

Friday Group

an academic group of supreme court advocates

a continuous legal education initiative



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Friday Group**

Organiser

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PREFACE

FRIDAY GROUP is an academic initiative for continued learning and sharing of valuable experiences gained in the field of law for members of the Group. The members are practicing Advocates in the Supreme Court of India. The meetings are held on Friday afternoon in Supreme Court of India Library-2. The first meeting was held on 10th July, 2015. The talks are being recorded since 20th January, 2017 and some of the talks are now available on YouTube by the name of Friday Group Seshagiri Rao. or <https://www.youtube.com/channel/UCzTV7krzRUNP3kg2lD4Weg>

The present publication is a collection of Articles on various aspects of law contributed by Authors, who spared their valuable time to contribute for the present Souvenir being released on the occasion of the 100th meeting of the Group.

These articles have been painstakingly scrutinised and curated by Shri Subhodh Markendeya Sr. Advocate, at the age of 82 years, burning midnight oil in the Winter of December 2018.

The present publication shall give an insight to various issues of law for all in a succinct manner. The object of the Friday Group and the present publication is to provide an opportunity to all those who are interested in issues of law to learn through the exposition of law by women and men of Law.

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Conferring Status of Legal Entities On Rivers, Glaciers Etc., A Legal Perspective

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The Bhagavad Gita says,

*“śhreyān swa-dharmo vigu a para-dharmāt sv-anu hhitāt
svabhāva-niyata karma kurvan nāpnoti kilbi ham”*

Which means, “It is better to do one's own dharma, even though imperfectly, than to do another's dharma, even though perfectly. By doing one's innate duties, a person does not incur sin.”

The present deliberation is on the legality of the Uttarakhand High Court judgments, which are currently under challenge before the Supreme Court. The Uttarakhand High Court has conferred status of a legal entity to rivers Ganga and Yamuna and all their tributaries, streams, referring to Article 48A and 51A(g) of the Constitution of India. The Director of Namami Gange Project and the Chief Secretary of State of Uttarakhand were declared as persons in Loco parentis. Subsequently, the same Court conferred legal entity status on Himalayas, glaciers, water bodies, etc.

A legal person is any subject-matter other than a human being to which the law attributes personality. This extension, for good and sufficient reasons, of the conception of personality beyond the class of human beings is one of the most noteworthy feats of the legal imagination. Legal persons, being the arbitrary creations of the law, may be of as many kinds as the law pleases. The birth and death of legal persons are determined not by nature, but by the law. They come into existence at the will of the law, and they endure during its good pleasure. Corporations may be established by royal charter, by statute, by immemorial custom, and in recent years by agreement of their members expressed in statutory forms and subject to statutory provisions and limitations.

The idea of a corporate personality as distinct from that of the

individual members was recognized by the Smriti writers as is noticed in Tagore Law Lectures.

The Supreme Court has in a judgment held that, it is the exclusive prerogative of the legislature to create a legal fiction meaning thereby to enact a deeming provision for the purpose of assuming the existence of a fact which does not really exist. It was also observed that creating a legal fiction by judicial interpretation may amount to legislation, a field exclusively within the domain of the legislature. Supreme Court has observed in another judgment that it is settled law that only sovereign legislative bodies can create legal fictions. In fact it has also been observed by the Supreme Court that a legislation can be invalidated on the basis of breach of the separation of powers since such breach is negation of equality under Article 14 of the Constitution. In our constitutional scheme equality, rule of law, judicial review and separation of powers form parts of the basic structure of the Constitution.

The rationale behind it is that any person aggrieved by a legislation has a fundamental right of judicial review against such legislation, to ensure that the rights of the citizen are not compromised. Whereas, in the event of judicial legislation, the debate is confined to the parties before the court and the material which can be brought before the court in accordance with rules governing the practice and procedures. The benefit of a detailed debate in public and legislature is not available thereby depriving "We the people", the ultimate sovereign, any role in the process directly or indirectly. Except a right of appeal, where it is possible, right to judicial review may also not be available to test the validity of creation of such legal entity.

In my humble opinion, courts creating new legal entities, with respect, appears to be contrary to the law declared by the Supreme Court. More so, when legal entities are given birth to without the necessary administrative, financial, regulatory, disciplinary related framework, it may lead to uncertainty qua their regulation. A laudable object is sought to be achieved by these judicial pronouncements which are in consonance with the constitutional ethos of conservation of the natural resources, but whether the means are constitutionally permissible is the question. There is no doubt that means are as important as ends in rule of law. The means and ends



have to be constitutionally permissible to achieve the constitutional goal.

- 1 Chapter 18, Verse 47 – Mukundananda, S. (2013). Bhagavad Gita: The Song of God. 1st ed. Jagadguru Kripaluji Yog.
- 2 Union of India and others vs. Lalit Miglani and others, SLP (C)(D) No. 34250/2017 and State of Uttarakhand and Others vs. Mohd. Salim and Others SLP (C) (D) 16879/2017.
- 3 Mohd. Salim vs. State of Uttarakhand & Others [2017] SCC Online Utt 367 (Uttarakhand High Court).
- 4 Lalit Miglani vs. State of Uttarakhand & Others [2017] SCC Online Utt 392 (Uttarakhand High Court).
- 5 Salomon on Jurisprudence, 12th Ed, Sweet & Maxwell, South Asian Edition pg.305, 306
- 6 Salomon on Jurisprudence, 12th Ed, Sweet & Maxwell, South Asian Edition pg.320
- 7 Mukherjea, B. (2010). B.K. Mukherjea on The Hindu Law of Religious and Charitable Trusts. 5th ed. Calcutta: Eastern Law House, pp. 35-36.
- 8 Sant Lal Gupta and others vs. Modern Cooperative Group Housing Society Limited and Others, [2010] 4 SCC 336 (Supreme Court).
- 9 Bhuwalka Steel Industries Limited and another vs. Union of India and others [2017] 5 SCC 598,615 (Supreme Court).
- 10 State of T.N. vs. State of Kerala [2014] 12 SCC 696, 771 (Supreme Court).
- 11 I.R. Coelho vs. State of T.N., [2007] 2 SCC 1, 105 (Supreme Court).

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