

THE ENFORCEABILITY OF FUNDAMENTAL RIGHTS VIS-À-VIS PRIVATE PERSONS: AN ANALYSIS OF THE INTERPRETATION OF THE SUPREME COURT*

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I. INTRODUCTION

Fundamental rights enshrined under Part III of the Constitution are generally enforceable only against the state.¹ This viewpoint was followed diligently by the Supreme Court initially.² However, the Supreme Court has stated that fundamental rights like Articles 17, 23 and 24 were exceptions to this general rule.³ The principal aim of this case-comment is to establish that firstly, the ratio laid down in the case of *P.D. Shamdasani v. Central Bank of India*⁴ is good law, and secondly, the enforcement of fundamental rights requires that the entity has a nexus⁵ with the state, and private actions which violate rights will be regulated by ordinary law.

The first case⁶ which *substantially* dealt with the question of enforceability of fundamental rights vis-à-vis private persons was the case of *P.D. Shamdasani v. Central Bank of India*⁷. The brief facts of the case are as follows - the petitioner held five shares in the respondent-bank and, the bank sold the shares to a third party by

* The instant case-comment primarily analyses the seminal case of *P.D. Shamdasani v. Central Bank of India*, A.I.R. 1952 S.C. 59, and more importantly, traces its application/non-application in the later decisions of the Apex Court.

1. NATIONAL COMMISSION TO REVIEW THE WORKING OF THE CONSTITUTION, REPORT 60 (2002); 2 H.M. SEERVAI, CONSTITUTIONAL LAW OF INDIA – A CRITICAL COMMENTARY 1160 (2006); DURGA DAS BASU, SHORTER CONSTITUTION OF INDIA 39 (2006); M.P. JAIN, INDIAN CONSTITUTIONAL LAW 836 (2005); V.N. SHUKLA, CONSTITUTION OF INDIA 20 (2001).
2. See *P.D. Shamdasani*, A.I.R. 1952 S.C. 59; *Vidya Verma v. Shiv Narain Verma*, A.I.R. 1956 S.C. 108.
3. *Sukhdev Singh v. Bhagatram*, A.I.R. 1975 S.C. 1331, at ¶ 95; *P.U.D.R. v. Union of India*, A.I.R. 1982 S.C. 1485-6, at ¶ 12; *Sanjit Roy v. State of Rajasthan*, A.I.R. 1983 S.C. 331-2, at ¶ 3. In addition, the Supreme Court in certain other decisions included even Article 21 as an exception, see *Bodhisattwa Gautam v. Subhra Chakraborty*, A.I.R. 1996 S.C. 926, at ¶ 6; *Zee Telefilms Ltd. v. Union of India*, (2005) 4 S.C.C. 680, at ¶ 28. The inclusion of Article 21 as an exception to the general rule is contested in the instant case comment.
4. A.I.R. 1952 S.C. 59.
5. The term *nexus* herein is regarded to include instrumentalities of the state, non-statutory bodies performing public functions and, state-aided/controlled entities.
6. It is conceded by the author that there is room for debate whether this case was indeed the *first* case as Patanjali Sastri, J. (as he was then) in the case of *A.K. Gopalan v. State of Madras*, A.I.R. 1950 S.C. 74, at ¶ 115, had opined as follows: “As for protection against individuals, it is a misconception to think that constitutional safeguards are directed against individuals. They are as a rule directed against the State and its organs. Protection against violation of the rights by individuals must be sought in the ordinary law” (italics supplied). However it is submitted that in the *A.K. Gopalan* case this issue was not directly in question. See *Bijayalaxmi Tripathy v. Managing Committee of Working Women’s Hostel*, A.I.R. 1992 Ori. 242, at ¶ 20.
7. A.I.R. 1952 S.C. 59.

exercising its right to lien as it sought to recover the debt owed by the petitioner. The petitioner unsuccessfully challenged the actions of the bank before the Bombay High Court.⁸ Thereafter, the petitioner approached the Supreme Court by way of a writ petition under Article 32 of the Constitution seeking to enforce fundamental rights guaranteed under Articles 19(1)(f) and 31 against the respondent-bank⁹.

II. RATIO OF *P.D. SHAMDASANI v. CENTRAL BANK OF INDIA*

A constitution bench¹⁰ of the Supreme Court had dismissed the petition on the preliminary ground that Articles 19(1)(f) and 31¹¹ of the Constitution were *not* enforceable against private persons.¹² The reasoning of Patanjali Sastri, C.J. was based upon the interpretation of the language and structure of the fundamental rights in question.

Firstly, with respect to the freedoms contained in Article 19 it was deduced that since restrictions could be placed upon these freedoms *exclusively by the state* in the succeeding clauses of the same Article; this provision envisaged only infringement through state action.¹³

Secondly, regarding Article 31(1) it was conclusively held that the *omission* of the word 'state' does not imply enforceability against private actions. This proposition was substantiated by juxtaposing Article 31(1) with Article 21¹⁴ of the Constitution. Even Article 21 does not have any express reference to 'state', and both provisions are akin to each other because the rights enshrined under both provisions can be deprived by 'procedure established by law' or with the 'express authority of law'.¹⁵ Therefore, as these rights can be curbed *only* by way of an authorised governmental action, it is conclusive that these rights are enforceable only with respect to state action.

In addition, with respect to Article 31(1) it was contended on behalf of the petitioner that as there was no express legislative power pertaining to the 'deprivation of

8. *Id.*, at ¶ 2.

9. It is pertinent to note that the Central Bank of India in 1951 (prior to its eventual nationalization in 1969) was regarded as a private person.

10. The bench consisted of Patanjali Sastri, C.J., Chandrasekhara Aiyar, Mehr Chand Mahajan, Mukherjea and Das, JJ.

11. Arts. 19(1)(f) and 31 of the Const. of India have been repealed by virtue of the Constitution (Forty-fourth Amendment) Act, 1978, § 6 (w.e.f. 20-6-1979). The right to property is now a constitutional right under Art. 300-A of the Const. of India.

12. A.I.R. 1952 S.C. 60 at ¶ 7.

13. *Id.*, 59 at ¶ 3.

14. Art. 21 of the Const. of India states as follows: "No person shall be deprived of his life or personal liberty except according to procedure established by law."

15. A.I.R. 1952 S.C. 59 at ¶ 3.

property' under Schedule VII of the Constitution, it must be regarded that the provision conferred a right against private action. However, this contention was dismissed as it was held that the State had the legislative power either under Entry No. 1 of List II or Entry No. 1 of List III of Schedule VII.¹⁶

The reasoning in the instant case is flawless but it is interesting to observe that Sastri, C.J. does not refer to his own opinion in *A.K. Gopalan v. State of Madras*¹⁷ wherein he categorically dismissed the notion of enforcement of fundamental rights vis-à-vis private persons. However, his Lordship's observations in the *A.K. Gopalan case*¹⁸ and the *P.D. Shamasani case*¹⁹ were relied upon and affirmed by another Constitution Bench of the Supreme Court in the case of *Vidya Verma v. Shiv Narain Verma*²⁰ and several High Court decisions²¹. In the *Vidya Verma case*²² the Supreme Court merely used the analogies in the previous cases and held that Article 21 of the Constitution of India was unenforceable against private persons.

III. IS ARTICLE 21 ENFORCEABLE VIS-À-VIS PRIVATE PERSONS - A STARE DECISIS CRITIQUE

A two-judge bench decision of the Supreme Court in the case of *Bodhisattwa Gautam v. Subhra Chakraborty*²³ had baldly stated that, "fundamental rights can be enforced even against private bodies and individuals". In addition, the Court had applied this reasoning to Article 21 of the Constitution.²⁴ It is submitted that this decision is completely devoid of reasoning and conveniently does not consider the ratio laid down in the *Vidya Verma case*²⁵. Article 141²⁶ of the Constitution of India embodies the maxim - *stare decisis et non quieta movere*.²⁷ Furthermore, the Apex Court has held that:

16. *Id.*, 60 at ¶ 6. It is also relevant to note that this contention is highly untenable as the Parliament is anyway given residuary legislative powers under Art. 248 and Entry 97 of List I of the VII Schedule of the Constitution. See generally *Union of India v. Harbhajan Singh Dhillon*, A.I.R. 1972 S.C. 1061.

17. A.I.R. 1950 S.C. 74 at ¶ 146.

18. *Id.*

19. *P.D. Shamasani*, A.I.R. 1952 S.C. 59.

20. A.I.R. 1956 S.C. 108 at ¶ 7 *aff'd P.D. Shamasani*, A.I.R. 1952 S.C. 59.

21. See *Sihnu v. Lachman Dass*, A.I.R. 1952 H.P. 41, at ¶ 5; *Firm AL. AR. Arunachalam Chettiar v. Kaleeswarar Mills Ltd.*, A.I.R. 1957 Mad. 309, at ¶ 24; *Tejraj Chhagalal Gandhi v. State of Madhya Bharat*, A.I.R. 1958 M.P. 115, at ¶ 11; *Paika Padhano v. Pindiko Patro*, A.I.R. 1958 Ori. 15, at ¶ 11; *Puthota Chinnamma v. Regional Deputy Director of Public Instruction, Guntur*, A.I.R. 1964 A.P. 277, at ¶¶ 13-15; *Sri Lakshmi Agencies v. Govt. of A.P.*, 1994 (1) A.L.T. 341, at ¶¶ 9-10.

22. A.I.R. 1956 S.C. 108.

23. A.I.R. 1996 S.C. 926, at ¶ 6 (italics supplied).

24. JAIN, *supra* note 1, at 1132. See also *Zee Telefilms Ltd.*, (2005) 4 S.C.C. 680, at ¶ 28.

25. A.I.R. 1956 S.C. 108.

26. Art. 141 of the Const. of India states as follows: "The law declared by the Supreme Court shall be binding on all courts within the territory of India."

27. 4 P. RAMANATHA Aiyar, *ADVANCED LAW LEXICON* 4456 (2005).

It is commonly known that most decisions of the courts are of significance not merely because they constitute an adjudication on the rights of the parties and resolve the dispute between them, *but also because in doing so they embody a declaration of law operating as a binding principle in future cases.*²⁸

In addition, in cases of conflict of opinions pronounced by the Supreme Court, the opinion expressed by the larger bench strength prevails.²⁹ By virtue of the doctrine of precedent this decision is *per incurium* as it does not consider the ratio of the *Vidya Verma case*³⁰.

Moreover, it is pertinent to note that S. Saghir Ahmad, J.³¹ in the case of *Chairman, Railway Board v. Chandrima Das*³² had relied upon his previous judgment on a different point of law, i.e. whether the offence of rape constituted a violation of Article 21.³³ But in this case he stated that, “where *public functionaries* are involved and the matter relates to the violation of Fundamental Rights or the enforcement of public duties, the remedy would still be available under the Public Law notwithstanding that a suit could be filed for damages under Private Law.”³⁴ If Article 21 of the Constitution was truly enforceable against private persons then there would be no need to distinguish between private and public law remedies. Hence, it is respectfully submitted that the decision of the Court in the *Bodhisattwa Gautam case*³⁵ is bad in law.

However, common law remedies will be available to persons aggrieved by private actions, because Article 21 is the sole repository of the right to life and personal liberty *only against the State.*³⁶ Therefore, common law remedies will be available against infringement of rights by private persons.³⁷

28. Union of India v. Raghubir Singh, A.I.R. 1989 S.C. 1933, at ¶ 8 (italics supplied).

29. See *Commissioner of Sales Tax, J & K v. Pine Chemicals Ltd.*, (1995) 1 S.C.C. 58, at ¶¶ 15-17; *N.S. Giri v. Corpn. City of Mangalore*, A.I.R. 1999 S.C. 1958, at ¶ 12; *Lily Thomas v. Union of India*, A.I.R. 2000 S.C. 1650, at ¶ 56; *Bharat Petroleum Corpn. Ltd. v. Mumbai Shramik Sangha*, (2001) 4 S.C.C. 448, at ¶ 2; *S.H. Rangappa v. State of Karnataka*, (2002) 1 S.C.C. 538, at ¶ 11; *P. Ramachandra Rao v. State of Karnataka*, (2002) 4 S.C.C. 578, at ¶ 28. See also N.K. Jayakumar, *Courts*, in 10 HALSBURY'S LAWS OF INDIA 339 (2001).

30. A.I.R. 1956 S.C. 108.

31. His Lordship gave the judgment in the case of *Bodhisattwa Gautam v. Subhra Chakraborty*, A.I.R. 1996 S.C. 922.

32. A.I.R. 2000 S.C. 988.

33. *Id.*, at ¶ 12.

34. *Id.*, at ¶ 11.

35. A.I.R. 1996 S.C. 922. Moreover, High Courts have continued to follow the ratio of the earlier decisions in recent cases neglecting the ratio laid down in the *Bodhisattwa Gautam case*, e.g. *Arun Gulab Gavli v. State of Maharashtra*, (2000) 102 Bom. L.R. 390, at ¶¶ 19-20.

36. *Additional District Magistrate, Jabalpur v. Shivakant Shukla*, A.I.R. 1976 S.C. 1207, ¶ 135 *contra* *Additional District Magistrate, Jabalpur*, A.I.R. 1976 S.C. 1207, ¶ 163 (H.R. Khanna, J., dissenting).

37. See BASU, *supra* note 1, at 899.

IV. ENFORCEABILITY OF FUNDAMENTAL RIGHTS VIS-À-VIS PRIVATE PERSONS - CURRENT LEGAL POSITION:

Articles 17³⁸, 23³⁹ and 24 of the Constitution of India are considered to be enforceable against private persons.⁴⁰ However, these provisions pertaining to untouchability and trafficking clearly provide that ordinary laws will be enacted, and private acts in derogation to these provisions will be punished under offences created under ordinary laws. The Supreme Court in relation to these fundamental rights has stated that, "it is the *constitutional obligation of the State* to take the necessary steps for the purpose of interdicting such violation and ensuring observance of the fundamental right by the private individual who is transgressing the same."⁴¹ Therefore, although these fundamental rights are supposed to be enforceable against private persons, they in turn cast an obligation upon the state to enact *ordinary* penal laws to be enforced against private persons. Thus, it is submitted that state intervention is necessary to enforce these rights and are not directly enforceable against private persons.

It is conceded by the author that the definition of 'state' under Article 12⁴² has undergone a metamorphosis, and the ambit of 'other authorities' has been considerably widened.⁴³ However, the widening of the ambit of the definition of state merely reaffirms the principle that in order for an entity to be subject to Part III of the Constitution of India, such an entity must be defined as 'state'.

V. CONCLUSION

It is submitted that the ratio of the Supreme Court in the *P.D. Shamdasani case*⁴⁴ has stood the test of time. Articles 17 and 23 of the Constitution as stated above, are *not* directly enforceable against private persons, and require the state to pass ordinary laws to create offences which in turn are enforceable against private persons. The

38. Art. 17 of the Const. of India states as follows: "Untouchability' is abolished and its practice in any form is forbidden. The enforcement of any disability arising out of 'Untouchability' shall be *an offence punishable in accordance with law.*"

39. Art. 23(1) of the Const. of India states as follows: "Traffic in human beings and *begar* and other similar forms of forced labour are prohibited and any contravention of this provision shall be *an offence punishable in accordance with law.*"

40. *P.U.D.R.*, A.I.R. 1982 S.C. 1485-6, at ¶ 12; *Sukhdev Singh*, A.I.R. 1975 S.C. 1331, at ¶ 95; *Sanjit Roy*, A.I.R. 1983 S.C. 331-2, at ¶ 3.

41. *Id.*, 1490, at ¶ 16; *State of Karnataka v. Appa Balu Ingale*, A.I.R. 1993 S.C. 1136, at ¶ 30.

42. Art. 12 of the Const. of India states as follows: "In this Part, unless the context otherwise requires, "the State" includes the Government and Parliament of 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."

43. *See generally Ajay Hasia v. Khalid Mujib*, A.I.R. 1981 S.C. 487; *M.C. Mehta v. Union of India*, A.I.R. 1987 S.C. 1086, at ¶¶ 11-18. *See* JAIN, *supra* note 1, at 837.

44. A.I.R. 1952 S.C. 59.

unenforceability of fundamental rights vis-à-vis private persons does not in any way depreciate the applicability of rights, but merely provides for a different mechanism to enforce rights, i.e. through ordinary laws.⁴⁵ Moreover, the compulsion of courts to bring an entity within the definition of 'state' under Article 12 of the Constitution, reiterates that fundamental rights are *only* enforceable against the state.