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We firmly believe in setting out cutting edge research and analysis having high quality. For this issue we received over a hundred submissions of which a select few have been published after our review process. The focus is to ensure that the articles have contemporary relevance that add value to our readers.

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(Editorial Board)

ENFORCEABILITY OF FUNDAMENTAL RIGHTS ON PRIVATE INDIVIDUALS

BY AKSHIT RAJPAL¹

INTRODUCTION

The citizens of India are vested with a few rights which are formulated to safeguard the natural interests of citizen. Thus, all individuals have the Fundamental and Constitutional rights awarded to them. These rights help recognise, accept and protect the very existence of the citizens. If any of these are seen to be violated, the right to exist is directly violated. Therefore, the same rights are to be kept on a higher pedestal and shall be considered sacrosanct in nature. These Fundamental Rights have played a pivotal role around the framing of the Constitution in general and the same needs to be in tandem with the Fundamental Rights

The Classical model states that these Rights are only supposed to keep a check on the relationship between a private person and the State in order to balance and control the ‘State power’ and the same is only enforceable ‘vertically’ against the State by a private person. They are not actually supposed to control the interaction between two private persons as it was believed that the private interactions felt under the ambit of The Common Law. Earlier the Courts had the philosophy to make it enforceable vertically only but with the emergence and dominance of the private power and the subsequent withdrawal of State power proved that such a method is insufficient, and they should be enforceable horizontally as well². Such a dynamic scenario, where there is an increase in the role of the private actors and a decrease in the role of the State has made us question whether our Fundamental Rights are more likely to be infringed upon by the State or the private actors³.

HORIZONTAL APPLICATION OF FUNDAMENTAL RIGHTS IN INDIA

There are two issues that need to be addressed before dwelling deep into the discussion of a system that enforces horizontality. First, who is the remedy being sought against? There are two ways to counter the issue. Either by letting the private party be the respondent itself or by reaching such private party by ensuring litigation towards the State. Second being, against what is the particular remedy being sought against? It might be a private action or a State action that has allowed the particular private action that has contravened with the right.

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² Rajiv Maheshwaram, Perspective Of The Judiciary To Economic Reforms Vis-À-Vis Rights Of The Poor, All India Rep. J. 71-83 (2012).

³ V.N. Shukla, Constitution Of India 29 (10th Ed. 2003).

There have been instances of private actors violating the Fundamental Rights of citizens where the Court has provided relief irrespective of the fact whether the culprit was a private actor or the State⁴. It has been seen that relief must be provided to the affected party when a fundamental right is violated by a private actor as emerging private corporations have played a large part in the power structure of the society and will defeat the purpose of Fundamental Rights as conceptualized through the eyes of the architects of the Constitution⁵. In the landmark case of *M.C. Mehta v. Union of India*⁶, the Court showed indications towards the inclusion of private actors as ‘State’. The Court debated over the fact that whether a private actor executing public functions shall come under the ambit of State or not. Bhagwati C.J., opined that “*It is through creative interpretation and bold innovation that the human rights jurisprudence has been developed in our country to a remarkable extent and this forward march of the human rights movement cannot be allowed to be halted by unfounded apprehensions expressed by status quoists.*”⁷. The Court also stated that the American ‘Doctrine of State Action’ may be suitable for India, thus all the functions discharged by a body which is seen as State does not have to be public.⁸ In *J.P. Unni Krishnan v. State of Andhra Pradesh*⁹ the Court opined on the applicability of Articles 14 and 15 while dealing with private educational institutions. It was held that mere affiliation or recognition awarded by the State to an institute does not make it a subsidiary of the State. Hence not extending the ambit of ‘State action’ to incorporate such private educational institutions.

The test laid down by landmark case of *Pradeep Kumar Biswas v. Indian Institute of Chemical Biology*¹⁰ was reaffirmed by *Zee Telefilms Ltd. & Anr. v. Union of India & Ors.*,¹¹ which cleared the cloud of ambiguity related to the expansion of ‘other authorities’ under Article 12. The Court also opined that a society registered privately can’t be considered State just because it has been backed by the State.

NEED TO INCLUDE PRIVATE ACTORS AND CONSTITUTIONAL BACKING

⁴ Bandhua Mukti Morcha V. Union Of India, A.I.R. 1984 S.C. 802; M.C. Mehta V. Union Of India, A.I.R. 1987 S.C. 1086; Bodhisatwa Gautam V. Subra Chakraborty, A.I.R. 1996 S.C. 1992; Ashok V. Union Of India, A.I.R. 1997 S.C. 2298; M.C. Mehta V. Kamal Nath, A.I.R. 2000 S.C. 1997.

⁵ Arthur Selwyn Miller, The Modern Corporate State: Private Governments And The American Constitution (1976)

⁶ MC Mehta v. Union of India, A.I.R. (1987) S.C. 1086.

⁷ *Ibid.*

⁸ Zee Telefilms Ltd. And Anr. V. Union Of India And Ors., A.I.R. 2005 S.C. 2677.

⁹ J.P. Unni Krishnan v. State of Andhra Pradesh (1993) 1 S.C.C. 645.

¹⁰ Pradeep Kumar Biswas v. Indian Institute of Chemical Biology (2005) S.C. 2677.

¹¹ Zee Telefilms Ltd. & Anr. v. Union of India & Ors (2005) S.C. 2677.

With the rise in decentralisation of government functions, globalisation and privatisation there has been a compulsive need to declare private persons, be it actual human agency or artificial persons such as companies as State. The viewpoint of the traditional State carrying out Welfare functions for the reason of ‘public interest’ has now shifted to the control of private actors. Not only have these private actors taken the functions but have also been made liable under the duties that were formulated for the traditional State. With the increase in laying off of Public Sector Units (PSU) to the private actors, there has to be a check on the oppressive and unreasonable acts arbitrary done by them and challenging them on the basis of unconstitutional shall be allowed.

The Indian Constitution has various provisions that lean towards the fact that private actors shall come under the ambit of State as per Article 12. The first being the Preamble itself. The preamble falls under the idea of the basic structure as laid down by *Kesavananda Bharti v. State of Kerala*¹². The preamble promises to secure “*social, economic and political justice*” and the same would be defective in nature if the protection against Fundamental Rights is only provided against the State as private actors are also bound to violate the same. The Preamble also promises “*Liberty of thoughts, expression, belief, faith and worship and Equality of status and opportunity*”. These concepts provided to citizens fall flat when such “*liberty of thoughts, expressions, belief and faith*” can be unreasonable be denied by private actors without any legal recourse. Big Corporations do it on an everyday basis by curbing the idea of forming trade unions and not allowing workers to do so. They have been continuously violating the concept of equality of status and opportunity by providing unequal pay to men and women¹³ and by providing inhumane conditions for working which infringes the dignity of these workers. As the Indian Constitution is living in nature, just because the same has been violated by private actors, one can’t exempt them from the mandates of the Indian Constitution. The Court has opined that “*one must bear in mind that the Constitution is to be construed not in a narrow or pedantic sense. The Constitution is not to be construed as mere law but as the machinery by which laws are to be made.*”¹⁴

The second justification arises from Article 12 itself. It states that “*Definition In this part, unless the context otherwise requires, the State includes the Government and Parliament of*

¹² Kesavananda Bharti v. State of Kerala (1973) 4 SCC 225.

¹³ MSI RECKONER, *Gender ready reckoner report*, http://media.monsterindia.com/logos/research_report/MSI_Gender_Ready_Reckoner_March_2017.pdf

¹⁴ Goodyear India Ltd v State of Haryana (1989) INSC 311.

India and the Government and the Legislature of each of the States and all local or other authorities within the territory of India or under the control of the Government of India". If we break down the same into smaller parts and analyse the same, we see that adding private actors to this definition is not impossible. Firstly, the Article starts with the phrase, "unless the context otherwise requires" in a living constitution shows that the same may have to change keeping in mind the social, economic and political changes that the society faces. Secondly the term 'includes' shows that the Article is not exhaustive of the definition of State but an inclusive one, showing that there could be more to State than what the Article mentions. As we have seen that a private actor may come under the ambit of State¹⁵, an agency or organ of the State may also be considered as State under Article 12¹⁶.

Third being Article 17 of the Constitution which abolishes and forbids the act of untouchability and any form of disability stemming from untouchability shall also be held punishable. The wording of Article 17 conveys that the very act of untouchability is absolutely banned be it for the traditional State, the agency of State or private actors. This also shows us that Article 12 is not the sole decision maker for who shall the Fundamental Rights be enforceable against. Article 23 which prohibits the gruesome act of trafficking humans and forced labour also follows the same lines. A simple understanding from the Article itself shows that the same is applicable to private actors and any violation by them would attract legal action¹⁷. Similarly, Article 24 that deals with the issue of child labour and "*Prohibits employment of children in factories, etc No child below the age of fourteen years shall be employed to work in any factory or mine or engaged in any other hazardous employment*". The Court usually directs them to employ an adult member of such child's family in place of the child¹⁸ and holds that anybody can be held guilty of violation of this Article. Thus, the above shows that, violation of Fundamental and Human Rights can be held punishable are it by the State or any private actor for that matter. Thus, showing us that the inclusion of private persons as a violator of fundamental rights under the ambit.

Another justification would be regarding the freedom of speech that is granted under Article 19 of the Indian Constitution. This right can't be snatched away by a body including the State,

¹⁵ Mahabir Auto Stores v Indian Oil Corporation, (1990) 3 SCC 752.

¹⁶ Star Enterprises v City and Industrial Development Corporation of Maharashtra, (1990) 3 SCC 280.

¹⁷ Asiad (People's Union of Democratic Rights) (1982) Indlaw SC 88.

¹⁸ M.C.Mehta v State of Tamil nadu, AIR (1997) SC 699.

its organs, agency and representatives or any private person. But this right comes with a restriction on its own that the said speech shall be in cohesion to the public interest. Again, taking the example of the industrial world, day in and out large companies curb workers from the right to assemble peacefully and demand for issues that are legitimate in nature. Under Article 19(1)(b) the denial of the right to assembly is not allowed and under Article 19(1)(c) any ‘private person’ cannot stop workers from *“to form associations or unions”*. A counter-argument may be presented which states that Article 19 allows the *“State from making any law, in so far as such law imposes reasonable restrictions on the exercise of the right conferred”* and if private actors come under the ambit of ‘State’ then they can impose the restraints on the rights. But this argument is fallacious and weak in nature. The context under this particular article regarding the State is leaning towards the traditional welfare state and its organs only and not private actors who are declared as ‘State’ for only a limited scale with respect to the reason they are declared as ‘State’. Thus, the one imposing the said ‘reasonable restrictions’ will only be the legislature who will pass such laws on behalf of the State as well as the private actors.

The fifth constitutional backing would be Article 21 that is the Right to Life. It assures that no individual is deprived of the personal liberty and to lead a life with dignity. A human’s life is incomplete without the Human Rights granted to them and thus the purview of Article 21 extends as far as it can reach. Also, they have also established a fair, reasonable and just procedure to go along with the same¹⁹. The ‘life’ spoken about here isn’t only related to death but extends to any act that disables the right to enjoy life or lowers the dignity of any individual. Thus, various private actors like big firms must comply with the welfare legislations for the labourers and have to follow the various wage payment and compensations statutes in application. If they do not comply with the same, then the labour under them can’t lead a dignified human life. It must be noted that the arbitrary declaration of what is the ‘State’ shall not affect the right to enjoy a dignified human life. One may counter that there are enough civil and criminal recourse available for the violation of Article 21 and there is no need to expand the ambit of State just to fit this in. But the same is in contradiction to the rule that to right the constitutional wrongs one must opt for constitutional solutions only.

Article 32(1) ensures the right to seek redressal for the violation of any Fundamental Right. If at any point a Fundamental Right is violated the Court has to provide remedy and justice for

¹⁹ Maneka Gandhi v U.O.I, AIR (1978) SC 597.

the same. In exercise of the power vested through Article 32, the SC can issue different writs. For instance, when a person files against illegal detention or custody by a private actor the Court may issue the writ of habeas corpus²⁰. Alternatively, the SC can control private rights with regards to the interest of the public²¹. Ultimately, from the above analysis we can say that Article 21 and 32 together act like a backbone and even if other Articles do not consider private actors as State, any violation is capable of being sought under these Articles.

THE OTHER SIDE OF THE CONTENTION

Declaring private actors as ‘State’ should only be guided with the idea of public interest in mind. The decision of what constitutes as public interest should consider several factors depending on which community has been vested with the right in question. After an affirmative answer on the above we must see whether the said interest violates their Fundamental Rights²². Certain things should be considered after declaring private Actors as State as it would make the same much clearer when a right has been violated. The statehood should only be provided for limited purposes as to when a citizen has been treated wrongly. Putting a private actor in the ambit of state shall not give them all the rights that a State company would get. For example, a worker in a private company can’t take benefits of being a government employee even if the private company has been declared as ‘State’²³.

CONCLUSION

Thus, from the above arguments and counter arguments one can successfully say that there is no reason not to make Fundamental Rights enforceable against private actors. Fundamental Rights have been put on such a high pedestal that anyone who has been vested with these can’t even surrender the same²⁴. Concluding the same, just because the violator of a Fundamental Right is a private person it shouldn’t exempt them from the legal action. We shall consider both sides of the plane and realise that the citizens have been treated wrongly by multiple private actors and as they escape the burdens of fundamental rights, the citizens don’t get the justice they deserve as envisaged by the Constitution itself.

²⁰ Madhu Bala v Narendra Kumar, AIR (1982) SC 938.

²¹ P. D. Shamasani v Central Bank of India, AIR (1952) SC 59.

²² Janta Dal v H.S. Chowdhary, AIR (1993) SC 892.

²³ Sukhdev Singh Bhagatram, AIR (1975) SC 1331.

²⁴ Bashasharnath v C.I.T, AIR (1959) SC 149.

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