

ESSAYS

UNVEILING THE RIGHTS: CORPORATE CITIZENSHIP IN INDIA POST STATE TRADING CORPORATION

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This article discusses a very controversial issue in Indian Fundamental Rights jurisprudence- the status of a corporation as a citizen under the Indian Constitution, and its consequent entitlement to the Rights enshrined therein. On an incisive and novel analysis of the Indian Constitutional framework and the judicial attention this question has received, the author blends concepts from corporate law into the purely Constitutional question, to make a case for the liberalisation of the existing legal position.

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I. INTRODUCTION

Corporations, in the last century have made an enormous difference to the nature and volume of trade and business in the country. In terms of economic and political power, they often outweigh even the State. This change is crucial in the Indian Constitutional context since our Constitution was framed in the mid-twentieth century with a State-controlled economy in mind.¹ Ironing out the

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1 G. AUSTIN, THE INDIAN CONSTITUTION: CORNERSTONE OF A NATION 5 (1999).

impact of this mismatch in light of the changed balance of power warrants considerable legal research and re-thinking. However, studies on corporate citizenship have hitherto remained largely one-sided; while the term 'corporate citizenship' as referring to social responsibilities and commitments of corporations have been the subject of extensive research, *constitutional rights* that accrue to a corporation and its shareholders have received much less attention. This paper attempts to bridge this gap.

The decision of nine judges of the Supreme Court in *State Trading Corporation*² is a landmark judgement on corporate citizenship in India. Despite this, it is intriguing to note that the proposition of law that emerged from this case is cited in most commentaries with little reference to the specific facts and circumstances that led the Court to this decision.³ This, in my opinion, has resulted in an inadequate understanding of the undercurrents that lie beneath the apparently clear *ratio* of the case [Section II]. I argue that this insufficient understanding has affected the post-*State Trading Corporation* jurisprudence of the Supreme Court and that a reconsideration of the entire area of law is necessary. Apart from the above claim, I make two further arguments in this paper: *first*, that the view adopted by the Supreme Court in *State Trading Corporation* is inconsistent with its constitutional role as the protector of fundamental rights of citizens [Section III] and *secondly*, that in the attempt to palliate this defect, later decisions of the Supreme Court⁴ that afford greater protection to the citizen shareholder's rights, have implicitly lifted the corporate veil, without even considering the grounds for doing so [Section IV].

II. LIFTING THE CORPORATE VEIL – CAUGHT IN DILEMMA

The decision in *State Trading Corporation* in the corporate citizenship jurisprudence of the Supreme Court is significant for two reasons: *first*, it conclusively negated the possibility of treating corporations as citizens for the purposes of Art. 19. This question has never been the subject of detailed judicial re-examination. *Secondly*, it considerably constrained subsequent decisions of the Supreme Court in their attempt to afford greater protection to shareholders' constitutional rights. Consequently, later decisions have attempted in varied ways to work their way around the ruling in *State Trading Corporation*, which was binding on them. A preliminary examination of what the case held would be in order before I attempt to examine what led the court to its decision.

2 *State Trading Corporation of India v. Commercial Tax Officer, Visakhapatnam*, [1964] 4 SCR 99 (Supreme Court of India).

The challenge on the ground of violation of Art. 19(1)(g) in *State Trading Corporation* arose out of an assessment of the said company for the purposes of sales tax by the Commercial Tax Officer, Vishakapatnam and issuance of notice demanding payment of this tax. State Trading Corporation was a private limited company registered under the Companies Act. Its corporate structure was such that 98% of its capital was funded by the Government of India and registered in the name of the President and the Governor and the remaining 2% in the name of two joint secretaries in the Ministry of Commerce and Industries.

The respondents raised a preliminary objection to this claim on the ground that a company is not a citizen for the purposes of Art. 19. Citizenship of corporations, it was argued, is neither recognized under the Constitution of India nor under the Citizenship Act, 1955. On behalf of the appellants, on the other hand, Mr. M.C. Setalvad, argued that neither Part II of the Constitution nor the Citizenship Act dealt with 'citizenship' exhaustively. Hence, even assuming that juristic persons are not considered citizens by the Constitution and the Act, the matter requires further examination. Consequently, he invited the Court's attention to pre-constitutional law i.e. common law preserved by Art. 372 of the Constitution.⁵ On this basis, he argued that the concept of nationality of corporations is determined on the basis of the place of incorporation of the company. Hence, he submitted, a corporation, all of whose shares are held by Indian citizens and incorporated in India is to be considered an Indian citizen.

Chief Justice Sinha on behalf of the majority upheld the preliminary objection of the respondents on three grounds. *First*, relying on the distinction between 'citizenship' and 'nationality', the former of which relates to international law while the latter, to municipal law, he held that even assuming that corporations are *nationals* of India, this does not establish their Indian citizenship. *Secondly*, relying on the word 'citizen' occurring in Part II and III of the Constitution, he held that they could not be given different meanings. Further, it was held that

3 M.P. JAIN, *INDIAN CONSTITUTIONAL LAW* 936 (5th edn., 2003); D.D. BASU, *SHORTER CONSTITUTION OF INDIA* 402 (13th edn., 2003); A.P. DATAR, *CONSTITUTION OF INDIA* 181 (2001).

4 *Bennett Coleman v. Union of India*, AIR 1973 SC 106 (Supreme Court of India); *Delhi Cloth & General Mills Co. Ltd. v. Union of India*, AIR 1983 SC 937 (Supreme Court of India).

5 Article 372 - Continuance in force of existing laws and their adaptation:

(1) Notwithstanding the repeal by this Constitution of the enactments referred to in article 395 but subject to the other provisions of this Constitution, all the law in force in the territory of India immediately before the commencement of this Constitution shall continue in force therein until altered or repealed or amended by a competent Legislature or other competent authority.

the definition of 'citizen' could not be derived from anywhere except Part II and the Citizenship Act since they were exhaustive on 'citizenship' in India. *Thirdly*, it was held that some of the rights guaranteed by Art. 19 such as the "right to assemble peacefully and without arms",⁶ "right to move freely throughout the territory of India"⁷ and the "right to reside and settle in any part of the territory of India"⁸ are not exercisable by a corporation and hence the framers could not have intended to apply Art. 19 to corporations.

Justice Hidayatullah concurred with the majority with two additional reasons for his decision. *First*, referring to 35 other provisions in the Constitution where the word 'citizenship' is used he held that none of these referred to juristic persons. Had the intention of the framers been to give a special meaning to 'citizens' in Art. 19 alone, he opined, the framers would have made such intention sufficiently clear. *Secondly*, he held that any fear of protection of corporations is misplaced in light of the fact that there can be "no discrimination, no taxation without authority of law, no curbs involving freedom of trade, commerce or intercourse and no compulsory acquisition of property".⁹ *Finally*, he refused to lift the veil, citing, however, no independent reason for this conclusion.

On behalf of the minority, Justice Das Gupta rejected the preliminary objection on two grounds. *First*, he held that it would be absurd to suggest that rights granted under Art. 19 are available when two or more people join together to do business or even when they form associations among themselves for the same purpose but not so, solely because they decide to carry out trade through a corporation. *Secondly*, as regards the lack of express mention of corporations as citizens in the Constitution, he suggested that this had to be seen in light of the fact that the framers were aware of the legal developments in the U.S.A. There, courts were not hesitant to pierce the corporate veil and grant remedy to citizen shareholders.

Finally, Justice Shah in support of the minority view suggested that if the Constitution and the Citizenship Act were taken to be exhaustive on citizenship in India, it would mean that prior to the coming into force of the Constitution there were no citizens. This, according to him, was clearly erroneous. In British

6 Constitution of India, 1950, Art. 19(1)(b).

7 Constitution of India, 1950, Art. 19(1)(d).

8 Constitution of India, 1950, Art. 19(1)(e).

9 State Trading Corporation v. Commercial Tax Officer, [1964] 4 SCR 99 (Supreme Court of India).

India, there was no statute which directly or indirectly restricted the rights of corporations over and above the restrictions on citizens and hence corporations enjoyed the same rights as natural persons. Further, if the restricted interpretation of citizenship is adopted, corporations would have rights such as right to equality, right against compulsory acquisition of property without compensation etc., but the most important right as regards a corporation i.e. the right to trade would be denied. On these two grounds he held in favour of a liberal construction of the word 'citizen' in Art. 19.

As the above discussion reveals, the decision in *State Trading Corporation* revolved around the question of recognising a corporation as a citizen though there were in fact *two* issues that came up for the consideration of the court: (1) whether a corporation is a "citizen" for the purposes of Art. 19(1)(f) and (2) whether the State Trading Corporation is precluded from claiming fundamental rights on account of it being "the State" under Art. 12. Though the second question remained largely neglected in the decision of the court, it is submitted that it had enormous implications on the ultimate result of the case.

The appellants could have had two prongs of arguments to justify a claim of rights by the corporation, *first*, that the corporation *per se* is a citizen and hence entitled to rights and *secondly*, that the corporation can claim rights through its citizen shareholders. The second prong of the argument as well as the question of whether the corporation is "the State" under Art. 12 (the second issue in the case), would have both required the court to look into whether the corporate veil ought to be lifted or not, but with the possibility of this leading to opposite results. To elucidate, lifting the corporate veil to reveal shareholders who are citizens would have validated the claim of fundamental rights, but lifting the veil revealing government actors exercising 'control' over the corporation would have warranted the conclusion that the corporation is "the State"¹⁰ and hence not entitled to claim fundamental rights. This conflict arises because, "*there are no two veils, where lifting of one would reveal shareholders and lifting of the other would reveal the Government. Either the veil is not to be lifted or it is to be lifted right off*".¹¹ Consequently, Mr. Setalvad was forced to restrict his submissions to the first prong of the argument resulting in lifting the corporate veil not being argued forcibly on behalf of the corporation. Interestingly, he himself in his autobiography admits the

10 R.D. Shetty v. International Airports Authority, AIR 1979 SC 1628 (Supreme Court of India); Ajay Hasia v. Khalid Mujib, AIR 1981 SC 487 (Supreme Court of India).

11 State Trading Corporation v. Commercial Tax Officer, [1964] 4 SCR 99 (Supreme Court of India), *per* Hidayatullah J.

inconsistent nature of his plea in this landmark case; on the one hand trying to reach the shareholders through the corporation, while at the same time trying to prevent the conclusion that the corporation was an agent of the state.¹² In any case, as a result of the peculiar factual matrix of the case, grounds for lifting the corporate veil came to be not argued and consequently not considered by the court in this landmark case.

III. 'SENTINEL ON THE QUI VIVE'

In this section, I argue that the somewhat evasive approach adopted by the court in *State Trading Corporation* is inconsistent with the role of the Supreme Court in protecting fundamental rights of citizens. The scheme of the Indian Constitution makes it amply clear that the Supreme Court has been entrusted with the imperative responsibility of acting as the protector of fundamental rights guaranteed by the Constitution. In its own words, the role of the Supreme Court under Art. 32 is that of a "sentinel on the qui vive".¹³ In consonance with this duty, wide powers have been granted to the Supreme Court under Art. 32, Art. 142 and Art. 144. Such wide powers in turn impose a constitutional obligation on the Court to "forge such new tools which may be necessary for doing complete justice between parties and for enforcing fundamental rights guaranteed by the constitution."¹⁴ Further, it is important to note that in matters relating to protection of fundamental rights, instead of looking at the object or form of the statute/order being challenged, the Court is bound to consider "the direct and inevitable consequence of the statute".¹⁵

The effect of the ruling in *State Trading Corporation* would undoubtedly be that as a result of restrictions placed on the company, the shareholders, who are citizens of India, are denied their constitutionally guaranteed rights. It is submitted that this should have been remedied by the Supreme Court for two reasons: *first*, the corporation's claim of fundamental rights is only a matter of *form* and in essence, the question is that of protection of fundamental rights of citizens who are shareholders of the company and *secondly*, minor flaws regarding the non-impleading of shareholders as parties to the petition, ought not to have prevented the Supreme Court from granting relief as long as a violation of the citizens'

12 M.C. SETALVAD, *MY LIFE: LAW AND OTHER THINGS* 465 (2000).

13 *State of Madras v. V.G. Row*, AIR 1952 SC 196 (Supreme Court of India).

14 *Nilabati Behera v. State of Orissa*, (1993) 2 SCC 746 (Supreme Court of India).

15 *R.C. Cooper v. Union of India*, AIR 1970 SC 564 (Supreme Court of India); *Maneka Gandhi v. Union of India*, AIR 1978 SC 597 (Supreme Court of India); *Bachan Singh v. State of Punjab*, AIR 1982 SC 1325 (Supreme Court of India).

fundamental rights was proved. For instance, in the *Sholapur Mills case*,¹⁶ where a shareholder of the company challenged an executive order on the ground that it infringed his fundamental rights, though the Court cautioned that in cases for redressing wrongs done to companies, the company itself should bring forth a claim, it ignored this minor flaw and went on to consider the matter on merits. Had the Court adopted a similar approach in *State Trading Corporation* and looked at the *impact or effect* of the action rather than at the *form* of the corporation, the result would have been different. The consequence of such an approach would have been that irrespective of whether the State action infringes rights of citizens directly or through restrictions on the corporation, since in substance, the 'impact or effect' of the action is the same, citizens would not be rendered remediless.

IV. POST STATE TRADING CORPORATION DEVELOPMENTS

The three significant decisions that came after *State Trading Corporation* and made a considerable impact on this area of law are *Telco*,¹⁷ the *Bank Nationalisation Case*¹⁸ and *Bennett Coleman*.¹⁹

In *Telco*, the petitioner company challenged a levy of sales tax imposed on it by way of a petition under Art. 32. It is important to note at the outset that the five-judge bench in *Telco* was bound by the decision in *State Trading Corporation*. The main argument on behalf of the company in this case was that, in *State Trading Corporation* the court was not invited to tear the veil of incorporation and that this ought to be considered in this case. This contention was rejected by the Court on the ground that if accepted, it would mean that they (the five-judge bench) would be doing something indirectly that *State Trading Corporation* (a nine-judge bench) had prohibited them from doing directly.²⁰ What is important to note here is that, as a result of this enhanced reading of the ruling in *State Trading Corporation*, the grounds for lifting the corporate veil came to be not considered even in this case.

16 Chiranjit Lal Chowdhuri v. Union of India, AIR 1951 SC 41 (Supreme Court of India).

17 Tata Engineering and Locomotive Co. v. State of Bihar, AIR 1965 SC 40 (Supreme Court of India).

18 R.C. Cooper v. Union of India, AIR 1970 SC 564 (Supreme Court of India).

19 Bennett Coleman v. Union of India, AIR 1973 SC 106 (Supreme Court of India).

20 ...but having regard to the decision of this Court in the *State Trading Corporation of India Ltd.* (AIR 1963 SC 1811) we do not see how we can legitimately entertain the petitioners' plea in the present petitions, because if their plea was upheld, it would really mean that *what the corporations or the companies cannot achieve directly, can be achieved by them indirectly by relying upon the doctrine of lifting the veil* (Emphasis supplied).

It is submitted that it was open for the court in *Telco* to consider the grounds for lifting the veil since it was not bound by *State Trading Corporation* on this issue. This is because lifting the veil did not receive consideration by the bench in *State Trading Corporation*. Hence this issue passed *sub-silentio* in that case and *State Trading Corporation* was consequently of no authoritative value on this point.²¹

Next came the eleven-judge bench decision in the *Bank Nationalisation case*, where a shareholder, the director and current account holder of the bank challenged the constitutional validity of the Banking Companies (Acquisition and Transfer of Undertakings) Ordinance. The Court adopted a 'qualitative approach' in this case and held that violation of a company's rights ought not to result in the deprivation of a citizen's remedy under Art. 32. Holding that the decision in *State Trading Corporation* would have no application when the petitioner was claiming violation of his own rights, the court granted remedy to the petitioner in this case independent of the detriment caused to the company. The impact of this judgment was that it imposed an additional burden on the citizen to prove violation of his fundamental rights independent of the detriment caused to the company.

It is the five-judge bench decision in *Bennett Coleman* that brought about a revolutionary change in the position of law. In this case, the Court was addressing a writ petition by the newspaper company, a shareholder, a reader and three editors of the newspaper challenging a restriction on the printing and publication of the newspaper. It was held that the individual rights of freedom of speech and expression of editors, directors and shareholders are all exercised through the newspaper through which they speak. The Court here recognized that a restriction on the newspaper would impact the fundamental rights of the shareholders of the company and that hence that remedy could not be denied. It was held that even the fact that the companies are petitioners does not prevent the Court from giving relief to the shareholders, editors, printers whose rights are at stake. The court here seems to have treated cases where *restrictions are imposed on newspapers* as a separate class, holding that the decisions in *State Trading Corporation*, *Telco* and the *Bank Nationalisation case* were inapplicable to such cases. These decisions were distinguished by placing reliance on the dicta in *Express Newspapers*²² and *Sakal Newspapers*²³ where relief was

21 *Municipal Corporation of Delhi v. Gurnam Kaur*, AIR 1989 SC 38 (Supreme Court of India).

22 *Express Newspapers Pvt. Ltd. v. Union of India*, AIR 1958 SC 578 (Supreme Court of India).

23 *Sakal Papers Pvt. Ltd. v. Union of India*, AIR 1962 SC 305 (Supreme Court of India).

granted to shareholders and editors though restrictions were imposed on the newspaper companies. It is submitted that this distinction is artificial and does not withstand scrutiny.

A. Bennett Coleman – Lifting the Veil?

A perusal of the decisions of the Supreme Court on the issue of corporate citizenship reveals three possible views with respect to the relative position of the corporation and its shareholders as regards a claim of fundamental rights: *first*, the conception that a company exercises its own rights; *second*, the view that that a company *derives* its rights from the shareholders; and *third* that shareholders exercise their rights *through* the company. The first view was expressly rejected by *State Trading Corporation*. As regards the second view, since one of the grounds of reasoning in *State Trading Corporation* was that a company is *incapable* of exercising many of the rights under Art. 19, this automatically precludes any claim as to a company's rights whether accruing to a company *per se* or derived from its shareholders. The third view, which is what *Bennett Coleman* supports, is what is subject to examination in this section. I argue in this section that this amounts to "*peeping behind the corporate veil*".

Piercing the veil of incorporation is an area of law that has resulted in widespread judicial indecision on account of the lack of settled principles guiding its exercise. But in his classic work on the subject, Ottolenghi recognizes four modes of dealing with the veil of incorporation - from peeping behind the veil to ignoring the veil completely.²⁴ The first mode, called "*peeping behind the corporate veil*", is the least offensive to the corporate character of the company and is what is of relevance here. In this mode of lifting the veil, the veil is lifted only to obtain information about the persons or entities behind the veil and once this is obtained, the veil is pulled down and the company is once more treated as a separate entity to which the new attributes are now assigned.²⁵ It is submitted that the ruling in *Bennett Coleman* amounts to "*peeping behind the veil*". The Court in this case 'peeps behind the veil' to look at the nature of the shareholders and after realising that they are citizens of India, goes on to decide the case based on this new knowledge. The significance of this exercise becomes clear when *Bennett Coleman* is contrasted with a company incorporated in India but having its entire share capital being held by foreign citizens. Had this been the situation, clearly the decision in this

24 S. Ottolenghi, *From Peeping behind the Corporate Veil, to Ignoring it Completely*, 53 Mod. L. REV. 339 (1990).

25 *Id.*

case would have been different because even if the State action infringed on the shareholder's liberties through the company, they being foreigners, would not have been entitled to claim the right in question.²⁶

This would mean that the Court (again without considering whether the grounds for lifting the corporate veil were made out or not) lifted the veil in this case and hence did what the five-judge bench in *Telco* refused to do in light of the ruling in *State Trading Corporation*. It is submitted that lifting the corporate veil and recognising the rights of citizens behind the veil is substantially different from recognising a corporation as a citizen. By lifting the corporate veil, the Court only recognises that there are shareholders behind the veil whose rights are being violated and hence grants the remedy. The corporation is still not recognised as a citizen. Hence, the ruling in *Bennett Coleman* does not conflict with the decision in *State Trading Corporation* since this question was not addressed by the court in *State Trading Corporation* in the first place. However, though the ruling in *Bennett Coleman* is not inconsistent with *State Trading Corporation*, it certainly goes against the enhanced reading of the dicta in *State Trading Corporation* by the Court in *Telco*. This is of special significance since the court in *Bennett Coleman* was bound by the coordinate-bench decision in *Telco*.²⁷

As a result of the above mentioned developments, the law relating to citizenship of corporations, in the words of the Supreme Court itself seems to be in a nebulous state.²⁸ But the general trend seems to suggest this: (1) a company by itself is not a citizen for the purposes of Art. 19 [*State Trading Corporation*] (2) Shareholders of a corporation can validly claim remedy for their individual violation of fundamental rights and the mere fact that a company is one of the petitioners would not preclude them from doing this [*Bank Nationalisation Case*], (3) In appropriate cases, where the rights of a company are so connected with the rights of the shareholder that a restriction imposed on one would automatically lead to a restriction on the other, shareholders of the company can be allowed to claim remedy against a restriction imposed on the company [*Bennett Coleman*].

B. Lifting the Veil – Grounds Established

In light of the expansion of the grounds for lifting the veil, arguments in favour of a reconsideration of the law relating to corporate citizenship in

26 See, *Daimler v. Continental Tyre Co.*, [1916] 2 AC 307 (House of Lords) for a similar example of "peeping behind the veil"

27 *Rajasthan Public Service Commission v. Harish Kumar Purohit*, AIR 2003 SC 3476 (Supreme Court of India).

28 *DC and GM v. Union of India*, AIR 1983 SC 937 (Supreme Court of India).

India,²⁹ sound particularly persuasive. This section examines whether grounds for lifting the corporate veil are established in light of the present position of law with the aim of providing doctrinal support to the ruling in *Bennett Coleman*.

It is well recognized today that when the doctrine of separate legal personality conflicts with 'public policy', separate personality gives way to 'public policy'.³⁰ The next query is as to what constitutes 'public policy'. The Supreme Court has held that in matters pertaining to 'public policy', lacking precedent, it may be guided by "*principles underlying the fundamental rights and the directive principles enshrined in our Constitution*".³¹ However, this is not to suggest that the scope of 'public policy' under s. 23 of the Indian Contract Act (which was the issue in the case cited above) and the standard required for lifting the corporate veil are the same. The only authority that I seek to draw from that decision is as regards the mode of ascertaining *what* constitutes public policy. Though a similar argument was rejected by the Supreme Court in a recent case on the ground that "*public policy is to be found within four corners of the statute*",³² it is submitted that even this objection does not apply here, because the present issue is not one involving the interpretation of the term 'public policy' in a statute and hence the interpretation of this term here, is not bound by statutory constraints. Interpreted this way, it is submitted that denial of constitutionally guaranteed fundamental rights to citizens on the mere ground of form and not substance, would constitute a violation of public policy. Hence, to prevent this effect, the Courts ought to lift the corporate veil of the company revealing the shareholders behind it.

It may be argued that a dispute as to the interpretation of a constitutional provision does not amount to violation of 'public policy' constituting grounds for lifting the veil. However, it is submitted on two grounds that this is incorrect. *First*, the dispute here is not merely as to the interpretation of Art. 19. That corporations are *not* citizens for the purposes of Art. 19 is well-accepted. The question, on the other hand, is whether courts should look beyond the corporate veil so as to recognise the rights of shareholders who are admittedly citizens for

29 H.M. SEERVAL, CONSTITUTIONAL LAW OF INDIA: A CRITICAL COMMENTARY I 103 (4th edn., 1993).

30 R.R. PENNINGTON, COMPANY LAW 53 (8th edn., 2001); P.L. DAVIES, GOWER'S PRINCIPLES OF MODERN COMPANY LAW 152 (6th edn., 1997); P. Dalal, *Corporate Entity in Existing Legal System – Its Rights and Liabilities under the Constitution and other Enactments*, 61 CORP. L. ADV. 96 (2004).

31 *Central Inland Water Transport v. Brojo Nath Ganguly*, AIR 1986 SC 1571 (Supreme Court of India).

32 *Zoroastrian Cooperative Housing Society Ltd. v. District Registrar, Cooperative Societies*, AIR 2005 SC 2306 (Supreme Court of India).

the purposes of Art. 19. *Secondly*, it is submitted that in cases of this nature, the threshold for 'peeping behind the veil' ought to be much lower than that for 'piercing the veil'.³³ This is because 'peeping' does not run contrary to either limited liability or separate personality of companies. To elucidate, the ruling in *Bennett Coleman*, for instance, does not violate the principle of limited liability because no *liability* is sought to be imposed on the shareholders. Hence, 'peeping behind the veil' to recognise rights of shareholders does not run contrary to any of the rationale for the recognition of limited liability of corporations.³⁴ Further, *Bennett Coleman* only recognises a limited exception to the rule of separate personality, solely for the purpose of recognising the rights of shareholders. Since it is a limited exception to separate personality, even the rationales for recognition of corporate personality based on the ability to enter into contracts, to sue and be sued and to own and manage property in the name of the company,³⁵ are not negated. Hence, it is submitted that though the court in *Bennett Coleman* did not consider the grounds of lifting the veil, the result of the decision stands justified.

C. Counter-Arguments

A potential concern that could be raised to the argument advanced above is that the veil should not be allowed to be lifted from within i.e. that the corporation veil ought not to be lifted at the instance of persons behind the veil.³⁶ This argument has also gained some amount of judicial recognition.³⁷ But it is submitted that this argument proves convincing only when the corporate entity is being used as an instrument to evade laws, which was the case in both the decisions cited above. In such cases, lifting the veil would amount to letting persons behind the veil take advantage of their own wrong. What we are concerned with here is however, the protection of constitutionally guaranteed rights of citizen shareholders. Hence, there is no reason why the court should be precluded from looking at the nature of the corporation regardless of who argues in favour of lifting the veil.

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- 33 *Daimler Company Limited v. Continental Tyre and Rubber Company Limited*, [1916] 2 AC 307 (House of Lords). Adopting a lower threshold for 'peeping behind the veil', it was held that in times of war, courts could legitimately look at the nationality of shareholders of a company to determine its enemy character. This is implicit recognition of 'public policy' as a ground for 'peeping behind the veil.'
- 34 *F.H. Easterbrook et al., Limited Liability and the Corporation*, 52 U. CHI. L. REV. 92 (1985).
- 35 *Disregarding the Separate Personality of a Corporation*, 23 HARV. L. REV. 217 (1910).
- 36 T.N. Pandey, *Requests for Lifting the Veil from Behind the Veil*, 2 COMPANY L.J. 128 (2006).
- 37 *Premlata Bhatia v. Union of India*, (2006) 3 Comp LJ 193 (High Court of Delhi); *Vishwa Nath v. Chamanlal Khanna*, AIR 1975 Del 117 (High Court of Delhi).

It has also been suggested, as an alternative to the approach advocated by this paper that an explanation be to be added to Art. 19 to the effect that even corporations are “citizens” under Art. 19.³⁸ It is submitted that not only is this unnecessary, but such an amendment would go against the intention of the framers of the Constitution and would further cause anomalous results. Since some of the rights enumerated under Art. 19 cannot be exercised by corporations, it is submitted that a recognition of a corporation as “citizen” for the purposes of Art. 19 would be contrary to the intention of framers. Also, protection of rights through the method of lifting the veil would provide for much more flexibility, which is much desired in light of the changing nature of private corporations and the arguments that they need to be considered as “the State”.³⁹

V. CONCLUSION

Even a casual perusal of the area of law relating to corporate citizenship in India would vindicate the significance of the decision in *State Trading Corporation*. The decision by nine judges of the Supreme Court in this case turned from a question, which was not even addressed in many previous cases,⁴⁰ into an issue of great constitutional importance. But as suggested earlier, the decision in this case which refused to lift the corporate veil was the product of a peculiar factual matrix; such was the position of *State Trading Corporation* that it could have been considered a “citizen” or “the State”. I have further argued in this paper that the Supreme Court, in keeping with its role as the protector of fundamental rights of citizens, should have looked the substance of the matter and gone on to lift the corporate veil, if not in *State Trading Corporation* at least in *Telco* (considering that this was specifically argued there) recognizing the rights of the shareholders behind the veil.

But the sheer complexity of the question defies easy resolution. While on the one side, arguments in support of recognizing rights of shareholders of a corporation are being made, equally persuasive are the arguments in favour of recognizing large corporations carrying out public functions as “the State” under

38 See, K.U. Anithakumari, *Indian Citizenship Law: Some Unsettled Issues*, 28 COCHIN U. L. REV. 64 (2004).

39 See, U.R. Rai, *Reach of Fundamental Rights*, 36 J. INDIAN L. INST. 292 (1994).

40 *State of Bihar v. Bengal Immunity Co.*, AIR 1955 SC 661 (Supreme Court of India); *Express Newspapers Pvt. Ltd. v. Union of India*, AIR 1958 SC 578 (Supreme Court of India); *Sakal Papers Pvt. Ltd. v. Union of India*, AIR 1962 SC 305 (Supreme Court of India).

Art. 12.⁴¹ Hence, it remains to be examined whether such corporations need to be considered as “the State” in the first place. If they are so recognised, whether this would change the position of shareholders of such corporations, whether the corporate veil could still be pierced so as to grant protection to shareholders and whether the solution lies in judicial discretion or legislative policy are all related issues that warrant re-examination. Better clarity on these questions would invariably require economic theories that define more accurately the characteristics of a corporation. A perusal of decisions abroad, which use the ‘separate person theory’ and the ‘contract theory’ haphazardly resulting in lack of settled judicial principles,⁴² bear testimony to this.

41 C.J. Mayer, *Corporations and the Bill of Rights*, 41 HASTINGS L. J. 577 (1990); U.R. Rai, *Reach of Fundamental Rights*, 36 J. INDIAN L. INST. 292 (1994).

42. L.E. Ribstein, *The Constitutional Conception of the Corporation*, 4 SUP. CT. ECON. REV. 96 (1995).