THE LIMITS OF PEEPING: FLUCTUATING IDENTITIES AND THE RECONCILIATION OF CORPORATE-CONSTITUTIONAL RIGHTS

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In the eyes of the law, a corporation is a creation of an artificial person that exists independently of the people who own or manage it.[1] However, the question of whether a natural person behind such a corporation could claim citizenship-based fundamental rights (hereinafter as **CBFR**) has led to doctrinal confusion in Indian corporate law. Courts have moved from the refusal to recognise corporate citizenship towards a more generous protection of shareholders. This paper argues that while liberal in its application, the courts have often relied on an unstable assumption that company shareholding represents a permanent citizenship.

The Doctrinal Baseline

The starting point is the decision in *State Trading Corporation of India v Commercial Tax Officer*[2] (hereinafter as ***STC***). In this case, the court held that Part II of the Constitution and the Citizenship Act together form an exhaustive code by restricting 'citizenship' only to natural persons.[3] As a consequence of this strict textualism, corporations are excluded from claiming rights under Article 19, which is a CBFR.

Following *STC*, the *Tata Engineering and Locomotive Co v State of Bihar*[4] (hereinafter as ***Telco***) tested whether this strict position could be avoided by lifting the corporate veil. In this case, the company sought protection against the sales tax being imposed by the State. To do so, the shareholders joined the petition and contended that the company was merely an instrument for their trade. It was argued that since they were Indian citizens, the corporate veil should be lifted to grant them CBFR protection from unconstitutional taxation. However, the Court refused this plea by holding that this would allow corporations to indirectly achieve what they are constitutionally barred from achieving directly, which is getting the Article 19 protection.[5]

[1] *Salomon v A Salomon & Co Ltd* [1897] AC 22 (HL).
[2] *State Trading Corporation of India Ltd v Commercial Tax Officer* AIR 1963 SC 1811.
[3] *ibid*; The Constitution of India 1950, pt II, arts 5–11; Citizenship Act 1955, s 2(f).
[4] *Tata Engineering & Locomotive Co Ltd v State of Bihar AIR 1965 SC 40.*
[5] *ibid*; Constitution of India 1950, art 19.

On the other hand, *R.C. Cooper v Union of India*[6] (hereinafter as ***Cooper***) distinguished itself from the *Telco* case. In *Cooper*, the court lifted the corporate veil to grant Article 19 relief to a shareholder challenging the nationalisation of banks. The court, while granting the CBFR to the shareholder, focused on the qualitative effect of state action on the rights of the citizen. The Court held that the CBFR of an Indian citizen is not extinguished merely because those citizens choose to associate and carry on business through the medium of a company.

Resolving the Confusion

On a plain reading, the *Cooper* case is often read as a direct violation of the *Telco* rule. This misunderstanding arises because *Telco* refused to lift the veil to grant CBFR to a company, since a company can never become a citizen. Whereas *Cooper* allowed the lifting of the veil to permit the shareholder to invoke CBFR. However, it is argued that this apparent contradiction dissolves once the two cases are seen as answering different questions. The shareholder in *Cooper* did not ask the Court to confer Article 19 rights upon the company itself.[7] Instead, the shareholder argued that he, as a citizen, possessed a personal right to hold his shares and carry-on business as a director. The shareholder claimed that the State's takeover had directly affected him by destroying the value of his shareholding and removing him from his directorship. By contrast, the petitioners in *Telco* attempted to borrow the citizenship of the company's shareholders to pursue the company's own commercial challenge against the applicability of sales tax.[8]

Telco therefore establishes the general rule that a company cannot merge their identity with that of the shareholders to fight their own battles. While *Cooper* creates a broader rule that where a State action is direct enough to strike at the company and, simultaneously, injure the CBFR of the shareholder, then that shareholder retains the right to sue for such CBFR infringement.

The Two-Limb Test

The qualitative approach of *Cooper* reached its fullest expression in *Bennett Coleman and Co v Union of India*[9] (hereinafter as ***Coleman***). In this case, in addition to the company, the shareholders, editors and publishers together challenged the restrictions on the printing and publication of a newspaper company. The Court held that the Article 19 rights of editors,

[6] *Rustom Cavasjee Cooper v Union of India* AIR 1970 SC 564.
[7] *ibid;* Constitution of India 1950, art 19.
[8] *Tata Engineering* (n 4).
[9] *Bennett Coleman & Co v Union of India* AIR 1973 SC 106.

directors and shareholders are directly exercised through the medium of the company.[10] Therefore, it was held that even though the corporate entity itself could not claim CBFR, the presence of the company as a petitioner was not a bar to the relief of CBFR to the individual citizens.

Thus, when read together, *Cooper* and *Coleman* may be understood as establishing a two-limb test for granting a CBFR to the shareholders.

Under the first limb, the court must look behind the corporate form to ascertain whether there exist appropriate citizens whose CBFR are at stake. This exercise, as Ottolenghi calls it, is known as peeping behind the veil.[11] It is only a temporary inquiry to identify who stands behind the company.[12] Once that inquiry is complete, the veil is pulled down, and the company continues to be treated as a separate legal personality (**SLP**), having an independent legal entity distinct from its shareholders, owners, and directors.[13] This is the least invasive type of veil lifting and thus does not violate the principle of SLP.[14]

Under the second limb, the state action must directly and necessarily impair the CBFR of those who stand behind the company. The Court must focus on the effect of the State's action, instead of the intention behind the State's action.[15]

The Methodological Vacuum of Peeping

This paper argues that the first limb of this test heavily relies on an unverified assumption. The court in Coleman treats the exercise of peeping behind the veil as if it is a simple factual inquiry. This assumes that the shareholders form an identifiable and stable group. The court does not provide any guidance on what should be done when a mixed body of Indian and foreign citizens is found. More importantly, shareholding fluctuates from time to time, while State restrictions are continuous. So, if a court grants a CBFR to a shareholder, based on their Indian citizenship, what would happen to the CBFR if the shares are later sold to a foreign citizen in future? Without a mechanism to account for this fluctuating foreign shareholding, the first limb of the test collapses when applied to almost all of the companies.

[10] *ibid;* Constitution of India 1950, art 19.
[11] S Ottolenghi, 'From Peeping Behind the Corporate Veil, to Ignoring It Completely' (1990) 53 *Modern Law Review* 338.
[12] *ibid* 339–341.
[13] K V Krishnaprasad, 'Unveiling the Rights: Corporate Citizenship in India Post *State Trading Corporation*' (2010) 22(1) *National Law School of India Review* 159, 167.
[14] Ottolenghi (n 11) 343.
[15] *Cooper* (n 6).

The One Person Company Exception

However, the One Person Company (**OPC**), introduced under the Companies Act 2013, provides a setting in which this difficulty does not arise.[16] Rule 3 of the Companies (Incorporation) Rules 2014 requires the sole member of such a company to be a natural person who is also an Indian citizen.[17] This eliminates the problem of fluctuating foreign shareholding, since at all times, the person behind the company is an Indian citizen. The claim advanced here is not that the company itself becomes a citizen, but that the peeping exercise of *Cooper* and *Coleman* can be applied with doctrinal integrity in this setting. However, this exception does not allow the courts to do away with the second limb.

Furthermore, the *JJ Irani Committee* explained that the introduction of OPC was meant to help individual entrepreneurs to move from the unorganised sector into a regulated and accountable corporate structure.[18] This paper contends that the heightened statutory regulation must serve that reformative purpose without becoming a barrier to the exercise of CBFR.

Conclusion

The exercise of peeping behind the corporate veil in Cooper and Coleman carries a serious difficulty. The shareholding is often fluctuating, and the citizen behind the company is difficult to identify with precision. The equitable insight of the CBFR expansion must therefore be confined to circumstances in which the relevant shareholder identity is stable and constitutionally meaningful, as available in an OPC. Restricting the peeping in this way preserves the protective value of the Constitution, while preventing the corporate doctrinal confusion that would follow from extending it to companies with fluctuating shareholding.

[16] Companies Act 2013, s 2(62).
[17] Companies (Incorporation) Rules 2014, r 3(1), as amended by the Companies (Incorporation) Second Amendment Rules 2021, GSR 91(E), 1 February 2021.
[18] Government of India, *Report of the Expert Committee on Company Law* (JJ Irani Committee, Ministry of Company Affairs, 2005), ch III, para 6.