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STATE AND NON-STATE ACTORS: A DILEMMA ON APPLICATION OF FUNDAMENTAL RIGHTS

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ABSTRACT

What is law? It is perennial question. Right since the days of the dawn of civilization, elders have explained the mystery to youngers in their own way; of course, subject to limitation of their own. Most of these said law to be divine revelation. May be Manu-Satroopa, Adam and Eve or Adam and Auwa stories are identical, and have been collected, collated and consolidated. Sruti, Smiriti, Bible or Quran are for Hindus, Christians and Muhammedans by Manu, Jesus christ and Hazrat Muhammad. During regime of powerful kings (crown), ‘the law’ was restricted to a law’ and Austinian and Benthamites, wrote in terms of ‘Law being command of sovereign’. Law as it is posited (Positive Law). In Germany, Savigny stated law to be volkgeist, forgotten text, custom, law as found. Then came sociologists, Comte, Ihering, Duguit and Pound, describing Law in terms of its functions Kelsen came with grund norm’ theory. Realists advocated; law as applied by courts.

A state is defined in International Law as an “Independent political entity” occupying a defined territory” “the members of which are united together for the purpose resisting external force and preservation of internal order.”

As per the Supreme Court in the case of Yusuf Khan v. Manohar Joshi laid down the proposition that it is the duty of the state to preserve and protect the law and the Constitution and that it cannot permit any violent act which may negate the rule of law.

With the economic liberalization in India and globalization of world economy, some people entertain serious doubts about the application and efficacy of the fundamental rights. The

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doubts are based on two fundamental premises: firstly, that with the increasing role of private enterprise and the decreasing role of the State, the fundamental rights would be violated more by the private enterprises than by the State; and secondly, the private enterprise itself will claim the fundamental rights as legal person such as corporations, including the multinational corporations. While these premises warn us against the possibility of reduced use and application of fundamental rights, they may not be able to cause any damage to them. In that context, merely by increasing the role of private enterprise, the State cannot absolve itself from the responsibility of honouring and safeguarding the fundamental rights.

After seeing the above said views with respect to the applicability of Fundamental Rights as per the Constitution, it is submitted that with the changing dimension of society and economic interest of the populace there is the shift in the notion of the Court with respect to the definition of State and applicability of Fundamental Rights in the society. Post the arrival of private sector in India (Bharat) there is the demand of services and other need from the ever-growing private sector in India, this has resulted the Court to adopt the newer and contemporary jurisprudence with respect to redress the ever evolving demands of the society.

Keywords: State and Non-State Actors, Fundamental Rights, Horizontal Application of Fundamental Rights

INTRODUCTION

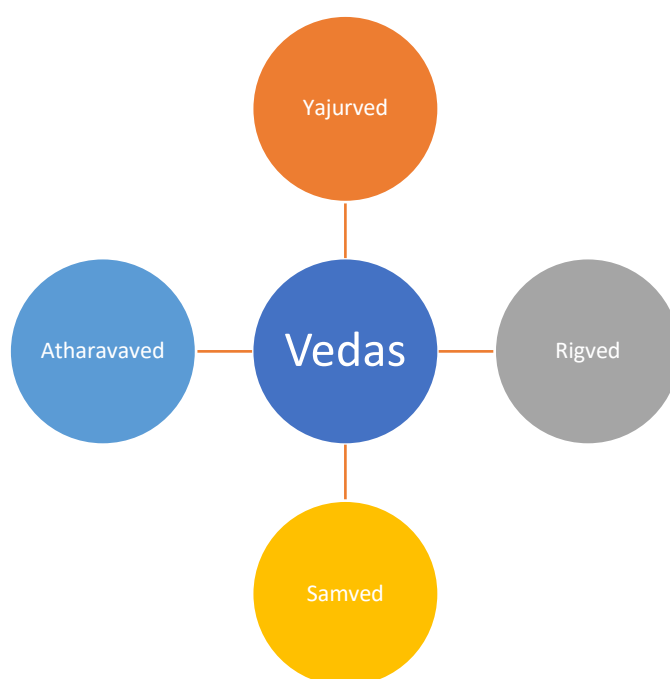
What is law? It is perennial question. Right since the days of the dawn of civilization, elders have explained the mystery to youngers in their own way; of course, subject to limitation of their own. Most of these said law to be divine revelation. May be Manu-Satroopa, Adam and Eve or Adam and Auwa stories are identical, and have been collected, collated and consolidated. Sruti, Smiriti, Bible or Quran are for Hindus, Christians and Muhammedans by Manu, Jesus christ and Hazrat Muhammad. During regime of powerful kings (crown), 'the law' was restricted to a law' and Austinian and Benthamites, wrote in terms of 'Law being command of sovereign'.²Law as it is posited (Positive Law). In Germany, Savigny stated law to be volkgeist, forgotten text, custom, law as found. Then came sociologists, Comte, Ihering, Duguit and Pound, describing Law in terms of its functions Kelsen came with grund norm' theory. Realists advocated; law as applied by courts.

There are roughly six legal systems in the world; Common law system, Civil Law or Continental legal system, Islamic legal system, Soviet legal system, Chinese legal system and

² Dr. G.P. Tripathi, Legal Method 95 (1 2016).

Vedic system or Hindu legal system. Vedic system remains almost unchallenged as regards its spiritual and philosophical height and is on to give leadership to the world in area of transcendental ends. Western philosophy concerns with logic and observation and ends with material world and at mental level. Six schools of Darshan in Bharat, (Philosophy) starts where western philosophy ends. Vaishnav, Shaiva, Buddha, Jain and International society of Krishna Consciousness are extended versions of present day Hindu/vedic legal system.³ Philosophy of law is concerned with the formulation of concepts and theories to aid in understanding the nature of law, the sources of its authority, and its role in society.

Lets have a glimpse of Vedic Law School, Law in veda; its interpretation by Mimansa, its elaboration in Smritis and Puranas revelation and revealed law. Source of Law is God.



No society is a tabula rasa. Every society may be presumed to be having some sort of arrangement for its organization and regulation, though the evolution of constitutions as we know them now is comparatively new and is generally traced back to the making of the Constitution of the US in 1789. As the Constitution of the US was the product of a revolutionary break from the previous constitutional arrangements, the making of the Constitution by any country is commonly associated with a break from the past and making of a fresh beginning. For the proper appreciation of the full implications of any constitution, therefore, an understanding of the constitutional position replaced by it becomes relevant, if not necessary. Accordingly, we also need to have at least a brief understanding of the constitutional

³ Ibid.

arrangements that existed in our country before we embarked upon making of our present Constitution. A fuller understanding of all the constitutional arrangements that may have existed in India at different times and that may have directly or indirectly influenced the making of the Constitution is somewhat obscure and difficult task that cannot be undertaken for the present purpose, but a brief account of those arrangements that preceded immediately before the Constitution and which have a direct bearing on it could be undertaken.⁴ Subject to a few exceptions the legal and constitutional history of India is traced from the time of the entry of the East India Company in the early 17th century.⁵ But not everything of that history has a direct bearing on the making of the present Constitution, though it is quite relevant for the understanding of the current legal system as whole.⁶ We may, therefore, start from the stage of the demand of the people of this country for a constitution and the then Colonial (British) Government's response to the demand.⁷

The British Government took over the governance of India from the East India Company in 1858, after our unsuccessful attempt to overthrow that regime in 1857. Up to this time the Company was the governing its possessions in India at the central level through a Governor General and his Council and at the provincial level through the Governor and his Council. Soon after that, the Indian Councils Act, 1861 brought some changes in the Councils but Indians did not have any place in them. In 1885 the Indian National Congress was established through which the enlightened Indians, especially lawyers, were expected to conceive and formulate the kind of constitutional arrangement India should have under the British rule and which could be presented in the form of petitions to the British Government.⁸ Accordingly it started discussing and presenting to the British Government constitutional designs for India before the end of the 19th century. Not much attention was, however, paid to its proposals either for the participation of the people of India in the government or for the grant of certain basic rights to

⁴ Mahendra Pal Singh, V.N. Shukla's Constitution of India A-3 (13, 2017).

⁵ Interested readers may find some glimpses of it in U.C. Sarkar, *Epochs in Hindu Legal History* (1958); Rama Jois, *Legal and Constitutional History of India*, Vols. 1&2; J.Jolly *Outlines of an History of Hindu Law* (Tagore Law Lecture 1883); P.V. Kane, *History of Dharmasastra* (Bhandarkar Oriental Research Institute, Poona); R.Pal, *The History of Hindu Law* (Tagore Law Lecture 1930); V.D. Kulshreshtha's, *Indian Legal and Constitutional History* (10th Edn., Eastern Book Co. 2012).

⁶ Ibid.

⁷ For a comprehensive and authentic constitutional history since the British rule in India, see, W.A.J. Archbold, *Outlines of Indian Constitutional History* (1926) together with A.B. Keith, *A Constitutional History of India 1600-1935* and M.Gwyer and A. Appadorai, *Speeches and Documents on the Indian Constitution 1921-1947* (1957). Also see, M.V. Paylee, *Constitutional History of India 1600-1950*.

⁸ Developments from here onwards are very well documented in B. Shiva Rao (Ed.), *The Framing of India's Constitution*, Vol.1 (IIPA, New Delhi 1966). A narrative historical background until the making of the Constitution is also given in the last volume of the same work titled "A Study" 1-107.

the people.⁹ The Indian Councils Act, 1892 made some provision for the inclusion of Indians in the Legislative Councils but not in the Executive Councils. As these arrangements did not satisfy the people of India in any way, they continued to express their demand for participation in the government. To pacify the growing unrest of the people, an Act was passed in 1909 which is popularly known as the Minto- Morley Reforms after the names of the then Governor-General and the Secretary of State respectively. “The most important aspect of the measure carried”, according to Keith, “was the increase of the representative element in the legislative Councils and the extension of their powers”.¹⁰

ARTICLE 12: NEXUS BETWEEN STATE AND FUNDAMENTAL RIGHTS

A state is defined in International Law as an “Independent political entity” occupying a defined territory” “the members of which are united together for the purpose resisting external force and preservation of internal order.”

As per the Supreme Court in the case of *Yusuf Khan v. Manohar Joshi*¹¹ laid down the proposition that it is the duty of the state to preserve and protect the law and the Constitution and that it cannot permit any violent act which may negate the rule of law.

Parts III, IV and IV-A of the Constitution together constitute and concretise the lofty goals of justice, liberty, equality, fraternity and the “dignity of the individual” set out in the Preamble¹². Imbued in the dominant theories of human rights we may classify these three parts respectively as: negative obligations of the State not to interfere with the liberty of the individual, positive obligations of the State to take steps for the welfare of the individual and the duties of individual to society and fellow individuals. While in the liberal tradition of constitutionalism the first ones are readily accepted as part of human rights regime, the second ones still invoke some resistance but are fast becoming indistinguishable from the first ones.¹³ The last ones are generally associated with the socialist tradition as negation of human rights. But as the human rights are fast acquiring horizontal application they also represent a positive step in that

⁹ See e.g., The Constitution of India Bill, 1895 and the Commonwealth of India Bill, 1925 both got prepared by Mrs. Annie Besant to which no attention was paid. The Bills can be found in B. Shiva Rao (Ed.), *The Framing of India's Constitution*, Vol. 1 (IIPA, New Delhi 1967) 5, 43.

¹⁰ A.B. Keith, *A Constitutional History of India 1600-1935* (1937) 229.

¹¹ (1999) SCC (Cri) 577.

¹² M.P. Singh, “The Statics and the Dynamics of the Fundamental Rights and the Directive Principles- A Human Rights Perspective” in S.P. Sathe and Sathya Narayan (Eds.), *Liberty, Equality and Justice* (Eastern Book Company 2003) 45-58.

¹³ M.P. Singh, “Socio-Economic Rights in India: A Comparative Perspective” (Mohr Siebeck Tuebingen 2015).

direction.¹⁴ In our Constitution they are conceived in that way and Parts III (Fundamental Rights), IV (Directive Principles of State Policy) and IV-A (Fundamental Duties) represent that arrangement. As regards Part III and IV, their enacting history and placement in the constitutional scheme clearly proves that primarily they are divided on the ground of enforceability of the former and non-enforceability of the latter in the courts.

The above-said distinction is similar to the one drawn between the subjective and objective rights in the European countries, particularly in Germany. Subjective rights inhere in the subject of these rights i.e., the individual and, therefore, he can seek their judicial enforcement. The objective rights do not inhere in any individual, but oblige the State authorities to perform certain acts for the individual. In case the authorities concerned fail to perform their job, it is illegal on their part. But the affected individual cannot seek judicial relief against such failure. Like many other concepts and ideas of our times, the concept of fundamental rights also developed in the west. Under that concept unlike the other legal rights, which are the creation of the state given to individuals against one another, the fundamental rights are claimed against the State. Therefore, whether a constitution says it or not, it is generally assumed that the fundamental rights given in it are available only against the State, i.e., against the actions of the State and its officials. For this reason, the Constitution of US, first amongst the modern written Constitutions to provide for the fundamental rights, applied those rights only to state action, even though the Constitution does not say so. The same conception has played a role in the application of fundamental rights in our Constitution, though some of them are expressly applicable to non-state action and some others are not expressly confined to State action.

In one of its early decisions, *P.D. Shamdasni v. Central Bank of India Ltd*¹⁵, the Supreme Court confirmed this position. In that case the petitioner sought the protection of the court to enforce its rights in Articles 19(1) (f) and 31 against the Respondent bank. The court dismissed the petition and said:

“ The language and structure of Article 19 and its setting in Part III of the Constitution clearly show that the article was introduced to protect those freedoms against the State action... Violation of rights of property by individuals is not within the purview of the article.”

In the case of *State of W.B. v. Subodh Gopal Bose*¹⁶ the court upheld the above notion.

¹⁴ Supra at 3 pg. 24.

¹⁵ AIR 1952 SC 59.

¹⁶ AIR 1954 SC 92.

CHANGING THE HORIZONS RELATED TO THE APPLICATION OF FUNDAMENTAL RIGHTS

With the economic liberalization in India and globalization of world economy, some people entertain serious doubts about the application and efficacy of the fundamental rights. The doubts are based on two fundamental premises: firstly, that with the increasing role of private enterprise and the decreasing role of the State, the fundamental rights would be violated more by the private enterprises than by the State; and secondly, the private enterprise itself will claim the fundamental rights as legal person such as corporations, including the multinational corporations. While these premises warn us against the possibility of reduced use and application of fundamental rights, they may not be able to cause any damage to them. In that context, merely by increasing the role of private enterprise, the State cannot absolve itself from the responsibility of honouring and safeguarding the fundamental rights.

As the courts in the earlier rulings have adopted the literal mode of interpretation in interpreting the provisions of Constitution related to the applicability of Fundamental rights or legal rights towards the private sphere however, lately various jurists, academicians and courts have affirmed on the limited applicability of Fundamental Rights or legal rights in the private domain. It is submitted that the definition of the State cannot and should not be used for restricting the application of a fundamental right only against the state, if in its contents and nature a right is not so restricted.

Articles (19) (1) (g) and Article 298, which contemplate engagement of the State in trade or business, and Article 46 which requires the State to promote educational and economic interests of the weaker sections of the people. In these cases “other authorities” would cover bodies created for the purpose of performing commercial activities or for promoting the educational and economic interests of the weaker sections of the people. The court also noted that the Rajasthan Electricity Board has power to give directions, the disobedience of which was punishable as an offence.

This in effect overruled earlier notion of the court related to the exclusion of the universities from the definition of “the State” within the meaning of Article 12.¹⁷ Accordingly, the universities have been later held to be “the State”.

Later the Court in held that the public corporations were a new type of institution springing from the new social and economic functions of government and, instead of classifying it into existing legal notion, it should be adopted to the changing times and conditions. The State,

¹⁷ University of Madras v. Shantha Bai, AIR 1954 Mad 67.

being an abstract entity, could undertake trade or business as envisaged under Article 298 through an agency, instrumentality or a juristic person. Statutory corporations are agencies or instrumentalities of the State for carrying on trade or business which otherwise would have been carried out by the State departmentally. Therefore, it must be seen whether a body is acting as an agency or instrumentality of the State.

The above said notion of the Mathew J's approach, whether a body is an instrumentality or agency of the government was reiterated by the court as the court pointed out that the corporations acting as the instrumentalities or agencies of government would obviously be subject to the same limitations in the field of the constitutional or administrative law as the government itself, though in the eyes of law they would be distinct and independent legal entities. If the government acting through its officers is subject to certain constitutional and public law limitations, it must follow *a fortiori* that government acting through the instrumentality or agency of corporations should equally be subject to same limitations.

Hon'ble Court summarised essentials which are needed to consider an entity as state:

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

The hon'ble court was of the view to determine whether an entity or corporation is a state, or the instrumentality or agency of the government. The enquiry must be not how the juristic person was born but why was it brought into existence. It was therefore immaterial whether the corporation was created by a statute or under a statute. The concept of

instrumentality or agency of the government was not limited to a corporation created by a statute, but was equally applicable to a company or society considering the relevant factors as laid down by the court.

Also, the court has time and again advanced strong arguments for including even the non-government companies within the meaning of State.

In pursuing the definition of “the State” in Article 12, the court has time and again reminded that what is “the State” for the purposes of Article 12 need not be the State for the purposes. For the purpose of wider application of the fundamental rights, State must be defined liberally, but not for other purposes. Thus, an employee of a public corporation may challenge the violation of his fundamental rights by the corporation, but for the reason he does not become a State employee and cannot seek the protection, for example of Article 311.

Accordingly no general rule or presumption may be drawn that registered society having some nexus with government are always “the State”. It has been held that the Institute of Constitutional and Parliamentary Studies, the National Council of Educational Research and Training (NCERT) and State Council of Education Research and Training are registered societies, but not “State”.¹⁸ Though the Court in cases have held that fundamental rights can be enforced against non-state actors, but is hesitant towards its enforcement as the same will increase the workload of the court towards the enforcement of the fundamental rights against non-state actors. Though, the recent judgments of the court tend to raise the ray of hope towards the enforcement of Fundamental rights in private sphere as well.

CONCLUSION

After seeing the above said views with respect to the applicability of Fundamental Rights as per the Constitution, it is submitted that with the changing dimension of society and economic interest of the populace there is the shift in the notion of the Court with respect to the definition of State and applicability of Fundamental Rights in the society. Post the arrival of private sector in India (Bharat) there is the demand of services and other need from the ever-growing private sector in India, this has resulted the Court to adopt the newer and contemporary jurisprudence with respect to redress the ever evolving demands of the society.

¹⁸ In the NCERT case, the ICAR [P.K. Ramachandra Iyer v. Union of India, (1984) 2 SCC 141] was distinguished by a cryptic observation that “ICAR was originally an attached office of the Government of India and its position was not altered when it was a registered as a society.” [(1991) 4 SCC 578, 583].

Constituent Assembly while discussing the draft the Constitution was of the view that the Constitution is the living document which should be allowed to be amended as a result of the popular and societal demand, so that the Constitution of India retains its relevance in the changing times. One of the evidence, of the same is the presence of Residuary list in the Constitution, which was introduced to give a solution and basic framework to the government in the event of rise of newer inventions and legal framework in the society.

The Journey of Court since the independence has been full of lot of interesting judgments and observation of the court which has later resulted into the shaping the future legal dimension of the society, one such notion is the applicability of fundamental rights towards the non-state actors. As noted above, various existing provisions of the Constitution either impliedly or expressly support the notion of the applicability of Fundamental Rights in the private sphere.

The Courts' judgments act as the northern star in the uncharted sea, which has acted and advised the state in the need. The courts' decisions and judgments act as the bedrock for the future legislative enactments and amendments, therefore sooner or later the I hope the legislature will embrace the evolving jurisprudence of the legal sphere.