

Evolution of “State” Under Article 12 of the Indian Constitution

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Abstract:

The definition of the term “State” has been defined under Article 12 of the Indian Constitution. Article 12 stipulates a very wide definition of State which may or may not create challenges for the Judiciary to interpret cases so as to include institution within its wide scope. The Indian Courts anyhow have developed a rich jurisprudence with respect to the interpretation of the said term/article. However, no fixed test has been established by the Judiciary to ascertain whether a said institution/corporate body would constitute as State under Article 12. This paper seeks to explore the important landmark judgements advanced by the Hon’ble Supreme Court and concerned High Courts discussing the key issues and challenges the current interpretation of Article 12 entails. The Judiciary may have failed to establish a particular test to determine the “other authorities” constituting State, however it guarantees redressal to its citizens through other remedies available under the Constitution.

Article 12 of the Constitution of India defines “the State” so as to include “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.”¹ The question that arises is what organizations and institutions come within the purview of the expression “other authorities” as suggested in the definition of the State. The judiciary has played a pro-active role in expanding the reach and dimensions of “other authorities” whereby certain criteria were applied in different cases, and progressively, bodies performing quasi-governmental functions, statutory corporations, registered societies, public enterprise and finally even government companies have been held to be “State” in terms of the aforesaid definition. The executives and the legislature have also made their way into the definition of State under Article 12. They are obligated under the Constitution to make laws which do not cut the thread of guarantee, binding the people of this country under the arsenal of fundamental rights. The role played by each organ of the State can be adjudged on the doorsteps of the Indian Constitution. The fundamental rights are available only against the State i.e., against the actions of the State and its officials. The definition of State cannot and must not be used for restricting the application of a fundamental right only against the State. The fundamental rights can be directly violated by State by its officials or agencies and indirectly by other institutions through its inaction. The latter is

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¹ Article 12 of the Indian Constitution.

dangerous because the State cannot escape responsibility on the plea that they are actions of private individuals. The definition of “State” is inclusive and not exhaustive. This paper would lay emphasis on the evolution of the definition of “State” under Article 12 of the Indian Constitution underpinning the rich jurisprudence developed by the Indian Courts in outlining the same.

Judicial Understanding of the term ‘State.’

The term “other authorities” as referred to under article 12 of the Indian constitution includes authorities like municipalities, District Boards and Panchayats. The Courts have come up with different tests based on the functions of the concerned authorities to determine whether the said authority would come under the ambit of State as defined in article 12. Different opinions of judges given in the concurring judgements has played an imperative role in understanding the essentials features that a body must have in order to be classified as a “State.”

1. Body to have “sovereign power” to invade upon the “basic fundamental rights” of the people.

The expansive interpretation of Article 12 is said to have begun from *Rajasthan SEB v. Mohan Lal*,² wherein the appellant i.e. the electricity Board of Rajasthan, Jaipur, constituted under the electricity Board Act, 1948 was a body corporate, which was earlier being controlled directly by a department of the state government. The issue in the case involved whether the fundamental right of equality enshrined under Article 14 of the Indian Constitution could be enforced against such corporate bodies or not, which relies on the premise of brining the said corporate within the ambit of Article 12, in other words would such corporate bodies constitute “other bodies” enshrined in the definition of the State? The Supreme Court on the said question observed that the expression "other authorities" in Article 12 will include all constitutional or statutory authorities on which powers are conferred by law. It is not material that some of the powers conferred may be for the purpose of carrying on commercial activities or promoting educational and economic interests of the weaker sections of people, hence ruling that the said board constitutes a ‘State’. However,

² Rajasthan SEB v. Mohan Lal, AIR 1967 SC 1857

Justice Shaw, in his concurring judgement, gave a new addition to the case by stating that a body invested by statute with “certain sovereign powers of the State” is covered under article 12.

It opened interpretations suggesting that a body would be constituted as State under Article 12 if the said body has certain sovereign powers delegated by the state or any government institution for that matter. In the present case the body is invested by statute with extensive power to control the electricity undertakings, the corresponding rules and regulations made by it constitutes a sovereign power of the state that is delegated to the board. To put simply, the court said that while judging whether a statutory or constitutional body is an authority “within the meaning of Article 12, it would be necessary to bear in mind not only whether against the authority, fundamental rights in terms absolute are intended to be enforced, but also whether it was intended by the Constitution-makers that the authority was invested with sovereign power to impose restriction on very important and basic fundamental freedoms.”³ Thus, the Court gave importance to the fundamental rights of people that are likely to be infringed by the statutory authority instead of merely possessing a statutory constitutional character, by giving the body the power to make rules detriment to basic freedoms of the people constitutes a State.

2. Concept of State Action

In the case of *Sukhdev Singh vs Bhagatram Sardar Singh Raghuvanshi*,⁴ the Court discussed whether certain statutory corporations are authorities which would come within the meaning of Article 12. The statutes for consideration were LIC Act, ONGC Act and Industrial Finance Corporation Act. All these three were corporations created by statutes and had statutory power to make binding rules and regulations and were subject to pervasive governmental norms. The Court in its majority judgement, ruled that a statutory corporation carrying on business of “public importance” are authorities within the meaning of Article 12 despite the fact that they have no power to issue binding directions with respect to penal consequences or punishments. These were new types of institutions which have come into existence due to changing economic and social times which the Court instead of fixing it to the older test, created a new test to adapt to the changing conditions. Justice Mathew introduced the term “instrumentality of the State” to affirm the notion of the state acting through the public corporations, which was subsequently added to the ratio of the case as

³ Ibid.

⁴ *Sukhdev Singh vs Bhagatram Sardar Singh Raghuvanshi*, (1975) 1 SCC 421

well. He further introduced the concept of State Action, which was two-fold; first, that the corporation is created by State, and second, the power exists with the state to invade the constitutional rights of the individuals. It should however be noted that the *Rajasthan SEB*⁵ judgement stated the similar requirements to prove a state but differed only by not regarding such action as “State Action” and laid emphasis on the “basic fundamental rights” of the people rather than their “constitutional rights.” There is a difference between fundamental rights and constitutional rights with the duty of the state to enforce the former, however, the Courts after adding constitutional rights as a requirement for a body to constitute state gave it a wider interpretation increasing the burden on the court.

3. Public Function

The concept of Public function carried by a corporate body was laid down initially in *Sukhdev Singh*⁶ by Justice Mathews. He stated that, “a public corporation is not generally a multipurpose authority, but a functional organization created for a specific purpose.” It held that insofar as they fulfil public purpose on behalf of the government, they are public authorities, and such are controlled by the government. However, subsequent judgements may or may not agree by the interpretation incorporated in the said judgement. The Supreme Court in *Zee Telefilms Ltd vs Union of India*⁷ ruled that BCCI is not a ‘State’ since it is neither financially or functionally nor administratively dominated by or under the control of the government. However, the minority judgement laid down the following functional tests based on which the said authority would have constituted State under Article 12;

- (i) When the body acts as a public authority and has a public duty to perform.
- (ii) When it is bound to protect human rights.
- (iii) When it regulates a profession or vocation of a citizen which is otherwise a fundamental right under a statute or its own rule.
- (iv) When it regulates the right of a citizen contained in Article 19(1)(a) of the Constitution available to the general public and viewers of the game of cricket in particular.
- (v) When it exercises a de facto or a de jure monopoly.

⁵ *Rajasthan SEB v. Mohan Lal*, AIR 1967 SC 1857

⁶ *Sukhdev Singh*, *supra* note 4.

⁷ *Zee Telefilms Ltd vs Union of India*, (2005) 4 SCC 649.

- (vi) When the State outsources its legislative power in its favor.
- (vii) When it has a positive obligation of public nature.

But these tests have not been taken into much consideration by the Courts. In *A.C. Muttiah v. Board of Control for Cricket in India*,⁸ it was held that a body is not a “State” within the meaning of Article 12 irrespective of whether it carries out public function or not. In *Board of Control for Cricket in India vs Cricket Assn. of Bihar*,⁹ the Court held that BCCI does discharge several important public functions, which make it amenable to the writ jurisdiction of the High Court under Article 226 of the Constitution of India. In *Zee telefilms ltd* the Court thus stated that, it cannot be denied that the Board does discharge some duties that can be said to be akin to public duties or State functions and if there is any violation of any constitutional or statutory obligation or rights of other citizens, the aggrieved party may not have a relief by way of a petition under Article 32. But that does not mean that the violator of such right would go scot-free merely because it is not a State. Though the remedy under Article 32 is not available, an aggrieved party can always seek a remedy under the ordinary course of law or by way of a writ petition under Article 226 of the Constitution, which is much wider than Article 32. Hence, the current situation is that a body discharging public function can be brought under Article 226 of the Constitution of India for violation of any of the constitutional rights, which includes fundamental rights.

4. State Financial Aid with “State Control” or “important public service”

The case of *Sukhdev Singh*,¹⁰ also laid down the following test to determine whether a body constitutes a state. It included certain socio-economic conditions to determine the same:

1. State financial aid alone does not render the institution receiving such aid a State Agency. Such aid must be in collaboration with a degree of control over the management and policies of the body corporate. This reasoning was deemed as a ratio in *Ramana Dayaram Shetty v. International Airport Authority of India*.¹¹
2. The combination of State Aid and the furnishing of an important public service may conclude the body to be a State agency. Justice Mathews thus recognized the socio-

⁸ A.C. Muttiah v. Board of Control for Cricket in India, (2011) 6 SCC 617

⁹ Board of Control for Cricket in India vs Cricket Assn. of Bihar, (2015) 3 SCC 251.

¹⁰ Sukhdev Singh, *supra* note 4.

¹¹ Ramana Dayaram Shetty v. International Airport Authority of India, (1979) 3 SCC 489

economic functions of the Government in the light of the poor socio-economic conditions of the country where people were incapable of carrying out the business out of their own expenses and necessarily required State intervention for the welfare of its people.

However, in *R.D. Shetty Case*, it was further ruled that the factor taken into consideration for determining whether a body is State is not exhaustive and the Courts will have to look into the facts or circumstances of various cases to arrive at a particular decision. “In *Pradeep Kumar Biswas v. Indian Institute of Chemical Biology*,¹² while reaffirming the tests laid down in *Sukhdev Singh*, the Court rightly pointed out that the tests pronounced by Justice Mathews in *Sukhdev Singh* were elaborated in *R.D. Shetty* and were reformulated two years later by a Constitutional Bench in *Ajay Hasia v. Khalid Mujib Sehravardi & Ors*.¹³ It further ruled that what may be technically characterized as obiter dicta in *Sukhdev Singh* and *R.D. Shetty* (since both the cases the “authority” in fact involved was a statutory corporation), formed the ratio decidendi in *Ajay Hasia* case.”¹⁴

5. Corporation created under a statute to be regarded as State to be used cautiously.

In the case of *R.D. Shetty* and *Som Prakash Rekhi vs Union of India*,¹⁵ the Court laid emphasis on functional test i.e. where a corporation is wholly controlled by Government not only in its policy making but also in carrying out functions entrusted to it by law establishing it or by the Charter of its incorporation. The quantum of role played by corporation created by a statute or under a statute in determining whether it is a “State” or not was reduced in the aforementioned cases. This functional test laid down stands in contravention to the majority judgement passed in *Sukhdev Singh*¹⁶ case wherein the intention of the Court to specifically cover the bodies under dispute in the case as created by a statute could be reflected from the reasoning it gave to discern such bodies from those created under the law. In the case of *Som Prakash Rekhi*,¹⁷ the Court provided that a company created under the statute should be covered within the ambit of State with great caution and wisdom. The facts of the case are, the pensions of the employees of the Bumrah Shell Oil Storage Limited, whose rights, title and interest was taken over by the State Government under the Bumrah shell (Acquisition of Undertakings in India) act, 1976, were reduced drastically by the

¹² *Pradeep Kumar Biswas v. Indian Institute of Chemical Biology*, (2002) 5 SCC 111

¹³ *Ajay Hasia v. Khalid Mujib Sehravardi & Ors*, 1981 SCR (2) 79

¹⁴ Kiran Suryanarayan, *Private Authorities discharging Public functions- an Analysis of State*, 3 RSRR 141. 11-12 (2016).

¹⁵ *Som Prakash Rekhi vs Union of India*, (1981) 1 SCC 449

¹⁶ *Sukhdev Singh vs Bhagatram Sardar Singh Raghuvanshi*, (1975) 1 SCC 421

¹⁷ *Som Prakash Rekhi vs Union of India*, (1981) 1 SCC 449

company without giving any reason for the same. The principal contention raised by the company i.e. the respondent, was that it was not a statutory corporation, but a company incorporated under the Companies act, 1956 and thus has a distinct legal personality in order to be prevented from being classified as State. Justice Pathak said that the provisions of Bumrah Shell Act will apply to any government company and moreover, does not alter the basic nature of that company. Its provision could have been applied to a private corporation if the act had selected one for vesting the undertaking in it, but that wouldn't make the private corporation a State within the meaning of Article 12 of the Constitution of India. Consequently, according to him, the extend and role that Bumrah Shell Act has over the control of the company is immaterial if its reach could cover the private corporations within its ambit. Therefore, it should be considered that the statements of objects and reasons should clearly specify upon whether the act itself intends to cover only the government companies serving important functions and thereafter the tests laid down in other cases should be taken into consideration.

Decaying distinction between private and public entities performing public function in the wake of changing interpretations of Article 12.

In the case of *Zee telefilms*,¹⁸ the majority judgment held that the BCCI would not come under the ambit of State as described under Article 12 of the Indian Constitution, which reaffirmed the ratio laid down in the case of *Pradeep Kumar Biswas*.¹⁹ It noted that the Board was not created by statute, the Government held no share capital, provided no financial assistance, conferred no monopoly, exercised no pervasive control, and had not transferred a government-owned corporation, hence Article 12 was not applicable. However, the minority judgment, primarily Justice S.B. Sinha did not agree with the said conclusion. In his dissent he stated that the distinction between private institutions and private institutions performing a public function delegated by state authorities or government is decaying due to social and economic changes. In such situation, "other authorities" as mentioned under Article 12 of the Indian Constitution should be given more expansive interpretation to include such private authorities which performs public functions, BCCI in the said matter. The Court in *Zee telefilms* rejected the contention that the control of cricket was in the nature of a "State function", holding that "the State/Union has not chosen the Board to perform these duties nor has it legally authorized the Board to carry out these functions under any

¹⁸ *Zee Telefilms Ltd vs Union of India*, (2005) 4 SCC 649.

¹⁹ *Pradeep Kumar Biswas v. Indian Institute of Chemical Biology*, (2002) 5 SCC 111

law or agreement. It has chosen to leave the activities of cricket to be controlled by private bodies out of such bodies' own volition (self-arrogated). In such circumstances when the actions of the Board are not actions as an authorized representative of the State, can it be said that the Board is discharging State functions? The answer should be no. In the absence of any authorization, if a private body chooses to discharge any such function which is not prohibited by law then it would be incorrect to hold that such action of the body would make it an instrumentality of the State."²⁰

It is essential to point out that whether the decision of the Court would have been same in the same matter, if the State chooses to delegate the function of national defense or the atomic power or judicial system or policy making to private institutions. Here, the problem of descriptive interpretation of 'State function' arises, that was first mentioned in the case of *R.D. Shetty*.²¹ "Constitutional rights cannot depend upon the economic policy that a State follows at any given time. Intuitively, as well, it seems somewhat strange to visualize a situation where, for instance, a private corporation is given control over the country's water supply, which it then withholds from people of a particular religion – and to imagine that the Constitution will have nothing to say about that. Again, these thought experiments highlight the need for a normative baseline of "State functions", that the Court – throughout its jurisprudence – has consistently failed to engage with."²² This in fact has created a loop hole on which the judiciary is silent or unsure about. Delegation of governmental powers to private institutions is a real time situation, with the private institutions having the authority to carry out changes which might affect the basic freedom of people, irrespective of the fact whether the said private party is financially, administratively or functionally operated by the State (government) and a test for the regulation of the same should also be given emphasis.

Relevance of Public Functions Test in the era of Globalization.

The courts so far have established various tests when it comes to the interpretation of the term "other authorities" under Article 12. The approach or test was first established in the majority judgement in the case of *Sukhdev Singh*²³ whereas a different view is also embedded in Justice

²⁰ *Zee Telefilms Ltd vs Union of India*, (2005) 4 SCC 649.

²¹ *Ramana Dayaram Shetty v. International Airport Authority of India*, (1979) 3 SCC 489

²² Gautam Bhatia, *what is the State – V: Zee Telefilms, the Death of the Functional Approach, and an Alternative*, INDIAN CONSTITUTIONAL LAW AND PHILOSOPHY. (April 29, 2019, 9:00 pm)
<https://indconlawphil.wordpress.com/2014/08/19/what-is-the-state-v-zee-telefilms-the-death-of-the-functional-approach-and-an-alternative/>.

²³ *Sukhdev Singh vs Bhagatram Sardar Singh Raghuvanshi*, (1975) 1 SCC 421

Mathew's opinion in the same judgement. The majority approach culminated into the ratio or decision in Pradeep Kumar's Case²⁴ whereas Justice Mathew's partially lead to the view of the minority decision in Zee Telefilms Case.²⁵ It was Justice Mathew, who suggested the Public functions test in his opinion in Sukhdev Singh's Case²⁶ as a method to find out instrumentalities of State under the term "other authorities" as mentioned in Article 12. The test lays down that when the functions performed by private bodies are similar to or could be identified with the state functions, they would become State Actors in relation to the public functions performed by them. The Supreme Court encountered the question whether a private entity discharging important public functions can be a State in the famous case of *M.C. Mehta v. Union of India*²⁷. Justice Bhagwati, though expressed his intention to include private authorities under State left the matter undecided on grounds of laxity of time. However, in this case it was observed that the doctrine of state Action might be applicable in India, and therefore all the functions of a body judged as State need not be public functions.

Subsequently, in the case of Zee Telefilms there has been a detailed discussion on the public functions performed by BCCI and "it was observed by the minority Judgement that a body discharging public functions and exercising monopoly power would be an authority under Article 12."²⁸ BCCI should be considered as State under Article 12 as it performs functions like controlling and regulating the game of cricket, it has final say in the matters of selections and disqualification of players, umpires and others connected with the games affecting their right of freedom of speech and occupation. According to minority view performance of a public function in the context of constitution would be to allow an entity to perform as an authority under Article 12 which makes it subject to constitutional discipline of fundamental rights. Except in the case of disciplinary measures, the Board has not made any rule to act fairly or reasonably. Hence, the public function test in its own ways has failed to curb the difference between private entities performing state functions and public institutions established by the state, while agreeing with the minority judgment of Zee 'Telefilms' case it should be observed that in the era of globalization and capitalism this distinction would get only bleaker and would create a problem on determining whether a particular institution would constitute as "other authorities" within the term "State" as defined in Article 12 of the Indian Constitution.

²⁴ Pradeep Kumar Biswas v. Indian Institute of Chemical Biology, (2002) 5 SCC 111

²⁵ Zee Telefilms Ltd vs Union of India, (2005) 4 SCC 649.

²⁶ Sukhdev Singh vs Bhagatram Sardar Singh Raghuvanshi, (1975) 1 SCC 421

²⁷ M.C. Mehta vs Union of India, AIR 1987 965

²⁸ Zee Telefilms Ltd vs Union of India, (2005) 4 SCC 649.

Conclusion

The role of concurring Judgements in exploring the scope and ambit of “other authorities” within the meaning of “State” under Article 12 has been pertinent and helped to escalate the welfare of the people by affirming the role the State to provide social, economic, and Political justice. The law enshrined in the cases mentioned above have been used as ratios in the subsequent cases reaffirming the different concepts adopted by different cases. The concept of “State Action”, with two essential criteria for judging whether a body constitutes a State i.e. incorporation under a Statute and infringing the constitutional rights of an individual, as envisaged by Justice Mathews in *Sukhdev Singh* in consonance with the test laid down in the case of *Rajasthan SEB* has provided for different interpretation of the term other authorities while giving the courts food for future thoughts and action for the subsequent courts to rather adopt the same explicitly in their ratios. The functional tests as propounded in the case of *R.D. Shetty* were reformulated two years later in the case of *Ajay Hasia v. Khalid Mujib Sehravardi*²⁹ (constitutional bench) and reaffirmed in *Pradeep Kumar Biswas* as a part of their ratios to be binding on the lower courts. The Judiciary may still be unclear about the public function test adopted by the court in various judgements; however, it guarantees remedies to its citizens if not under Article 32 then under Article 226 under the principle of direct horizontally. To conclude, the term “State” as defined under Article 12 has been subjected to various interpretation by various judges while some agreeing or disagreeing with the previous judgements; the Judiciary, nevertheless, has played a pivotal role in the protection of employees against arbitrary action by the management, as well as the protection of fundamental rights and the availability to the citizens of the same remedies against public enterprises and body corporates or private institution disguised as the State.

²⁹*Ajay Hasia*, sua note 13.