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**HAVE THE INDIAN COURTS PROVIDED AN
OVER-EXPANSIVE DEFINITION OF ‘STATE’
UNDER ARTICLE 12 OF THE INDIAN
CONSTITUTION?**

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ABSTRACT:

Several political scientists and philosophers have coined their own definition of the term ‘State’. This is primarily because the idea of what constitutes a ‘State’ has evolved over time. It stems from the notion of ‘sovereignty’- the legal authority of a juristic person whose decisions shall be binding upon his subjects. Through this article, I shall argue that *although the Indian courts have provided an expansive definition of ‘State’ under Article 12 of the Indian Constitution, it does not cross the threshold to become over-expansive in nature.* I shall corroborate this position by analyzing certain doctrinal tests and case-laws which shall explore the evolution of the term ‘other authorities’ enshrined in Article 12 of the Constitution.

Keywords: *Constitutional law, State, private actors, government instrumentality, over-expansiveness*

INTRODUCTION

Several political scientists and philosophers have coined their own definition of the term ‘State’. This is primarily because the idea of what constitutes a ‘State’ has evolved over time. It stems from the notion of ‘sovereignty’- the legal authority of a juristic person whose decisions shall be binding upon his subjects.¹ French political scientist, Jean Bodin, was one of the first to try and understand this relationship between sovereignty and the State. According to his theory, ‘sovereign’ meant ‘final and perpetual authority to make decisions was vested within the State’.² English philosopher, John Locke, did not agree with this idea (of what he referred to as an ‘Absolutist State’) and decided to adopt a liberal definition which would govern the powers and duties of the State.

In his book, *Two Treatises of Government*, Locke conceded that although a portion of an individual’s natural rights had to be surrendered when a government was formed, it was the duty of the State to uphold and protect the well-being of these individuals, for it was through them that

¹ BRYCE, *STUDIES IN HISTORY AND JURISPRUDENCE*, Volume II, p.53

² BODIN, JEAN, *SIX BOOKS OF THE COMMONWEALTH*, (République, I, 8 [Mc] 84), Du Puys, Paris (1576)

the State derived its legitimacy. He further argued that it was only through the existence of a well-functioning government, that both individuals and societies would experience growth and progress.³ In the Indian context, the modern definition of a 'State', and its constituents has been a topic of dispute. The General Clauses Act defines it as a political body created for the purpose of governance with its paramount interests being the protection of civil liberties.⁴ Through this paper, I shall argue that although the Indian courts have provided an expansive definition of 'State' under Article 12 of the Indian Constitution, it does not cross the threshold to become over-expansive in nature. I shall corroborate this position by analyzing certain doctrinal tests and case-laws which shall explore the evolution of the term 'other authorities' enshrined in Article 12 of the Constitution.

DEFINITION AND SCOPE OF ARTICLE 12

The definition of the "State" under Article 12 adopts a very broad perspective with a view to ensuring fundamental rights are guaranteed in respect of all reasonably practicable organizations. As per the text of Article 12, the term 'State' includes the following:

(a) the Central Government and the State Governments; **(b)** the Parliament of India and the State Legislatures; **(c)** all local authorities; and **(d)** other authorities within the territory of India, or under the control of the Central Government.⁵

This broad definition facilitates the extension of administrative law to include more juristic entities within its framework. It expands judicial review, as many more entities are subjected to writ jurisdiction, and it also makes bodies liable to uphold the fundamental rights of individuals.⁶ From a bare reading of the statute, it can be affirmed that the concept of 'State' as embodied in Article 12 of the Constitution would encompass not just the executive and legislative bodies of the Centre and the states, but also municipal bodies, and 'other authorities' which came

³ Goel, Shivam, *Article 12 (September 2015). Defining the Term 'State' (Part III of the Constitution of India, 1950)* Available at SSRN: <https://ssrn.com/abstract=2660116> or <http://dx.doi.org/10.2139/ssrn.2660116>

⁴ The General Clauses Act, 1897, § 3, cl. 58

⁵ INDIA CONST. art. 12

⁶ *Shamdasani v. Central Bank of India*, AIR 1952 SC 59 (India) ; *Board of Control for Cricket in India v. Cricket Association of Bihar*, (2015) 3 SCC 251 (India)

within the ambit of the State's 'instrumentality' under the doctrine of 'State Action.'⁷ Judicial interpretation of the word 'other authorities' has further extended the meaning of this doctrine. The theory of 'State Action' has further been broadened to include actions within its scope which have been performed by private individuals or entities exercising constitutional rights. To better understand the extended significance of the word 'other authorities' in Article 12, it is important to understand the evolution of the scope of Article 12 which can be examined through a catena of judgments.

THE TEST OF VESTED SOVEREIGN POWERS

In one of the earliest cases in 1967, Rajasthan State Electricity Board v. Mohan Lal⁸, the Supreme Court was called upon to address a dispute regarding a promotion between some workers and the Rajasthan State Electricity Board. The Court's preliminary issue was whether the Board fell within the meaning of Part III because it was "State" (other authority) according to Article 12. The Board contended that the term "other authority" must be read "ejusdem generis" which loosely means that when a law extends to a number of common categories and concludes with a general clause, this particular clause must be interpreted only to include certain elements that are part of the common category to which these elements belong. According to the Board's contentions, bodies exercising governmental functions were the common category which ran through Article 12. They argued that the Electricity Board was established by a statutory law for purpose of carrying out commercial activities. Hence, it could not fall within the scope of Article 12.

Rejecting that argument, the Supreme Court declined to apply the ejusdem generis principle, arguing that there has been no common "genus" running through Article 12, in this case. Instead, it referred to the dictionary meaning of the word "authority" and stated that this meaning was broad enough to accommodate all entities which had been established by way of statutory authority and were vested with the power to conduct functions on behalf of the government.⁹ By this approach,

⁷ Som Prakash Rekhi v. Union of India, AIR 1981 SC 212 (India)

⁸ AIR 1967 SC 1857 (India)

⁹ Ibid.

the Court affirmed that to ascertain the character of an entity, one need not take into account the nature of the functions performed by it.

What needs to be taken into consideration is whether the entity was formed by a statute or its actions are controlled and scrutinized by the government. In his concurring judgment, Justice Shah elucidated that Board could impose certain rules and regulations which upon being enforced could prove to be detrimental to the fundamental rights of individuals. The ability to impose such regulations was in compliance with the fact that the Board had been vested with certain sovereign powers of the State. By using this standard to determine the sovereign powers vested in an entity, Justice Shah agreed that the Board was within the ambit of Article 12.

In 1975, in the case of Sukhdev Singh v. Bhagat Ram¹⁰, the issue which was deliberated by the Apex Court was whether certain statutory entities (including ONGC and LIC) would attract the application of Article 12 by virtue of being a State. In its majority opinion, the Court reiterated Rajasthan Electricity Board's contention that an entity was governed by Article 12 if:

“It had the **authority to issue directions whose disobedience could be punished by criminal law** or if it had had the authority to make, oversee and enforce such regulations.”¹¹

Justice Mathew has been credited for laying down another parameter to determine whether an entity attracts the application of Article 12. This was a precursor to what is now known as the “government instrumentality test”. He stated that such ‘other authorities’ must follow a prescribed standard as though it were the State “acting through the instrumentality or agency of corporations”. Thus, it must be liable to the same restrictions which would be imposed upon the State in case it was discharging its activities through a third-party or an agent. The Court condensed the requirements for attracting Article 12 into a two-fold test which chiefly was; **(1)** the degree of control over policies or financial power the entity exerted over individuals and **(2)** the carrying out of a “public function” synonymous to the State’s activities.

¹⁰ AIR 1975 SC 1331 (India)

¹¹ Ibid.

THE TEST OF A GOVERNMENT INSTRUMENTALITY

In *RD Shetty v. International Airport Authority of India*¹², the defendant- International Airport Authority was a private organization formed under the 1971 International Airport Authority Act. It had sent out applications inviting tenders at Bombay International Airport for operating fast food places and snack bars and eventually accepted the best offer. This verdict was challenged on the ground that the Airport authority had failed to comply with its own rules and regulations in finalizing the deal, and also had violated Article 14 by treating equals unequally, without any rational nexus. The Court expanded its analysis of this issue to decide whether the activities of private corporations would attract the provisions of Article 12.¹³

In the judgment, the Court held that when an organization, independent in its operations, is given legitimacy by way of a statute, it must comply with the standards set in Article 12. When extensive and extraordinary financial support is provided by the State and its intent in offering such assistance correlates with the reason for which the organization is supposed to use the assistance, it must adhere to the aforementioned standards. Ergo, the intent of such an entity must be one that provides public service. This is largely a reiteration of Justice Mathew’s concurring opinion in the *Sukhdev Singh* case as I have discussed earlier. Here, the Court first developed the irrefutable notion that even the State is bound by the public duties of transparency and equal opportunity even though it may be acting in its capacity as a contractor. It was subsequently held that:

“...the Government which represents the executive authority of the State, may act through the instrumentality or agency of natural persons or it **may employ the instrumentality or agency of juridical persons to carry out its functions.**”¹⁴

It can be inferred from these lines that even corporations and private entities would have the same prescribed regulations and restrictions which would be imposed upon the State. This was due to the fact that they owed a duty of care, towards individuals, while discharging their functions. What was left to be ascertained by the Courts was whether such an entity met the prescribed standards as an “instrumentality of the State”. This reasoning was upheld in the subsequent landmark

¹² AIR 1979 SC 1628 (India)

¹³ P.M. BAKSHI, CONSTITUTION OF INDIA, (8th ed., Universal Law Publishing Co.) (2007)

¹⁴ Ibid.

judgment of *Som Prakash Rekhi v. Union of India*¹⁵, where the Court deliberated on whether a public organization fell within the ambit of Article 12. By ruling affirmatively, the Court elucidated that there would be a “breakdown of the rule of law” if fundamental rights could not be enforced upon companies, bureaus and institutes which acted in the capacity of an agent of the State. This would lead to a phenomenon of a large fragment of public undertakings being carried out underneath the garb/figment of juristic persons who would have the unfettered liberty to encroach upon fundamental rights.

ARE THERE LIMITATIONS TO THE EXPANSIVE DEFINITION OF THE STATE?

In the case of *Pradeep Kumar Biswas v. Indian Institute of Chemical Biology*¹⁶, the Court provided an expansive interpretation of Article 12 where the issue of judicial liability was resolved unequivocally. The bench held that the definitive criterion of deciding if an organization ought to be a State instrumentality would be if the body was under the "deep and pervasive control" of the State.¹⁷ Subsequently, in the case of *Zee Telefilms v. Union of India*¹⁸, an interesting problem emerged, wherein the Court was tasked to determine whether the Board of Cricket Control of India (BCCI), the principal body that governed cricket as a sport, will attract within the provisions of Article 12. Based on the test of "deep and pervasive state control" set out in the case of *Pradeep Kumar Biswas*, the Court ruled that the BCCI does not come within the scope of Article 12. It is pertinent to mention that the decision of the minority court holds that, in periods of 'reform and liberalization', in which the bulk of public roles are transferred to private entities, the conduct of these private bodies will still be subject to the Supreme Court's statutory writ jurisdiction.¹⁹ **It can be said that merely because an entity responds to the tests laid down in Article 12, when it discharges a public role, does not contribute to the presumption that all of its roles are primarily discharged in lieu of public function.**

¹⁵ AIR 1981 SC 221

¹⁶ AIR 2002 5 SCC 111 (India)

¹⁷ *Ajay Hasia vs Khalid Mujib Sehravardi* 1981 AIR 487 (India)

¹⁸ AIR 2005 SC 2677 (India)

¹⁹ *Ibid.*

CONCLUSION

After analyzing various doctrines and judicial precedents, I firmly believe that our Courts have laid out straightforward tests with an objective standard of determining which entities fall within the ambit of Article 12. To understand whether private actors will be governed will be governed by these provisions, Courts place emphasis on the “deep and pervasive control test” and “government instrumentality test”. These tests have clearly listed out certain criteria which upon application by the Court show a clear distinction between entities which fall within the ambit of Article 12, and those which do not. The cases of Sukhdev Singh and Zee Telefilms have shown how private actors may be vested with the sovereign powers of the State during the discharge of their functions. The latter case does not affirm this notion but neither does it reject this contention. Although it may seem that Courts often provide an expansive explanation of which entities are encompassed under Article 12, it is primarily to curb the unfettered use of State powers disguised in the form of private actors. Therefore, the idea behind the Court’s judgments is essentially making a political decision to ensure that the “balance of power” is maintained, and there are reasonable restrictions imposed on organizations which may have the authority to infringe fundamental rights. This balance is extremely necessary to prevent the boundaries of public and private actors from being dissolved.