

ISSN: 2582-6433



INTERNATIONAL JOURNAL FOR LEGAL RESEARCH AND ANALYSIS

Open Access, Refereed Journal Multi Disciplinary
Peer Reviewed 6th Edition

VOLUME 2 ISSUE 7

www.ijlra.com

DISCLAIMER

No part of this publication may be reproduced or copied in any form by any means without prior written permission of Managing Editor of IJLRA. The views expressed in this publication are purely personal opinions of the authors and do not reflect the views of the Editorial Team of IJLRA.

Though every effort has been made to ensure that the information in Volume 2 Issue 7 is accurate and appropriately cited/referenced, neither the Editorial Board nor IJLRA shall be held liable or responsible in any manner whatsoever for any consequences for any action taken by anyone on the basis of information in the Journal.

Copyright © International Journal for Legal Research & Analysis



IJLRA

EDITORIAL TEAM

EDITORS

Megha Middha



Megha Middha, Assistant Professor of Law in Mody University of Science and Technology, Lakshmangarh, Sikar

Megha Middha, is working as an Assistant Professor of Law in Mody University of Science and Technology, Lakshmangarh, Sikar (Rajasthan). She has an experience in the teaching of almost 3 years. She has completed her graduation in BBA LL.B (H) from Amity University, Rajasthan (Gold Medalist) and did her post-graduation (LL.M in Business Laws) from NLSIU, Bengaluru. Currently, she is enrolled in a Ph.D. course in the Department of Law at Mohanlal Sukhadia University, Udaipur (Rajasthan). She wishes to excel in academics and research and contribute as much as she can to society. Through her interactions with the students, she tries to inculcate a sense of deep thinking power in her students and enlighten and guide them to

the fact how they can bring a change to the society

Dr. Samrat Datta

Dr. Samrat Datta Seedling School of Law and Governance, Jaipur National University, Jaipur. Dr. Samrat Datta is currently associated with Seedling School of Law and Governance, Jaipur National University, Jaipur. Dr. Datta has completed his graduation i.e., B.A.LL.B. from Law College Dehradun, Hemvati Nandan Bahuguna Garhwal University, Srinagar, Uttarakhand. He is an alumnus of KIIT University, Bhubaneswar where he pursued his post-graduation (LL.M.) in Criminal Law and subsequently completed his Ph.D. in Police Law and Information Technology from the Pacific Academy of Higher Education and Research University, Udaipur in 2020. His area of interest and research is Criminal and Police Law. Dr. Datta has a teaching experience of 7 years in various law schools across North India and has held administrative positions like Academic Coordinator, Centre Superintendent for Examinations, Deputy Controller of Examinations, Member of the Proctorial Board



Dr. Namita Jain



Head & Associate Professor

School of Law, JECRC University, Jaipur Ph.D. (Commercial Law) LL.M., UGC - NET Post Graduation Diploma in Taxation law and Practice, Bachelor of Commerce.

Teaching Experience: 12 years, AWARDS AND RECOGNITION of Dr. Namita Jain are - ICF Global Excellence Award 2020 in the category of educationalist by I Can Foundation, India. India Women Empowerment Award in the category of "Emerging Excellence in Academics by Prime Time & Utkrisht Bharat Foundation, New Delhi.(2020). Conferred in FL Book of Top 21 Record Holders in the category of education by Fashion Lifestyle Magazine, New Delhi. (2020). Certificate of Appreciation for organizing and managing the Professional Development Training Program on IPR in Collaboration with Trade Innovations Services, Jaipur on

March 14th, 2019

Mrs.S.Kalpana

Assistant professor of Law

Mrs.S.Kalpana, presently Assistant professor of Law, VelTech Rangarajan Dr. Sagunthala R & D Institute of Science and Technology, Avadi. Formerly Assistant professor of Law, Vels University in the year 2019 to 2020, Worked as Guest Faculty, Chennai Dr.Ambedkar Law College, Pudupakkam. Published one book. Published 8 Articles in various reputed Law Journals. Conducted 1 Moot court competition and participated in nearly 80 National and International seminars and webinars conducted on various subjects of Law. Did ML in Criminal Law and Criminal Justice Administration. 10 paper presentations in various National and International seminars. Attended more than 10 FDP programs. Ph.D. in Law pursuing.



Avinash Kumar



Avinash Kumar has completed his Ph.D. in International Investment Law from the Dept. of Law & Governance, Central University of South Bihar. His research work is on "International Investment Agreement and State's right to regulate Foreign Investment." He qualified UGC-NET and has been selected for the prestigious ICSSR Doctoral Fellowship. He is an alumnus of the Faculty of Law, University of Delhi. Formerly he has been elected as Students Union President of Law Centre-1, University of Delhi. Moreover, he completed his LL.M. from the University of Delhi (2014-16), dissertation on "Cross-border Merger & Acquisition"; LL.B. from the University of Delhi (2011-14), and B.A. (Hons.) from Maharaja Agrasen College, University of Delhi. He has also obtained P.G. Diploma in IPR from the Indian Society of International Law, New Delhi. He has qualified UGC - NET examination and has been awarded ICSSR - Doctoral Fellowship. He has published six-plus articles and presented 9 plus papers in national and international seminars/conferences. He

participated in several workshops on research methodology and teaching and learning.

ABOUT US

INTERNATIONAL JOURNAL FOR LEGAL RESEARCH & ANALYSIS

ISSN

2582-6433 is an Online Journal is Monthly, Peer Review, Academic Journal, Published online, that seeks to provide an interactive platform for the publication of Short Articles, Long Articles, Book Review, Case Comments, Research Papers, Essay in the field of Law & Multidisciplinary issue. Our aim is to upgrade the level of interaction and discourse about contemporary issues of law. We are eager to become a highly cited academic publication, through quality contributions from students, academics, professionals from the industry, the bar and the bench. INTERNATIONAL JOURNAL FOR LEGAL RESEARCH & ANALYSIS ISSN 2582-6433 welcomes contributions from all legal branches, as long as the work is original, unpublished and is in consonance with the submission guidelines.

Solving Adjudicatory Legal Issues With ‘Alternate Dispute Resolution’: An Analysis From ‘Hohfeldian Jurisprudential’ Lens

Authored By - Samrat Bandopadhyay*1, Aditya Prakash Mishra**2 and Shekhar Mazumdar***3

Abstract

In an ever changing dynamic and versatile market landscape in the contextual setup of democratic and political fabric of India, the companies and firms dovetail their legal and technological process to the management and planning objectives defined by holistic and inclusive business strategy and synergized with the growth journey and narrative of the country. The inherent quintessence of ‘competitive advantage’ for a business along with its business objectives and decision are based on multiple factors. In that endeavour, the legal parlance is bedrock and a vital fulcrum of decision-making process. The instant paper is an attempt to comprehensively analyse the ‘WN Hohfeldian Jurisprudential Theory’ including the ‘Rights’ and ‘Duties’ Correlation in light of catena of cases surfacing before Hon’ble Courts of Law in Indian jurisdiction of legal parlance. The intersections and cross-sectoral analysis of Alternate Dispute Resolution via. Arbitration and Mediation are emerging as vital alternatives to resolve litigation issues. The contemporary world has thrown challenges for sustainability of business where ‘Commercial Dispute Resolution’ via. a Mediation or Arbitration has a tremendous potential. The instant paper is an attempt to revisit those areas of dispute resolution in a timely and cost-effective manner which is not only empowering but also make a perfect scenario of “agreeing to disagreeing in a setup which facilitates harmonious construction from an alternate dispute resolution honouring confidentiality and effective protection of goodwill in market scenario”.

Keyword: *Hohfeldian Matrix; Jural Correlatives; Deontic and Alethic Square of Opposition; Alternate Dispute Resolution; Arbitration; Mediation.*

¹ * Joint Director, Central Government Civil Services Officer, Group A, Government of India, BE (Information Science and Engineering), MBA (IIT Kharagpur) and presently pursuing LL.B. at RGSOIPL, IIT Kharagpur.

² ** BE (Mechanical Engineering) and presently pursuing LL.B. in 3rd year at RGSOIPL, IIT Kharagpur

³ *** BTech (Electrical Engineering), Sam Higginbottom University of Agriculture, Technology and Sciences, Allahabad, Uttar Pradesh and presently pursuing LL.B. in 2nd year at RGSOIPL, IIT Kharagpur

Introduction

For the analysis of legal position, Hohfeldian method is a seminal contribution in the legal field⁴. It is an analytical tool for understanding the dimensions/facets of 'Rights' and 'Duties'. It provides with unprecedented clarity to understand the legal problem. However, the legal 'Rights' and 'Duties' as analysed by Hohfeldian method, may not provide the complete picture in the canvas or broader contour of analysis where in Eastern or Indian System of 'Rights' analysis involves 'Obligation', where the society provides a obligation on the individuals and groups to respect others, where the enforcement comes from within (from inside). Western Jurisprudence is based on legal rights and duties. Eastern law is based on 'Dharma'⁵, which is outer reflection of inside, whereby the philosophy of Vedas and Upanishads have a bearing- which are building blocks of tolerance and respect for others. The inner understanding of Eastern jurisprudence involves understanding the concept of 'Juristic person', beyond the realm of the two classifications as 'Natural person' (like humans) and 'Artificial person' (like Corporation as entities).

Legal Rights and Corresponding Duties

Before understanding and analysing the Steps in the Application of Hohfeldian Jurisprudential Analysis for Mediation and Arbitration, it is vital to amplify the factors what constitutes the rights and duties in this perspective. The Legal Right can be categorised as Claim Right, Privilege Right, Power Right and Immunity Right, whereas, the corresponding duties include that of Duty, Liberty or 'No Privilege right', Liability and Disability. Though the squares of opposition are a post- Hohfeldian activity, nonetheless, the squares of opposition had its origin with Aristotle in fourth century BC, namely the 'Deontic Square of Opposition' and 'Alethic Square of Opposition'. The dynamic relations between the Deontic and Alethic relations would constitute a 'Right' using the Aristotelian Squares of Opposition. The Mediation and Arbitration includes an number of steps including identifying the parties and the stakeholders who have a stake in the final result of the process of alternate dispute resolution (ADR). It is pertinent to note that the inherent advantage of ADR includes going into the sub-stratum of the issues involved in an environment which is mutually agreeable to the parties where the parties may have an arbitration clause in their contractual agreement to

⁴ In the Hohfeldian method, Hohfeld's legal relations with the various legal relationships described with 'Jural opposites' and 'Jural Correlatives'.

⁵ The conceptual base of 'Dharma' finds its quintessential role and presence in Vedas and Upanishads in Indian ancient literatures.

resolve the dispute in an arbitration setup. In Mediation, the parties participate voluntarily and confidentiality is being maintained in the process, where the skilled and trained mediator acts as a catalysts and facilitator to settle the disputes without any prejudice or any time-consuming hassles in effective negotiated and collaborative environment of dispute resolution.

Steps in the Application of Hohfeldian Jurisprudential Analysis

The first and foremost step is to develop the 'Deontic Square of Opposition' and then, the second step would be to analyse the analytical framework of 'Alethic Square of Opposition'. The last step is to super-impose each of the 'Squares of Opposition' on top of each other to form a 3-dimensional analysis in the form of 'Hohfeldian Cube Analysis' Such an analysis a dynamic in nature and can provide multiple permutation and combinations for analysis for legal framework analysis in analytical form. It is vital to note that the dynamic business setup is influenced by myriads of factor which form the basis to analyse the varied permutations and combinations while arriving at a negotiated or agreeable solution to the dispute between and among parties in the cases where ADR mechanism is being opted by parties for resolution of their disputes. The Hohfeldian Jurisprudential analysis is a tremendous tool to analyse the position of the parties where the rights and duties of the parties are analysed 'threadbare' and in an efficacious manner. In this analysis whereby, the 'Right' is for protection of interest. In Hohfeldian analysis, it is the shifting 'dynamics' of Rights and Duties, where the arguments advanced in the Court of Law can provide multiple permutation and combinations of 'Rights and Duties' and its movement in the course of analysis with cogent reasoning. Another line of thought is that of the opinion of the Positivists that includes that Right is an interest and it must be recognized and protected. Thereby *in sequitur* it is averred that the Interest by law signifies that, mere recognition is not enough.

ADR as a viable option for resolution of disputes finds its application in ancient culture and inbuilt in the family value system of Indian jurisprudence. Lord Krishna role as a Mediator in Mahabharata⁶ for resolving the disputes via Mediation between the Pandavas and Kauravas. The legal system provides the right to be enforced by legal system, whereby the interest partakes the characteristics of legal right. In the basic and rudimentary understanding of the legal system, constituent elements include the parties or individuals. Whereby, the

⁶ An epic which has a social and cultural narrative in Indian culture contains verses or Slokas which depicts historic richness and work of vivid culture of ancient sage Vyasa.

interactions are between individuals, it is warranted to Connect individuals with Rights and duties. For every 'Right', there is a corresponding 'duty' and the whole world has a corresponding duty towards that right. Others have a 'duty' to respect that 'Right' against the holder of the right. The Right can be divided into 4 species:

1. Claim Right in strict sense
2. Liberty/Privilege- for example, to enjoy the right to stroll in his/her own garden without being disturbed
3. Power- The right emanating, for instance, from a Will, which bestows upon the individual certain rights of possession and ownership of property.
4. Immunity- The right enjoyed, for example by a diplomat in an Embassy in foreign country.

The word 'Right' is general in nature is a 'Genus' whereas, 'Species' is specific and pertains to say, Right to alienate, Right to Stroll, Right to enjoy the garden or its ascetic beauty, Right to play in the playground, among others. So, 'Right' is a very general term, like that of 'duties'. From Sphere of right one jumps into the sphere of duties which one is supposed to have towards others. This defines the 'Zone or Sphere of activities'. Here, 'Privilege' forms the private sphere of control. If it is transgressed by the activities of neighbour by disturbing via. disturbance while strolling in the garden of his, then there is an intervention in the personal 'Privilege' as a right enjoyed by the individual. Simultaneously, there is a 'Duty' of the neighbour to respect that privilege which one enjoys in his or her own land or garden. So, the starting point of analysis is the 'Privilege' right which one enjoys in his sphere or zone of activity and there has to be protection of the Legal Right which an individual gets with the ownership and possession of the property, which is the 'Power' bestowed by the purchase deed or the sales deed and the due executed registered Agreement of Sale, which is enforceable in the eyes of law. That 'Power' is right to move to the Court by the statute enabling a rightful owner to assert his or her claim over the property and make it enforceable in Court. 'Claim Right' is strict in nature and has to be construed as the right enjoyed which is correlated to the duty of 'No Privilege' for the neighbour, not to disturb the owner when he/she is strolling in his or her own garden, where the strolling is '*Rights in rem*' in general sense. The diagonals are 'Jural Opposites' while the horizontals are 'Jural Correlatives', whereby the 'Privilege' and 'Duty' are mutually exclusive and can be seen from varied legal scenarios.

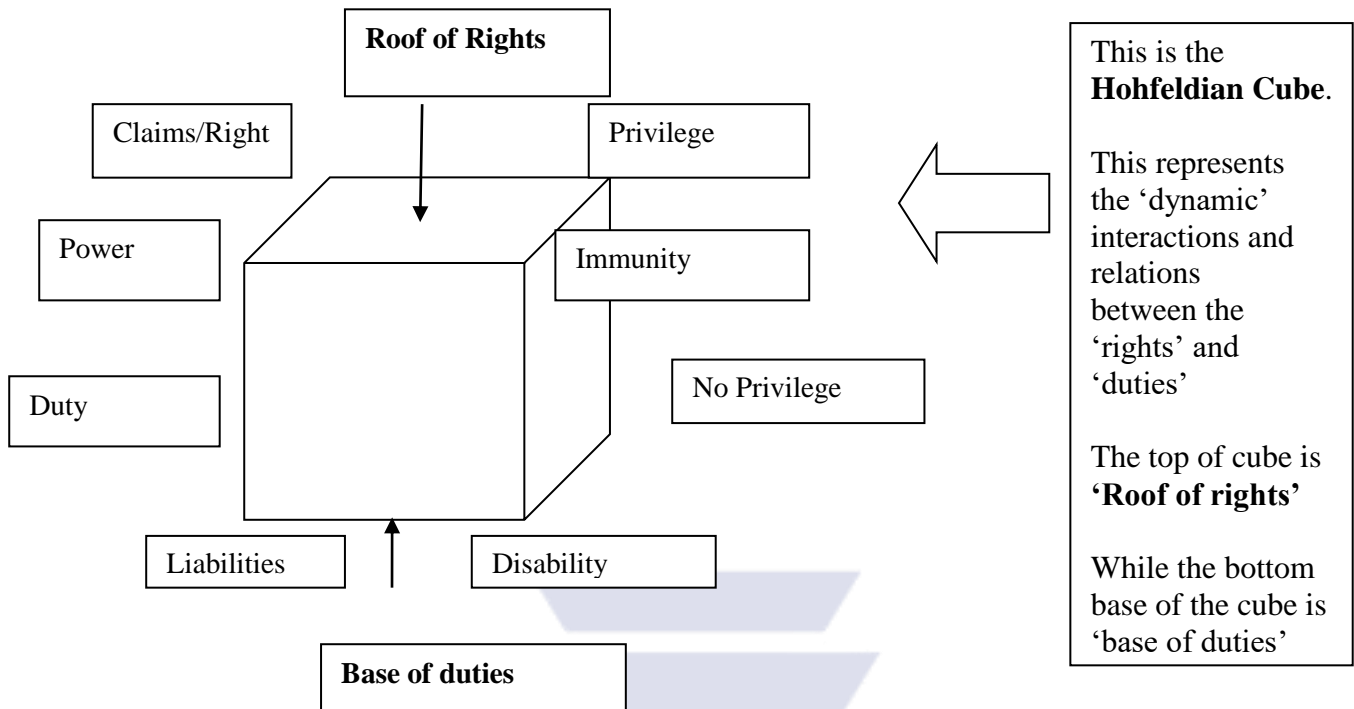


Diagram 1- The complex interaction could be understood as follows diagrammatically

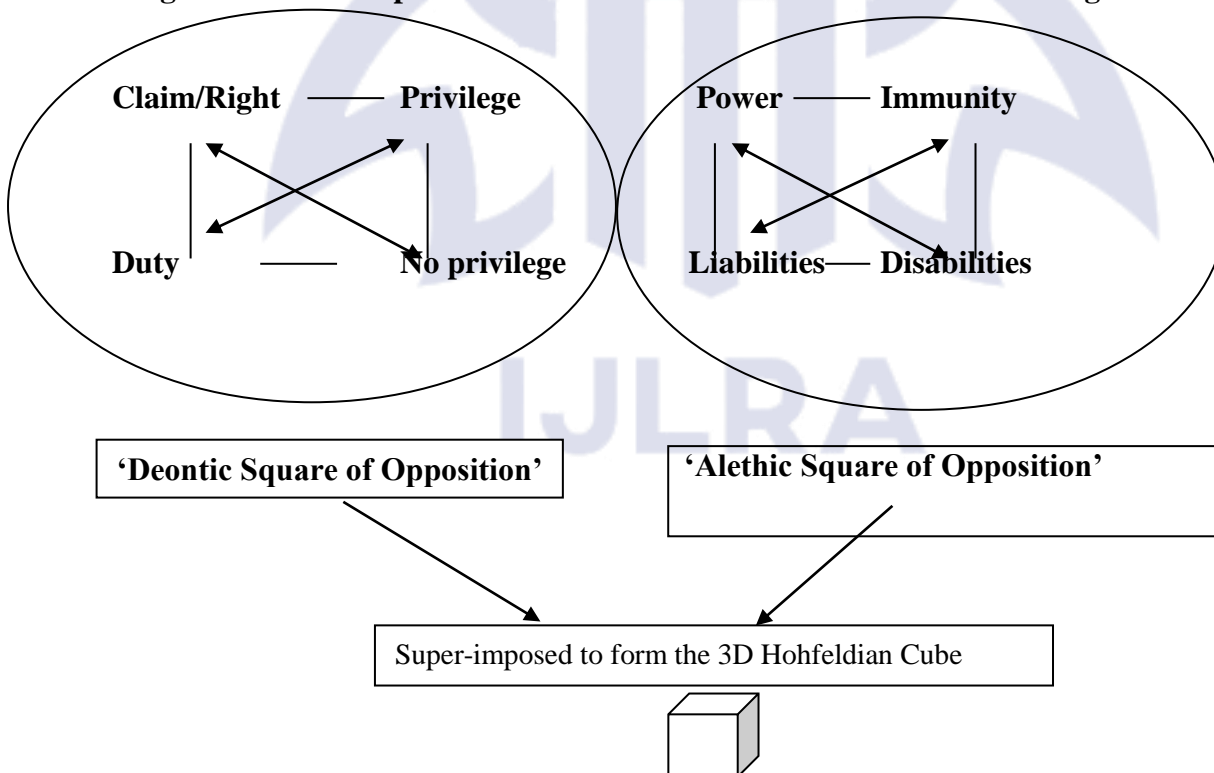


Diagram 2- Super-imposition of 'Deontic' and 'Alethic' Squares of Opposition to form the Hohfeldian Cube.

Let's analyse some scenarios where Mediation and Arbitration as an 'Alternate Dispute Resolution' could help address and tackle the issues involved in practical daily day to day scenarios and to analyse it from a 'Hohfeldian Jurisprudential' Lens.

Scenario 1:

In case of *Volenti non fit injuria*, with the example of batsman playing Cricket match, includes the '**Zone of Liberty**' involves the 'Right to play the game'. Where, the spectators or the **match-lovers buying ticket on their own volition** understanding the risks involved have assented to the position '**No Right**' for the match duration inside the cricket stadium. Where, being injured by a 'Sixer' (six played by a batsman) would not bring a cause of action as the match goes while purchasing the ticket has assented to those inherent risks involved in the game. Likewise, the scenario can be dynamically analysed from the viewpoint of say a batsman in '**Immunity**' (Right) position while scoring a six without injuring the umpire. Where, the **audience is brought by that concurrence of Volenti non fit injuria**, from the '**Power**' position to the '**Disability**' position. So, the scenario could **dynamically create multiple scenarios and options to analyse**. So, if the audience of the cricket match had bought a ticket which spell out categorically, that if the organizers are not responsible for any mishap or accident caused by inadvertent reasons or by purchasing the ticket, any injury or accident caused by risks of watching the 'live' match at stadium, the ticket purchaser is subsuming the risk. Any fallout of any accident, could be mediated between parties post the unfortunate incident of injury, could be dealt accordingly as per Alternate dispute resolution as defined *apriori*. All the Rights and Duties co-analysis has a bearing in the final outcome of the legal scenario helping in understanding the stand of each parties while deciding the fate of the case in instant scenarios, wherefore the Hohfeldian analytical analysis of 'Right' and 'Duties' are a robust tool to get complete clarity of unprecedented nature.

Scenario 2

While planting of plants in one's own garden or land, there is a '**Privilege**' (as a right) to plant trees where the trespasser or neighbour shall not cause destruction or injury to the plants. If there is any trespass, by enforcing his **right the owner of the land has the 'Power'** right to move to Court, where if the verdict comes in favour of the owner, the trespasser or the neighbour violating the societal norms or by action of cutting the trees or causing harm to the plants could **be moved to the 'Disability'** position. Here, the disputes between the parties of nature of a 'trespass' could be effectively solved if the parties are willing to mediate via an alternate dispute resolution arriving at a mutually agreed compensate of damages, if any.

Scenario 3

The 'Power' enjoyed because of a statute in numerous cases or instances, would provide the option to the right-holder to move to the Court or exercise his or her option of seeking justice so the preliminary position of the person in 'Power' (right position) is enforceable in Court, whereby in the eyes of law it holds credence. At the same time, the offender of the law is moved to 'Disability' position, once the cause of action is proved in the Court of Law. In such scenario, if it is of a contractual nature of any agreement defined apriori between the parties and also has a 'arbitration clause', then the issue could be solved by resorting to 'arbitration'.

Explicating the Hohfeldian analysis via. ADR case studies

A conjoint reading of Section 89 of Code of Civil Procedure, 1908 along with Section 12A of the Commercial Court Act, 2015 enables pre-litigation mediation mandatory for commercial disputes. The seminal case of *M/S. Afcons Infrastructure Ltd. & Anr. vs M/S Cherian Varkey Construction Co. (Pvt.) Ltd. & Ors.*⁷, spelt out with clarity the guidelines about the Alternate Dispute redressal process within the meaning of Section 89 of the aforesaid code. The aforesaid case, helped define the nature of cases which are considered unsuitable for ADR. The cases involving prosecution for criminal offenses along with cases which involves serious allegation of the nature of *inter alia* fraud, forgery, fabrication of documents, coercion and impersonation were deemed not fit for ADR. In another case, *Hussainara Khatoon & Ors. Vs Home Secretary, State of Bihar, Patna*⁸ which was reported in Supreme Court Cases (SCC), the Hon'ble Justice Bhagabati in the apex Court, Hon'ble Supreme Court of India observed that although the right to speedy justice is not mentioned explicitly in the Constitution as Fundamental Right, still it is implicit in the broad sweep as contained in Article 21. In catena of cases surfacing before the Hon'ble Court of law in India, it is averred that varied cases related to family law, employment law, consumer law and laws in the realm of Trade, Taxes and Constitutional Laws have a tremendous potential where ADR has its applicability. The applicability of the scope of settling disputes via ADR necessitates that there should not be any pressure, force, coercion or threat of any kind to settle disputes against the wishes of the parties involved, as could be established from the decision in *B.P.*

⁷ *M/S. Afcons Infrastructure Ltd. & Anr. vs M/S Cherian Varkey Construction Co. (Pvt.) Ltd. & Ors.*, (2002) 8 SCC 24

⁸ *Hussainara Khatoon & Ors. Vs Home Secretary, State of Bihar, Patna* (1980) 1 SCC 81

*Moideen Sevamandir & Anr. vs A.M. Kutty Hassan*⁹ and is important to reckon that CPC trials procedure is a complex one with different stages for the litigation for meeting the ends of justice; nonetheless, ADR is a process or a mechanism within the legal setup which enables resolution of disputes in a manner without having recourse to litigation. Applying the Hohfeldian Analysis, in the aforesaid cases, the complex legal issues involved could be divided into sub-issues. The analysis enables the parties to define and specify with clarity the rights and the corresponding duties of the parties involved prior and post the arising of the dispute, which is the subject matter of settlement via ADR. ADR enables the parties to understand and specify with clarity the 'Power' right, if any by the facts and circumstances of the case, bestowed by a clause of 'Arbitration' in the contractual agreement between the parties to resolve their dispute. Another area to exemplify, the applicability of Hohfeldian Analysis, can be seen vide Section 60 of the Transfer of Property Act 1882, which spells out the remedy to the Mortgagor as "equity of redemption". Reliance placed on the case *Seth Ganga Dhar vs Shankar Lal & Others*¹⁰, it was held by the Hon'ble Court that the document in question contained a stipulation creating a 'clog on the equity of redemption' which was found to be illegal. Hon'ble Supreme Court of India had held that, as such a long term or period of redemption of 85 years was not necessarily a 'clog on equity of redemption'¹¹. So, here by Hohfeldian Analysis, the Mortgagor was in 'Zone of Activity' where the law has left that individual alone which is "Right/Claim of Right of equity of redemption" which is intact after the judgment; while the Mortgagee is moved from the initial position of "Power" (bestowed or enjoyed with his/her 'Right of foreclosure') to "Disability" if there is 'Clog in the Right of Equity of redemption of the Mortgagor'.

Conclusion

Hohfeld Cube analysis provides immense clarity in understanding the relationship between eight jural relations. It helps in simplified understanding of complex legal problems, with clarity and defines questions with utmost details, whereby the parties could resolve their disputes via Alternate Dispute Resolution, be it through Arbitration, Mediation, Conciliation or Lok Adalat's. It is not only a useful mechanism to decipher the relationships between the rights and duties, but also a tool which is highly practical and boon to the Court or legislature

⁹ B.P. Moideen Sevamandir & Anr. vs A.M. Kutty Hassan, 2009 (2) SCC 198

¹⁰ Seth Ganga Dhar vs Shankar Lal & Others 1959 SCR 509

¹¹ Ibid.

to appreciate the jurial relations in a cogent and coherent manner. The investors confidence in a market setup has to be bolstered with a robust legal framework which is confidence generating as well as self-empowering to stakeholders in the value chain to negotiate and build a case for resolution to disputes in a 'Win-Win scenario' in business ecosystem outside the hassles of the Court premises in adversarial system of justice in India. To conclude, Mr. Frank Sander, Professor Emeritus of Harvard University while coining the term 'Alternate Dispute Resolution' described it as a solution to "the deadening drag of status quo-ism", the attempt of analysis via the Hohfeldian Jurisprudential matrix and Hohfeld Cube is beckon of light which provides a scenario of positivity where 'delay in delivery of justice could be tackled' resulting in parties in dispute to be in a 'win-win' scenario, reinforced and augmented by a phenomenal change in the legal system by the applicability of 'Alternate Dispute Resolution'.

