessions and to use their talent "to increase the wealth, not for their own sakes, but for the sake of the nation and, therefore, without exploitation. The State would regulate the rate of commission which they would get commensurate with the service rendered and its value to society."¹²²

The analysis of antitrust jurisprudence also reflects a similar philosophy where a person's property right is protected so long it helps foster a better environment and the moment it becomes anti-competitive the property rights need to be curtailed as the core philosophy of the antitrust law believes that free market provides the best environment for economic development and prosperity.

The essence of private enterprise is the private ownership of the means of production, distribution, and exchange. Not surprisingly, therefore, the critics of private enterprise have advocated and in many cases successfully enforced the conversion of private ownership into so called public or collective ownership. Let us look, first of all, at the meaning of ownership or property. As regards private property the first and most basic distinction as Gandhian philosophy enunciates is between (a) property that is an aid to creative work and (b) property that is an alternative to it. There is something natural and healthy about the former- the private property of the working proprietor; and there is something unnatural and unhealthy about the latter- the private property of the passive owner who lives parasitically on the work of others.

121 Tawney R.H. "*The Acquisitive Society*." (London: G Bell & Sons Ltd, 1922), 34

122 Gandhi, M.K. *Harijan*. 63-64

Private enterprise carried on with property of the first category is automatically small-scale, personal, and local and their existence is vital for the economy. Reflecting such a sentiment even under an antitrust law in, *US v. Aluminum Company of America*¹²³ and *Brown Shoe case*¹²⁴ the courts in United States has allowed relatively small and struggling manufacturers to reorganize their distribution and dealer networks in order to compete efficiently with established manufacturers even when such efforts had restraining effects on intra brand competition. Such small scale enterprise carries no wider social responsibilities. Its responsibilities to the consumer can be safeguarded by the consumer himself. Social legislation and the trade union vigilance can protect the employee. Though no great private fortunes can be gained from small-scale enterprises, yet its social utility is enormous. Schumacher says that when we take the case of large scale enterprise, the concept of private ownership becomes absurd. The property is not and cannot be private in any real sense:

Such property may be called passive property, or property for acquisition, for exploitation, or for power, to distinguish it from the property which is actively used by its owner for the conduct of his profession or the upkeep of his household. To the lawyer the first is, of course, as fully property as the second. It is questionable, however, whether economists should call it property at all.... since it is not identical with the rights which secure the owner the produce of his toil, but is the opposite of them.¹²⁵

This reflects the sentiments of Gandhi when he criticizes the concept of private property in a capitalist set up. Even anti-trust framework in a free market environment proposes limitations on the notion of private property where the property is used as a tool to advance ones' self interest at the cost of the economy and a healthy process of commercial activity. Hence, the study is proposed to understand the notion of property in its multifaceted setting where property is a tool and it need to be viewed in conjunction with morality, individuality, freedom, ethics, society, labor and to view property as a relation. It is pertinent to understand whether such an outlook from Gandhian standpoint gives us a strategy to tackle the dynamics of property. The

123 *US v. Aluminum Company of America* 377 U.S. 271 (1964)

124 *Brown Shoe Co., Inc v. United States* 370 U.S. 294 (1962)

125 Schumacher, E.F. "*Small is Beautiful: A Study of Economics as if People Mattered.*" (London: Blond & Briggs Ltd, 1973), 186

historical background and evolution through the various theories of property and how philosophers saw it through different period of time has to be understood to analyse the problem of inequality and development and the next chapter would be devoted to get clarity on different ideologies which has emerged so far.

The problem of Ownership

Gandhi's philosophy of Non-Possession rests upon the idea that no one actually possesses anything and hence the concept of ownership is fundamentally problematic, but it doesn't deny the existence of the concept of possession. The concept tries to define the notion of possession and the rights flowing from it as a result of possession. This doctrine runs contrary to the established norm of ownership and private property in a modern society, characterized essentially as an acquisitive society. It asks 'of what do you claim ownership? For Gandhi his ultimate struggle was for freedom of the individual. Complete liberty was his ultimate goal and all other political struggles were subject to the ultimate goal. "Real Swaraj [freedom] will come, not by the acquisition of authority by a few, but by the acquisition of the capacity by all to resist authority when abused".¹²⁶ Hence, for Gandhi the gift of liberty carried with it the utmost moral responsibility for its use.

Gandhi in his endeavor held nonviolence to be a basic weapon in his political fight as it was democratic where the larger public can get themselves involved whether it's the participation of old, women or young. It was available to everyone irrespective of one's capacity and position in a given society—not just to those who owned weapons, but also to the weakest man. Second, a violent victory, however big the victory might be it would only indicate that the violence has triumphed and is not an indication of justice being delivered. The fate of the larger mass that is unarmed and helpless would be at the mercy and benevolence of the armed few, which is not sustainable, peaceful and democratic. This was contrary to very notion of liberty as Gandhi understood it.

126 CWMG 30, 159

Gandhi saw systematic destruction of India's cottage industries which supported millions of poor people to live a dignified life and provided a livelihood because the British, in their endeavor to capture market and get hold over resources created a systemic destruction leading to a market which is favorable for products of the Industrial Revolution. Gandhi hence emphasized in using hand knit cotton cloths and other locally produced goods where by cottage industry can be revived. Although this was a magnificent effort in itself, even more telling was the way he brought it about. His plans were not to complain, but to create a space for goods produced in India where the demand for the British goods would plummet. Gandhi urged and mobilized people to buy Indian-made goods and to destroy the foreign made cloths so that it would act as a symbolic warning to the British government of the resolution of the common man to support handspun Indian fabric khadi replacing foreign mill-cloth to become, in Jawaharlal Nehru's words, "the livery of India's freedom"¹²⁷. Gandhi created demand for khadi replacing mill knit cloth of industrialized England. Gandhi emphasized to create "demand-side economics." For Gandhi it was foundational and it catered to the needs of Indian society where unemployment and poverty in rural India is widespread. He believed that, ultimately, the only guarantee of good society lay in the quality of the citizenry.

Gandhi preferred decentralized form of government where the function of governing would be least and people will govern themselves hence he believed in "That government is best which governs least."¹²⁸ Once again, this indicates Gandhi's urge for complete moral authority where external control is minimal and individual freedom is maximum. The centralized governments of modern society decides for its citizen, the welfare policy, foreign relations, education and health policy where citizens surrender their personal rights, in the name of secure life, giving control to the governments, which in turn surrender their sovereignty to foreign institutions and faceless elements which would ultimately dictate the policies or arm twist the state to create policies which would serve their purposes. Gandhi urged people to be fearless

127 Mishra O. P. "*Economic Thought of Gandhi and Nehru: A Comparative Analysis.*" (New Delhi: MD Publications Limited, 1995), 35

128 Constructive Programme: Its Meaning and Place, CWMG, 75, 146-66.

as he believed “Fearlessness is the first requisite of spirituality. Cowards can never be moral”¹²⁹.

Gandhi believed in a decentralized governing structure as the capacity for people to govern themselves, to cultivate, to educate and to live a fulfilling life is a possibility which should not be underestimated. Gandhi, believed that large scale industrialized agriculture is not a requirement in India. It would lead to poor soil regeneration, unemployment, poor demand, and lack of marketing opportunities with long term loss. It would not only require dependence on mechanized instrument but also on electrical power and fuel. For the larger poor rural mass that have small land holdings it was impossible to compete with the industrialized production. Industrialized production will also lead to homogeneous food and heavy use of fertilizers which will ruin land and health of consumers. Good earth called for the sweat of one’s brow to yield the bread of life. One may criticize the production method as traditional and unsuitable but it should be recalled that organic farming and its products are now desire by people and it has its own market. Gandhi believed that simplicity is required in the way one lives, his food habits, and his possessions and in his thoughts. Healthy, nourishing food was the alpha and omega of rural economy which has to be maintained.

Gandhi believed that industrialism has certain inherent flaws and it should be adopted only when it is necessary and required: God forbid that India should ever take to industrialism after the manner of the West. The economic imperialism of a single tiny island kingdom (England) is today keeping the world in chains. If an entire nation of 300 millions took to similar economic exploitation, it would strip the world bare like locusts.¹³⁰

Gandhi was skeptic about the economic development happening in western industrialized society and its applicability in India. It was difficult to envision its sustainability and applicability in a nation like India where the socio economic conditions are different from the western world where industrial mode of production

129 M.K. Gandhi, CWMG, 24, 411

130 M.K. Gandhi, “Discussion with a Capitalist”, CWMG, 43, 412–413.

thrived. Gandhi believed that it would be catastrophic to copy the western model of development by industrialization. Even Adam Smith in his work '*A theory of Moral Sentiments*' says, that people has this disposition to admire and almost to worship the rich and the powerful, and to despise or at least neglect persons of poor and mean condition which is a universal cause of the corruption of our moral sentiments. He further says that "Moralists all down the centuries have complained that wealth and greatness are often given the respect and admiration that only wisdom and virtue should receive, and that poverty and weakness are quite wrongly treated with the contempt that should be reserved for vice and folly".¹³¹ Hence the idea of economic development is not perhaps acquisition of wealth and that which needs to be aspired for. There is a need for clarity of fundamentals of economic process and its dependence on the idea of property institutions. The idea of property which had been a subject of much debate from early ages met with a dramatic shift after industrialization where acquisition of wealth became desirable. The commercial entities started wielding much economic power sometimes large enough to influence state and its actors. Concentration of power in economic enterprises had a catastrophic impact many a time on the society. It reflected the expansion of private property rights which in turn eclipsed the commons property. This also led to the shifting of focus on accumulation of wealth by individuals in comparison to welfare of people at large. Economic progress and development of society were measured in terms number of rich and wealthy men and not in terms of distribution of wealth in society and the quality of life which people in general led.

131 Adam Smith, *A Theory of Moral Sentiments*, Chapter 3 , The Corruption of our moral sentiments that comes from this disposition to admire the rich and the great, and to despise and neglect the downtrodden and the poor.

Chapter – 2

A pragmatic Approach

“The will to economic power, if it is sufficiently single minded brings riches. But if it is single minded it destroys the moral restraints which ought to condition the pursuit of riches and therefore also makes the pursuit of riches meaningless”

r. h. tawney¹³²

Gandhi during his life time tried to bring social reform apart from his political struggle for self determination. His endeavor to reform the society and the immediate goal to liberate India from the colonial rulers led him to conduct different experiments with ideas and its applications. Gandhi was an action oriented thinker. Gandhi in his life time tried to build up strategies to understand and tackle the conflict of property as part of his struggle as property was a fundamental aspect and a point of conflict in untying the knot of reform. His understanding of property as a legal relation was surpassed by his need to use it for the benefit of deprived sections of the society. Gandhi appears to have conceived the idea of property stressing more on the obligations it creates rather than property as a source of rights.

Gandhi as a political activist and thinker had people as the audience, so Gandhi strived to keep his views simplistic and relatable for the rural mass. Hence, his economic ideas were not typically academic in layout to today's standards and it's a futile debate whether he was essentially a theorist. The crux was that his ideas of economics was for the masses to understand and uplift them and help them in having a holistic life, and hence, he described it in the terms a common man would understand, adopt and implement, in his day to day life.

In order to achieve a goal or to realize a dream, visualizing is fundamental. To live a life of happiness and holistic well being, it is pertinent to understand the kind of development, progress and prosperity, we require. Gandhi stressed more on a holistic

¹³² Tawney, R. H. The Acquisitive Society, 36

development and well being as that is fundamental from which one can build the humanity for greater heights. To achieve such a holistic well being what should be the parameters of economic, social, legal and political ideas, and how to execute them. To realize a holistic well being may not be an easy task and perhaps may appear as Utopian. For Gandhi such a holistic well being is something one needs to aspire for, strive for no matter that may be Utopian in appeal. As Judith Brown states in the biography of Gandhi, “He was caught in compromises, inevitable in public life. But fundamentally he was a man of vision and action, who asked many of the profoundest questions that face humankind as it struggles to live in community. ... As a man of his time who asked the deepest questions, even though he could not answer them, he became a man for all times and all places”.¹³³

Gandhi was predominantly a man of action. “He did not attempt to express his ideas in a finished form. Gandhi says “I claim to be an economist though not of the academic sort. I understand the roots of misery and (poverty) of India”.¹³⁴ You heard not only words but also his thoughts. You could, therefore follow him as he moved to a conclusion”,¹³⁵ in saying so to Louis Fisher, Gandhi indicates that his ideas are experiments and always is evolving and till he is alive the process of evolution will go on. In his preface to *Hind Swaraj*, Gandhi wrote that his views are 'mine, yet not mine'.¹³⁶ That is Gandhi expected to act according to them as long as it is proved to be wrong and it was his conviction that led Gandhi. He even showed open mindedness to rectify the mistakes if proven so. In the same way Gandhi accepted many things he opposed in the given circumstances to be of immense benefit if applied in other circumstances. Hence in describing Gandhi and his ideas, Nanda says, 'Gandhism is... only a distinctive attitude to society and politics rather than an ideology; a particular ethical standpoint rather than fixed formulae or a definitive system'.¹³⁷ Gandhi saw social conflict in society especially between labor and capital in industry; between tenant and landlord in agriculture and between village and city.¹³⁸ These conflicts

133 Brown, Judith M. “*Gandhi: Prisoner of Hope.*” (New Haven and London: Yale University Press, 1989), 394.

134 CWMG, 77, 341

135 Fischer, Louis. “*The Life of Mahatma Gandhi.*” (London: Jonathan Cape, 1951), 466.

136 M K Gandhi, *Hind Swaraj*, Preface.

137 Nanda, B.R. “*Gandhi and his Critics.*” (Delhi: Oxford University Press, 1985), 145.

138 Das Gupta, A. K. “Gandhi on Social Conflict.” *Economic and Political Weekly*, 3: 49, (Dec 7, 1968): 1876.

were having its base in property where the institutions whether economic, cultural, social or political were under constant friction. The unequal abilities of human beings and the unequal distribution of property rights convinced Gandhi that a strict regime of property can't be a basis of human development. Property rights have to be structured in such a way that the weakest person could be accommodated and he can have a fruitful life under the system and his weaker property rights will not be a barrier to his growth.

Gandhi in his life, through his experience and experiments realized that it is important to develop action oriented mechanisms to move with people and the system of state and to do so there should be some underlying principles which could be universally made applicable and could withstand the tests of time. Though Gandhi does not deny the importance of reason and believes it to be a way to organize ideas but not the most important one. Apart from reason, intuition, love, forgiveness are all instruments of knowledge and the role of emotions has its own importance. Hence, the approach of Gandhi is more complicated and cannot be understood by reason and commonsense alone which were visible in his mechanism of struggles. Gandhi advocates passive resistance and proactive approach on two strong forces of human nature to counter the man made inequality. The form of passive resistance in non co-operation or civil disobedience was a realistic approach with far reaching implications which he successfully practiced and it shows Gandhi as a realistic person who could harmonize the conflicts of institutions.

Gandhi and the earlier philosophers

First chapter of this thesis was devoted to understand the property theories which has influenced and left its mark on the discourse of property. All the property theories have its roots in the well being of the individual and the community. They consider that property is a tool to achieve human development and growth and it's the community's, society's and state's interest which is predominant and individual's right is subservient to the communities' interest. Nevertheless, a balance is equally desirable and whatever be the justification for granting property rights a single approach or justification limits the scope of property discourse.

Gandhi's nuanced engagement with the institution of property is symbolic of his lawyerly approach to the issue. In understanding the implications of property institutions, Gandhi drew extensively from his belief in the importance of access to the basic needs of man, the centrality of truthful living in public and private life, and most importantly his steadfast commitment to ensuring that legal change come about through a bottom up process, which is sustainable.¹³⁹ We can see in his writings that Gandhi hardly engages with the discourse of ownership, possession and property rights as such, but taking the concept of trusteeship which encapsulates ownership, possession and property rights suggests his willingness and ability to engage with trusteeship as an independent institution, a practice unique to those familiar with the law and legal institutions. Hence, to view Gandhi devoid of serious academic and legal consideration would be to under estimate his legal credentials. The vast literature Gandhi left behind is an evidence of his trained legal mind in sync with his political and philosophical ideals. And so, to view the Gandhian discourse in over simplistic and binary terms would be an under estimation of his works and thoughts.

In the spectrum of property theory to place Gandhi may not be an easy task as there are certain similarities in his thought however vague with the thinkers we had discussed in the earlier chapter. Gandhi finds lot of similarity with Locke where the primacy is given to the commons property and interest. But where Locke has tried to justify private property Gandhi in a way after almost 300 years where private property has become the norm tries to balance the conflict generated by public and private interest by pointing out the public nature of the private property. Gandhi is looking at the conflict generated by the private property where justification of private property is popularly considered as a long gone conclusion. Hence Gandhi tries to bring in obligations on private property holders by proposing the principle of trusteeship. In the bundle of rights Gandhi seems to have added a bundle of obligation by adding a perspective which is equally important or can even stand alone *Vis-à-vis* understanding the quiver or arrow in the bundle as a mere right. Here, Gandhi seems to be contradicting Bentham where he seems to say property is nothing but a basis of obligations and not right.

139 Ajith Dasgupta, Gandhi's Economic Thought, 2

As we see in first chapter there is a significant similarity with what Aristotle says as his best way of ownership regime is, where the land is owned individually but crops are communally used, where ownership is subservient to the communal use.¹⁴⁰ Gandhi in 20th Century says that it would be prudent to own land as private holding if the community cannot hold it for the benefit of all, but the duty vests with the individual who holds it to use it in such a way where the community shall benefit. The idea of trusteeship is reflective of such a thought where private property has become the established norm. Even Aquinas says that property exists to promote human well being that is property can be privately owned but its use should remain common.¹⁴¹ It establishes a deeper and fundamental medium for human good for Gandhi and Aquinas. As property is a fundamental medium of human good its ownership by collective or individual cannot be denied. But what should be the nature and contours of such a right need to be debated.

Locke like Gandhi says that one may appropriate more than he can use. Even for Locke such appropriation is justified only when there is enough for others in the commons property. Both Gandhi and Locke acknowledge that fundamental acts of use and appropriation are necessary to human survival but cannot be a basis for greed. The similarity goes further in the aspect of accumulation of wealth. Locke expresses doubt where Gandhi is quite firm on his belief that ultimate value of material prosperity puts us into a cycle of acquisitiveness and conflict. Hence the intrinsic value of money is questioned by both. However, later the use and application of Locke's idea has been controversial and quite contradictorily used by the later policy makers as has been described in the first chapter itself but his own thoughts in 18th Century draws several parallels with Gandhi.

In comparison Hegel's theory of property as a mode of social relation poses a very interesting comparison with Gandhi as for Gandhi the basic unit of development to begin is village where the social relation can reflect clearly. Property which is communal is more visible in villages where it is a creation of social relation depending on each other and creating obligations which go beyond the legal framework. Hegel's will theory's dominant aspect of self development and property as

140 Aristotle, *Nicomachean Ethics*

141 Aquinas, Thomas. "Summa Theologica"

a constitutive relationship among private property, personal identity and community describes Gandhi's outlook when he describes the notion of non-possession, trusteeship and sarvodaya where free will gains importance and it embodies the capacity for property. Hegel too allows ownership to the common good of the community and also allows modifications of property right in service of the common good consistent with preserving property as a right. Kant who views property in harmony with others distinguishes ownership as sensible and intelligible. Where sensible possession being bare physical possession and intelligible possession as possession of an object without holding it and is tantamount to ownership. The idea of property is complex where it cannot be empirically determined but reason alone establishes its reality. Kant's thought of what it means to have objects as your own is significant from a Gandhian perspective rather than how to acquire them, indicates an in-depth understanding of property which Gandhi too grapples with. Like Kant, Gandhi also views property not as an object but an institution that regulates relationships between and among persons. It's a means of welfare rather than an end in itself. It was with utilitarian idea of property that Gandhi goes into conflict especially with Bentham. Even with Adam Smith Gandhi finds harmony in some fundamental ideas. Even Smith the father of "Capitalist" Doctrine acknowledges that pursuit of wealth can be potentially corrupting.¹⁴² People believe that acquiring wealth and power will make them happy because others will admire them. This though Adam Smith recognizes as a vain pursuit. For Smith, true happiness consists in tranquility. But the illusion that wealth will bring happiness is not altogether bad, provided properly constrained and institutionalized. On the other hand Polanyi who like Gandhi is significantly influenced by Tolstoy takes a Gandhian approach in his analyses of the destructive impact of the new economic system by focusing on the transformation of labour and land into market commodities. Labor (Human Beings) and land (natural resources) were commodified though they were never a direct product of human industry. As a result "Nature would be reduced to its elements, neighborhoods and landscapes defiled, rivers polluted... and the power to produce food and raw materials destroyed".¹⁴³

142 Adam Smith, *Wealth of Nations*, 16

143 Polanyi, *Great Transformation*, 73

With Ropke Gandhi finds harmony. Ropke says economism has invariably led economists in the trap called 'social rationalism', the tendency to regard market mechanisms as value neutral methods applicable to any economic or social order. Ropke suggests that economists should endeavor to avoid segmenting economic inquiry from the complex character of human nature. He rejects the neoclassical premise of humans as rational utility maximizers. Gandhi also significantly differs in applicability of rationality as for him rationality poses inherent limitations as things cannot be differentiated between head and heart. He says "The ordinary man is not such a *nemo aeconomicus*... the motives which drive people toward economic success are as varied as the human soul itself."¹⁴⁴

Gandhi has significant difference with what Bentham and Utilitarian's considers as the nature and contours of property. Though the Utilitarian idea in conjunction with Gandhi is discussed later in this chapter but it's pertinent to discuss it here to an extent possible especially when we now discuss the pragmatic approach of Gandhi.

Gandhi and American Pragmatism

Gandhi's ideals of non possession, trusteeship and sarvodaya which were effectively utilized to realize his political and social goals were predominantly antagonistic to property's dominant utilitarian understanding. Gandhi's ideals reveals how its legal framework may be used and deployed towards realization of a plurality of normative goals even in 20th Century society. This is where the middle path approach or the pragmatism in Gandhi don't summarily reject the market based capitalist approach but by embracing the notion of capitalism in a property regime of his own to an extent possible and by introducing trusteeship, Gandhi successfully achieved what otherwise would have been impossible. He brought into his fold the capitalist who could stand for the cause Gandhi stood for. His readiness to alter his thinking when circumstances change was not a marriage of convenience and compromise but a clever strategy. His thinking exhibits an uncanny resemblance to American Pragmatism¹⁴⁵ which was gaining idea at the other side of the globe in 19th century. This legal and philosophical

144 Ropke, Human Economy.

145 Posner, Richard A. "What has Pragmatism to offer Law?" 63 *S. Cal. L. Rev.* (1990):1653, 1600

pragmatism characterized by the ideas of anti foundationalism, instrumentalism and context sensitivity was a unique blend which is visible in Gandhian pragmatism.

Gandhi's pragmatism emphasizes a healthy and constructive skepticism towards capitalism, but at the same time recognizes the importance of several of the capitalistic institution's goals and objectives. By entering into a dialogue with the idea of capitalism and by making intelligent choices, Gandhi sought to infuse capitalism with a plurality of normative ideals through a reliance on the techniques of practical reasoning and situation sensitivity. Gandhi sought to create a space within the capitalist structure and didn't altogether advocate removal of capitalist principles. If a change has to be brought then it should a change in fundamental ideals of people. The philosophical pragmatism and legal realism which flourished in the latter half of 19th Century was a result of the scientific activities of 17th and 18th Centuries. The scientific activities persuaded the people that the physical universe had a uniform structure accessible to human reason and that even human social system might have a similar mechanical structure to it. It has hence believed that through perception, measurement and mathematics the human mind would uncover the secrets of nature and the laws of social interaction. This is also applicable to laws decreeing balanced government, economic behavior in accordance with the principles of supply and demand, and moral and legal principles.

This view challenged the ideals held and propagated by the romantic poets like Blake and Wordsworth who influenced thinkers like Pierce, Holmes or Nietzsche. They probably wished to shift attention from a passive, contemplative relation between an observing subject and an objective reality, whether natural or social, to an active, interactive and creative relation between striving human beings and the problems that counter them and that they seek to solve. Social institutions being scientific, legal or religious were the product of shifting human desires rather than of a reality external to those desires. Truth as observer independent was not a pragmatic approach. The pragmatist real interest was not in merely truth, but in belief justified by social need. Pragmatists recognize that knowledge is local and perceptual and is shaped by the historical and other conditions in which it is produced.¹⁴⁶

146 Posner, Richard A. "*Law, Pragmatism and Democracy*."(Harvard: Harvard University Press, 2003)

For Gandhi truth had multiple dimensions whether it being moral, spiritual or metaphysical in both theoretical and practical content. Truth being the central tenet of his philosophy which bridges his thought to action. Such an action should be based on the moral principles and is performed in the spirit of truth, that is satyagraha.

Hence, truth can have different facets; it can be what is fated to be believed in the long run as Peirce thinks. It can also be that the truth is what is good to believe as James suggests, or truth is what survives in the competition among ideas as Holmes views it. Similarly, Thomas Kuhn says that scientific theories do not just indicate the things as they are found in nature but it also indicates a function of human need and desire. It is a narrow outlook and perspective to consider the succession of theories on a given topic as a mode to bring us closer to ultimate reality. Cardozo in his seminal work '*The Nature of the Judicial Process*'¹⁴⁷ also argues for legal pragmatism. Cardozo takes the law as a body of immutable principles as objective, but to be viewed in a pragmatic sense, which is not the sense of correspondence with an external reality. For Cardozo, the final cause of law is the welfare of society and hence the things that counts is not what the judge believe to be right, but what he may reasonably believe that some other man of normal intellect and conscience might reasonably look upon as right. Law needs to adapt to the changing times need to be forward looking, for it to be a pragmatic concept of law. Cardozo says, there can be no wisdom in the choice of a path unless we know where it will lead. For a judge to weigh the social interests that shape the law, the knowledge which can guide him is the experience and study and reflection; in brief from life itself.¹⁴⁸ Interpretation of law whether principles in common law or statutes is a creative process and not a mere contemplative task. The early 20th Century, pragmatism was crippled by lack of tools of economics, statistics and other pertinent sciences which were insufficiently developed to enable a social engineering approach to be applied to law. Now the strengths of pragmatism are better appreciated than half a century ago.

147 Cardozo, Benjamin N. "*The Nature of the Judicial Process*." (New York: Dover Publications Inc, 2005)

148 Benjamin Cardozo, *The Nature of the Judicial Process*, 113

The pragmatic temper or outlook is broad enough to embrace a multitude of philosophies that are profoundly inconsistent at the operating level, including a multitude of inconsistent jurisprudence. Where in law the concern is not to find an objective truth, pragmatism has been of great relevance. If the truth is unattainable then there can be no higher truth to look upon as a measure and hence there can be no convincing ground for foreclosing further inquiry based on any higher truth. The critical outlook towards legal approach on entities like mind, intent, freewill, causation, reasonableness can be seen as a pragmatic approach. Tested by the pragmatic criterion of practical consequence, these entities are remarkably elusive. Law seems to have no means of locating them in fact ignores them on any but the most superficial verbal intent. The law tries to see evidences that indicates intent or *mens rea* in a crime and tries to decipher the intent which often go the dangerous level of adventure having a very contradictory consequence.

For instance people who have caused no harm at all may in the process can be interrupted and punished for attempt and conspiracy; any person can be held liable in tort law when their acts were neither a necessary nor a sufficient condition of the harm that ensued; and persons whose acts caused injury in an uncontroversial sense may be excused from liability because the harm was an unforeseeable consequence of the act.

The principle of legal liability can be re-described without reference to metaphysical entities such as mind and causation. This re-description is an important part of pragmatic jurisprudence, though may not be quite digestible at a semantic level. Pragmatism in a way tries to counter formalism. Legal formalism holds that legal issues can be answered by inquiry into the relation between concepts. Such an inquiry can be done without need for more than a superficial examination of their relation to the world of facts. In this scenario the predominant question which is being answered is what rules and outcomes have a proper pedigree in the form of a chain of logical links to an indisputably authoritative source of law. As only those rules and outcomes which comply with the rules are then correct and the rest is objectionable. It could lead to a superficial working of legal institutions.

Similarly, the rule of common law that there are no non-possessory rights in wild animals can be generalized automatically and without any hesitation can be

applied to bar any person to hold any rights with respect to natural resources. This indicates that we can obtain the correct rule of property rights in oil and gas without ever having to go into the economics of developing these resources. The pragmatic approach reverses the sequence with the questions that what is the right, which would be more sensible, efficient, and fair for oil and gas. Pragmatist in his inquiry will probably look into wild animal laws with an empirical approach dominating his inquiry. There will be no inclination to allow existing rules to expand to their semantic limits, by a process of analogy or verbal similitude alone. Formalism on the other hand restricts the people into the mold of existing legal concepts, viewed as immutable and rigid. The pragmatist thinks that concepts should be subservient to human need and therefore prefers law to adjust its categories to fit the practices of the non legal community as well.

The interpretation of text is not a pure logical exercise. Pragmatist are more interested in using the legislative or constitutional text as a resource in the fashioning of a pragmatically attractive result rather than testing the authenticity of a suggested interpretation as an expression of the intent of legislators or framers of the constitution. A pragmatist will never agree to the consequence where a murderer being benefited by the succession rights of the murdered. A strict interpretation of the law may not find the murderer as a successor to be illegal but morally and ethically the question which needs to be answered is can an offender benefit from his offense. For a pragmatist this question cannot be answered affirmatively. From a moral and ethical standpoint, to assume the consequence of crime and legal succession as the consequence should not end up creating a norm. Hence it is required to interpret law not just by the letter of law but also by the spirit of law.

Two major schools of thought differs in a core aspect of interpretation of statutes where statutes need to be interpreted as they are written and other school argues that statutes are a culmination of public opinion voiced through legislators, who can be thought to be faithful representatives of constituents who share the same devotion. It reflects a social choice theory which reflects on the difficulties of aggregating preferences by the method of voting, whereas on the other hand the interest group theory of politics points out the suggestions of economists that the legislative process often caters to the re-distributive desires of narrow coalitions and

ultimately ends up in conflict with the public welfare. To locate statutory meaning by way of legislative intent or judges seeking to perfect through interpretation the decrees of special interest state may be not be easy task at it seems. It indicates a need to understand the ends of law in conjunction to the social change and the consequence of it.

If we consider further the relation between pragmatism and economic analysis, Richard Posner suggests both are very much compatible as pragmatism recognizes that there are areas of discourse where lack of common ends precludes rational resolution. The economic approach has prolonged itself on ethical insights developed by philosophers like Kant, Rawls, Bentham and Nozick, but still the economic approach cannot content itself of legal pragmatism. Its limitation becomes obvious when questions like freedom of speech and its restrictions are considered, may be economics can indicate efficacy and consequences but not about the question of restriction of it as such. Pragmatist like John Dewey and Peirce has tried to generalize the ethics of scientific inquiry, open mindedness, forward looking, respectful of fact, and willingness to experiment. Hence economic analysis and pragmatism can be argued to be compatible in their approach towards law.

Morality and Ethics

It's quite a challenge to attempt to find an answer as to how far Gandhi's idea of morality and ethics, in principle and in practice can find voice and expression in twenty first century. Ethics and morality can be a reflection of time. Would it be proper for the future generation to understand the morality and ethics of today's world and to test it according to the ideals of their time? Perhaps, many of the ethical and moral practices would be labeled as savage by them. Hence Gandhi's idea has to be understood in the context and to see how far certain principles which are universal and based on morality and ethics transcend the time.

Gandhi's idea of economics cannot be understood devoid of ethical values. Gandhi's ethical system rejected the western model of utilitarianism and contrasted it with an emphasize on social justice as fairness to the individual, with priority to

collective rights. Rawls¹⁴⁹ and Gewirth¹⁵⁰ had closely followed Gandhian ethical principles in their endeavor in understanding distributive justice. Justice whether it's economic or legal and social in Gandhi's schema has a strong basis on ethical values. Hence his approach was development from a bottom up process unlike in a centralized system of governance. Gandhi approached distributive justice from a poorest of the poor perspective and justice to the most vulnerable was a foremost consideration.

Gandhi believed that economics which do not take care of ethics is doomed to fail as it was illusory in nature and had little to do with real life. And any nation or individual who are to be guided along such principles of economics will perish.¹⁵¹ Like ethics, morality was also a significant component as ethics evolves out of moral values. Referring to people like Ruskin who realized the role of morality proclaimed that men can be happy only if they obey the moral law.¹⁵² To explain what morality is though not an easy task but it's definitely futile to put it in a definition. Paul Bloom, argues in this book '*Just Babies*'¹⁵³ argues that morality is biological in the sense that to distinguish between right and wrong is not a process of law but is a process of life and more so biological in nature and its evidence can even be seen in babies.

Gandhi's theory of bread labor can be seen as an attempt to strengthen the moral foundations of commerce. By stressing on giving oneself dignity in earning one's bread by laboring with his own hand and consequently helping the poor to escape the shackles of industrialization or mechanical life, Gandhi attempted to instill the values of ethics and morality.¹⁵⁴ This was central to his economic and social philosophy.

The consequences created by the current mainstream economic theory and its practice have brought Gandhian economics and methodology into significant relevancy. Economics which had been devoid of ethical values has focused on market

149 Rawls, J. A. "*Theory of Justice*." (Harvard: Belknap Press of Harvard University Press, 1973)

150 Gewirth, A. "*Reason and Morality*." (Chicago: University of Chicago Press, 1978)

151 The Great Sentinel, *Young India*, 13 October, 1921

152 Gandhi, M. K. "*Ruskin: Unto This Last, A Paraphrase*." (Ahmedabad: Navajivan Publishing House, 1951), 1

153 Bloom, Paul. "*Just Babies: The Origins of Good and Evil*." (New York: Crown Publishing, 2013)

154 Letter to Narandas Gandhi, 14/16 September 1930, CWMG 44, 147-50

forces, which was thought to be a value-neutral mechanism capable of arranging for a wide and relatively equitable distribution of resources. However, in recent time the advent of technology has enabled unlimited consumption and greed but also legitimized it by expansion in production. This development has ignored social wastefulness as distinguished from market wastefulness.¹⁵⁵ Even pushing the critical issues like right to employment, state as an institution of violence or the corporate system as an institution of exploitation has all been pushed aside into periphery.

The expansion of production has increased the severity of environmental problems, unemployment, exploitation and inequality. This has led to the creation of new wants for those who were well off and for the larger majority of people who finds it difficult to satisfy their basic needs were left out. How can we justify economic progress when the larger mass is in utter poverty and is left out to be exploited? What is the ethical and moral foundation of such development? Isn't the property regime which favors accumulation of wealth in ignorance of ethical and moral fabric of society unjustified?

Gandhi has claimed that "true economics never militates against the highest ethical standard, just as all true ethics, to be worth its name, must at the same time be also good economics... true economics stands for social justice; it promotes the good of all equally, including the weakest and is indispensable for decent life".¹⁵⁶ Gandhi remarked that "the mind is a restless bird; the more it gets the more it wants, and still it remains unsatisfied". So the nature of man is such that "a man is not necessarily unhappy because he is rich, or unhappy because he is poor". "Life corroding competition and large cities do not further health or happiness".¹⁵⁷ Gandhi favored decentralization of production and consumption bringing the ultimate consumer to the source of production. Gandhi's economic ideals aimed at regulation of excesses of factories and machinery rather than their destruction. Gandhi believed that it would liberate the poor from the "bonds of the rich".¹⁵⁸ Economic activity impacts not only the economy but also society and the environment. Hence taking economic efficiency

155 J. D Sethi, J.D. "Essay in Gandhian Economics." In Forward, edited by Diwan and Lutz, (New Delhi: Gandhi Peace Foundation, 1985), XIII- VI

156 Primary Education in Bombay, *Harijan*, 9 October 1937

157 Gandhi, *Hind Swaraj*, 45

158 'No and Yes', *Young India*, 17 March 1927

based on production and consumption to understand distribution of income or monetary power would be inadequate. The tendency to monetize human values could be catastrophic.

The essentials of Gandhian economics, “boils down to this simple injunction: never advocate actions or policies that lead to material advancement at the cost of social, moral, or spiritual impoverishment. Instead the holistic approach of an economics should be to ascertain that his organizational principle and policies enable or should possibly encourage, a higher overall quality of life for all.¹⁵⁹

Gandhi points out to seven social sins where he states that wealth without work and commerce without morality is a social sin and by linking work with morality he exemplifies that work and morality cannot be compartmentalized in life and towards the approach to the problems of life.¹⁶⁰ They were all problems with multifaceted angles to it and morality, religion, work and commerce was so internalized that one cannot be viewed from a single stand point. This creates a space for morality and ethics and to consider these values as foundational. The property regime has to have a strong ethical and moral foundation and only then it could serve the purpose of uplifting the poor from the grips of poverty as property rights will have a bearing not just to the person who holds it but to the community also. Gandhi says “if you spend a rupee in buying a death dealing instrument for murdering someone, that rupee is dipped in blood, worthy only to be thrown away, where as if you spend that same rupee for buying food for a starving man it may mean life for him. The rupee so spent is thus charged with life giving properties”.¹⁶¹ Gandhi was influenced by Ruskin and he believed that “An economics that inculcates Mammon worship enables the strong to amass the wealth at the expense of the weak, is a false and dismal science.¹⁶² Gandhi was a practical idealist.¹⁶³ He treated life as an integrated whole: blending personal and public; principles and their practice. He used ethics, morality, virtue, dharma and religion as interchangeable terms.

159 Diwan and Lutz, 'Introduction', in *Intermediate Technology in Essay in Gandhian Economics*, 1987, 13

160 'Notes', *Young India*, 22 October, 1925.

161 CWMG 41, 466

162 CWMG 66, 168

163 CWMG 18, 133

Gandhi saw the development which was happening and the direction it was taking the humanity as unsustainable in the time to come. He is quoted as saying that the “Earth provides enough to satisfy every man's need but not for every man's greed”.¹⁶⁴ The greed which is promoted by way of man's dependence on machinery and taking machinery as a tool to advance his narrow self interests is unsustainable. The biggest drawback being that machinery helps a few to ride on the backs of millions. It was completely unacceptable for Gandhi to see how affluence of some is tied to the misery of many or vice versa. The impetus behind it is not the philanthropy to save labor, but greed.¹⁶⁵ This parasitism of man over machine about which Gandhi talks is a consequence of man's dependence of machinery leading to a parasitic society. Gandhi explained it in the following way-

Man is made to obey the machine. The wealthy and middle class become helpless and parasitic upon the working classes. And the latter become so specialised that they also become helpless. The ordinary city dweller cannot make his own clothing or produce or prepare his own food. The cities become parasitic upon the country. Those who live in temperate climates are increasingly parasitic upon tropical peoples. Governments upon the peoples they govern. Armies upon civilians. People even become parasitic and passive in regard to their recreation and amusements.¹⁶⁶

Though Gandhi's arguments for independence from machine based mass production can be understood in the context of Indian independence struggle but the concept of Swadeshi which Gandhi developed had multiple goals to it. Diwan and Lutz points out that Swadeshi ‘demand the sacrifice of utility for the sake of loyalty’.¹⁶⁷ Gandhi urged people, especially those in urban areas to consume locally produced goods because of the ideal of neighborliness. This principle though appears to be simple but had significant ecological and economical bearings. It led people to simple living and high thinking. Gandhi expressed his idea clearly in 1919 in a meeting pointing out that 'Swadeshi is that spirit in them which required them to serve their immediate neighbors before others and to use things produced in their neighborhood in preference to those more remote. In so doing, they served humanity to the best of their capacity. They could not serve humanity neglecting their

164 Pyarelal, Nayyar. “*Mahatma Gandhi*.” Volume X: The Last Phase, Part II, (Ahmedabad: Navajivan Trust, 1958), 552

165 'Discussion with G. Ramachandran', *Young India*, 13 November 1924

166 'Notes' *Young India*, 15 April 1926

167 Diwan and Lutz, 'Introduction', *Essays in Gandhian Economics*, 14

neighbors”.¹⁶⁸ It is in their interest, for their existence and for their well being that people should cultivate the habit of swadeshi. Swadeshi is an attempt to bring producers and consumers to engage with locally produced goods so that infant industry in rural society can flourish.¹⁶⁹ At the same time it can check the ill effects of globalization and economic exploitation.

Gandhi like Locke says permission or no, it is stealing if we take more than we need. Even if it is done inadvertently as some of our actions may not be consciously done and by habit we perpetuate our needs and desire which makes us acquire more than we need and the acquisition becomes limitless where the need replaces acquisition as an end in itself. Today we only desire possession of a thing; tomorrow we shall begin to adopt measures, straight if possible, crooked when thought necessary, to acquire its possession. Then possession and ownership becomes a species of violence. Gandhi's faith and insistence on non violence in a way conflicts with the property rights and hence how one uses it, by way of duty being cast by law or by ethical and moral obligations, would be a deciding factor to bring legitimacy to property rights. Gandhi who denounced violence in action, in words and in thoughts saw his faith on non violence as a non negotiable aspect to have bearing on interconnectedness of life. Property rights if taken to have bestowed obligations would make it more meaningful. If we consider it as a duty and an obligation, then to possess beyond what we reasonably require, is a sin, violence committed, which ultimately leads to greater divide of inequality. And the test for the progress of a country would not be measured by the millionaires, but by the well being of the masses.¹⁷⁰ In a time of great crisis which reflects political and economic instability, environmental problems and humanitarian crisis, it is necessary that we use the resources with limits and to share what we possess in an equitable manner with community.

Gandhi's idea of non possession is a clear indictment on a society based on multiplication of wants and unnecessary consumption. The real purpose of an economic system is to guarantee to every person a world where one's needs and

168 'Speech at Woman's Meeting, Godhra', *Young India*, 20 August 1919

169 William M Dugger, "An Ayresian View of Gandhian Economics." *Journal of Economic Issues*, 16:2, (Jun, 1982) : 441-444

170 'Speech at Muir College Economic Society, Allahabad', 22 December 1916, CWMG, 13, 310-17.

mechanism to attain the needs are through meaningful processes where the co-operation between people could create a common destiny for each other rather than the needs become a point of conflict.

The significance of Non possession or voluntary poverty gains importance in such a context of acquisitive society. Non possession for Gandhi has two different facets, that is, the distinction of voluntary poverty as a lack of status and lack of sustenance.¹⁷¹ The struggle is between ceremonial and functional attributes. The struggle for status is predatory as it has to be acquired, where as sustenance is productive, as it is skill and knowledge based. Locke acknowledges the very notion where he states that Labor is a self generated, intentional action something which the person makes through the exercise of her intellect and will and is significant in conferring ownership over property.¹⁷² For Gandhi voluntary renunciation is of status and not of sustenance and it has a significant economic and moral value attached to it.

The idea of trusteeship aims to bring social, political and economic decentralization and at the same time is an attempt to provide opportunities for the marginalized where they can participate and work in decentralized structures and modes of institution which are sustainable and independent. Trusteeship has an inherent non violent approach where it tries to create an environment where there won't be any forceful takeover of the property but attempts to create a structure where one can make difference to people around them. For Gandhi change cannot be brought about unless a change of mind can be made. Hence trusteeship to an extent is a balancing act. On one side it tries to avoid conflict and violence and on the other side it attempts to create a structure outside the system of governance where people can without depending on state can participate in community welfare. Gandhi took it as a system which can withstand the test of time avoiding the circle of violence otherwise which could have unleashed by changing the property regime. The traces of violence in case of a forced change from 'have's' to 'have not's' will linger for a long time encapsulating the future generations. Gandhi was not in favor of taking the property of the rich as the communists believed under Marx that property of the rich should be distributed forcefully among the workers and underprivileged. Instead

171 William M Dugger, *Ayerasian View of Gandhian Economics*, 441-444

172 John Locke, *Second Treatise on Government*, para 27

Gandhi urged people to voluntarily create an environment where by they would use the property in such a way that they should consider themselves as trustees of the property for the benefit of the larger good. This under no circumstances would give rise to an atmosphere of conflict or animosity. Violence would give rise to a vicious circle of conflict and animosity which would go on for generations to come. But, honesty of the trustee need to be assumed for us to have faith in such a system as it requires good faith.¹⁷³ As everyone doesn't have the same abilities to generate wealth, where as everyone should be given equal opportunity, hence trusteeship offers a middle path devoid of violence where benefits can be enjoyed by both rich and poor, provided the society generates an environment of honesty and integrity where people act in good faith.¹⁷⁴ This doesn't need a revolution to happen but could be undertaken by each and every individual by change in their mind at their own individual level. Hence Gandhi has said that "we invite the capitalist to regard himself as a trustee for those on whom he depends for the making, the retention of, and increase of his capital".¹⁷⁵ Hence, Gandhi famously said 'be the change one wants to see in the world'.

If there is a necessity arising out of non co-operation of the rich, the poor always have an option of non-cooperation towards rich as rich cannot accumulate wealth without the co-operation of poor. Trusteeship being a "principle of economic conscience" tries to De-legitimize accumulation of wealth. Even there can be "legislative regulation of the ownership of wealth".¹⁷⁶ The consideration of Gandhi for trusteeship has a deeper metaphysical reason than that of material considerations. By virtue of birth one gets access to those resources, making of which there had been no contribution and replenishing it without any contribution whatsoever is to appropriate the fruits of labor of others. Once you possess, it implies retention for the future and it's not possible to possess without the readiness to defend the possessed goods. Gandhi believed that with birth comes a debt, if not repaid it equals theft.¹⁷⁷ He

173 'Equal Distribution', *Harijan*, 25 August 1940

174 See 'Talk with Manu Gandhi', 15 April 1947, CWMG, 87, 284.

175 Questions and Answers: Can you avoid class war?, *Young India*, 26 March, 1931

176 'Practical Trusteeship Formula', *Harijan*, 25 October 1952. Also See K. Raghavendra Rao, 'The Moral Economy of Trusteeship', in Sethi (ed.) *Trusteeship*, 38

177 Varma, R. "Gandhi's Theory of Trusteeship: An Essay in Understanding." In *Trusteeship* edited by Sethi, 47-8

was trying to balance the rights and obligations of a human being by putting focus on the obligation which is created when you are born.

Hence, anything appropriated or possessed without an inward moral balance that is to be a good trustee, is to violate the deeper purposes of human odyssey which would eventually breed possessiveness, greed, exploitation, discontent and revenge.¹⁷⁸ It would be antithesis to a good civilization. Gandhi says in his seminal work *Hind Swaraj* “a man is not necessarily happy because he is rich, or unhappy because he is poor. The rich are often seem to be unhappy, the poor to be happy. Millions will always remain poor.”¹⁷⁹ Gandhi says that people in ancient India chose the path devoid of luxuries and pleasures as the forefathers knew that, if we set our hearts after such things, we would become slaves and lose our moral fiber. To observe morality is to attain mastery over our mind and our passions. Even big cities were a snare and a useless encumbrance and that people would not be happy in them, that there would be gangs of thieves and robbers, prostitution and vice flourishing in them and that man would be robbed by rich men. They were, therefore, saw satisfaction in villages.

Gandhi acknowledged that in tune with the times he do not advocate abolishing everything above the bare necessity and is not glorifying poverty. He was not for taking back humanity to its earlier days. However, the essential needs of the poor had to be satisfied before the craving for luxuries by the better off.¹⁸⁰ There is nothing intrinsically good in returning to primitive methods of grinding grain. If the millions of people who are unemployed need to be employed then there is no harm in abolishing such machineries which unemploy people.¹⁸¹ As it would be sustainable to produce those goods where people remain unemployed and hence there won't be any buying capacity with them. If economics is about humans, not just individual welfare then we should think about but welfare of all. Though we believe that if we think about individual welfare then ultimately we end up thinking about the welfare of all but time has told us again and again that this approach is flawed. Even it should not be

178 Iyer, R. “Gandhian Trusteeship in Theory and Practice.” in Trusteeship, edited by Sethi, 1-16

179 M.K. Gandhi, *Hind Swaraj*, 45

180 See 'Answer to Questions at Constructive Workers' Conference, Madras', *The Hindu*, 26 January 1946.

181 'Why not labour saving devices', *Harijan*, 30 November 1925

greatest good of the greatest number but greatest good of all which should be the guiding force.

The idea of Sarvodaya was put forth by Gandhi as a counter to a non egalitarian society. The task is not just to uplift the poor as the life of the rich is no less deprived than that of those they exploit, but to bring ethics into the life of people. If an ethical life which is fuller and more meaningful has to be achieved then people should develop the capability to renounce privileges in the midst of utter despair among the larger lot and should act as trustees for the privilege they are bestowed with. If such an outlook can be developed then “we shall cease to think of getting what we can, but shall decline to receive what all cannot get”.¹⁸²

Gandhi elaborates his idea of civilization and industrialization in *Hind Swaraj*. Gandhi insists that industrialization should not be a process where it becomes an instrumentality to subjugate people as bonded laborers. As men are bestowed with various faculties, the labor he does should be one which excites his faculties where machine does not rule but men use machine to explore his creativity and faculty. Any machine which brings freedom and happiness in labor is indeed a prized invention of science. Gandhi says “there is a difference between invention and invention. I should not care for the asphyxiating gases capable of killing masses of men at a time. The heavy machinery for work of public utility which cannot be undertaken by human labor has its inevitable place, but all that would be owned by the state and used entirely for the benefit of the people. I can have no consideration for machinery which is meant either to enrich the few at the expense of the many or without cause to displace the useful labor of many”.¹⁸³

Though machines undoubtedly could bring progress and development but this progress and development are for few. Those few who progress and develop do so at the cost of others and unless and until the progress and development doesn't trickle down to the lowest strata such a process of industrialization cannot be a boon to the society. Hence, rampant industrialization where costs outweigh benefit is a cause of great concern. Human development is a benefit which is short term benefit brought

182 'What of the West?', *Young India*, 3 September 1925

183 See 'A Discussion', *Harijan*, 22 June 1935

about by industrialization and in long term interest of the future generations is sacrificed and resources are over utilized and irreparable ecological disaster makes such a progress unsustainable. The problem is aggravated when the dependence over machinery doesn't stop at an ideal level. Now men depend on machines and technology to such an extent that men becomes slave. The law, the legal institutions, and judiciary couldn't create a duty or an obligation to level the inequality created by industrial progress. In a capitalistic society everyone is free to pursue their own goals and the duty and obligations towards fellow being, nature and even wildlife takes a back seat. The perspective towards life based on rights makes everyone mindful about their rights but not about their duty and obligations which is co relative. The industrial progress the zealous to sustain it has resulted in over utilization of resources to such an extent that the result is colossal and irretrievable destruction. Gandhi says,

The supreme consideration is man. The machine should not tend to make atrophied the limbs of man. For instance, I would make intelligent exceptions. Take the case of singer sewing machine. It is one of the few useful things ever invented, and there is a romance about the device itself. Singer saw his wife labouring over the tedious process of sewing and seaming with her own hands, and simply out of his love for her, he devised the sewing machine, in order to save her from unnecessary labour. He, however, saved not only her labour but also the labor of every one. Who could purchase a sewing machine.¹⁸⁴

Gandhi advocated a very limited role for industrial production which is unavoidable like ship building, steel manufacturing etc., even for sewing machine one need to have factories which can be state run or nationalized. In state run factories workers should be provided with the most attractive and ideal conditions, not for profit, but for the benefit of humanity, love taking the place of greed as the motive. Gandhi wanted a humane condition for laborers to work where such work should not be a consequence of mad rush for wealth. The laborer must not only be assured of a living wage, but his life should not be a daily task that is a mere drudgery. Like Singer sewing machine and *charkha* (spinning wheel) which gives men freedom and control, it also brings a situation where individuality is promoted. Machines should not be an encroachment on the individuality.¹⁸⁵ Human freedom is far more important than an

184 'Talk with Manu Gandhi', 10 April 1947, CWMG, 8, 249.

185 'Discussion with G Ramachandran', *Young India*, 13 November 1924.

increase in the production of some goods that more than likely, were not of an essential nature. Unfettered capitalism even commercializes the aspects of life which creates a dangerous loop from which an escape is difficult for eg., Walter Mignolo¹⁸⁶ argues that one of the most terrifying aspect of uncontrolled capitalism is the control of food supply which indicates the reproduction of coloniality of power in a different way.

It is quite difficult to imagine, now that we have come a long way on the path of capitalistic aspirations of material wealth, how much relevancy Gandhi holds in today's world. On one side we have a society whose aspirations and material consumption has got no end and on the other side we are faced with a stupendous task of catering to these ever expanding needs of society, which brings us to the crossroads of stark reality and bleak future. Gandhi a century back could envision that the path of consumerism, commoditization and industrialization would be an endless journey. Dasgupta¹⁸⁷ notes that Gandhi after realizing the follies had the courage to lay the foundation of an economic system to strive for rather than a compromising plan that could be easily implemented. He did not sketch some futile utopia; instead in keeping with his belief in focusing on the means rather than the end, Gandhi looked at economic problems from a sarvodaya perspective. This does not mean that applying Gandhian principles to economics is impractical or impossible in today's world. And if one remembers that the context in which his ideas were formulated, a far more pragmatic view of his economic doctrine surfaces. Gandhi focused on development of rural and agrarian life as it was the weakest and most ignored but it is the place core or nucleus of a nation.

Where large population is depending on nature, which is typically agrarian, with scarce resources, one need to be realistic and visionary to implement a development model which focuses not on just urban but on rural population as well keeping in mind the economic fabric. To create a self independent and sustainable system village is not a Utopian thought for Gandhi for which he endeavored tirelessly.

186 Mignolo, D Walter. "Coloniality of Power and Decolonial Thinking." In *Globalization and the Decolonial Option*, edited by Walter D Mignolo and Arturo Escobar, (London: Routledge, 2013), 6

187 Ajit K. Dasgupta, *Gandhi's Economic Thought*, 2; See also Bharatan Kumarappa's 'Editor's Note' to *Gandhi's Sarvodaya*, iv-v.

Gandhi visualized, as part of his economic idea, an India composed of self sufficient but interlinked rural republics with decentralized small scale economic structures and participatory democracy. E. F. Schumacher, who popularized Gandhian economics with his slogan 'small is beautiful', explained that smallness meant reuniting small scale production and small scale consumption, this minimizing transport, as transport added cost without adding anything of real value to goods. He noted that the economics of scale, which were a nineteenth century truth, had been shown to be a twentieth century myth.¹⁸⁸ It is to be understood as a fundamental truth that “high thinking is inconsistent with complicated material life” noting that “all real human needs are essentially simple, therefore only frivolities and extravagances like supersonic transport were invariably complex”.¹⁸⁹

The modernization posed challenges leading to crisis beyond the capability of mankind where resource depletion, ecological imbalance and personal alienation could be overcome only with enormous sacrifice and discipline. This sacrifice and discipline permeates to the level of individuals in terms of his duty and obligations. Failure of which has caused irreparable damage. Some has argued that modernity a consequence of coloniality of power was able to create on form of rationality which established itself as the only legitimate way of knowing the world.¹⁹⁰ Other ways of knowing and understanding the functioning of the world was ex-pulsed from the map of episteme and downgraded to the underdeveloped character of doxa. The ‘Coloniality of power’ is referred to describe the phenomenon by which a rigid hierarchy between different knowledge systems exists in the world. Gandhi’s approach creates an alternative norm to counter the coloniality of power by bringing ethical and moral values to understand the economic transactions.

Gandhi's economics is normative. Schumacher says that the fundamentals of Gandhian economics are simplicity and non violence, while for modern economists who measure 'standards of living' by amounts of consumption, this is difficult to understand. In modern economics, consumption is the end and purpose of economic

188 Hoda, S. “Schumacher on Gandhi.” In *Mahatma Gandhi: 125 years*, edited by M. Chaudhuri and R. Singh, (Varanasi: Gandhian Institute of Studies, Sarva Seva Sangh, 1995), 101-2.

189 Hoda, Schumacher on Gandhi, 44.

190 Castro Gomez, Santiago. “The Missing Chapter of Empire: Post Modern Reorganization of Coloniality and Post Ford Capitalism.” in *Globalization and Decolonial Option*, edited by Walter D Mignolo and Arturo Escobar, (London: Routledge, 2013), 282

activity; in Gandhian economics, on the other hand, ownership and consumption are merely means to an end.¹⁹¹ The multiplication of wants and the desire to fulfill them do nothing to further personal growth. They add nothing to self respect or long term contentment,¹⁹² and ownership is merely a clouding of the fact of impermanence.

Though individual is at the core of Gandhi's moral thought, he strongly stressed that human nature predisposed us to co-operation rather than individualism. The general legal theory that when there is conflict of interest between individual and society, society's interest gains paramount importance was acknowledged by Gandhi. Individual can only be seen in a context of the society and its interest. In order to fulfill one's needs, individuals had to exercise their individualism, but in case of a conflict with the societal interest the predominance as to be given to the society. Every individual should endeavor to work towards the reformation and reorientation of society to enable a greater scope for the realization of all individuals. Because of this connect between individual and society, the converse is also true. Gandhi says "I don't not believe.... that an individual man gains spiritually and those that surround him suffer. Hence, the essential unity of man and for that matter all that lives. Therefore I believe that if one man gains spirituality the whole world gains with him and, if one man fails, the whole world fails to that extend".¹⁹³

The underlying philosophy being that we should not only do to others that which we would like them to do to us, but that what we in fact do to others we do to ourselves. If we aid those less fortunate than ourselves, the action is not only intrinsic but for Gandhi may also be instrumental, aiding us in our own quest for self realization, which comes from a realization of underlying connectedness and value. An ethical economics is therefore a spiritual economics, and a pursuit of wealth and power are not necessarily incompatible with spiritual quests.

The economic quest should not bring about just an increase in material wealth but should be identified more with a greater self, identifying oneself with achieving greater truth, helping one to expand his horizon and visions of life. This cannot come

191 Schumacher, *Small is Beautiful*, 47-8.

192 See 'Plain Living and High Thinking', *Harijan*, 1 February 1942

193 'Not even Half Mast', *Young India*, 4 December 1924.

by amassing material wealth and industrial progress, but by working for social justice and well being of the community.

For example the famous talisman which Gandhi gave was essentially economic in its essence and it guides one to view his economic and social development in context to the community he lives in rather than in isolation from his community rooted in individualism, hence Gandhi says:

I will give you a talisman. Whenever you are in doubt or when the self becomes too much for you, apply the following test. Recall the face of the poorest and weakest man whom you have seen, and ask yourself if the step you contemplate is going to be of any use to him. Will he gain anything by it? Will it restore him to a control over his own life and destiny? In other words, will it lead to swaraj for the hungry and spiritually starving millions? Then you will find your doubt and yourself melting away.¹⁹⁴

Gandhi always encouraged people to think in the context of society we live in, imbibing the ethical and moral value to be pursued. We cannot be happy when we are surrounded by sorrow and we cannot be rich in the midst of poverty. We need to look at ourselves as part of the society whose aspirations and needs are that of ourselves. Hence your property rights have inherent limitations and what belongs to us belongs to the society as well. Property, ownership and possession cannot be contemplated in the individual level but has to be seen in the context of society.

Gandhi and Utilitarianism

Gandhi's objection to the western economic thinking emanated from a plethora of reasons and out of that the ethical considerations were foremost. Gandhi's criticism of Utilitarianism may be well known but the reasons were deep rooted in ethical considerations with significant theoretical underpinnings to it. The western idea of Utilitarianism is a form of Consequentialism¹⁹⁵ in which only consequence that

194 Tendulkar, D.G. "*Mahatma: Life of Mohandas Karamchand Gandhi*." Vol. 8 (New Delhi: Publication Division, Ministry of Information and Broadcasting, Government of India, 1960), 288-9

195 Apart from Consequentialism and Utilitarianism, deontology forms the three leading schools of ethics in as far as they bear on issues relating to choice. See, Philip Pettit "*Consequentialism*." In *Utilitarian Ethics*, edited by Aldershot and Bartworth, (London: Duckworth, 1989).

matters is the utilities,¹⁹⁶ that made difference to human beings were the measure. While this theory which is also called teleological theory differs among other similar theories but they agree in the rightness of an action depending upon the goodness of its effects as a measure. On the other hand Deontological theories see the rightness of an action as being intrinsic to the action itself, it's not the consequence but the action itself which determines the rightness which in a way draws similarity with Gandhi, for he believed that only right action could lead to right consequence.

Gandhi's reference to Utilitarianism can be seen as a critique of teleological theory. His reference of Utilitarianism has been based on the doctrine of 'the greatest happiness of the greatest number'.¹⁹⁷ For Gandhi the criticism that the greatest number denotes the sacrifice of the interest of the minority for the sake of majority was a point of disagreement. For Gandhi even in case of greatest happiness the genuine difficulty which persists with the doctrine is the difficulty to take aggregate happiness as the measure as it wouldn't be possible to assess the distribution of aggregate benefit among the individuals leading to exclusion of category of people. The other major criticism which Gandhi makes is that Utilitarianism concerns with economic happiness, which is materialistic in content and nature. As Gandhi perceived that in such pursuit of happiness, moral laws are violated and for utilitarian's in the west it was not much of a relevance to apply moral laws to economic analysis. The consequence of this attitude is in evidence in all of the western countries.¹⁹⁸

As had been the classical criticism on Utilitarianism, even Gandhi talks of the consequence that Utilitarianism will require us to ignore the misery of the many simply in order to maximize aggregate satisfaction. The idea that there is more to human welfare than pleasure or happiness is a theme better understood in today's world as there are evidences for us to consider now that we have come a long way through industrial progress and material development. For Gandhi more so it was the

196 Utility being understood either in the sense of pleasure or happiness as explained by Bentham and J. S. Mill or Preference or Satisfaction as in Modern Economic Theory.

197 Parekh, Bhiku. "*Bentham's Political Thought*." (London: Croom Helm, 1993), 16-17, Bhiku Parekh mentions that Bentham himself corrected the phrase of referring to greatest number as the greatest happiness where according to Bentham it is the greatest happiness in the aggregate that a moral agent should try to achieve by an appropriate choice of actions.

198 Iyer, Raghavan. "*The Moral and Political Writings of Mahatma Gandhi*." Vol. 3, (Oxford: Clarendon Press, 1989), 410.

moral consequence which mattered. Gandhi's stress on ethical behavior has a Kantian understanding to it. Gandhi described truth as god, and his pronouncements on the central importance of personal autonomy, human dignity and respect for individual makes him a person who stress on action rather than consequence of action like deontologist but with significant exceptions to it.

For deontologists certain actions can be right *per se* but for Gandhi such actions need to be justified on a broader purpose- the service of human kind. Consequences are equally significant.¹⁹⁹ Another major difference in approach rests on intention. Deontologists place a great deal of weight on the nature of the motive or intention with which action is performed. Gandhi stressed not on motive especially when it could lead to undesirable outcome. Human actions don't always reflect application of mind especially if the action helped to bring about a morally bad outcome, no matter how pure had been the motive the consequence is undesirable. Misplaced benevolence is a point in concern, like charitable deeds. Gandhi didn't believe that something worthwhile is going to be achieved in giving alms to professional beggars or doles for unemployed unaccompanied by stringent conditions such as an obligation to accept work may not be a right action though it doesn't lack pure motive.

Moral principle can at times contradict or conflict with another moral principle, for deontologists the claim rests ultimately on the categorical character of certain moral obligations, requirements or principles. For Gandhi it may not be easy to tackle such a scenario and it's a matter of choices to be made as for him basic principles of conduct can be derived from truth. At the same time it would be too simplistic to say that one grand principle can be made and the rest would follow.²⁰⁰ That life is not a straight line and that one cannot arrive at the right choices by applying an overriding moral principle in terms of which every alternative can be assessed, are persistent themes in Gandhi's work.²⁰¹ But Gandhi believed that it was not necessary that moral principles are hierarchical in nature or can always be complementary to each other. Gandhi explicitly says that life is a bundle of duties

199 Gandhi, M. K. "Speech at Prayer Meeting" CWMG 8, 231

200 CWMG 8, 59; *Harijan*, 8 th June 1947.

201 CWMG 4, 515-16; CWMG 37, 270

very often conflicting and one is called upon continually to make one's choice between one duty and another.²⁰²

Hence the deontological prescription of choice that an action must not violate certain absolute moral side constraints²⁰³ was therefore impracticable, for satisfying one constraint may require violating another. Practical ethics is a matter of relative dharma where what constitutes action, truth or ahimsa in a particular instance always requires estimating results and working out tradeoffs. For Gandhi to analyze a particular action it is important to consider various facets like means and consequence the ethical and moral questions. An act of giving alms to a professional beggar though has noble intentions but the morality is questionable as it is giving alms for the sake of giving without any thought to the consequence, perpetuating the profession of begging. Hence, Gandhi's ethical theory doesn't distinguish between means and ends, between actions and outcomes. Moral consequences attached to both so the means require to be justified as such, without reference to the ends they are designed to achieve. Again consequences can be morally good or bad to an extent greater than any that could be measured especially in case of giving education or supporting a poor boy to be educated. As it is not a guarantee that he can be a good human being just because he is educated. In this respect Gandhi's consequentialism merges into deontology which indicates that the conflict of ideas between Gandhi and Utilitarianism fundamentally differs in their approach and it is difficult to lay down the approach as Gandhi stresses more on an analytical approach rather than creating a system which can be followed easily.

202 CWMG, 8, 434, *Young India*, 5th November 1925

203 Nozick, Robert. "*Anarchy, State and Utopia*." (Oxford: Blackwell, 1947), 166.

Chapter 3

Institutions of Property and Gandhi

“True economics never militates against the highest ethical standard just as all true ethics, to be worth its name, must at the same time be also good economics . . . True economics stands for social justice; it promotes the good of all equally, including the weakest and is indispensable for decent life”
*m. k. gandhi*²⁰⁴

This chapter focuses on how Gandhi himself approached and experimented with institutions of property. Gandhi's engagements with property institutions were experimental and for him it served larger goals. Gandhi as a political leader, his engagements with property institutions was primarily a tool to achieve those larger goals where India's independence and self sustenance was a medium for higher goals of reformation. In Gandhi's lifetime his ideas of non-violence, truth and freedom gave him much positive attention but, on the other hand his economic ideals and opposition to the popular and mainstream utilitarian ideals brought much negativity and misunderstanding among people.²⁰⁵ Gandhi was termed an idealist and Utopian for his economic ideas. Gandhi experimented with the economic ideas and had a much nuanced sense of what kind of competitiveness in the market could be healthy and where one need to be cautious about carrying on commercial activity with the notion of free and fair trade. Commercial activity for Gandhi has been influenced heavily by political, social, ethical and moral considerations and it was not an end in itself but was a vehicle to achieve and realize the larger goals of reformation. For Gandhi independence and freedom from colonial masters was meaningless until and unless the means were rooted in truth and nonviolence and only then the future could develop the capacity to sustain its freedom and independence not just political but social and economic.

204 Gandhi, M.K.. 'Primary Education in Bombay', *Harijan*, 9 October 1937.

205 Rivett, Kenneth "The Economic Thought of Mahatma Gandhi." 10 *Brit. J. Socio.*1, (1959): 1

Gandhi saw the property institutions which India needs to develop has to be sustainable and harmonious to its conditions and special needs and should gel well with the various other equally important factors of nation building. Gandhi's approach to the market based economy was evolving throughout his life time and especially his approach to tackle the modern property institutions. But the foundational ideas were deeply moored in his philosophy of truth and non-violence and every tool he developed, be it of swadeshi, *charkha* or his engagement with modern property institutions were deeply colored in a Gandhian philosophy. Gandhi had firm conviction that solutions must be found where the poorest live and such solutions must have some capacity to spark and mobilize their energies hence, Gandhi's philosophy centered on village as its nucleus.

Gandhi's views on free market economy go to the very roots of his philosophy. His view of a society is heavily influenced by his economic ideals, where emphasis is given to distributive justice, creation of wealth, and where no conflict between capital and labor exists. Gandhi believes that economy is self sufficient devoid of modern market competitive practices and resultantly the society is free from exploitation and violence. Gandhi brought forth the concept of 'Swaraj' to tackle the problem of inequality and to bring economic independence. This chapter will focus on the larger questions of normative practices based on modern property institutions and how Gandhi tackles the issues which now has become a common feature of the market economy. Further towards the second part of this chapter the thesis will discuss the philosophy and institution of copyright and knowledge commoditization, a modern property institution. But, to understand Gandhi's approach to property institution we need to understand his approach towards the market as an institution and the property institutions within the market and how does Gandhi perceives the notion of free market and fair trade, competition and barriers to trade. The market economy for Gandhi had posed challenges which in the context of national freedom movement gave him opportunity to experiment and how he creates an effective weapon of mass struggle not just in tackling the British but in liberating the common man from economic, political and social woes of the time.

Market Economy and the Principles of Competition

In an address to the businessmen in Karachi in 1934, Gandhi points out that competition is not a bad thing by itself and it being the basis of trade, it is all right to progress through competition, but there should not be mutual jealousy and quarrels.²⁰⁶ Gandhi many a times believed that competition in itself may not be good and its universal applicability is questionable. Free market economy creates markets as venues in which buyer and seller of defined commodity can conduct commercial transactions in which they honor the agreed upon terms of transaction. It creates an environment of well functioning, competitive markets which are capable to offer greatest array of products and services at the lowest possible price. It also endeavors to create consumer surplus that increases societal well being and consequently leads to the most efficient allocation of investment capital. To sustain this free market ideal it is important that it should be based on certain premise or assumptions that such competitive market is not vitiated by monopoly; participants have perfect information; there are no transaction costs; and all participants maximize their personal utility. Having said this the validity of these assumptions can be dubious given the actual market conditions where tendency to create monopoly; existence of natural monopoly and adverse impacts due to increasing industry concentration on consumer choice and prices and more generally on social wellbeing is felt.

For Gandhi co-operation is better than competition. The market-based economy where private property has utmost significance and it's the sole purpose of competition to acquire monopoly has a corroding and enslaving nature to it. Every economic activity cannot be subjected to competition and every economic activity cannot be viewed from a pure commercial aspect. Gandhi would often compare that the food available in a hotel cannot be compared to the food made by one's mother though there are costs attached to both. There is no competition between the two and it's incomparable. When one commercializes ones enterprise and competes with others one tends to lose ones significance and everything becomes contextualized. Market as an institution for Gandhi cannot be universal and every product in the market cannot be commodified and commercialized. Commercializing certain

206 Gandhi, M. K. "Speech to businessmen, Karachi." CWMG, 64, 137

products in market under-signifies its relevance and could cause long term irreparable damage to the economy and to the society. Much has to be learned from industrialization which is greed driven, creating mass unemployment, and undermining human dignity, rendering people roofless, destroyed local communities and caused moral and social havoc. In such a scenario, market cannot act as an institution of distributive justice.

Gandhi in 1917 while speaking at a reception by merchants of Broach, underlines his general attitude towards markets and market participants. Gandhi says “no one wants you not to earn money, but it must be earned righteously and not be ill-gotten. Merchants must earn money by fair means”. Further, emphasizing the larger role of merchants Gandhi observes that “India’s strength lies with the merchant class. So much does not lie even with the army. Trade is the cause of war and the merchant class has the key of war in their hands”,²⁰⁷ these statements underlines the practical approach Gandhi takes where Gandhi tries to balance the rights and obligations of the merchants. He stresses the importance of market and the role it plays in political economy. It’s important for Gandhi to compete on fair terms and not to conduct oneself with the sole motive to make profit whatever be the mechanism.

Market as an institution was of utmost importance for Gandhi and he realized that it serves multiple purposes. It’s the life blood of society. Gandhi visualized and aspired for a market which was not moored in violence and the participants can earn their livelihood with respect and dignity. Market institutions are not to be just distributive in nature but are a platform for one to express ones abilities and creativity. J. C. Kumarappa in his book ‘*Economy of Permanance*’²⁰⁸ says that economy for Gandhi is centered on human welfare than on material production. The twin touchstones for validating such welfare are truth and non-violence. Any economy where the norms are violative of truth and non-violence cannot be termed in the real sense of the word as welfare economy. It is necessary that production and consumption as far as possible remain localized. When the production is localized there can be no round about means possible to regulate distribution and the temptation to speed up production artificially and at any price will disappear. Consequently, most

207 Gandhi, M. K. “Speech at reception by Merchants.” Broach, CWMG, 16, 68

208 J.C. Kumarappa, “*Economy of Permanance.*” (Varanasi: Sarva Seva Sangh Prakashan, 2010).

of the endless difficulties and problems that economic system poses could be tackled like unemployment, excess production, undesirable ecological consequence and importation of artificial wants being created.

Economy or economic conduct is classified under the Gandhian ideals into four categories that is predatory, parasitic, gregarious and service economy or mother economy. Predatory economy is based on consumption without production, where in order to consume the market has to depend on production from other markets; parasitic economy refers to such economy where the consumption destructs the production source; enterprise economy where consumption is co-related with production; gregarious economy is where production reflects a excess sense of duty as against feeling of right; service economy or mother economy, where production is driven by a sense of duty where service is in itself a reward. Kumarappa²⁰⁹ categorizes economy in such a way and he refers as ideal being the service economy where truth and non-violence need not be sacrificed. Economic activity should predominantly aim to produce goods which cater to the primary needs thereby reducing violence. Such production can be effected in two ways one as a mother producing food for her child and other to effect the easiest way of transferring consumers wealth to the producers hands. In the second case the economy sees a production for exchange. The larger the margin of profit the more we develop a sense of greed and irresponsibility with a cascading effect on the economy and society as a whole. What is hence desirable is exchange in surplus which is mutually beneficial.²¹⁰ For human satisfaction must be mutual to be real.

Gandhi saw some inherent vices in money as token for exchanges of commodities in a market-based economy and thinks it hardly reflects true values. Commodifying of objects makes it imminent to mark it based on value and the quantify it itself is an impossible task. At the same time it can also used to conceal values. Money often acts as an inducement to part with a more valuable article for a less or even harmful substitute. Hence, money often deceives and creates violence. Money not only becomes a medium of segregation in society but is a mode of exploitation and violence which is so subtle that often we tend to ignore. Adoption of

209 Kumarappa, Economy of Permanence, 19-24.

210 Kumarappa, Economy of Permanence, 18

money as a mode of measure and store value couldn't be avoided as man started commodifying objects. Hence uses of money over a period of time became inherent and foundational element of modern market institutions, but how to control and used properly use it with checks and balances are a question which has no easy answer. In the process men forgot that money is a mode and not an end in itself and money should be a way to help express people their personality in their daily life and economic activity rather than money assumes an element of our personality. As what we eat, how we are clothed and what manner of lives we lead, all have a bearing, not only on our own lives, but also, on the future of mankind. The more permanent the foot prints are the more harm it creates for the earth.

Gandhi's philosophy indicates that even with a simple life one can live a very fruitful and fulfilling life. Probably it's only with a simple life that one can achieve greatness in thought and action. Swadeshi was an attempt in this direction of simplifying life where conventional trade is minimized making the villages self dependent as for Gandhi India lives in her villages.²¹¹ In 1921, on behest of the Government of India Mr. A. C. Coubrough C. B. E authored a bulletin whereby the swadeshi movement was criticized arguing that such a movement acts as a prohibitive tariff enriching only the capitalist and its punishing for consumers. As the piece goods which are boycotted by swadeshi movement are imported as they are not manufactured in India and its non competitive. As there is no replacement for such goods boycott of goods are against the law of supply and demand and its failure is inevitable. These boycotts would lead to higher prices. The farmers need to hence concentrate on producing cotton. For Gandhi these arguments were one sided and hollow.²¹² Gandhi in his reply argues that the boycott is intended as a voluntary prohibitive tariff. It would neither benefit capitalist nor harm consumers. Perhaps, it's only for a short period of time that there could be high prices of locally produced cloth. As the demand gains momentum it will itself increase supply as more and more people will engage in *charkha*. Though non-competitive imports are larger but the idea of boycott are intended for multiple reasons. The boycott is not primarily to engage in commercial war with other countries, but to make good use of time and

²¹¹ Guha, Ramachandra, "*India After Gandhi : The History of World's Largest Democracy*" (London: Picador, 2007) 201

²¹² Gandhi, M. K. "Indian Economics." CWMG, 25, 213

resources of lakhs of unemployed and impoverished mass. *Charkha* brings the honor of being able to solve the problem of economic distress in a most natural, simple, inexpensive and businesslike manner. It would empower and bring economic independence without having to depend on free trade with other countries for the basic necessities of life. Hence competition for Gandhi would bring more harm than good when the goods are of basic necessities of life. Gandhi believed that for the poor the economic is the spiritual. One cannot make any other appeal to those starving millions. It will fall flat on them. But you take food to them and they will regard you as their God. They are incapable of any other thought. If not distributive justice, then equitable distribution is what one has to endeavor to achieve. Through swadeshi Gandhi sought to bring equitable distribution and provide means of self sustenance to millions of poor.

Swadeshi for Gandhi didn't mean to be a product of India with Indian fund and talent but it meant any goods which would effectively serve the purpose of Indians. Hence, for Gandhi in his own words "Any article is swadeshi if it sub-serves the interest of the millions, even though the capital and talent are foreign but under effective Indian control".²¹³ Gandhi commenting on Bata an international brand says that it would be considered foreign though the labor employed may be all Indian and the capital also found by India. The manufacture will be doubly foreign because the control will be in foreign hands and the article, no matter how cheap it is, will oust the village tanner mostly and the village *mochi* (cobbler) always. Already the *mochis* of Bihar have begun to feel the unhealthy competition. The Bata shoe may be the saving of Europe; it will mean the death of our village shoemaker and tanner. Interestingly Gandhi was futuristic in his attitude and was pragmatic to the core. He was never against the western ideas as such. He says that, "I would love to secure the engineering talent of the West to give me a village wheel which will beat the existing wheels, though deep down in me I have the belief that the improvements that indigenous talent has made are by no means to be despised".²¹⁴

In an interview to Alice Schalek when asked what is the sense of boycotting British goods?, and moreover England does not give preference to her own goods and

213 Gandhi, M. K. "True Swadeshi." CWMG, 75, 92; See also *Harijan*, 25th Feb 1939

214 Gandhi, M. K. "True Swadeshi." CWMG, 75, 92

there is free competition for all the nations of the world. Gandhi replied that it's a wrong notion. Gandhi said that "It only appears as though there was free competition. England does give preference to her goods in a variety of insidious ways. There is apparent freedom, but no true freedom. But even if the British were impartial in favoring foreigners, I would have my quarrel with them. I want preference for Indian interests"²¹⁵. Though free competition was not bad in itself but he realized that there is a time and opportunity for a country to engage in free competition. If the industry is in nascent stage and if one has to protect the basic necessities of people to open and subject such an economy to international competition may be blunder. For Gandhi there were various considerations to subject an economy and its market to competition. It might seem that there is free competition but many a times that's not the case. Free competition is a phenomenon even now the economists are grappling with. Gandhi's consideration for maintaining free competition was the purpose for which free competition can be a mechanism.

Gandhi wrote in 1921:

Even though I am a layman, I make bold to say that the so-called laws laid down in books on economics are not immutable like the laws of Medes and Persians, nor are they universal. The economics of England are different from those of Germany. Germany enriched herself by bounty-fed beet sugar. England enriched herself by exploiting foreign markets. What was possible for a compact area is not possible for an area 1900 miles long and 1500 broad. The economics of a nation are determined by its climatic, geological and temperamental conditions. The Indian conditions are different from the English in all these essentials. What is meat for England is in many cases poison for India. Beef tea in the English climate may be good, it is poison for the hot climate of religious India. Fiery whisky in the north of the British Isles may be a necessity, it renders an Indian unfit for work or society. Furcoats in Scotland are indispensable, they will be an intolerable burden in India. We forget that what may be perfectly good for certain conditions in the West is not necessarily good for certain other, and often diametrically opposite, conditions in the East. Free Trade which may have been good enough for England would certainly have ruined Germany. Germany prospered, only because her thinkers, instead of slavishly following England, took note of the special conditions of their own land, and devised economics suited to them. And both England and Germany will have to revise their policy in economics immediately the nations that are now being exploited by them come to their own, and refuse to be exploited. The civilization of both is based

215 Gandhi, M. K. "Interview to Alice Schalek." 347, CWMG, 41, 301

upon the exploitation of other lands. Let us remember that even if we have desire, we have not the power to exploit any single nation on earth.²¹⁶

Gandhi's observation above indicates that economics is not a straight jacket formula which can be conveniently adopted but has to be intelligently utilized if it has to yield results. Free competition along with it brings certain tendencies to create exploitation and violence which is altogether undermines the benefit and a cautious approach hence is required. For Gandhi, Indian economy should not be based solely on competition and should serve the purpose of market based utility. Indian goods and economy if solely rests its purpose to compete with other economy and products then that would be a narrow outlook where failure is imminent. The purpose is not to compete and win but there are larger goals for an economy to serve and every economy has its own uniqueness. Gandhi wrote an article in Young India indicating India's unique needs and how its economy differs from other countries. Gandhi was of the opinion that free trade for a country which has become industrial, whose population do not mind praying upon other nations and therefore sustain the biggest navy to protect their unnatural commerce, may be economically sound (with questions of morality lingering in mind). The Free trade principles of Britain for India had produced her curse and held her in bondage.

'Khaddar' was created by Gandhi as not just a symbol of self sustenance but an effective economic tool. To counter the import of western manufactured cloth market was a political and economic need for Gandhi. Gandhi very effectively showed how khaddar can replace the cheap western mill cloth by sending it as a political message and an economic tool indicating that a market based production can be replaced by a production mechanism which is independent of capitalistic market forces and can be self sustaining. In the market-based economy Gandhi through khaddar sought to change how we perceive the functioning of the market and the role the kind of creative role market participants can play and ought to play. Though the process for Gandhi was not an easy one and he acknowledges that khaddar has to develop its own market and there is great difficulty is the absence of a ready market for khaddar. It was not a direct attempt to replace foreign cloth but to create a market

216 Gandhi, M. K. "Evils of Machine Milling." 371 Notes, CWMG, 38, 368

for khaddar which could give people choice so that they can shift to khaddar from foreign cloth. A product like khaddar can be effectively manufactured and profitably sold by common man in a market based economy without having to rely on its institutional framework. One can effectively internalize the production of khadder without having to depend on middle men and can make a profit though the cheaper alternative of mill cloth would exist. If Gandhi on the other hand had sought to competition with mill cloth it could have been disastrous for khaddar but to find a place of its own in the market irrespective of its pricing Vis-à-vis the other substitutes i.e., the mill cloth or foreign imported textile was Gandhi's success. Gandhi states that:

I will not engage in any such killing competition. The capitalist may for capturing the market sell his calico for nothing. The manufacturer whose only capital is labour cannot afford to do so. Can there be any competition between the dead artificial rose, however symmetrical it may be, and the living rose whose two petals will not be alike, or can there be any competition between a wax statue of Cromwell and the living one? Khaddar is a living thing. But India has lost her eye for the real art and is, therefore, satisfied with the glossy exterior, Revive the healthy national taste for khaddar and you will find every village a busy hive.²¹⁷

Gandhi had several occasions in his life when he had to engage with the modern property institutions. The principles Gandhi held were significantly reflected in his thoughts and actions and it was those thoughts and actions which was fundamental for Gandhi. Gandhi realized that economic activity has a core purpose of bringing about distributive justice. Institution of market however we conceive cannot be divested of its core values and to recreate it as a science where the human element is taken out could be disastrous. Economy has a significant role to play to bring peace and wellbeing in a society and it requires a holistic approach.

System of Competition and the Problem of Distributive Justice

In a free market economy the principles of competition play a significant role as to how the economy is regulated and governed. Free and fair competition being the norm, the role of market participants especially that of a dominant firm in a given

217 Gandhi, M. K. "Hand loom v. Spinning Wheel." CWMG, 2, 5

scenario has been a matter of great contention, as to what kind of role they are supposed to play. The recent trend where by firm's which are categorized as dominant are cast with a higher degree of responsibility to see to it that a fair playing environment exists and their actions in no way hurts unfairly smaller players, consumers or the society. They are also cast with a duty to engage with other participants though strictly speaking which law cannot dictate. This larger role or obligation cast on the dominant firm underlies some significant friction of ideas and clash of philosophy. Antitrust laws or competition law tries to govern the market and it proscribes abuse of dominance. Law though in a loose manner has cast obligations on dominant market players but sometimes law attempts to impose a duty of care and 'duty to deal'. The prominent idea behind the casting of a duty was that by virtue of dominance one has the capacity to influence other players, choices of consumers and ultimately the power derived out of dominance can be used to maintain or leverage dominance to other sectors. When we say that a firm has got a duty it means that some have a right and the underlying asset is a property whether it's a 'thing' or a 'right to a thing'. The property can be intangible like intellectual property or tangible.

The courts have developed a notion of 'refusal to deal'²¹⁸ whereby an attempt is made in casting a duty on the dominant firms. The wider scope for interpretation and the criteria for determining a case of refusal to deal are objective and the parameters unspecified. It means that it is difficult for the court to see as to what are the limitations of the property rights of a party so that the other party can be cast with the duty. If at all a duty is cast upon the dominant player to deal, then under what circumstances it has been done and what was the criteria undertaken to decide the duty. Whether such duty is in anyway contravening the so-called right of the firms to trade or engage in a business activity or to put it more simply their right to property itself and hence a understanding of 'property rights' is required. The antitrust regime which is a product of free market plays pivotal role in regulation of market and the property rights.

218 Albertina, Albers-Llorens. "Refusal to Deal and Objective Justification in EC Competition Law." *The Cambridge Law Journal*, 65: 1 (Mar., 2006): 24-27; Also See Hovenkamp, Herbert. "The Antitrust Enterprise: Principle and Execution." (Cambridge: Harvard University Press, 2005), 291-300.

The broader objectives of the antitrust law have been different for different jurisdictions and there have been other economic and social commitments of the state which have been influencing the law and the courts while looking at the issues in a broader light²¹⁹. The US is more focused on the consumer welfare where as in Europe the competition policy is towards an economically efficient market. For example advocates of ‘utilitarian antitrust’ consider competition law as a means to generate consumer welfare, which instrumentalises competition, claiming that competition without efficiency does not deserve protection. As Hovenkamp eloquently points out “Judges have spoken of antitrust law as a ‘consumer welfare prescription’ for so long that the phrase seldom produces anything but yawns... The rhetoric of consumer welfare is very powerful. A statute declaring protection of consumers to be the goal of antitrust would probably pass congress by a unanimous vote”.²²⁰ But another point of view is that free competition is not an end in itself, it is but a means to an end. In its report on the mergers in contemplation Safeway Plc and Asda Group Ltd the UK Competition commission observed that when working effectively, competition involves a process of rivalry between firms’.²²¹ This process constitutes a societal value in itself, even in the cases when this process does not lead to welfare gains, because vigorous competition between firms is the lifeblood of strong and effective markets.

Whether it’s US or European Competition Law or the jurisdictions which have largely formulated their antitrust law based on these jurisdictions are primarily capitalistic in their approach in determining issues of antitrust. The *GE/Honeywell Merger* is perhaps the most cited example of competition law jurisdictions reaching different conclusions on the legality of a transaction or some other conduct that has economic effects.²²² The case revolves around the difference of opinion between United States and European Union as to the merger effects between GE and

219 Möschel, Wernhard. “The Goals of Antitrust Revisited.” *Journal of Institutional and Theoretical Economics (JITE) / Zeitschrift für die gesamte Staatswissenschaft*, 147: 1, The New Institutional Economics New Views on Antitrust (Mar. 1991): 7-23

220 Herbert Hovenkamp, *The Antitrust Enterprise*, 31

221 ‘Safeway Plc and Asda Group Ltd. A Report on the Mergers in Contemplation’, September 2003, U K Competition Commission. Cited in Mark Furse, “*Competition Law of the EC and UK.*” 6th Edition, (Oxford: Oxford University Press, 2008).

222 See COMP/ M.2220, *General Electric/Honeywell*, OJ 2004, L48/1; U S Department of Justice Press Release, Statement by Assistant Attorney General Charles A. James on the EU’s Decision regarding the GE/Honeywell acquisition, 3 July 2001.

Honeywell might have. The effects needless to say are both positive and negative but whether the negative outweighs the positive effects and what are the other dimensions of such a merger was a contentious issue between the conflicting jurisdictions. This indicates the differences of many different jurisdictions and the conflicts to which they occasionally give rise, requires appreciating that competition law are not merely a set of substantive rules, but have procedural, institutional and jurisdictional dimensions apart from the conceptual dissimilarities. However, all the jurisdictions concerned have legitimate interests to protect. In the case of the extraterritorial application of competition law, the interests of foreign firms will be directly affected as might their competitiveness and efficiency. Similarly, in market access cases, a country applying its competition law might have little interest in protecting local consumers and access by foreign suppliers, but will have an interest in not harming the competitiveness of local firm and the efficiency of its economy.

Many nations do not have a tradition of antitrust, especially third world and developing as well as least developed economies. Many less developed and developing nations are concerned with the distribution of wealth, opportunity, access to markets, and control over the power and perceived abuses of multinational enterprises.²²³ Whether economic goals are the only concerns of antitrust regime is a question which one needs to consider especially in the context of developing and least developed economies. Concerns like the freedom of the firm to engage in a business or their right to hold and use the intellectual property has eclipsing the ultimate purpose of welfare. Competition law just doesn't seek a free market economy but in doing so, it wants to achieve a better standard of life to the people and more importantly it tries to achieve an ulterior objective of fairness, equality and well being of the people in a society where the weakest person will have the opportunity and freedom to excel through his hard work and dedication. But many a times, this objective was overlooked in pursuing pure economic goals. The difference in opinion as to the objectives of the competition law has led to conflict of opinions as what constitutes the ultimate goal of the antitrust law is not same in different jurisdictions.

223 Fox, Eleanor M. "Trade, Competition and Intellectual Property – TRIPS and its Antitrust Counterparts." *29 Vand. J. Transnat'l L.* (1996): 481

The public-private interest conflict indicates larger question with many facets to it and is not an easy question as it's hardly legal or economic in its nature. From a legal perspective if primacy is given to the individuals' legal right and the interests of the larger public and their welfare is sacrificed, when there is a conflict of interest, which makes the individual more vulnerable in the long run because he will be only driven by self interest. Moreover we fail to understand that the public interest need to be taken care of, if the individual interest is to be better served, which puts us in a vicious loop from where escape seems to be almost impossible. The Indian case of *Re All India Organisation of Chemists & Druggists and Others*²²⁴ put forth before the court such a predicament where the court attempted to decide the case looking at the larger interest of the society that the boycott of the particular drug manufacturer was hampering the availability of essential drug in the market. As medicines and drugs are a life saving and should be seen above the commercial interest of the parties the court could advocate that the competition should be healthy. When social harm is evident such conduct cannot be approved though the court didn't consider anticompetitive effect of the conduct from a purely antitrust analytical framework. If the courts favor the property right of an individual at the larger cost of the public, is to motivate the individual by showing only his self interest rather than a larger public interest, though the individual may find it beneficial in the short run. People should be motivated and driven by the force of larger good than a narrow benefit of individual well being which the law should aspire for. Hence the right to property should not be construed in such a manner which negates the public interest and the societal development. It's not just the narrow economic concerns, but competition law can serve a democratic purpose, in the process ensuring the observance of the rule of law.²²⁵

This indicates that even in a free market economy there is a need to create an obligation on the dominant firm where regulation cannot be ignored. The courts have attempted to find an amicable solution by reading obligations on dominant firms. If the law doesn't hold responsible *per se* or creates obligations, a dominant firm may utilize its monopoly power in an unjustifiable manner. The dominant firms, by law, are not obligated to share information or to sell its product or services to other

224 *Re: All India Organization Of Chemists And Druggists And Ors* (1996) 21 CLA 322

225 Vedder. Hans, "Of Jurisdiction and Justification. Why Competition is Good for Non Economic Goals, But May Need to be Restricted." 6: 1, *Competition Law Review*, (2009): 51-75.

competing firms in the market as there is freedom of trade. Whether law create obligations on dominant firm to deal with other firms and under what circumstances can it do so is a matter of great debate and can only be objectively justified and which would be circumstances specific.²²⁶ When we say a firm has a “duty” the burden of proof falls on the dominant firm and creates a presumption that to establish its right not to deal is with the dominant firm. Being a dominant firm and being in an advantageous position it would be more fair to ask the dominant firm to show the burden of proof rather than the plaintiff and the dominant player should be required to show that by forcing it to deal would amount to a violation of its rights as a free market player or its trade rights.

The duty of a dominant player has been explained by courts in various cases directly and even indirectly without a reference to the duty as such. The European Court of Justice has held that a dominant firm has a special responsibility towards the competitive process 'not to allow its conduct to impair genuine undistorted competition on the common market'²²⁷ and probably the responsibility grows with the degree of dominance.²²⁸ This means that the law aims not just to protect the competitors but above all the competitive process and free access to the market to other players and ultimately the interests of the consumers are protected, but it could be contrary to legislative intent or express provisions would be needed so that the application to real life cases are uniform and result oriented. Some say that the mere existence of the dominant player weakens the competitive process or to be more precise a free entry into the relevant market and its precisely for this reason that the court has vested on the dominant firm a more serious responsibility of regulating its own conduct so that none other genuine interests are harmed, but this attempt may not solve the problems at hand.

226 Case 77/77, *Benzine en Petroleum Handelsmaatschappij BV v. EC Commission*, 29 June 1978, [1978] ECR 1513.

227 Case 322/81 *Michelin v. Commission* [1983] ECR 3461, para. 57

228 Case C-333/94P *Tetra Pak II* [1996] ECR I-5951, para. 24, Case C-395-296/96 *P Compagnie Maritime Belge Transports SA v. Commission* [2000] ECR I-1364, opinion of Fennelly AG, para. 1137, paras 112–19 (ECJ).

In *Sea Containers/Stena Sealink*²²⁹ case the dominant firm which was an owner cum user of the facility along with other users was casted with a duty to separate its management from the use of the facility so that other users will be treated equally and the dominant firm can't take an advantage as a user because it is the owner of the facility. In *United Brands*²³⁰ a leading case of refusal to sell, the court cast a positive duty on the dominant firm by making it obligatory to sell to a long standing customer unless there are objective reasons to justify not to do so. In *Bronner case*²³¹ Advocate General Jacobs even opined that a dominant undertaking must actively promote competition by allowing potential competitors access to the facilities which it has developed. However, there are cases establishing that in certain circumstances, the law can impose an obligation to deal. The cases have dealt with both refusal to supply a customer who is not an actual or potential competitor of the dominant firm and refusal to deal with a competitor who operates, or wishes to operate, in competition with the dominant firm on the dominated market or a market downstream to the dominated market. The exact circumstances in which an obligation to deal may, or should be, imposed is uncertain however, and has provoked widespread debate. There are a number of factors which make this area especially controversial.

First, an obligation to deal interferes with a firm's freedom of contract and right to dispose freely of its property in a way and which *prima facie* curtails the fundamental right of the firm to trade. In *United States v. Colgate & Co*, Justice McReynolds stated that 'in the absence of any purpose to create or maintain a monopoly, the [Sherman] act does not restrict the long recognized right of trader or manufacturer engaged in an entirely private business, freely to exercise his own independent discretion as to parties with whom he will deal'.²³² Similarly in *Oscar Bronner v. Mediaprint Zeitungs- und Zeitschriftenverlag GmbH & Co. KG*, the then Advocate General stated that 'the right to choose one's trading partners and freely to

229 Commission Decision No 94/19/EC of 21 December 1993, IV/34.689 - *Sea Containers/Stena Sealink* – Interim measures, OJ 1994 L15/8, para. 66.

²³⁰ Case 27/76 *United Brands Company v Commission* [1978] ECR 207

²³¹ Case C-7/97, *Oscar Bronner GmbH & Co. KG v. Mediaprint Zeitungs- und Zeitschriftenverlag GmbH & Co. KG and Others*, 26 November 1998, [1998] ECR I-779, para. 34 of the Opinion of Advocate General Jacobs

²³² 250 U.S. 300, 307 (1919)

dispose of one's property... are generally recognised principles in the law of the member states, in some cases with constitutional status'.²³³

Further in cases involving a refusal to deal with a competitor there is a concern that it may be difficult to identify conduct which has an anticompetitive effect and in particular, that the imposition of an obligation to deal may discourage innovation both by the dominant firm and its competitor. This leads to a tension between static and dynamic efficiencies since consumer welfare may be increased not only by price competition in the form of lower prices on a downstream market but also through dynamic efficiencies resulting from innovation and the creation of new products. The acceptance of market power may therefore be the best way to promote investment and innovation incentives and dynamic efficiency. The tension between forced sharing and incentives to invest has been noted both by the Supreme Court of US in *Trinko* and in *Oscar Bronner*.²³⁴ This tension between forced sharing and incentives is especially acute in the sphere of intellectual property, where the intellectual property right is specifically granted to investors as a reward for effort. But this leads us to a bigger problem that in such cases enforcement may be difficult and costly and the Competition Authority or court may have to consider what terms of dealing it is reasonable to impose, a task it is not ideally suited to perform most of the times. In *Trinko*, for example Justice Scalia stated that an obligation to deal also required the courts to act as central planners, identifying the proper price, quantity and other terms of dealing, a task to which they are well ill-suited.

In the UK, the Competition Appeal Tribunal (CAT) in *Genzyme*²³⁵ held that a firm that had abused its dominant position through the operation of an unlawful margin squeeze was primarily responsible for bringing the abuse to an end and that a direction should be necessary only if it was unwilling or unable to find a solution. The judgment thus initially gave the parties a period to negotiate a remedy. Since,

233 Case 7/97 *Oscar Bronner v. Mediaprint Zeitungs – und Zeitschriftenverlag Gmb H & Co. KG* [1998] ECR I – 7791, [1999] 4 CMLR 112, para. 56.

234 In *Verizon Communications v. Law Offices of Curtis V Trinko LLP* 540 U.S. 398, 407- 408 (2004) Justice Scalia noted that forced sharing was in tension with the purpose of the antitrust laws since it might lessen the incentive for the monopolist, the rival or both to invest in economically beneficial facilities. See also the opinion of Jacobs AG in Case C-7/97 *Oscar Bronner v. Mediaprint Zeitungs – und Zeitschriftenverlag Gmb H & Co. KG* [1998] ECR I – 7791, [1999] 4 CMLR 112, para. 56-58.

235 Case 1016/1/1/03 *Genzyme Limited v. OFT* [2004] CAT 4.

however, the conduct of the dominant firm essentially precluded a negotiated settlement, the CAT in the end imposed directions erring in favor of an approach which would be more likely to stimulate than mute competition.

Mostly the courts have discreetly held in most cases cutting across different jurisdictions the use of Essential facility in granting relief to the party approaching the court against a dominant market player. But the application of essential facility has not been the only case where the concept of duty to deal has been decided because the cases where essential facilities don't apply the court need to successfully hold the duty to deal against an erring dominant firm and it becomes more so a tricky question. But before we consider such cases in the forthcoming chapters it becomes pertinent to look into the concept of essential facility and its adoption by the courts. The essential facility requires the sharing over a natural monopoly asset which is considered as a necessary input for the development of another market. Sharing such an asset is considered as requirement under the law creating an antitrust liability. The doctrine rests on two basic premises: first, by virtue of being a natural monopolist one should not be permitted to deny access to the critical facility leading to a foreclosure of rivals opportunities in adjacent markets; second, the more radical remedy of dividing the natural monopoly among multiple owners, while mitigating the threat of leveraging, could sacrifice important efficiencies. The duty-to-deal, under antitrust laws is only an exception to the rule that on general obligation or duty can be cast on a market player to share their assets with rivals as it would be counterproductive and a weak property regime would create insecurities leading to stunting of market and its growth. Notwithstanding its vintage, the doctrine has been subject to much criticism and controversies.

Antitrust and Trusteeship

It is in these circumstances that we need to consider the doctrine of 'trusteeship' as enunciated by Gandhi, where both the individual and the public interests are attempted to balance. Where the capitalists uses his property as a trustee and uses it for the ultimate benefit of the beneficiaries, that is the public; and the public or the workman works in the factory as if it is his own property and shares a sense of ownership in the property. In the case of *Genzyme* the court has indicated an

obligation if understood by the parties and willing to modify their conduct would be most appropriate where a legal intervention is not desirable. These cases have indicated that a legal solution to all market problems is not possible but what is required is a sense of cooperation towards other participants rather than a 'right' based approach.

Duty of the dominant firm should be viewed in a very positive way and the underlying philosophy should be such that it harmonizes the conflict and achieves a healthy coexistence between different market participants which also involves the interest of the society at large. Lately, it has been the trend to ignore the *in rem* rights of the property and focus more on *in personam* rights in line with the 'bundle of rights theory'²³⁶. Because the *in rem* character of property and its consequences are vital to an understanding of property as a legal and economic institution. Thomas W. Merrill and Henry E. Smith in their essay '*What Happened to Property in Law and Economics*' argues that the decline of the conception of property as a distinctive *in rem* right in Anglo-American thought, and the rise of the view of modern legal economists that property is simply a list of use rights in particular resources supports the approach that Gandhi takes on property.²³⁷ When Gandhi signifies the *in rem* character of the property right it clarifies that the property should be in consideration with the welfare of the society, which is reflective of the statement which Merrill and Smith makes, As Blackstone, Smith and Bentham recognized, the tried-and-true method of handling potential conflicts over resources among large numbers of claimants is to create *in rem* property rights- rights that give one person the ability to exclude all other claimants to the resource and thereby determine its use. Gandhi goes a step further and says that it's not just the *in rem* rights but the utility of the wealth to the society which should determine the property right because if the wealth is in no way benefiting the society then such wealth is of no significance and economic policy which supports property rights in derogation of the duties which is attached to the property rights in terms of trusteeship should not be upheld.

236 Merrill, Thomas M. and Smith, Henry E. "What Happened to Property in Law and Economics?" 111 *Yale Law Journal* (2001): 357

237 Merrill and Smith, What Happened to Property in Law and Economics?

In a free market economy intangible property has evolved considerably and its horizon is ever widening. Whether it is knowledge or intellectual property as the source of property right, the ever widening and complex nature of conflict between different constituents has gained momentum, as knowledge has become a source to create property rights into unchartered territory. It also indicates the shift towards what is called weightless economy becoming a major force in the free market economy of 21st century where ideas, knowledge and information are being brought in the domain of private property and the tussle between private and public property is seeing a paradigm shift towards a tussle between private and private property rights. This becomes possible under the stricter regime of private property guaranteed by legislations and judicial interpretation of property rights.

Intangible Property Rights and Gandhi

Access to knowledge is a prime concern of property rights in twenty first century where property rights in intangibles has gained value far more than a value which can be attached to physical object which is ultimately perishable. Intangibles cannot be stolen and are not perishable. Twenty first century is an intangible driven economy where ideas, software, trademarks, patents and copyright are of far more value than a physical object. The most valuable companies in the world have ownership of intangibles which is core to their business concern than a physical object to say machinery, land or product.

The conceptual origins of intangible property right primarily can be traced to debates of two schools of philosophical thoughts, Utilitarian school of Jeremy Bentham, J. S. Mills and Thomas Jefferson and the Natural rights school of Locke and Rousseau.²³⁸ Utilitarianism perceives an intellectual discovery or invention as a product of society which has its moorings in a cumulative process of producing intellectual assets where the advance of knowledge is a byproduct of interplay between individuals. On the other hand natural right stresses on individuals contribution. Where Utilitarianism perceives intellectual contribution as a result of collective efforts and so should serve the interest of all members of society at large and believes that inventions cannot by nature be a subject of property. As Thomas

238 Granstrand, O. "*The Economics and Management of Intellectual Property: Towards Intellectual Capitalism.*" (Cheltenham: Edward Elgar, 1999), 23.

Jefferson puts it “Society may give an exclusive right to the profits arising from them, as an encouragement to men to pursue ideas which may produce utility, but this may or may not be done, according to the will and convenience of the society, without claim or complaint from anybody”.²³⁹ In contrast, Natural right school believes that each individual is having a natural claim to the results of his or her physical or mental labor.²⁴⁰ So whether it is physical or intellectual creation there can be no difference between both, there is essentially no difference between property in physical or intellectual creations as both are an extension of that individual’s identity, “an extension of which the individual could not be deprived by others, and especially not by societal institutions”.²⁴¹ As Locke advocates that all humans possess an unquestionable property in their own person. Though eventually the natural rights school of thought faded and the utilitarian school of thought was adopted into the system of property rights. As the US Copyright Act of 1909 succinctly puts it, “The enactment of copyright legislation by Congress under the terms of the Constitution is not based upon any natural right that the author has in her writing [. . .] but upon the ground that the welfare of the public will be served [. . .] by securing to authors for limited periods the exclusive right to their writings.” In Europe where the development of natural rights took place a concept of moral rights also emerged which went beyond the provisions of statute.

As Europe largely followed Natural rights philosophy, France developed a notion of moral rights or *droit morals* which are not a statute based protection called *droits patrimoniaux*. Moral rights are conceived out of the idea that creative works were the product not simply of creative labor but of creative inspiration. *Droit moral*²⁴² protects an author's moral or intellectual interest in his or her work. Hence it is not time barred and only a natural person can avail such a moral right. Such moral right confers on the author a right to be identified either by name or pseudonym as the creator of the work; right of disclosure to publish or not to publish the work; right of the author to withdraw or modify the work already published; and right of integrity that is to preserve their work from alteration mutilation or even to protect from

239 Granstrand, O, The Economics and Management of Intellectual Property, 34

240 Granstrand, O, The Economics and Management of Intellectual Property, 23

241 Granstrand, O, The Economics and Management of Intellectual Property, 23

242 Fine, Richard. “American Authorship and the Ghost of Moral Rights.” *Book History*, Vol. 13 (2010): 220

excessive criticism. In spite of Moral rights evolving into a branch, its adoption and codification largely remained invisible though it had an effect of granting rights to infinity to the author on the work.

The new economy has brought forth an era where knowledge and information are the most valuable commodities. The knowledge and information as private goods could be of infinite value but at the same time they exhibit the distinctive characteristics of public goods. The commodification of knowledge and information has brought in a strict proprietary regime providing protection to the right holder. It resulted in proprietary regime where it became difficult for individual users to have access, to the otherwise free and unlimited access, over production, use and dissemination of knowledge and information.

Knowledge and information is a significant social and cultural product which is shared, hence evolving with the time and are also subjected to democratic processes and scientific debates with the changing notions of a changing society. Therefore it has been argued that the basic notions of mainstream economic paradigm about excludability, exhaustability, scarcity and rivalry which apply to tangible goods may be unfit criterion to be applied in case of production, use and distribution of knowledge.²⁴³ As network effects in case of knowledge doesn't exhaust the original sources leading to either an excessive cost burden on others nor it leave anybody worse off. Moreover, it doesn't exclude anybody from parallel exploitation and enjoyment leading to an economic shortage or social threat. On the other hand, proprietary ownership on knowledge may lead to under utilization and exploitation leading to economic and social backwardness and degradation.²⁴⁴ It could have a further serious effect by aggravating inequality and exploitation by few.

243 Kaul, I. et al. "*Defining Global Public Goods. In Global Public Goods: International Cooperation in the 21st Century*", edited by Kaul, I., I. Grunberg, and M.A. Stern, (Oxford: Oxford University Press, 1999), 3–17

244 Vanneste, S. et al. "From 'tragedy' to 'disaster': Welfare effects of commons and anti commons." George Mason University, School of Law, Law and Economics, Working Paper Series, 2004, 04–23

Free access of knowledge has harmful effect on social welfare, artistic, cultural and scientific advancements as some endeavor to argue.²⁴⁵ The market becomes a mechanism to set price even where the goods have been produced at zero marginal costs whether it's an online news article, symphony or software. Knowledge and information as public, non rival and non exhaustible goods becomes idiosyncratic to the established system of the market economy and to the basic tenets of neoclassical economics. The legal mechanisms and Intellectual property regime with effective enforcement becomes a necessity to establish right holders proprietary claims. Law becomes an instrumentality to transform knowledge and information as commodities. Law creates knowledge into a scarce, rival, exhaustible economic resource to benefit a few right holders thereby ensuring economic gains and commercial exploitation by few. In this scenario, knowledge and information are no more considered as a collaborative enterprise by way of culture, science and communication. Law helps maintain a division between producers and consumers,²⁴⁶ circumscribing non owner's right and freedom.

The institutions of copyright which attributes its origin in the philosophy of utilitarianism, and more so, as far as common law countries are concerned.²⁴⁷ Copyright provides an exclusive right to copy, reproduce, distribute, adapt, perform or display ones work of creative expression.²⁴⁸ It is in a way a bundle of exclusive rights available to the right holder to exercise control over the use of one's work for a specific period of time.²⁴⁹ Copyright law grants an exclusive right independently of any application or registration process. It only protects the expression within a work, and not the idea expressed by the author. Copyright is mainly limited by the concepts of fair use and independent creation. The justification of copyright has its roots in incentivizing creativity. By providing authors and creators with a limited, market-

245 Some argue for proprietary rights for knowledge by referring to Demsetz's theory on the impact of externalities in the development of property right system and also refers to Hardin's popular metaphor about the tragedy of commons. Demsetz, H. "Towards a Theory of Property Rights." *The American Economic Review*, 57: 2, (May,1967):. 347-359; Hardin, Garrett. "The Tragedy of the Commons." *Science*, 162:13 (December, 1968): 1243-1248.

246 Barthes, R. "S/Z." trans Richard Miller, (New York: Hill and Wang, 1974)

247 Balganes, Shyamkrishna. "Foreseeability and Copyright Incentives." 122 *Harv L. Rev.* (2009): 1569, 1576

248 Scotchmer, S. and Maurer, S. M. "A Primer for Non-lawyers on Intellectual Property: Innovation and Incentives." (Massachusetts: MIT Press, 2006), 65-95

249 In most states of the world and for the majority of the existing works this period is set at author's life plus 70 years. However in India, the Indian Copyright Act of 1957 section 22 states that the period of grant of copyright shall be 60 years.

based monopoly over their works which are reflected in a set of exclusive rights for a specific period, copyright tries to appeal to self interest driven creator and his creative process. This spur in creativity could add to learning and progress of society.²⁵⁰ Irrespective of its ultimate benefit of distribution of wealth and opportunities to the society, the utilitarian logic underlying copyright is manifest in the idea that more expressive creativity benefits society at large.

The logic behind conferring exclusive rights and award patents or copyrights acts as a motivation which will trigger innovation and ultimately would benefit the society at large, but the question whether that is the only motivation for one to innovate is significant. Studies show that extrinsic and intrinsic reasons influence people to innovate, discover or invent. Extrinsic reasons are the recognition one gets and the financial benefits which comes along by commercially utilizing and exploiting the invention. But the intrinsic reasons are human zest for invention and discovery, one's curiosity and scientific, creative and intellectual temperament. Ryan and Deci²⁵¹ argue that the intrinsic reasons define the creativity initially in a person's life and later as we advance through our education system and societal pressures we depend on extrinsic reasons to propel our scientific temperament. For Gandhi this intrinsic value is important as the proprietary rights granted for innovation is not absolute and is conditional. It is important that the innovation and intellectual output has its roots in the society and do contribute towards the welfare of the society. There are moral questions which are more important. What is the nature of innovation and whether it actually contributes to the development of the society? If nuclear bombs and chemical weapons are innovated that is not worth the effort as it would invoke disaster and death to millions of innocent people. What is the benefit of such innovation to the society even though it would be worthy to categories it as an innovation where one gets exclusive proprietary rights over it. Hence the ethical and moral dimensions of such proprietary rights which are ignored by the copyright and patent regime is questionable. As Gandhi doubted the logic, and primarily because of ethical and moral questions, Gandhi was not an advocate of intellectual property regime which gave proprietary rights over knowledge and ideas which helps one in

250 The Statute of Anne- the world's first copyright statute describes itself as an Act for the encouragement of learning.

251 Ryan, R. M., & Deci, E. L. "Intrinsic and extrinsic motivations: Classic definitions and new directions." *Contemporary Educational Psychology*, 25, (2000): 54–67

establishing claim rights. It eventually leads to controlling of knowledge and ideas which took centuries to develop and has innumerable contributors where we act as a mere link between past and future. Granting of such rights is not devoid of its negative effects which have to be understood properly.

Intellectual property presents a situation of trade off or balancing act. If the property regime is too generous to the creators then good ideas will take too long to copy, adapt and spread to the contrary it will stifle creation of ideas. This trade off has always been colored by politics. A country will have stronger legal protection to the creators if they are at the forefront of such innovation and creativity and on the other side countries who are in infancy of such innovation and creativity tend to have a loose property regime where copying and reproduction creates cheapest possible access to best ideas. The less they copy other ideas and the more they create their own, the more they protect ideas. Interestingly many a times it was found that free copying gave the inventor much fame and money compared to the benefits he received out of legal protection and licensing. Charles Dickens who once complained about piracy could earn money and fame more after his work was pirated by United States publishers which gave him fame. Dickens fame made him a public speaker who commanded large amount for his lectures than what he could have earned as an author under a strict property right regime.²⁵² The same is said about engineer James Watt, designer of steam engine. The economists Michele Boldrin and David Levine²⁵³ argue that what truly unleashed steam powered industry was the expiry of the patent, in 1800 as rival inventors revealed the ideas they had been sitting on for years. Consequently competition forced Watt to innovate and resultantly could make more profits. It is argued that far from incentivizing improvements in the steam engine the patent actually delayed them. Recently the open access movement in software also indicates such a trend where the open access has created more benefit and improvement to the software that would not have been possible if licensing was made compulsory to use of such software.

252 Hudon, Edward G. "Literary Piracy, Charles Dickens and the American Copyright Law." *American Bar Association Journal*, 50: 12 (December, 1964): 1159

253 Selgin, George. and John Turner, "James Watt as Intellectual Monopolist: Comment on Boldrin and Levine." *International Economic Review*, 47: 4 (November, 2006): 1341-1348

Economically copyright attempts to induce creativity based on twin principles of preference satisfaction and wealth maximization. The belief underlying copyright's theory of incentives is premised on rationality of individual creators, who are believed to be motivated, if not entirely, by the urge to maximize their own self interest via the market. Likewise, copyright assumes that preferences can be satisfied without a predetermined outer boundary. The urge to maximize their own personal welfare thus becomes a motivation for creators. On the other hand Gandhi's ethical ideal limits one's preferences and wants, which stands in strong contrast to copyright's operating assumptions about individual behavior as a positive and normative matter.

Copyright being an institution which rests on the self interest or draws its logic based on the motivation created by self interest stands in contradiction to the Gandhian ideals. For Gandhi the collective enterprise of village communities and their growth based on sharing contradicts a property right which has its moorings in self interest. Copyright a product of industrial era²⁵⁴ conflicts with the village based development, emphasizing self sufficiency, sharing and ethical motivation. Copyright which perpetrates the institution of private ownership has significant similarity to other real and personal property institutions and copyrights structure of exclusive rights rests itself on property's idea of exclusion.

Gandhi though saw private property as a necessary evil, in an instance of an alternative available always stood for community interest and its primacy. Though in his life time Gandhi actively engaged with the necessary evil of copyright, but it was in his own terms. Gandhi's discomfort with copyright is based on his disagreement about the assumptions copyright rests on to justify its regime. For Gandhi rejection of copyright has been based on purely personal considerations and is to be contrasted in cases of rejection of law,²⁵⁵ which was based on moral legitimacy of law and *lex iniusta non est lex*.²⁵⁶

254 Mark Rose, "Authors and Owners: The invention of Copyright." (Cambridge: Harvard University Press, 1993)

255 This was a central component of satyagraha, where Gandhi advocated the mass, but non-violent disobedience of an immoral or illegitimate law. See Gandhi, Non -Violent Resistance, at iv. He developed this approach in South Africa for the first time, and employed it routinely during the Indian freedom movement.

256 Translated as "unjust law is no law"

Gandhi never sought copyright to his first book published in 1910 titled *Hind Swaraj or Indian Home Rule*. As Gandhi was involved in publishing while in South Africa the decision to put 'No Rights Reserved' can be seen as a conscious one, based on his belief that consumption of books in a 'continuous ethical community in which printers, authors and readers becomes comrades'.²⁵⁷

Gandhi even asserts that his own work heavily draws from materials that he has read in the past, hence there is no claim of originality in its content.²⁵⁸ But Gandhi's first serious interaction with the institution of copyright comes in 1926 while in India. Gandhi's work especially his autobiography was being reproduced by publishers who did so for commercial purposes. Gandhi's followers found this reproduction and commercial exploitation of his works both objectionable and counter to Gandhian values as it was misquoted many a times and people made profit out of Gandhi's writings by reproducing it.²⁵⁹ When Gandhi's attention was drawn on the fact, he stated that he considers his works as common property and he has not yet thought of copyrighting his works. Gandhi further states that "copyright is not a natural thing. It is a modern institution, perhaps desirable to a certain extent. But I have no wish to inflate the circulation of *Young India* or *Navajivan* by forbidding newspapers to copy the chapters of the autobiography".²⁶⁰

Gandhi's objection to copyright was personal that he had moral discomfort with the idea of copyright and he never found anything justifiable in utilizing his copyright. Rather than questioning its relevance and desirability, copyright for Gandhi was against his value and belief systems. For Gandhi his ideas and principles are motivational to others rather than being an 'imperative' one.²⁶¹ His rejection of copyright was personal, but nonetheless exemplary in function. When Gandhi says that he have 'never yet copyright' of anything in a way seems to suggest that his position and opinion on copyright may change.

257 Hofmeyr, Isabel. "Violent Texts, Vulnerable Readers: *Hind Swaraj* and its South African Audiences." 23 *Pub Culture* (2011): 285, 292

258 Gandhi, M. K. "Hind Swaraj" in CWMG, 10, 245-46.

259 Gandhi, M. K. "Exercise the Copyright", in CWMG, 34, 449-50.

260 Gandhi, M. K. "Exercise the Copyright", in CWMG 450

261 Gandhi, M. K. "Exercise the Copyright", in CWMG 462

Later in his life Gandhi uses copyright in a limited way for strategic reasons, still continuously asserting and adhering to his personal objections as an abstract principle. His only demand when approached by publishers to publish his letters and other works were to adhere to originality in translation, even when he denied having copyright.²⁶²

It is interesting to note that even while Gandhi opposed the logic behind copyright he wasn't completely opposed to the idea of paying for knowledge and information. This had been a common misconception about Gandhi. Gandhi was pragmatic that he wasn't beginning from a blank slate. He understood that people depended on market mechanisms for their livelihood and one cannot completely castigate their efforts as illegitimate and it would be wrong to ask them to abandon their wealth altogether.²⁶³ Gandhi hence focused on redistribution in embracing payment mechanisms. When Gandhi sought to publish vernacular versions of 'Harijan' he was not averse to the idea of charging nominal subscription fee from those who could afford. He said "I do not believe in presenting the public with free literature on any subject. It may be ever so cheap, but never free".

Copyright promotes self interest and is market-based. In a way it creates artificial restriction on the flow of knowledge and information, like market prices, where artificial barriers, especially unreasonable pricing creates restriction for access. In copyright Gandhi finds restriction of freedom and imposing of duties. But Gandhi's acceptance of prices for knowledge and Information, while rejecting copyright may seem to be contradiction, but for Gandhi it was minimal and reasonable and has to be applied under specific circumstances to create value. Though an analysis may suggest that the ideas that 'free' knowledge and information connote a sense of positive liberty and the absence of restraints, rather than a sense of zero price. Hence reasonable pricing is justified.

In 1922, Gandhi had talks with Macmillan Publishers to publish his autobiography in United States. But as a precondition to their publishing the book, they demanded that Gandhi transfer to them all of his rights in the autobiography for

262 Gandhi, M. K. "Letter to Narandas Gandhi." in CWMG, 56, 25

263 Gandhi, Trusteeship

both United States and United Kingdom market.²⁶⁴ Hence, beyond granting permission they wanted assignment of rights in the work, which Gandhi himself never claimed nor asserted. In a letter to John Haynes Holmes who was negotiating with Gandhi to get his work published, Gandhi wrote of two justifications which made sense for him for accepting the terms put forth by Macmillan Publishers.²⁶⁵ In accepting the benefit which comes along with granting of rights, such benefits can be used for larger public causes and ultimately the whole purpose was also to reach wider audiences in the western world.²⁶⁶

Gandhi tends to explain the decision in terms of distributive benefits which copyright assertion would bring about. The benefits could be employed for his social projects, but by doing so Gandhi in a way embraces the core utilitarian basis of copyright law, though he intends to employ this market mechanism towards a morally justifiable end. A larger benefit of adding to the cause of national movement from having his message obtain an external support and validation from readers outside India, would be a larger common benefit even if it meant that Gandhi had to compromise in his personal objection to copyright.

For Gandhi life had been a series of compromises and his willingness to do so in this case reflect that such compromises can be done on honorable terms with a perfectly legitimate outcome. But for Gandhi compromising on fundamental ideals and morals was however an untenable proposition. The rejection of copyright earlier was largely a pragmatic position that Gandhi had taken, which he was open to modify provided the broader goal would be better served. His rejection of copyright was situational rather than foundational. At the same time the idea of making money out of his writings for charitable purposes was quite alien to him. These compromises were suggestive of exceptions rather than rules.

Gandhi was looked upon by the masses for guidance, approval and planning. His writings during this period are replete with commentary on important episodes on

264 Gandhi, M. K. "Letter to Emil Roniger." in CWMG 35, 348-349

265 Gandhi, M. K. "Letter to John Haynes Holmes." at 281.

266 Gandhi, M. K. "Letter to John Haynes Holmes." at 281.

the struggles, all of which ended in strategic prescriptions for future engagements.²⁶⁷ It was critical for Gandhi that his messages remain simple, accurate and complete and his open permission to newspapers to freely copy and translate his articles without restrictions created unprecedented problems. But then Gandhi soon realized that it could also lead to misunderstandings as translation could create problems and Gandhi never had control over them.

An instance occurred in 1940 which changed Gandhi's understanding and engagement with the institution of copyright. An incident occurred in Ajmer where Congressmen hoisted the national flag at the fort and the fort was alleged to have constructed in honor of Mughal rulers and therefore the police believed that it could trigger communal clashes and hence asked the congressmen to bring down the flag.²⁶⁸ Gandhi was called up and he too advised to bring down the flag. After this incident Gandhi gave a neutral perspective on the issue and later even gave a perspective from the side of police but after necessary investigation when Gandhi came to know the real facts he publicly denounced the action of the police. Several of pro-government newspapers though had published the earlier opinions of Gandhi, refrained from publishing his criticism which brought forth a biased opinion to the mind of the readers. These selective reproductions which were untruth or half truths troubled Gandhi.²⁶⁹

This incident brought copyright into a new perspective for Gandhi where idea of truth or connecting the act of copying to the idea of falsehood made Gandhi see the value in copyright. Gandhi realized that failure to assert copyright can at times compromise truth, which for Gandhi had immense importance in public and personal life. Gandhi wrote, 'Since my main articles will henceforth be written in Gujarati, I would not like their unauthorized translations appearing in the press. I have suffered much from mistranslations when I used to write profusely in Gujarati and had no time myself to produce simultaneous English translations. I have arranged this time for such translations in English and Hindustani. I would therefore ask editors and

²⁶⁷ Gandhi, M.K. "Prohibition." CWMG, 49; Gandhi, "Message to Indians in the United Kingdom." in CWMG, 54; Gandhi, M. K. Congressmen Beware!, in CWMG, 74

²⁶⁸ Gandhi, M. K. "The Ajmer Trouble." in CWMG, 78

²⁶⁹ Gandhi, M. K. Notes, CWMG, 78, 317

publishers kindly to regard English and Hindustani translation rights as reserved. I have no doubt that my request would be respected'.²⁷⁰

The Ajmer episode was though not a case of mistranslation but one of selective reproduction, but Gandhi's willingness to accept the utility of copyright was based on strong arguments. Gandhi viewed copyright as a fundamentally divisible bundle of rights²⁷¹ and by reserving translation rights was dividing the bundle to ensure that he retains only as much as was necessary to counter the problems he was encountering. Identifying the translation right and treating it as an independent right was something that only familiar with the law was likely to have come up with. Interestingly, Gandhi never contemplates an infringement action but a mere assertion was enough for Gandhi. By doing so a normative force was developed without having to depend on copyright regime for recourse. Invoking the legal mechanism would have been against his ideals bringing practical and ideological conflicts. In doing so he avoided any interaction with British legal machinery and with copyright institution.²⁷² On the other hand it was enough for Gandhi to assert where he had faith that people would abide by his decision and in doing so he kept the matter personal without depending on the copyright regime in any way.

Gandhi's assertion of translation rights created resentment among publishers though Gandhi made it clear that any one is free to publish which Gandhi translates. Gandhi by doing so wanted to make sure that the crux of the matter is not lost in translation and translation is done properly. It didn't have any financial implication whatsoever. When one of the publishers wrote to Gandhi with an argument saying that his writings were 'the property of the nation and therefore there could be no copyright in them',²⁷³ Gandhi responded by saying that the grievance was just, but the reservation was limited to translation rights. He further says "Experience had taught me that English translations of my articles written in any Indian languages were faulty, but it would not have been proper to confine the copyright to translation into English. All important Gujarati articles would be translated simultaneously into

270 Gandhi, M. K. "Copyright" CWMG, 78, 408-409

271 It wasn't until the enactment of the 1976 Copyright Act, that copyright's bundle of rights came to be recognized as fundamentally divisible in the U.S. See Edward J. Martin, "Indivisibility of Copyright." 27 *A LB. L. R EV.* (1963): 257

272 Gandhi, M. K. "*The Law and Lawyers.*" (Ahmedabad: Navajivan Publishing House, 1962), 126.

273 Gandhi, M. K. "Two Just Complaints." CWMG, 79, 36.

English and Hindustani and published almost at the same time. There is, therefore, no hardship involved, for there is no copyright in the translated articles which can be and are being reproduced".²⁷⁴

Gandhi by putting the translated work back in public domain successfully dis-embeds the proprietary rights created by the copyright regime from its element of author's right over manuscript to be utilized in a way the author wants. In the ordinary understanding, a copyright owner is given the translation right in order to produce a translation of the original work, and thereupon obtains the same set of exclusive rights to the translation that the author seeks.²⁷⁵ Gandhi consciously disentangles the two and retains only the translation rights thereafter the reproduction is in public domain.²⁷⁶ It is indicative of how Gandhi strategically un-bundles the copyright's structure, tailoring to his own exclusive needs. He also in the process indicates that every structure of law permits ones to create a set of rule within the given domain and Gandhi with his minimalistic ideas can easily navigate through such structure of law. Gandhi understood that though he cannot agree to claim proprietary rights but his words can be easily misinterpreted and he had to ensure that it doesn't happen and it is important to convey it properly and for that matter resorting to copyright regime within the limits of his ideals can be easily done without resorting to the proprietary rights to which he has disagreements. The intangible property right has more subtlety to it than mere considering it as a property right. Gandhi in a way also denounced the use of copyright regime as a tool to control knowledge and information. By invoking property rights on ones copyright and patents any person can control, restrict and influence the flow of information and knowledge in a free market economy which can be easily used to subjugate, dominate and influence people and society. Intellectual property regime is nothing but a mechanism to control the flow of knowledge and information by creating property rights which had been in the public domain for centuries. It is also a mechanism to create a space for market economy which otherwise is not a possibility unless one controls the intellectual property.

274 CWMG 79, 36.

275 Translation is today treated as an adaptation, or even as a derivative work.

276 Gandhi, M. K. "Copyright", CWMG 78, 317-318.

Gandhi understood that translating a work was itself an expressive act,²⁷⁷ and multiple translations can co-exist in a world, though the most original would be the most sought after. Though there are enough reasons to gravitate towards the translations that exhibit the greatest fidelity to the original version; but there are definitely enough scope for multiple versions to exist in the market which is uncontrolled by a property regime. It's wrong to judge the work from ones perspective of good and bad because Gandhi believes that this matter cannot be looked at from a purely legal point of view, or from a purely financial one. We should also look at it from moral and practical point of view.²⁷⁸ His moral and practical beliefs outweighed other concerns in allowing multiple versions to co-exist and for Gandhi proprietary rights in such a work are undesirable.

For Gandhi, it was important that privilege is not misused and commercial interest shouldn't be the only purpose for a translation.²⁷⁹ In this whole episode Gandhi's structural approach in embracing copyright where Gandhi denounced the utilitarian, market-based behavior, with a willingness to employ copyright strategically to subvert its core normative values, while upholding his own principles and ideals. Contrary to the practice Gandhi made publishers to convince him that the translation rights they seek was not for profit maximization alone instead it has a core element of disseminating his messages to a wider audience. In doing so Gandhi to an extent successfully curtailed self-interested actors from misusing the privilege and on the other hand encouraged public spirited behavior in its place.²⁸⁰

As we can see Gandhi was though personally skeptic about the institution of copyright but was not opposed to the institution as such. Copyright's fundamental reliance on artificial scarcity, market-based distribution and profit driven approach to spur creativity was not in sync with Gandhi's approach. Writing to Gandhi was basically an act of practical reasoning and the utilitarian and incentive driven approach were irrelevant.

277 Gandhi, M. K. "Letter to Jivanji D. Desai." CWMG 88, 421 (Anand Hingorani had suggested different Boards, so that the Tamil Board would device about the Tamil translation and the Malayalam Board would advise about the translation in that language)

278 Gandhi, M. K. "Letter to Desai-I." CWMG, 422.

279 Gandhi, M. K. "Letter to Jivanji D. Desai." CWMG 89, 1

280 CWMG 89, 1

Gandhi differentiated legal structure of copyright from its underlying normative values. Gandhi's engagement of copyright was an attempt to avoid the capitalist tendencies and to promote access of his work for the public. It also pointed out that how copyright's utilitarian economic framework maybe strategically used to serve the purposes of moral rights *i.e.*, attribution and integrity, even when the system doesn't recognize moral rights independently.²⁸¹ Gandhi successfully showed that how in reality copyright's basic framework could be used emphasizing the non-economic goals realizing more than moral obligations, beyond attribution and integrity.

Gandhi's copyright develops a space for one to use the copyright regime without depending on the capitalist tendencies of profit and monopolistic dominant tendencies. At the same time it also guarantees that one can make sure that one's work will not be misused and the intention of the author to make his work accessible to all is also taken care of. Gandhi's philosophy of action provides a powerful and plausible explanation for his interaction with copyright law and its various facets. We can see that Gandhi's rejection of the institution of copyright which is inherently utilitarian in nature is fundamentally based on its inability to accommodate the ethical ideas that he believed ought to be central to all normative justifications of human action and behavior.

Copyright also could lead to a disciplinary regime like censorship, subjecting to a visible discipline the bodies of both the transgressive work and the transgressive author. Copyright also serves a censorship function by making attribution a precondition of the monopoly right.²⁸² Foucault in his work '*Society must be Defended*' says there were ways in which state power tried to control the biological, that is acquisition of power over man as a living being. The state control over one's life and death was antithetical to the social contract as the contract never envisaged giving control of one's life to the sovereign. Foucault points out that this philosophical debate of political thought and the analysis of political power after eighteenth century gained another layer. The new layer was more subtle and non disciplinary unlike the

281 Fromer, Jeanne. "Expressive Incentives in Intellectual Property." 98 *VA . L. R EV.* (2012): 1745

282 Foucault, Michael. Aesthetics, Method and Epistemology, "*What is an Author*" Vol. 2, (New York: The New Press, 1998), 208

power of the sovereign over one's life. This was an attempt to control the man as a living being or man as species. The multiplicity of men were dissolved into individual bodies that can be kept under surveillance, that can be trained, used and if need can be punished.²⁸³ This is indicative of controlling man as not an individual but man as a specie. The evolution of copyright if seen in this perspective can be termed as an instrumentality of the state to control man as a disciplinary tool, as a mechanism of censorship. Thus the subject matter of copyright can be referred as biopolitical as Foucault calls it and that means the regulation of copyright to spur innovation and creativity makes copyright as property living where as on the other side making regulation of copyright coterminous results in death of the living property. Foucault indicates a need to consider the copyright law is an act of imagining the proprietizing a work first by constructing it as a life. This life which he calls biopolitics is because of the compelling factor to live and create in particular ways through the regulation of the fields and systems it shares with its population. This disciplinary and biopolitical regime is closely linked with censorship and copyright and are not mutually exclusive from each other. It can be very well argued that Gandhi by rejecting the institutional framework of copyright and the control of state by granting rights leading to controlling of the copyrighted work in a way critiques the regime as a controlling mechanism. Hence Gandhi can also be called as post modern in his approach.

Gandhi saw limitations in reason and use of technology and these features of modern civilization are destructive to the human life and its development. As modern economic life followed an inexorable momentum of its own, it reduced men to a helpless and passive victim and represented a new form of slavery. This also indicated that dependence on technology and machines are demeaning the value of labor. Whether it's creative art, intellectual or physical labor, all are subjected to the unmindful onslaught of modernity. Gandhi says:

Ideally, I would rule out all machinery, even as I would reject this body, which is not helped to salvation, and seek the liberation of the soul. From that point of view, I would reject all machinery, but machines will remain because, like the body, they are inevitable. The body itself, as I told you, is the purest piece of mechanism; but if it is a hindrance to the highest fights of the soul, it has to be rejected.²⁸⁴

²⁸³ Foucault, Michael. "*Society Must be Defended.*" trans. David Macey, (New York: Picador, 2003), 271-75

²⁸⁴ Gandhi, Hind Swaraj, 9

This construction of man as subservient to machine where technology instead of liberating man is used to regulate, censor and punish is devoid of any morality and such technology and dependence on it should be rejected. Gandhian philosophy signifies the importance of morality and dignity of man and places man at the centre of civilization. A civilization has to be hence measured in terms of its ability to produce men and women possessing such distinctively human powers as self-determination, autonomy, self-knowledge, self-discipline and social co-operation. Modern civilization on the other hand alienated the man's ability to state and machinery and Institutionalized mans power, rendering men passive, helpless and heteronymous.

In Gandhi's view, modern society is also violent in its very nature. Man placed himself in the society in relation to the language of conflict, struggle, mastery, domination, subjugation victory and defeat, deeply rooted in violence.²⁸⁵ In a way modern civilization is so violent against nature that it has placed man above it and not in cooperation with it, leading to exploitation and destruction of man himself. Man being the central part and detached from the nature and other beings has had its impact on how we consider property rights as a foundational block in creating the world and economizing it in terms of a market structure has further alienated man from the planet as a being of which he is just a mere part. The idea of property has made a good enough contribution in perpetuating violence and creating destruction with its narrow interpretation and significance given to private property rights as the core of property regime. The next chapter would lay out the constitutional framework where an extension to property rights into private domain would be analyzed and whether constitution has legitimized property rights to an extent creating a regime of private property taking its reach beyond a balanced regime.

²⁸⁵ Parekh, Bhikhu. "*Gandhi's Political Philosophy: A critical Examination.*" (London: Palgrave MacMillan, 1989), 25

Chapter 4

Constitutional and Judicial Interpretations of Property

“No institution can be made non-violent by compulsion. Non-violence and truth cannot be written into a constitution. They have to be adopted of one’s own free will. They must sit naturally upon us like next-to-skin garments or else they become a contradiction in terms”

*m. k. gandhi*²⁸⁶

Gandhi’s philosophy sought to create an Indian society which is not industrialized or minimalistic in its dependence on machinery and mass production, where economic growth was decentralized and humanistic in approach and the role of government and regulation was minimal. Gandhi also envisaged of making provincial borders and a national army extraneous. Though, Gandhi visualized for an Indian state with as little government as possible but there was no much elaborate explanation on how Gandhi hoped to achieve it. Gandhi wanted a moral framework to express the collective will, but what exactly that paradigm would look like in practice was a point of contention and debate. For Gandhi the discussion gains importance because it mattered how the property rights would be incorporated in the constitution which was about to be written and what will be the contours of such property rights which would define the relation between state and its people.

Judith Brown argues that Gandhi desired a state completely void of positive law where truthful individuals leading a simple life co-operative life, which would need little outside regulation and would be able to manage their own affairs harmoniously.²⁸⁷ For most of his life Gandhi was averse to parliamentary politics. By 1945 Gandhi pleaded with colleagues to desist from their service as Indian

286 Pyarelal. *“Mahatma Gandhi: The Last Phase.”* Vol. II, (Ahmedabad: Navajivan Publishing House, 1958), 124-25.

287 Brown, Judith. *“Modern India: The Origins of an Asian Democracy.”* (Oxford: Oxford University Press, 1990), 205

National Congress ministers because of the inadequacies of democratic political activity.²⁸⁸

But as the transfer of power became an imminent reality Gandhi was caught in a dilemma. For Gandhi it represented a fundamental incompatibility between his political vision and the realities of running a state.²⁸⁹ In his autobiography Nehru wrote of Gandhi's economic ideas as utterly wrong... and impossible of achievement.²⁹⁰

Gandhi dismissed the idea of Capitalism for its exploitative excesses and socialism for its connection to industrialization and concentration of power. In a 1940 interview Gandhi explicitly stated his objection to socialism, "Pandit Nehru wants industrialisation because he thinks that, if it is socialized, it would be free from the evils of capitalism. My own view is that evils are inherent in industrialism, and no amount of socialisation can eradicate them".²⁹¹ Capitalism and Socialism now has become the quintessential hallmarks of modern society, also revealed the aspect of man as a prisoner of his craving for luxury and self Indulgence. Its effect now is visible not just on the society but on the state and the way governance is carried out. Hence regulation of property and its modern institutions reveals much about the society and its people and the state and its governance.

When the Constituent Assembly met to determine the profile of the new polity, Gandhi did not press his views on it. When it opted for the modern state, he did not take a public stand against it either. He does not seem to have spoken about it to Nehru or even to such loyal supporters as Vallabhai Patel and Rajendra Prasad either.²⁹² When his close associates offered to mobilize public opinion and mount pressure against the new constitution, he advised them against it and urged them instead to 'leave it to those who are laboring at it'.²⁹³

288 Chatterjee, P. "Gandhi and the Critique of Civil Society." In *Subaltern Studies III*, edited by Ranjith Guha, (Delhi: Oxford University Press, 1984), 189.

289 Chatterjee. *Gandhi and the Critique of Civil Society*

290 Nehru, Jawaharlal. "*Towards Freedom: The Autobiography of Jawaharlal Nehru.*" (New York: The John Day Company, 1941), 52

291 Gandhi, M. K. "Interview to Francis G Hickman." 17th Sep 1940, CWMG 79, 233

292 Parekh, Bhikhu. *Gandhi's Political Philosophy*, 120

293 Gandhi, M. K. "Talk with Sir Stafford Cripps." CWMG 90, 218, 220

The regulation of property institutions and the idea of property under the constitutional framework came under serious debate even after the Indian constitution came into existence. The property rights as has been enumerated under the constitution found itself in the cross roads of conflict between protection of private and public interests. The balancing of interests of different stake holders had become a difficult task and the judiciary was confronted with this question soon after the constitution was adopted. Judiciary found itself in a difficult situation to interpret the constitution in light of the evolution of the idea of property in the time of great ferment. Reflecting the idea of Gandhi, Justice K. K. Mathew delivering Dr Rajendra Prasad Memorial Lectures in 1975 states that:

(D)emocracy is not a mere mechanism of choosing and running the government. The egalitarian principle of democracy requires not only one man one vote, but also the equal effective right of each man to live a full human life. Democracy must, therefore, be seen as a whole complex of relations between individuals. An individual to live his secular life, as he may wish, would owe duties towards society and fellow citizens. Each must have an opportunity to prove, exert, develop and enjoy his human faculties. Therefore, each must allow others to have equal effective access to opportunity to exercise his capacities as means of producing utilities is an impediment, as it must be described as lack of access to man's liberty. If we take labour in its broader sense of human energy, it is property. This theory of property assumes importance in a democratic society.²⁹⁴

In the first place it was a difficult to grapple the contours of property and it depended much on what should be the philosophical approach one needs to take to understand the property and its contours. In a democratic and evolving society like India with varied layers of society having different and conflicting interests to protect it was not an easy task to understand property as a concept.

British India showed that property as a notion can be an effective tool to control, regulate and even disarm the people in a kaleidoscopic society like India. Karl Renner in his '*The Institution of Private Law and their Functions*'²⁹⁵ states that "property in modern conditions has become a means of control over other people's

294 Mathew, K. K. "*Democracy, Equality and Freedom*." edited by Upendra Baxi, (Lucknow: Eastern Book Co, 1978)

295 Kahn- Feund. "*The Institutions of Private Law and their Functions*." trans by Agnes Schwarzschild, (London: Routledge and Kegan Paul Ltd., 1949), 105-08

labor and life”. Hence private property requires reconciliation with public interest balancing public needs against private needs. Likewise, M. R. Cohen in his essay on “*Property and Sovereignty*”²⁹⁶ states that right is a relation, not between an owner and a thing, but between the owner and other individuals in reference to things. Therefore, the property is a right over things resolves it into component rights such as the attributes of ownership *jus utendi*, where the power of alienating the object or granting to others rights or liberties or privileges with respect to it; and *jus disponendi* where the liberty of using the object according to the owners will. Property is not an end in itself but a tool to live a meaningful and harmonious life. Property thus is a fundamental component of life enriches the life and creates new paradigms for life creating imageries of peace, democracy and rule of law. Constitution in its endeavor tries a difficult balancing between various facets of rights and its obligations in context to the guarantees provided by the spectrum of constitution rights. When we consider right to life to be meaningful, deprivation of property needs to be considered from broad constitutional spectrum. As property is a comprehensive term and is an essential guarantee to lead a meaningful life with human dignity, for in order that a man may be able to develop himself based on the powers of his faculties, he needs freedom and security. The economic and social justice, equality of status and dignity of person are assured to him only through property. Roscoe Pound has argued that a system of individual property on the whole conduces to maintaining and furthering of civilization. But at the same time concentration of wealth or property can also defeat the very own purpose of furthering the civilization. Sir Henry Maine wrote²⁹⁷ that nobody is at liberty to amass several property and to say at the same time he values civilization. The history of the two cannot be disentangled. Granting facilities and opportunities to hold the property furthers the basic structures of egalitarian social order guaranteeing equality. It also in its processes removes disabilities and inequalities and accords status and dignity of person.

The constitution of India, in its historical background provided twin outlooks in the form of directive principles Vis-à-vis the fundamental rights to realize social and economic aspects of property in a democratic framework. The scheme of property is a necessary component for the successful working of political democracy in which

296 Cohen, Morris R. “Property and Sovereignty.”¹³ *Cornell Law Quarterly* (Dec 1927): 8-30

297 Maine, Henry S. “*Ancient Law.*” (London: John Murray Albemarle Street, 1931)

the state is bound to provide to every person in the society equality of opportunity in economic arrangement. The aspiration is to create a distributive and equitable operation of Material resources in an economic system to establish the egalitarian social order. The framework though conceptual but mandated an outlook to create a society which could create imageries of peace, prosperity and progressiveness cutting across all sections of the society understand the spirit of constitution guiding towards the cherished and lofty goals of the constitution.

The constitution of India through article 31 and 19 (1) (f) accorded to 'property' the status as a fundamental right. But granting the status of right to property as a fundamental right raised serious questions and disputes early on in 1950 itself. The emergence of conflict between the animation of the founding fathers and the judicial interpretation on the word acquisition/appropriation was visible in the way the provisions were drafted exposing serious crevasse and limitations of expression. When can private property be subjected to sub-serve common good or to prevent common detriment and what are the contours of property rights under the constitutional schema was an open question and a cause of much debate. Again, the traditional view of property rights which is reflective in constitution is that it protects those who have property, the constitutional framework protects the right holder by creating a duty not to be deprived of one's property, or to bequeath one's property to whomever one wants applies to property owners only, and the right not to be encroached upon in one's house by the police only applies to those who have a house. So the question of creating a society with distributive justice and equity is not addressed in the constitution which sustains the inequality and protects those who have the property but not who even lacks the basic property rights like a piece of land or livelihood.

The limitations of a right to property in a constitutional fabric was evident to the framers as the constitutional debates indicates, especially after they having considered various provisions of different constitutions throughout the world. This limitation was clarified by Hidayatullah J. in his concurrent judgment in *Golaknath v. State of Punjab*²⁹⁸ and reiterated in his '*Right to Property and the Indian*

298 (1967) 2 SCR 762

Constitution',²⁹⁹ enumerates that the right to property is an acquired right and it is the weakest of right fit to be placed along with commerce clauses. Further, quoting Grotius, who had treated the right as an acquired right (*ius quaesitum*) and ownership (*dominium*) as either serving individual interests (*vulgare*) or for the public good (*eminens*) says that such acquired right has to give away to eminent domain (*ex vi super- eminentis domini*), but there must be public interest and if possible compensation. Our constitution though saw the matter in the way Grotius did but overlooked the possibility of just compensation. This observation in itself says volume of things as to the limitations of constitutional provisions on the notion of property. Prior to 1977, before the 44th amendment to the constitution of India right to property was categorized as a fundamental right under article 31 (1) and clause (2)300 and 19 (1) (f)301. 44th amendment brought forth 300-A.³⁰² It is pertinent to understand the background and debates of property in line with the constitutional provisions before we could analyze complexity of constitutional provisions of property in context to the Gandhian philosophical thought on property. Property is at its highest potency in our society as a family of constitutional norms. Though property has become one of the most richly theorized legal concepts, yet it also lacks fundamentally practical underpinnings like identifying criteria by which to distinguish it from other legal rights. Property has its positive sources, its characteristic of rights and obligations, its judicially patterned remedies in a constitutional framework, its historical arc and its allocative efficiency and the capability of creating a social meaning at any given moment. Still given all its dimensions Property is complex enough to have its own conceptual or normative anchors

299 Hidayatullah M. "*Right to Property and the Indian Constitution*." (Calcutta: Calcutta University, 1983).

300 Article 31 states of Compulsory acquisition of property (1) No person shall be deprived of his property save by authority of law. (2) No property shall be compulsorily acquired or requisitioned save for a public purpose and save by authority of a law which provides for acquisition of the property for an amount which shall be fixed by such law; and no such law be called in question in any court on the ground that the amount so fixed is not adequate.

301 Art. 19(1) (f) guaranteed to the Indian citizens a right to acquire, hold and dispose of property.

302 The objects and reasons to the amendment says that property while ceasing to be a fundamental right, however, be given express recognition as a legal right, provision being made that no person shall be deprived of his property save in accordance with law. Article 300 -A came into force by 44th amendment on 19.06.1979. Article 300 -A states that No person shall be deprived of his property save by authority of law.

Constitutional debates on property

India's constituent assembly debates shed considerable light on the background of the making of the constitution of India and the provisions related to property. The constitutional assembly endeavored to create a document which reflects the aspirations of the people and the provisions sought to conceptualize and create the instrumentalities to achieve those aspirations, sustain it and could give a progressive direction to the nation. Hence, much thought and time has been devoted by the framers not only in wording the constitution but also in understanding the philosophical contours of those cherished ideals and goals which were sought to be realized. The framers primarily thought of a strong and feasible bill of fundamental rights, of which the right to property constituted a vital part which was thoroughly discussed and debated in the constituent assembly meetings.

The draft submitted by K. M. Munshi put forth the provision that 'No person shall be deprived of his life, liberty or property without the due process of law'.³⁰³ Whereas K. T. Shah in his draft provided for acquisition of the private property with compensation contemplated only in case of property belonging to religious institutions. The sub-committee came up with a draft clause 27³⁰⁴ where just compensation for acquisition in all cases was provided for, where the acquisition can come up with a just process and manner of determining compensation. The due process clause came up with certain resistance where a comparison was drawn with Fifth Amendment of United States which was largely believed to be responsible for striking down several of progressive legislations. There was apprehension that in India it could lead to problems in abolishing *Zamindari* and *Jagirdari* systems.³⁰⁵ These provisions indicate that an unbridled domain to private property which in no way significantly threatened the status quo was conceptualized. A narrow approach of distributive functions of property to an extent to limit the *Zamindari* and *Jagirdari* system which at the time had significantly divided the population was the only major and immediate concern of the framers. The fresh and enthusiastic efforts of the framers were severely limited which could hardly fill or even narrow the gap between

303 Art. v (1) (e), Munshi's Draft, found in FIC, vol. II at 75.

304 Draft Report, Annexure, FIC, Vol. II pp. 128, 141.

305 Advisory Committee Proceedings, FIC, Vol. II, pp. 245-46.

the Zamindars and the poor common man. Whether the independence India gained could make sense to the millions of poor people even without access to the basic needs remained a larger question.

Finally, after much debate the form in which the right to property was incorporated in Fundamental Rights in Article 19 which guarantees and protects certain rights of citizens took the following shape. Article 19 (1) (f) declared that all citizens shall have the right to acquire, hold and dispose of property. Similarly Article 31 provided for certain safeguards against compulsory acquisition of individual's property. Though, Article 31 was primarily based on clause (1) and (2) of section 299 of the Government of India Act, 1935, but deviates significantly on certain grounds. While Article 31 (1) adopted the wordings of clause (1) of 299, clause (2) of 31 departed with (2) of 299 where 31 (2) comprehensively dealt with all private properties movable and immovable and acquisition as well as requisition of property. Though on one side it protected the rights in relation to the property for an individual but the other side of the coin as to whether these provisions led to bridging of gap by enabling the distributive functions effectively or not remained. This balance of the provision was difficult to come by especially when it has to be understood from the point of view of the larger goals of the constitution and other provisions. Whether this provision tipped the balance between the property owners and the people who were looking forward towards a more distributive and equal society remained a question.

The significance of this provision could be understood from the larger purposes which the provision could have achieved. Property in legal sense meant an aggregate of rights which are guaranteed and protected by law. It extends to every species of valuable right and interest, more particularly, ownership and exclusive right to a thing, the right to dispose of the thing in every legal way, to possess it, to use it, and to exclude everyone else from interfering with it. The dominion or indefinite right of use or disposition which one may lawfully execute over particular things or subjects is called property. The exclusive right of possessing, enjoying and disposing of a thing is property in legal parameters. Therefore the word property connotes everything which is subject of ownership, corporeal or incorporeal, tangible or intangible, visible or invisible, real or personal; everything that has an exchangeable value or which goes to make up wealth or estate or status. Property, therefore, within

the constitutional protection denotes group of rights inhering citizen's relation to physical thing, as right to possession, use and dispose of it in accordance with law. The term property has a most extensive signification, and, according to its legal definition, consists in free use, enjoyment, and disposition by a person of all his acquisitions, without any control or diminution, save only by the laws of the land.

On the other hand, the directive principles of state policy which significantly tried to achieve the larger goals remained a cherished goal for the state and the society ultimately became dependant on neither state nor the individuals to adhere. In *Waman Rao's Case*³⁰⁶ Chandrachud C. J.,³⁰⁷ speaking for the unanimous constitutional bench considered the constitutionality of the first constitutional amendment act of 1951 introducing Art 31-A and 31-B tracing the history of land tenures, the debates in the constituent assembly, need for the agrarian reforms and stated that in one predominantly agricultural society, there is a strong linkage between ownership of land and the person's status in the social system. Those without land suffer not only from an economic disadvantage, but also a concomitant social disadvantage. The important provisions in part IV³⁰⁸ of the constitution which could have balanced the

306 (1981) 2 SCC 362

307 The same constitutional bench while deciding the first *Minerva Mills case* reported in (1980) 3 SCC 625, per majority, held Art. 14 to be a basic structure and decided that nationalization of coal industry is violative of article 14, where Bhagwati J. gave a dissenting view which subsequently in other cases the court upheld and had consistently held that Art 14 as not a basic structure. Hence, article 14 of the constitution in the context of right to property is not a basic feature or basic structure.

308 Part IV titled Directive Principles of State Policy has provisions like Article 38. State to secure a social order for the promotion of welfare of the people.—(1) The State shall strive to promote the welfare of the people by securing and protecting as effectively as it may a social order in which justice, social, economic and political, shall inform all the institutions of the national life. (2) The State shall, in particular, strive to minimize the inequalities in income, and endeavor to eliminate inequalities in status, facilities and opportunities, not only amongst individuals but also amongst groups of people residing in different areas or engaged in different vocations.

Article 39. Certain principles of policy to be followed by the State.—The State shall, in particular, direct its policy towards securing— (a) that the citizens, men and women equally, have the right to an adequate means of livelihood;(b) that the ownership and control of the material resources of the community are so distributed as best to sub serve the common good; (c) that the operation of the economic system does not result in the concentration of wealth and means of production to the common detriment; (d) that there is equal pay for equal work for both men and women; (e) that the health and strength of workers, men and women, and the tender age of children are not abused and that citizens are not forced by economic necessity to enter avocations unsuited to their age or strength; (f) that children are given opportunities and facilities to develop in a healthy manner and in conditions of freedom and dignity and that childhood and youth are protected against exploitation and against moral and material abandonment.

Article 41. Right to work, to education and to public assistance in certain cases.—The State shall, within the limits of its economic capacity and development, make effective provision for securing

property rights granted to its citizens were rendered toothless by virtue of it being epitomized as a cherished goal to be achieved. The Directive Principles also at the same breath provides that the application of the provision under the directive principles shall not be enforceable by any court, but the principles therein laid down are nevertheless fundamental in the governance of the country and it shall be the duty of the State to apply these principles in making laws. These were the provisions which catered to the basic needs of the weakest of the society. This significantly tilted the balance no matter what ever be the reasons indicated by the legislature and the judiciary in the years to come.

After 44th amendment of the constitution incorporating article 300 -A there was made provisions for right to property, though belatedly demoted, from a fundamental right to a constitutional right. The word ‘property’ used in Art 300 – A must be understood in the context in which the sovereign power of eminent domain is exercised by the state and property expropriated. No abstract principles could be laid. Each case was considered in the light of its own facts and circumstances. The phrase “deprivation of the property of a person” was equally considered in the factual situation of a case. Deprivation connotes different concepts. Deprivation of property is by acquisition or requisition or taking possession of private property, by necessary implication for public purpose, in accordance with the law. The word ‘law’ used in Art 300-A must be an act of parliament or of state legislature, but not by executive fiat or an order. It is inherent in every sovereign state by exercising its power of eminent domain to expropriate private property without owner’s consent. *Prima facie*, state would be the judge to decide whether a purpose is a public purpose or not. But it is not the sole judge. This will be subject to judicial review and it is the duty of the court to determine whether a particular purpose is a public purpose or not. Public interest has always been considered to be an essential ingredient of public purpose. But every public purpose does not fall under article 300 -A, nor every exercise of eminent domain, an acquisition or taking possession under Art 300- A. Generally speaking

the right to work, to education and to public assistance in cases of unemployment, old age, sickness and disablement, and in other cases of undeserved want.

Article 46. Promotion of educational and economic interests of Scheduled Castes, Scheduled Tribes and other weaker sections.—The State shall promote with special care the educational and economic interests of the weaker sections of the people, and, in particular, of the Scheduled Castes and the Scheduled Tribes, and shall protect them from social injustice and all forms of exploitation.

preservation of public health or prevention of damage to life and property are considered to be public purpose.

On one side these provisions indicate that property rights is not a birth right but it depends on lot of other factors and it's not fundamental to human existence but the other side of the coin is that property rights is a significant contributor towards human flourishing in a society and it has a significant social and economic role to play. Hence, the doctrine of eminent domain signifies the social role. The right of eminent domain is ingrained within the constitutional framework and in the right of the sovereign state; it commands power and authority over the land and its people by compelling a transfer of any land under its command for a declared purpose which accounts for public exigency or public good. It is the supreme idea of property which rests with the state or in a much complex sense in the aggregate body of people in their sovereign capacity. It gives the power to the state under a constitutional framework to practically expropriate the property under the declared laws of the land and the power of eminent domain comes as an extension of state power.

Black's law dictionary explains eminent domain thus "the power to take private persons or corporations authorised to exercise functions of public character...", in the United States, the power of eminent domain is founded in both the Federal (fifth amendment) and the state constitutions. The constitution limits the power to taking for a public purpose and prohibits the exercise of the power of eminent domain without just compensation to the owners of the property which is taken. The process of exercising the power of eminent domain is commonly referred to as 'condemnation' or 'expropriation'. A series of cases³⁰⁹ in India has clarified the concept of eminent domain from early as 1951.

In a welfare state envisioned in the Directive Principles of State Policy, the basic perquisites are that everyone is entitled to minimum material well being, such as food, clothing and decent housing. Expanding living standard is possible with the existing or expanding physical resources and scientific knowledge etc., and the state has a right and duty to act when private initiative fails. In a democratic society every

309 *Chiranjitlal Chowdhuri v. Union of India*, AIR 1951 SC 41; *State of Bihar v. Kameshwar Singh*, AIR 1952 SC 252; *Bishambar Dayal Chandra Mohan v. State of Uttar Pradesh*, (1982) 1 SCC 39

individual needs legal protection for the beneficial enjoyment of what he has discovered and appropriated, has created by his own labor and what he has acquired under the existing social and economic order subject to law and order. Equally, welfare consists in adjusting individual interests with social interests by the aid of law as property designed to mitigate the privileges which property offers in enjoyment of the things that life has to offer. Restraints on the power to use the property as a delegated power of command, is a means as quasi-governmental private control over the major assets of a nation. Property, thereby, is subject to regulation. The directive principles enjoin the state to recognize the economic system by law or administrative means and the fundamental rights are means to that end to make right to life meaningful, equality of opportunity and of status and dignity of person a reality. The fundamental rights and the directive principles were the two wheels of the chariot as an end to make social and economic democracy a truism.

In these circumstances right to property under article 300-A can be considered as a basic feature or structure of the constitution remains a lingering question. It was in *Kesavanda Bharti case*³¹⁰ that the court came up with the doctrine of basic structure where Sikri C.J enumerated the concept of basic feature as consisting of a) supremacy of the constitution, b) republic and democratic form of government, c) secular character of the constitution, d) separation of powers between legislature, executive and the judiciary and, e) federal character of the constitution. It was further held that this framework of the constitution was based on the foundation of the dignity and freedom of the individual which is of paramount significance and which could not be destroyed by amendments made to the constitution. Further, in *Indira Gandhi v. Raj Narain*³¹¹, Mathew J. held that to be a basic structure it must be a terrestrial concept having its habitat within the four corners of the constitution. The debates in the constitution assembly on the lines of section 299³¹² of the Government of India Act,

310 *Kesavanda Bharati v. State of Kerala* (1973) 4 SCC 225

311 1975 Supp SCC 1

312 The Government of India Act 1935 Part XII, titled Miscellaneous and General and under subtitle Provisions as to certain legal matters section 299 dealing with compulsory Acquisition of land, &c states that- (1) No person shall be deprived of his property in British India save by authority of law. (2) Neither the Federal nor a Provincial legislature shall have power to make any law authorizing the compulsory acquisition for public purposes or any land, or any commercial or industrial undertaking, or any interest in, or in any company owning, any commercial or industrial undertaking, unless the law provides for the payment of compensation for the property acquired

1935 and the resultant right to acquire and, hold to the property in article 19(1) (f) and deprivation and acquisition of the property under article 31, as fundamental rights in part III of the constitution, find their habitation like in every constitution of modern democracies. Equally the debates in the constituent assembly and the unanimous animation of the founding fathers was that the tiller of the soil should be conferred with right to hold the property directly under the state and to abolish the estates, elimination of intermediaries and conferment of right, title and interest in the land, in the estate on the cultivator. The constitution assures to every citizen social and economic justice apart from political justice, equality of status and of opportunity and dignity of person as basic postulates for successful working of political democracy. Establishment of social and economic democracy and agrarian reform as its ingrained facet was the nation's chartered mission for economic restructure of the social order.

The issue of right to property as the basic structure was pointedly projected for the first time assailing the imposition of ceiling on agricultural holdings in Maharashtra Agricultural Lands (Ceiling on Holdings) Act, 1961 as amended up to 1976 in *Waman Rao's Case*.³¹³ Chandrachud C. J.,³¹⁴ speaking for the unanimous constitutional bench considered the constitutionality of the first constitutional amendment act of 1951 introducing Art 31-A and 31-B traced the history of land tenures, the debates in the constituent assembly, need for the agrarian reforms and stated that in one predominantly agricultural society, there is a strong linkage between ownership of land and the person's status in the social system. Those without land suffer not only from an economic disadvantage, but also a concomitant social

and either fixes the amount of the compensation, or specifies the principles on which, and the manner in which, it is to be determined.

(3) No Bill or amendment making provision for the transference to public ownership of any land or the extinguishment or modification of rights therein, including rights of privileges in respect of land revenue, shall be introduced or moved in either chamber of the Federal Legislature without the previous sanction of the Governor-General in his discretion, or in a Chamber of Provincial Legislature without the previous sanction of the Governor in his discretion.

(4) Nothing in this section shall affect provisions of any law in force at the date of the passing of this Act.

(5) In this section "land" includes immovable property of every kind and any rights in or over such property, and "undertaking" includes part of an undertaking.

313 (1981) 2 SCC 362

314 The same constitutional bench while deciding the first *Minerva Mills case* reported in (1980) 3 SCC 625, per majority, held Art. 14 to be a basic structure and decided that nationalisation of coal industry is violative of article 14, where Bhagwati J. gave a dissenting view which subsequently in other cases the court upheld and had consistently held that Art 14 as not a basic structure. Hence, article 14 of the constitution in the context of right to property is not a basic feature or basic structure.

disadvantage. In the very nature of things it is not possible to provide land to all landless persons but that cannot furnish an alibi for not undertaking at all a program for the redistribution of the excess land according to social and economic considerations. The court noted that:

We embarked upon a constitutional era holding forth the promise that we will secure to all citizens justice, social and economic and political, equality of status and of opportunity; and last but not the least, dignity of the individual. Between these promises and the 1st amendment there is a discernible nexus, direct and immediate. Indeed, if there is one place in an agricultural dominated society like ours where citizens can hope to have equal justice, it is on the strip of land which they till and love, the land which assures to them dignity of their person by providing to them a near decent means of livelihood...³¹⁵

The first amendment has thus made the constitutional ideal of equal justice a living truth. It is like a mirror that reflects the ideals of the constitution; it is not destroyer of its basic structure. The provisions introduced by it and the 4th amendment for the extinguishment or modification of rights in lands held or let for persons of agriculture or for purposes ancillary thereto, strengthen rather than weaken the basic structure of the constitution. It seems to us ironical indeed that the laws providing for agricultural ceilings should be stigmatized as destroying the guarantee of equality when their true object and intendment was to remove inequalities in the matter of agricultural holdings.

Further, in *Kesavanda Bharati case*³¹⁶ the court held that article 31-C brought by 25th constitutional amendment act, 1971 has to be given full play as it fulfills the basic purpose of restructuring the economic order. Each word in Art 39 has a strategic role and the whole article has a social mission. It embraces the entire material resources of the community. Its task is to redistribute such resources. Its goal is to undertake distribution as best sub-serves the common good. It reorganizes, by such distribution, the ownership and control of material resources of the community. 'Resources' is a sweeping expression and covers not only cash resources but even ability to borrow credit resources. Likewise, the word 'distribution' used in Art 39 (b) must be broadly construed so that a court may give full and comprehensive effect to the statutory intent contained in Art 39 (b). It should not be construed in a purely

³¹⁵ *Waman Rao v. Union of India*, para 8

³¹⁶ *Kesavanda Bharati v. State of Kerala* (1973) 4 SCC 225

literal sense so as to mean only division of a particular kind or to particular persons. The word distribution will include various facets, aspects, methods and terminology of a broad based concept of distribution. It does not merely mean the property of one should be taken over and distributed to others like land reforms. It is only one of the modes of distribution but not the only mode. Nationalization of the transport as also the units, the vehicles would be able to go to the farthest as possible and provide better and quicker and more efficacious facilities. Nationalization of contract carriages was thus upheld in *TN v. L. Abu Kavur Bai*.³¹⁷

Later, in *Sanjeev Coke Manufacturing Co*³¹⁸ case upholding the nationalization of coking units it was held that material resources of the community in the context of reordering the national economy embraces all the national wealth, not merely natural resources, all the private and public resources of meeting material needs, not merely public possessions. Everything of value or use in the material world is material resources and the individual being a member of the community his resources are part of those of the community. To exclude ownership of private possessions from the coils of article 39 (b) is to cipherise its very purpose of redistribution on the socialist way. Material resources of the community mean all things which are capable of producing wealth for the community. There is no warrant for interpreting the expression in so narrow a fashion and to confine it to public owned material resources, and exclude private owned material resources. The expression involves no dichotomy. The words must be understood in the context of the constitutional goal of establishing a sovereign, socialist, secular, democratic republic.

In *State of Kerala v. Gwalior Rayon Silk Manufacturing Co Ltd*,³¹⁹ another constitutional bench held that the concept of agrarian reform is a complex and dynamic one promoting wider interests than conventional reorganization of the land system or distribution of land. It is intended to realize the social function of the land. Likewise, in *Gujarat Pottery Works v. B.P. Sood*³²⁰ another constitutional bench had held that in the interest of national economy, this court considering modification held that the state shall have full control over the minerals and metal resources of the

317 (1984) 1 SCC 515

318 (1983) 1 SCC 147

319 (1973) 2 SCC 713

320 AIR 1967 SC 964

factory including the power to cancel or modify the terms and conditions of prospective licenses or mining lease. It was further held that they were not violative of Articles 14, 19 and 31. Since they are saved by the ninth schedule, they are immuned by operation of Art 31.

As the courts in these cases decided that since material resources of community is a wide concept and must be broadly interpreted to bring within its sweep all resources, natural or physical, movable or immovable, corporeal or incorporeal, tangible or intangible properties etc., even private property form a part of such a resource of the community. The word 'distribution' equally must be construed broadly to include not only allotment of resources to public use but also dispensation of largess to poor to provide access to equal opportunity. Thus right to property under 300- A cannot be a part of basic feature or structure of the constitution. It can only qualify as constitutional right. How far this constitutional right succeeded in delivering the desired intent of the broad ideals of the constitution is a matter of debate. All the cases which were discussed above indicate largely a pattern which is of serious concern. From a Gandhian perspective the pattern doesn't seem to be very encouraging and at times creates a tussle between people and state power. Though Gandhi was against the promotion of private property but nevertheless endeavored to create a balanced and pragmatic approach by giving space as it denoted Individual freedom. It gave the opportunity for a person not only to create a better life but was also a mode of expression of his faculties.

Though the constitutional provisions had supported the endeavor of common man to create an atmosphere where he can flourish but the skepticism around the constitution cannot be ignored as is said "Every 'great cause' begins as a Movement, becomes a Business, and eventually degenerates into a Racket." "What starts out here as a mass movement ends up as a racket, a cult, or a corporation".³²¹ E. F. Schumacher in his book *Small is beautiful* says Gandhi is critical of the idea that there could be perfect constitution where no one has to be good and still society will be a better place as system would automatically regulate well under a perfect constitution. In a sense, Gandhi didn't have much hope on documents but on people. The society need to

321 Hoffer, Eric. "*The Temper of our Time*." (New York: Buccaneer Books, 1996).

improve human actions and thoughts and their interventions without which a society will not be able to move forward and hence whether the society progress or is peaceful and happy depends on the nature of man himself. Gandhi says “We have no government armed with power capable of contending with human passions unbridled by morality and religion. Avarice, ambition, revenge, or gallantry, would break the strongest cords of our Constitution as a whale goes through a net. Our Constitution was made only for a moral and religious people. It is wholly inadequate to the government of any other.”³²² Gandhi in saying so was pointing towards the human nature and was talking about the dangers of possible disconnect the creators of constitution, its interpreters and the executive would have towards those common man in the street.

For Gandhi the state and the constitution have to be minimalistic. Gandhi was clear about the creative dimensions of the state, its nature; and its capability of overreach where it can squabble over its intent to reconcile or suppress class divisions were just a sideshow to a more serious aspect. The state was the antithesis of the individual, and of *ahimsa (non-violence)*: “The State represents violence in a concentrated and organized form. The individual has a soul, but as the State is a soulless machine, it can never be weaned from violence to which it owes its very existence. . .” The idea of Swaraj is an attempt of Gandhi to neutralize the overreach of state and its machinery. Gandhi reflects skepticism when he says “I look upon an increase of the power of the State with the greatest fear, because all the while apparently doing well by minimizing exploitation; it does the greatest harm to mankind by destroying individuality, which lies at the root of all progress”.³²³

The over reach of state, its industry and its agencies has a dimension of censorship and power and to consider that the state would be benevolent and its function to create a system of order could be a fallacy. It is significant hence to develop a temperament where the people are capable of self organization and self restraint and the development of this faculty of the people wherever becomes weak, the space is occupied by the external control by the state and its agencies. After all

322 Adams, John. “*The Works of John Adams* .” ed. Charles. F. Adams, Vol. 4, (Boston: Little Brown & Co, 1851), 31, Accessed on July 22, 2015 oll.libertyfund.org/titles/adams-the-works-of-john-adams-10-vols

323 Interview with Nirmal Kumar Bose 9/10 Nov 1934, *Modern Review* (Oct, 1935) 412

state has a strong tendency and a legitimate interest to fill in the vacuum which is largely expected of it by the weak populace.

Gandhi who throughout his life who advocated for settlement of legal issues amicably without the intervention of courts was also for limiting the state and its agencies to the margins. The ideal situation would be in a civilized society to create a space for the people's participation and prominence to their action which need to be developed consciously by the state. It definitely indicates an evolved and mature society where everyone has a creative and productive role without domestic or foreign intervention in the day to day affairs.

Sovereignty and Swaraj

The assumption that men are by nature violent has created the problem of sovereignty as a choice between anarchy and institutionalization of state as a supreme authority. State thus becomes representative of peoples' power bringing a unified but problematic situation of blurring the distinction between state and people or that of sovereignty and power. Consequently theories of power are gradually replaced by theories of sovereignty where state becomes sole embodiment of power. In response to the theory of sovereignty Gandhi sought to create space for autonomy. Individuals not only deserve the freedom to carry a moral project but they have an obligation to pursue it. It is possible only if an individual is free from such domination and violence. To cater to the needs of the poorest and the vulnerable members of community is reflective of the autonomy of moral agents. To be able to free oneself from want of basic things are a condition, and not just the goal, to autonomy.

Gandhian ethical perspective in evaluating the political economy and the framework of constitution finds that commercial interest creates workers, suppliers, and customers as a means to achieve the commercial goals and interests. Within this framework, the private property regime gives the owners the liberty to supersede the autonomy requirements of others. Hence, institutions like civil society need to evolve in a post constitutional era where voluntary, spontaneous choices and actions can evolve from collective judgments about what is good for its members over time. This evolution could also be a result of a suspicion of the role of an active state and its

property regime that is seen as a threat to a society which values autonomy and freedom.

In this context Gandhi's theory of Swaraj is an alternative idea, by which a clear separation between state and its people can be visualized. The theory of Swaraj does not intend to seek power of the state but is a means to control and regulate state from any abuse of its authority. In effect Gandhi questions the very theory of representation underlying the constitution of the modern state. The theory of Swaraj signifies the power of the people. Gandhi says "I hope to demonstrate that real Swaraj will come not by the acquisition of authority by a few but by the acquisition of the capacity by all to resist authority when abused. In other words, Swaraj is to be attained by educating the masses to a sense of their capacity to regulate and control authority".³²⁴

Swaraj is neither a call for self rule nor merely a call for independence from foreign rule. It desires sovereignty for masses of the nation and of individual as opposed to the state as sovereign. Hence, to complement it Gandhi also brought forth the idea of civil disobedience in response to unjust laws of the state but also the constructive programme for establishing and reforming institutions of civil society. It attempts to generate public opinion, initiate voluntary and collective non violent action constituted by a unity of plurality of sovereignties. It seeks to achieve sovereignty of civil society as independent of state authority whether foreign or native.

The prominent theory of Hobbes based on human nature and life, that it is 'solitary, nasty, brutish and short', necessitates a strong state and envisages a complete surrender of the right to self-governance of the individual. On the other hand for Rousseau the right to self-governance of the individual and the general will of the people are sacrosanct. The state becomes a necessity to protect the property of individuals and the territorial integrity of the state. Both Rousseau and Hobbes concede that the state is representative of the interests of civil society and see it, in its turn, as constitutive of the very legitimacy and authority of the state, they provide no

324 *Young India* 29-01-25 p. 35

theoretical ground for dissent against the state where Gandhi advocates the theory of civil disobedience as a tool for dissent and resistance. Gandhi argues that civil disobedience against the state is a civil, not a criminal matter. There can be no separation of private and public in matters pertaining to civil society. The issue could either be personal or political. Gandhi underlines the insignificance of dualism of private and public, individual and citizen and nature and culture, and also disputes the theory of representation. He overturns the classification of law in the modern nation state which holds that any act of disobedience against the state is criminal. Hence Gandhi lays out a map for resistance even in case of a constitutional overreach by state.

Gandhi's theory of swaraj is based on the principle of the non-violent control and regulation of state authority by civil society asserting its supremacy over the state in questions concerning the principles that govern law, order and justice i.e., Constitutional in essence. Gandhi rejects the presupposition that the existence and survival of civil society is fundamentally premised on the sovereignty of the state or on a 'state of necessity'. Swaraj gives the ability to resist unjust state authority individually, or collectively. It is in a way a measure of the success of self-governance, true freedom and civil society. Therefore, for Gandhi the problem of sovereignty in the modern nation state is one of putting in place institutions that awaken 'the masses to a sense of their capacity to regulate and control authority' or overreach of constitutional powers. Gandhi knew that 'Non- violence and truth cannot be written into a constitution. They have to be adopted of one's own free will. They must sit naturally upon us like next- to-skin garments or else they become a contradiction in terms'. Hence it is necessary, to have space for dissent in the face of the abuse of authority rather than to advocate subjection to it is the principle that determines the relation between the individual and the state. Gandhi therefore intrinsically rejects any interpretation of sovereignty in terms of a theory of power or the capacity for enforcement. For Gandhi no men can be sovereign because not one man, but men inhabit the earth. The idea of complete independence does not emanate from constitution but emanates from the consciousness in the average villager that he is the maker of his own destiny. Swaraj is hence the endeavor to create the space for Indians to rule themselves, individually and collectively.

Conclusion

“Man’s happiness really lies in contentment. He who is discontented, however much he possesses, becomes a slave to his desires. And there is really no slavery equal to that of his desires.... And what is true for the individual is true for society”

*m. k. gandhi*³²⁵

The notion of property with all its complexities and dimensions create a kaleidoscopic narrative which in Gandhi’s idea is an instrumentality for the quest for knowledge, reason for aspirations and even forms a theory of resistance. Property theory is a part of the narrative to liberate human being from the suppressions and hence constitutes within itself the power to achieve the aspirations and goals of mankind thereby contributing and enriching the society of which he is an inherent part. Gandhi in understanding the notion of property took it as a means and not an end to achieve a meaningful life and hence, an instrumentality in achieving the purpose of life. Property does not just have a function of economic distribution and equity but social, ethical and spiritual fabric to it. Gandhi especially signified the importance of ethics in creating his economic principles and believed that economics devoid of ethics is cannot be humanistic in its approach. In his lectures ‘*On Ethics and Economics*’, Amartya Sen argues that ‘the nature of modern economics has been substantially impoverished by the distance that has grown between economics and ethics.’³²⁶ Throughout Gandhi’s writings we can perceive a series of economic ideas and principles which has over a period of time came to be recognized as “Gandhian Economics.”³²⁷ The nature and the way the ideas have been put forth made those principles abstract to the extent that their influence on Gandhi’s own action remains confusing and at times perceived as contradictory and inconsistent. Gandhi himself says that “At the time of writing I never think of what I have said before. My aim is not to be consistent with my previous statements on a given question, but to be

325 *Harijan* 1-2-42, 27

326 Sen, Amartya. “*On Ethics and Economics*.” (Oxford: Basil Blackwell, 1987), 7

327 Kumarappa , *Gandhian Economic Thought* (1951); K. Vasudevan , *Gandhian Economics* (1967)

consistent with truth as it may present itself to me at a given moment. The result has been that I have grown from truth to truth”.³²⁸

Nevertheless a deeper analysis of Gandhi’s ideas and principles shows a pattern and has strong theoretical foundations to it. The conventional theory of property which is discussed in chapter 1 is an attempt to juxtapose Gandhi with the established theories of property based on labor personhood and utilitarianism. The Gandhian analysis finds the labor theory as promoting a property regime which neither encourages productivity based on labor nor facilitates equitable distribution of property and Gandhi’s philosophy does not agree on a premise which tends to facilitate the person who creates property based on labor alone as superior and at the cost of person who needs it. It creates flaws in a free market system where labor does not indicate true efforts, whereas control of labor becomes a key factor instead of labor itself.

On the other hand, Gandhian analysis finds Hegel’s personhood theory as a manifestation of individual’s right to act as a free personality where one can have a sphere of self assertion. Though it can be argued that metaphysical idea of freedom to empirical legal acts may create the notion of personality a vague idea, it can also do little to understand the legal consequences of our action. When on the other side the justification of property where physical possession over things which are fundamental to human existence is desirable but it also has an effect of limiting freedom on a large scale as property law do not guarantee a basic subsistence or basic freedom for everyone which is necessary. Hence it creates the conflict and rarely addresses the case of imposition of limits on people who do not have access to property rights. Hence, Gandhian perspective justifies private property only where it does not fail to promote basic sustenance, and do not compel one to part with their freedom when it conflicts with property rights regime. Though the personhood theory argues for a regime where everyone has a definite sphere of rights and duties, but what the limitations of it are an open ended question. For Gandhi the principle of freedom of personality may not justify a legal order when a few could compel others to work under degrading and brutalizing conditions by virtue of monopoly over resources.

328 “Conondrums” *Harijan* 9-30-39

Gandhi also disputes the utilitarian free market approach to property rights as extending the control over resources at the cost of those who do not have the wherewithal to acquire it. Utilitarian approach to property is considered by Gandhi to be devoid of ethics and morality and the utility based approach to property sacrifices the interest of the community and ultimately leads to larger problems.

The constitutional framework of India has broadly created a regime for property rights which has been a manifestation of sovereign power and it has created a power structure which dilutes the autonomy for the weaker section of people. Though constitutional framework protects property it benefits those who has property rights and does not take into account the section of people who has a weaker claim on property rights. To establish a property claim for community under a tort liability has not received any constitutional support. In this context the theory of autonomy or Swaraj gains relevance. The necessity of a strong state has led to surrender of the right of self governance of the individual. The constitutional framework creates sovereignty for the state in contrast to its people and individuals, who also has no less a claim over sovereignty and autonomy. Within this framework the property owning class and the state agencies supersede the autonomy requirements of others, creating a state of conflict and violence. Gandhi's theory of Swaraj gives an alternative idea, by which a clear separation between state and its people can be visualized where the property regime is more balanced and serves the interest of the people. The theory of Swaraj does not intend to seek power of the state but is a means to control and regulate state from any abuse of its authority. In effect Gandhi questions the very theory of representation underlying the constitution of the modern state. The theory of Swaraj signifies the power of the people. Gandhi says "I hope to demonstrate that real Swaraj will come not by the acquisition of authority by a few but by the acquisition of the capacity by all to resist authority when abused. In other words, Swaraj is to be attained by educating the masses to a sense of their capacity to regulate and control authority".³²⁹

In these contexts, Gandhi intends to create a space for non-violent, non possession based theory of trusteeship. Gandhi's rejection of conventional and

329 *Young India* 29-01-25 p. 35

mainstream economic thoughts reflecting his abstract ideas sit at odds with his embrace of certain aspects of copyright and free market as evidenced by the discussions in third chapter, but nevertheless Gandhi created his own narrative by doing so. The criticism of Gandhi on free market idea of competition and copyright creates a narrative where Gandhi can be considered as a critique of modernity and its institutions. Gandhi felt commodification of knowledge in copyright in its attempt to coat knowledge in secrecy. Gandhi says that 'Education is that which liberates' is as true today as it was before. Education here does not mean mere spiritual knowledge nor does liberation signify only liberation after death. Knowledge includes all training useful for the service of mankind and liberation means freedom from all manner of servitude even in the present life.³³⁰ Hence, to have control or proprietary rights and commodifying knowledge by creating an institutional framework not just defies logic for Gandhi but is also an instrumentality of violence. It also signifies a very important shift which is called weightless economy that is economy based on privatization of ideas, information and knowledge. It indicates emergence of the weightless economy and a shift in the narrative of private public conflict which had been a major concern of the property institutions. But by 21st century the weightless economy seems to bring the conflict of private with the private interests as is enunciated in chapter three where the conflict in antitrust and copyright interests indicate an emergence of private property conflicts. In this context it is argued that Gandhi's trusteeship principle creates a space for the judiciary and legislature to develop norms where the existing regime is insufficient to address such conflicts as the cases suggest.

Gandhi in tackling with the social, political and legal problems has shown great willingness to experiment with the ideas he may disagree with and creating a narrative where if possible he can adopt and create new perspectives out of such ideas turning it to his favor is a strategical move. It shows the ability of trusteeship principle to create a space of its own even in a free market oriented system as trusteeship is able to tackle the very foundational concept of property in a wider sense. Trusteeship helps to create new paradigms of knowledge system and life style by way of collaborative strategies in the interest of larger goals. Though such actions were subjected to popular critique but for Gandhi it never appeared as a contradiction in principle or in

330 *Harijan*, 10 March 1946; CWMG 83, 208.

practice. For Gandhi his principles and actions should be understood in its widest sense and is context specific, but it also creates scope of adaptation. Gandhi in his life time believed that his actions and his reasoning behind his actions were far more evolutionary and in turn more representative of his beliefs than were his statements when de-contextualised from the times, event and facts, and taken as abstract ideas. Gandhi when he said “My life is my message”³³¹ conveyed a lot more suggesting that if people were to understand and learn from his words and actions then they should primarily look to his actions rather than his statements alone.

To fully explicate Gandhi’s economic ideas with any measure of brevity is a challenge. As Gandhi never explicitly spell out his abstract philosophy in a systemic and comprehensive manner, but it required much study and analysis to piece them together from his several writings over extended period of time. The abstractness of his ideas was not a deliberate attempt but the multidimensional and evolving nature and character of things which Gandhi was attempting to grasp requires a flexible outlook with some core conceptual framework to it, which Gandhi very well could define. Gandhi cross referenced and quoted from multiple disciplines and drew ideas from spiritual, religious, ethical and moral philosophy.³³² It is clearly reflective the way Gandhi dealt with the notion of property where the act of balancing rights and obligations were indicative of multiple concerns rather than a pure economic or legal perspective being followed. For example when Gandhi evaluates the concepts of marriage he never fails to link it with equality, distributive function and economic aspect of it. Gandhi says that concept of marriage as an equal partnership implied that the wife had an equal right to her husband’s income and assets. ‘It is my firm belief that a wife has full right to the husband’s earnings. She has an inalienable right to his property.’³³³ Here Gandhi recognizes the concept of property as an inherent feature of livelihood and life where property in a limited way is essential as a medium for human welfare. The inheritance laws, he urged, should also be changed so as to give equal shares to sons and daughters.³³⁴ He points out “the difficulties in bringing this about, noting that property is bound up with power. Man has always desired power;

331 Prabhu, Joseph. “*Gandhi, Empire, and a Culture of Peace, in Indian Ethics : Classical Traditions and Contemporary Challenges.*”, edited by Purushottama Billimoria et al., (Ashgate Publishing, 2007), 395- 396

332 Ajith K. Dasgupta , *Gandhi’s Economic Thought*, 7-12

333 *Hindi Navajivan*, 8 August 1929; CWMG, 41, 269.

334 *Young India*, 17 October 1929; CWMG, 42, 4-5.

ownership of property gives this power. Man hankers also after posthumous fame based on power. This cannot be had if property is progressively cut up in pieces as it must be if all the posterity becomes equal co-sharers.”³³⁵ Hence understanding Gandhi’ economic philosophy should not be the process to compartmentalize his economic ideas in isolation which would render the study obsolete, incomplete and incomprehensible.

Gandhi points out that the notion of property is a fundamental concept where control of property creates dominance as control of property means control of matter, and, it becomes control over human beings. It can also become a means of violence. The dimensions of property in a free market society also indicate the nature of acquisitive society. For Gandhi it seems to be a misplaced idea that private property regime increases productivity and better utility. Private land holding does not mean that it creates better irrigation and fruitful use of land. Where farmers get better crops as output the middle men and manufacturers who have financial stakes and are well informed know when greater profit can be made by a decreased output. Patents which could bring benefits to society are often bought up by manufacturers and never used. Better products ends up making loss because low quality substitutes which are profitable to produce are dumped in the market. Advertising persuades people to buy the less economical goods. Hence, for Gandhi there are inherent sources of wastefulness in a regime of private enterprise and free competition where modern property institutions become a source of conflict and violence.

Gandhi also uses his idea of property as a critique to the modern society where property has become an end to be achieved creating an element of public function to it under the constitutional framework. For Gandhi dependence on machinery reflects the tendency of human violence. Machinery is a grand yet awful invention and the possibility of machines controlling man cannot be denied. ‘It is possible to visualize a stage at which the machines invented by man may finally engulf civilization. If man controls the machines then they would not; but should man lose his control over the machines and allow them to control him, then they could certainly engulf civilization

335 CWMG 42. 4–5.

and everything'.³³⁶ The human dependence on machine facilitates those who have the wherewithal to access the machinery and it also denotes a labor market which is moving towards specialization. Gandhi says 'Machinery is like a snake-hole which may contain from one to a hundred snakes. Where there is machinery there are large cities; and where there are large cities, there are tram cars and railways; and there only does one see electric lights.'³³⁷ Such development magnifies inequality in society. The human cost is eventually catastrophic. Gandhi points out that in an organized country where there are only fixed and limited avenues of employment, where the worker has become highly skilled in the use of one particular kind of machinery, his employment avenues would be limited,³³⁸ eventually widening the gap of inequality and distribution of wealth. Hence Gandhi argued economics should be necessarily humanistic in its approach and should be non-violent as it should not be an instrument to suppress human being and exploit him and so should not be ethically autonomous. That economics is untrue which ignores or disregards moral values. The extension of the law of non-violence in the domain of economics means nothing less than introduction of moral values as a factor to be considered in regulating international commerce. The very right to live accrues to us only when we do the duty of citizenship of the world. From this one fundamental statement perhaps it is easy enough to define the duties of man and woman and correlate every right to some corresponding duty to be first performed. Every other so-called right can be shown to be usurpation hardly worth fighting for.³³⁹

The institution of private law which has gained importance in an a free market environment implies the total power of doing with the thing what one likes, which has in fact become an institution of public law under the constitutional framework and its main functions are exercised by complementary legal institutions developed from the law of obligations. The law eventually takes account of this change of function by giving property an increasing public law character. Hence even in a structural legal

336 CWMG, 48, 353; The most celebrated scientist since Einstein, Stephen Hawking has warned that creating thinking machines or artificial intelligence can wipe out human civilization. See <http://www.bbc.com/news/technology-30290540> and an open letter says the research on Artificial Intelligence is by necessity interdisciplinary, because it involves both society and AI. It ranges from economics, law and philosophy to computer security, formal methods and, of course, various branches of AI itself. See <https://futureoflife.org/ai-open-letter/>

337 Gandhi, M. K. "Machinery." CWMG, 10, 305.

338 *Harijan*, 2 November 1934

339 Gandhi, M. K. "Gandhi to Julian Huxley." before 17 October 1947 CWMG, 89, 348

analysis of property the heavy influence of public law character sprinkles the notion of property with multifarious concerns evidencing the inability and at times failure of law to fully appreciate the contours of property, especially when it concerns with the character of eminent domain.

For Gandhi, human consciousness dictates the action. To call a society or community worthy of a civilized society it inherently should constitute a co-relation of rights and duty where action of the every member of the society is guided by a natural process of respecting each other's rights and hence develops an obligation without the force of law. This indicates the role of morality in performance of one's duty creating a relationship which is mutual. To observe morality is to achieve a mental status and temperament which human desire could hardly ignite. So doing, we know ourselves. Hence obligations take prominence in Gandhi's schema in comparison to rights. The nature of right to perpetuate human wants was a grave concern for Gandhi. Gandhi believed that the perspective to look at things primarily through a 'rights' perspective may not be healthy for the society. It could easily promote self oriented behavior and thoughts and it's not in the interest of human being which is clearly evidenced by historical studies itself.

Gandhi while rejecting a model based on human greed, which he saw even in ostensibly anti-capitalist paradigms from the West says:

Socialism and communism of the West are based on certain conceptions . . . fundamentally different from ours. One such conception is their belief in the essential selfishness of human nature. I do not subscribe to it, for I know that the essential difference between man and the brute is that the former can respond to the call of the spirit in him, can rise superior to the passions that he owns in common with the brute and, therefore, superior to selfishness and violence, which belong to the brute nature and not to the immortal spirit of man.³⁴⁰

The root of the problem for Gandhi lay in the nature of human being his greed and his nature of acquiring things which does not have a limit and an end where it leads to a society promoting human consumption and commodification which is a loop from which exit becomes difficult. The only hope, as Gandhi saw it, lay in the

340 Gandhi, M. K. "Interview with The Pioneer newspaper of Lucknow." published on August 3, 1934, CWMG 64, 231-232.

ethical and moral outlook which is the inherent strength of Indian civilization: a long and hoary tradition of self-restraint. Gandhi's solution to the vicissitudes of humanity was an inherent part of the economic, political and, indeed, spiritual shift in perspective: 'A man should consider himself not the owner of his property but its trustee or custodian. He will use it for the service of society. He will accept only that much for himself as he has earned with his labor. If that happens, no one will be poor and no one rich. In such a system all religions will naturally be held equal. Therefore all quarrels arising out of religions, caste and economic differences will be ended'.³⁴¹

The Modern society has build up a narrative where human desires and unlimited quest for material well being has been considered as a virtue which is progressive and would lead to growth and development. Such insecurities of human being is exploited and perpetrated by the narrow approach as we see the dimensions of property and its institutions today. The claim for economic supremacy and its assurance is rhetorical in western societies. It is common to cite the power of technology, possession of a cell phone as a metaphor of social change. Nevertheless, it is equally noteworthy that technological advancement does not add to respect of law and creates regulation easier. It also do not create a sense of duty and respect for others rights nor brings in a value based system which his ethical or moral enriching the social fabric which are equally important indicators in comparison to its technical accouterments.

Schumacher proposes intermediate technology as a method of empowering people by way of tool aid and know how, creating people centered development and adapting technology with a human face. It creates care and respect for the millions of people living without status, without economic means and without a voice in their own destiny. There is a greater need to understand the duality of human requirement in terms of scale. The scheme of property as envisaged by Gandhi gives scope for people to organize themselves and their structures on a personal and community scale, as well as to understand the national and global dimensions and implications. Such property rights could create economic growth on a human scale and which could be owned, understood and managed by those who use them.

341 M.K. Gandhi Foreword, "Varnavyavastha," May 31, 1945, CWMG 87, 24.

Gandhi makes it evident that for any individual if he intends to cherish his freedom and independence then it's important for him to give equal value to the freedom and independence of others. He does not believe that he should carry a single soul with me, if I cannot appeal to his or her reason. Gandhi says that 'I have found by experience that if I wish to live in society and still retain my independence, I must limit the points of utter independence to matters of first rate importance. In all others which do not involve a departure from one's personal religion or moral code, one must yield to the majority'.³⁴² It shows that Gandhi was accommodative to the needs of others and desires of others and only when it's a matter of principle that Gandhi intends to be rigid. Gandhi considers himself as a social being.

Gandhi gives a perspective on property by considering one of the central features of property – exclusion. Generally exclusion works well when there are choices, but exclusion is a legal challenge in cases of private necessity devoid of choices. To a man adrift in sea he needs to get on to a ship to save himself. It can happen in cases of critical goods and services, like medical facility, rail road, single port, patents, copyright or cases like essential facility doctrine in cases of antitrust laws. Though exclusive use is not unlimited use of property but the interventions of law are limited in free market society. The question of casting limitations on the use of private property in order to protect the interests of one's neighbor, competitor or a stranded person at sea becomes a challenge. The evolution of law through various theories looks for consistency, regularity, and functionality across legal systems which create a durable constitutional order that can survive such conflict of interests. The belief that people will use their interest in property sub-serving the interests of the neighbors are desirable but not self-enforcing.

Gandhi suggests a personal self interest to be constrained by a confined generosity and it is possible only by a strong foundation of political order based on ethics and morality. This is in contrary to the Keynesian economic philosophy where ethical considerations are not merely irrelevant, they are an actual hindrance, for foul is useful and fair is not. For Keynes the time for fairness comes when the economic

342 Gandhi, M. K. "The Law of Majorities." CWMG, 21, 45.

growth achieves a status of enough for everyone. Schumacher, considers consumption of fuel or coal to bring about a point that economic growth viewed from the point of economics, physics, chemistry and technology, has no limitations but creates a bottleneck when viewed from the point of view of environmental sciences. An attitude of life which rests on the pursuit of material wealth and well being is a source of conflict as it contains within itself no limiting principle, while other factors has its limitations. Hence property as a concept should account for the limitations of human pursuit in conjunction with the limitless economic growth and the desires it perpetrate. What could be the driving force for a change in structural and conceptual understanding of property and people's attitude towards a holistic understanding of property is a question which Gandhi himself tries to reflect in depth. Owing perhaps to his experiences as a lawyer, Gandhi did not view some new law as the panacea for every social, economic, or political problem. He assigned a lot more importance to the renewal of the human being. Gandhi believed that the quality of any country ultimately depends on the quality of its people. His abhorrence of legal cleverness as a means of fixing human problems is best illustrated by E. F. Schumacher in his classic, *Small Is Beautiful*, "Gandhi used to talk disparagingly of 'dreaming of systems so perfect that no-one will need to be good'". Contrary to it now inequality now is a global phenomenon, with disparities even in Western societies reaching near Eastern levels, or two, that globalization raises inequalities in local arenas. The genius of Gandhi lay in making urban India confront its conscience, and establishing the connection in the urban mind that India could make no viable progress while rural areas were being bled white. The reality of urban life conflicts with a clear conscience where inequality exploitation and lack of freedom and liberty created by an institutional framework of property tilting the balance towards self of the individual rather than obligations has caused enormous troubles creating divides in the core of society and to its foundation.

Gandhi realizing the ill effects of industrialism states that "the West had had a surfeit of industrialism and exploitation. If they who are suffering from the disease are unable to find a remedy to correct the evils, how shall we, mere novices, be able to avoid them? The fact is that this industrial civilization is a disease because it is all evil" In stating so Gandhi underlines the inherent fault-lines of an industrialized society not because of industrialization itself, but because of the inability of change it

can bring and because of the inequality and suffering it can cause to the helpless poor of the society. Gandhi further states that:

Let us not be deceived by catchwords and phrases. I have no quarrel with steamships or telegraphs. They may stay, if they can, without the support of industrialism and all it connotes. They are not an end. . . . They are in no way indispensable for the permanent welfare of the human race. Now that we know the use of steam and electricity, we should be able to use them on due occasion and after we have learned to avoid industrialism. Our concern is, therefore, to destroy industrialism at any cost. India has lived till now when other nations have perished because 'she has adapted herself to changing conditions.' Adaptability is not imitation. It means power of resistance and assimilation. India has withstood the onslaughts of other civilizations because she has stood firm on her own ground not that she has not made changes. But the changes she has made have promoted her growth.³⁴³

This passage indicates the structure of property and the institutions desirable where the real welfare of human being in a society with collective responsibilities can be fostered leading to a better living conditions rather than a society where the property institutions fosters ill effects of industrialism and caters to the greed and selfishness of human beings.

As Schumacher puts it foundations of peace cannot be laid by universal prosperity, in the modern sense. If at all such a prosperity can ever be achieved it can be possible only by appealing to the human instincts of greed and envy, which would tend to destroy intelligence, happiness serenity and ultimately the peaceful existence of mankind itself. Hence the contours of property rights has to be created, understood and drawn in a way which would enunciate the larger goals of human existence where the ethical and moral component cannot be ignored even under a pure legal and economic analytical framework and the Gandhian philosophical approach helps us to create the wider canvas which could be harmonious, inclusive and non-violent.

343 Gandhi, M. K. "To change to Industrialism is to Court Disaster." CWMG, 36, 382

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