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**RE-DEFINING THE DEFINITION OF “STATE” UNDER ARTICLE 12 OF THE
INDIAN CONSTITUTION**

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The Constitution of India defines certain fundamental rights of individuals. A fundamental right, as defined in the Constitution, is unique when compared to other constitutional rights in one vital aspect. While a fundamental right is inviolable, a non-fundamental right possesses no such characteristics. It is inviolable in the sense that no ordinance, custom, usage or administrative order can abridge or take away any fundamental right.¹

Fundamental rights are meant for promoting the ideals of a political democracy. They prevent the establishment of an authoritarian and despotic rule in a country and protect the liberties and freedom of the people against any invasion by the State. In short, they aim at establishing ‘*agovernment of laws and not of men*’. However, the government is constitutionally empowered to impose *reasonable* restrictions on these ‘unique’ rights. However, whether these restrictions are reasonable or not is a question to be decided by the constitutional courts.

To ensure that fundamental rights are appropriately sheltered, the Constitution has conferred on the Supreme Court and the High Courts the power to grant effective remedies whenever such rights are violated.² The courts may thus issue writs of *habeas corpus*, *mandamus*, *prohibition*, *quo warranto* and *certiorari* for preventing fundamental rights from being dishonoured. A look at the history of judicial interpretation of Article 32 and Article 226 shows us that these

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¹ Singh MP, VN Shukla’s, *Constitution of India*, 11th Edition, Eastern Book Company, Lucknow, 2008, p 44

² Article 32 (Supreme Court) and Article 226 (High Courts) of the Constitution of India grant this power.

provisions have been liberally construed and judicial remedies for the enforcement of fundamental rights have been vividly expanded to sustain the claims of such right holders.³

It is pertinent to note another fundamental difference between fundamental rights and other legal rights. Unlike legal rights, which are the created by the State through legislations, fundamental rights can be claimed only against the State. Therefore, whether the Constitution says it or not, it is generally assumed that fundamental rights given in the Constitution are available only against the State, *i.e.*, against the actions of the State and its officials.⁴

For that reason, and moreover for the reason that some of the fundamental rights are expressly guaranteed against the State, a definition of ‘State’ was necessary. The ‘State’ includes the Government of India, Parliament of India, the Government and the Legislature of each state and all local or other authorities within the territory of India or under the control of the Government of India⁵.

This definition has created a lot of confusion amongst judicial minds till date, especially regarding the meaning of the term ‘other authorities’. However, when we peruse Article 226, there is a striking contradiction with the definition of State under Article 12. Article 226 empowers the High Courts to issue writs against ‘*any person or authority*’. Does this actually contradict the definition of State in Article 12 so as to make private individuals and organizations amenable to the jurisdiction under Article 226? The latest instance in which this issue came up was earlier this year in the case of *ABC v. Police Commissioner & Others*⁶, before the High Court

³ *Constitution of India*, supra note 1, at p 46

⁴ *Id.*, pp 23-24

⁵ Article 12 of the Constitution of India

⁶ Writ Petition (C) No. 12730 of 2005; the judgment was delivered by a Single Judge on February 5, 2013.

of Delhi. The primary question was whether a fundamental right can be enforced, under Article 226, against media groups which are private organizations by their nature. In this case, the victim's mother filed a writ petition⁷ before the High Court against the Commissioner of Police⁸ and two media groups⁹ alleging a violation of her daughter's fundamental right to privacy and confidentiality guaranteed under Article 21 of the Constitution. It was alleged in the petition that the contents of the First Information Report filed by the victim, alleging a case of sexual abuse against her father, was leaked by Respondent 1 to Respondent 2 & 3 and the same was featured in their respective newspapers as well as news channels.

Under Article 226, writs can be issued against '*any person or authority*', and the same can be issued for enforcing fundamental rights as well as for any other purposes. It is nothing but a public law remedy available against a private body or person performing a public function or discharging a public duty.¹⁰ The term '*authority*' in Article 226, in the context, must receive a liberal meaning unlike the same term in Article 12. Article 12 is relevant only for the purpose of enforcement of fundamental rights under Article 32.¹¹ The words '*any person or authority*' used in Article 226 are, therefore, not to be confined only to statutory authorities and instrumentalities of the State.¹²

They may cover any other person or body performing a public duty. What is relevant is the nature of the function carried out by the impugned body. Duty must be judged in the light of

⁷ Under Article 226 of the Constitution of India

⁸ Respondent 1

⁹ Hindustan Times (Respondent 2) House and AajTak (Respondent 3)

¹⁰ *supra* note 6, at Para 28

¹¹ Remedies for enforcement of rights conferred by Part III of the Constitution of India

¹² *Andi Mukta Sadguru Shree Muktajee Vandas Swami Suvarna Jayanti Mahotsav Samrak Trust & Ors. v. V Rudani & Ors.*, (1989) 2 SCC 649

positive obligation owed by the person or authority to the affected party. No matter by what means the duty is imposed; if a positive obligation exists, mandamus cannot be denied.¹³

When a private body exercises public functions, even if it is not an instrumentality of the State, the aggrieved person has a remedy not only under the ordinary law, but also under the Constitution, by approaching the High Courts under Article 226.¹⁴

So, the pertinent issue that needs scrutiny is the test to decide whether a particular function is a public function in the context of exercise of jurisdiction under Article 226. Can a media house be treated as performing a public function?

It has to be noted that not all the activities of private bodies are subject to private law alone. When the activities of a private body are governed by the standards of public law, when its decisions are subject to duties conferred by a statute or when, by virtue of the function it is performing, it is in a dominant position in the market, the private body is under an *implied duty* to act in public interest.¹⁵

The test of whether a body is performing a public function or a public duty, and is hence amenable to judicial review, may not depend upon the source of its power or whether the body is ostensibly a '*public*' or a '*private*' body.¹⁶ Principles of judicial review prima facie govern the activities of bodies performing public functions.¹⁷

¹³*Id.*

¹⁴ Zee Tele Films &Ors v. Union of India &Ors, (2005) 4 SCC 649

¹⁵ De Smith, Woolf and Jowell, *Judicial Review of administrative action*, 5thEdn., Thomson, Sweet & Maxwell, 2012

¹⁶*Id.*

¹⁷*Id.*

A body performs a '*public function*' when it seeks to achieve some collective benefit for the public or a section of the public and is accepted by the public or that section of the public as having authority to do so. Therefore, bodies exercise public functions when they intervene or participate in socio-economic affairs in public interest.¹⁸

From the aforementioned observations, it can be understood that an activity of a body can be termed to be a public function for the purposes of scrutiny by a constitutional court when the same is performed under a duty to act in *public interest*. Any violation of such duty, even by a private body, would fall within the ambit of High Courts exercising jurisdiction under Article 226, especially when the same is alleged to have infringed any fundamental right.

In a democracy, where freedom of speech and expression is preserved at a very high pedestal, the media has an extremely vital role to perform in the larger public interest. The press and media are instrumentalities through which the right to freedom of speech and expression of citizens are made meaningful. They are also the repositories of public trust and faith. It is for this reason that the press became to be known as the '*Fourth Estate*'.¹⁹ As a result, they owe a duty to the public to report news and views accurately without any prejudice or ulterior motives. Therefore, restraint and caution are two words that personnel in this industry must keep close to their hearts.

It is difficult to over-emphasise the importance of freedom of press as one of the pillars of a Government '*of the people, by the people, and for the people*'. The press, especially the newspapers, stands by common consent, the first among the organs of opinion. The conscience

¹⁸Binny Ltd. v. Sadasivan, (2005) 6 SCC 657

¹⁹MarkandeyKatju J, '*Role of Media in the 21st Century*', AIR 2002 Journal 273

and the common sense of the nation, as a whole, keep down the evils which have crept into the working of the Constitution, and may in time, extinguish them.²⁰

The press, as a medium of communication, is a modern phenomenon. It has immense power to advance or thwart the progress of a civil society. Its freedom can be used to create a brave new world or to bring about universal catastrophe.²¹ It is the function of the press to disseminate news from as many different sources, facts and colours as possible. A citizen is entirely dependent on the press for quality, proportion and extent of his news supply.²²

The media, be it print or electronic, is generally called the fourth pillar of a democracy. The media, in all its forms, discharges a very onerous duty of keeping the people knowledgeable and informed. The impact of the media is far reaching as it not only reaches the people physically but also influences them mentally. It creates opinions, broadcasts different viewpoints, brings all the government lapses to the forefront and is an important tool in restraining corruption and other ills of the society. The media ensures that an individual actively participates in the decision making process as well.²³

In light of the above discussion, it can be ascertained that the press and media perform a public function and discharge a public duty of disseminating news, initiating and responding to debates, and dealing matters of current interest in the society. It cannot be said that they do not perform a

²⁰Lord Bryce, *American Commonwealth (New and Revised Edition)*, pp 274 -275 and 367<which edition, publisher, place and year?>

²¹ The Second Press Commission Report, Vol. I, pp 34-35

²²*Id.*

²³Sanjoy Narayan, Editor in Chief Hindustan &Ors. v. Honourable High Court of Allahabad, through Registrar General, 2011 (9) SCALE 532

public function or discharge a public duty, *inter alia*, when they perform the act of reporting news.

They command immense power of making, moulding, sustaining or even drastically changing public opinion. The functions performed by the press and media are recognized by the State which consequently accords various rights and privileges to them. It is therefore clear that press and media are indispensable organs of a democracy as they play a vital role in the process of development of the State. Hence, it can be concluded that the media is amenable to writ jurisdiction under Article 226. This judgment virtually establishes media as the 'fourth estate' of the state.