



Expanding the definition of 'state' under Article 12 in the era of privatization: A constitutional imperative

Nikhilesh Sharma¹, Bhavana Sharma²

¹ Research Scholar, Department of Laws, Himachal Pradesh University, Summerhill Shimla, Himachal Pradesh, India

² Assistant Professor, Himachal Pradesh University Regional Centre Khanyara, Dharamshala, Kangra, Himachal Pradesh, India

Abstract

The traditional idea of the state has been drastically changed by India's changing governance landscape, which is characterized by liberalization, privatization and the growth of public-private partnerships. Through significant rulings like *R.D. Shetty v. International Airport Authority of India*^[1], *Ajay Hasia v. Khalid Mujib Sehravardi*^[2] and *Pradeep Kumar Biswas v. Indian Institute of Chemical Biology*^[3], the Indian Constitution's Article 12, which defines "State" for the purposes of Part III, has been subject to expansive judicial interpretation. In order to expand the application of basic rights to entities carrying out public responsibilities, these rulings developed the "instrumentality or agency" theory.

However, this doctrinal framework's inherent limits have been shown by the current era of privatization, especially in cases like *Zee Telefilms Ltd. v. Union of India*^[4], where corporations performing important public duties have been excluded from the definition of "State." As a result, there is a lack of accountability, which enables private actors carrying out public obligations to avoid constitutional scrutiny.

This paper argues that the existing tests—financial, functional and administrative control—are inadequate in addressing the complexities of modern governance. It advocates for a purposive and functional interpretation of Article 12, emphasizing the nature of functions performed rather than the form of the entity. Drawing upon comparative constitutional jurisprudence and scholarly writings such as H.M. Seervai, V.N. Shukla, and M.P. Jain, the paper proposes the adoption of a broader, rights-oriented approach to ensure effective enforcement of fundamental rights in an era of shifting state functions.

Keywords: Article 12, state, privatization, fundamental rights, instrumentality test, public function, constitutional accountability

Introduction

Fundamental Rights are enshrined in the Indian Constitution as legally binding restrictions on the use of authority. Article 12, which defines the term "State" for the purposes of Part III, is essential to this enforcement framework. Article 12's scope is not just definitional; it also establishes the extent of constitutional remedies under Articles 32 and 226, so influencing the practical effectiveness of basic rights. In the past, the idea of "State" was limited to statutory and governmental powers. However, the judiciary has expanded this reach to include entities that, while not literally governmental, serve as the State's instrumentalities or agencies as administrative functions and welfare governance grew.

Judicial rulings like *R.D. Shetty v. International Airport Authority of India* and *Ajay Hasia v. Khalid Mujib Sehravardi*, in which the Supreme Court developed the "instrumentality or agency" test, are the most notable examples of this development. Courts were able to apply constitutional requirements to a broader range of businesses as the focus changed from formal ownership to functional and financial control. In *Pradeep Kumar Biswas v. Indian Institute of Chemical Biology*, the Court reinforced the standard of "deep and pervasive control" as a determinant of whether an organization qualifies as "State," marking a crystallization of this doctrinal development.

The post-1991 era of liberalization, privatization and globalization (LPG) has significantly changed the nature of governance in India, despite these theoretical developments. The State has moved away from providing services directly, giving private actors and hybrid organizations control over

traditionally public activities including infrastructure development, healthcare, education and even regulation. The traditional line between the public and private domains has become hazier as a result of this change, which raises serious questions regarding Article 12's continued suitability as a means of guaranteeing constitutional responsibility.

Decisions like *Zee Telefilms Ltd. v. Union of India*, in which the Supreme Court refused to designate the Board of Control for Cricket in India (BCCI) as a "State" despite its de facto monopoly over a nationally significant public function, demonstrate the shortcomings of the current system. These rulings show that judges continue to rely on the "control" test, frequently at the expense of a more intentional "functional" approach. As a result, private organizations with significant public authority may avoid constitutional examination, creating an accountability gap and weakening the normative power of fundamental rights.

This paper proceeds on the premise that the contemporary governance landscape necessitates a re-examination of the definition of "State" under Article 12. It argues that the existing doctrinal tests—rooted in notions of ownership and control—are insufficient to capture the complexities of modern statecraft. Instead, a shift towards a functional and rights-oriented interpretation is imperative, one that prioritizes the nature of the function performed over the formal status of the actor. Such an approach would align with the broader constitutional objective of securing justice—social, economic, and political—and ensure that the guarantees of Part III are not rendered illusory in an era of increasing privatization.

What is State

State has been defined by number of jurists, Salmond defines state as "a society of men established for the maintenance of order and justice within a determined territory by way of justice."^[5] McIver considers the state as an agency of social control. Austin identified the State with the sovereign, that is, with the individual person or the body of persons which bears the supreme powers in an independent political society^[6].

Constitutional Foundations of Article 12

It is clear from reading the Constitution Assembly Debates of India (CAD) that the authors of the Constitution intended for fundamental rights to take precedence over other rights. The definition of state was provided in Article 7 of the Draft Constitution^[7]. The definition was adopted to avoid the inconsistent treatment of the Indian State and Province under the Draft^[8]. The objective behind defining state was to provide an impetus to the effective enforcement of fundamental rights^[9]. The expression state under Article 12 lists the authorities against whom fundamental rights may be asserted and obliges them to uphold and protect the people's basic rights. In the Constituent Assembly there had been divergent opinions concerning the phraseology of Article 12 since it was couched in the widest extent possible^[10]. But Dr. B.R. Ambedkar insisted on its retention so that fundamental rights could be claimed against anybody or authority exercising power over the people^[11]. He used the term "authority" to refer to anybody that possesses either the authority to enact laws or the authority to exercise judgment. Additionally, a closer examination of the article shows that the words were added in a way that would enable the lawmakers to interpret the term in light of the evolving needs of society. This is in line with the framer's intention to make the constitution a "living document" that will endure over time^[12].

Article 12's definition of "state" is broad rather than exhaustive. Two crucial terms for flexibility to deal with societal difficulties are included in the article's language. The first is the definition's "inclusive nature," which is demonstrated by the word "includes," which can be utilized to incorporate new organizations that fall under Article 12's purview. As a result, authorities not included in the Article may also be included if they fulfil any other requirement of the "State" or if they carry out any tasks typically carried out by the Government. The second is the usage of the phrase "unless the context otherwise," which permits the concept of state to be applied in many contexts and ways. For example, in order to make the right to life or personal liberty guaranteed by Article 21 a meaningful reality, the term of state must be used as broadly and frequently as possible.

It is to be noted that the definition is applicable to Part III and as per Article 36 to Part IV as well^[13]. Merely because an authority is a 'state' does not make its employees civil servants^[14]. Additionally, "local authorities" are "state," but this does not give them the right to assert their position as central or state governments. The rationale is that the terms "state" and "government"^[15] are separate and public companies cannot be regarded as state-level government agencies. The Indian Constitution's Article 12 implies the concept of State Action, which is not specified in the document. The article specifies the fundamental rights that the people are entitled to and is the first article in Part III of the Constitution. Since the Fundamental Rights are specifically protected against the State, defining the State was required. In several instances, the Article has been

examined by judges. In the majority of cases, the Court examined the factual circumstances at the time and determined the term's judicial meaning in accordance with political and economic shifts, their effects on the State, and their place in society. This keeps a variety of institutions under judicial examination.

Despite Article 12's straightforward phrasing, the term "other authority" is tested quite a bit. The judiciary has developed the test of instrumentality or agency, which lays out a number of criteria, in order to extract the true meaning of the term and advance the goal of fundamental rights. One such crucial test is the "Public Functions Test." Other tests include the government monopoly test, the deep and pervasive state control test and others. To hold an authority as "other authority" and hence state under Article 12, the cumulative effect of all the tests is required. These exams aim to provide a significant connection between the government and the relevant authority. Despite playing its role as 'social engineer' while analysing the cases what can be seen is that the various tests acts as a limitation upon the further enlargement of the concept of State Action though constitution framers intended to give wide meaning to Article 12. The points made in the ruling also demonstrate the judiciary's reaction to the evolving socio-economic changes. In light of this, the paper provides a thorough examination of the evolution and reach of the definition of state under Article 12, as well as how the narrow formulation of the standards used to establish the State Action concept has rendered the law immobile in terms of expanding its application to private entities carrying out public functions.

As per the Article of the Constitution of India, State includes the Government and Parliament of India and government and legislatures of each state in India. It also includes local and other authorities within the territory of India and local and other authorities under the control of Government of India^[16]. Even though the framers of the Constitution attempted to provide a comprehensive definition of "State," the liberal inclusion of "other authorities" has rendered the entire clause vulnerable to "oblivion" in the future. It is crucial to remember that the legal interpretation of the term "state" largely determines the extent of fundamental rights provided in part III of the Constitution of India. In essence, the judiciary has the logical right to experiment with its own ideology over this crucial part of our Constitution because of the clause "other authorities." The nature and extent of fundamental rights will expand if the courts are able to interpret Article 12 in a liberal and expansive manner. However, the efficacy of the rights protected by Part III of the constitution would be effectively curtailed and imprisoned if the meaning of "State" were narrowly construed^[17]. As a result, there have been significant shifts in the definition and meaning of the term "state" throughout history, one in the direction of liberalism and the other in the direction of restrictive conservatism. The majority of constitutional scholars have been astounded by this unforeseen shift in interpretation.

Interpretational Shift: Tracing the Evolution of Judicial Interpretation

In *University of Madras v. Shantha Bai*^[18], the court applied the ejusdem generis concept, marking the beginning of this movement. According to this understanding, "other authorities" would only refer to entities that carry out sovereign functions and are "extended arms" of the government. Although this view was a significant departure

from the literal meaning, which only recognized the legislative and executive branches, it was severely limited in that no non-governmental organization could ever be considered a state. As a result, they cannot be held accountable for limiting any of the fundamental rights.

In contrast to earlier interpretations of Article 12, there was a significant enlargement in the meaning of "State" between the 1950s and 1960s. The second line of reasoning involved interpreting the phrase "within the territory of India" as being more restrictive than "under the control of the Government of India." Accordingly, only "other authorities" created by a statute or the Constitution would be regarded as "states" under Article 12^[19]. This new interpretation eliminated the prior *ejusdem generis* principle and the court openly states that a categorization that runs through the bodies already covered by the provision is necessary to apply the theory of *ejusdem generis*. This theory cannot be used since the bodies listed in Article 12 cannot be grouped together based on a reasonable link. As a result, Article 12's scope was broadened. However, the court limited this article's application to constitutional and statutory entities alone.

In *Sukhdev Singh v. Bhagat Ram*^[20], the term "state" was interpreted even more broadly. The Supreme Court ruled that the term "other authorities" in Article 12 is sufficiently broad to encompass any authority established by a statute and operating within Indian territory or under the authority of the Indian government. More significantly, Justice Mathew provided a revised definition of "state" in his concurring opinion, taking into account the advancement of human civilization. He held that the public corporation was a new type of institution which sprang from the new social and economic functions of Government and instead of classifying it into old legal category, it should be adapted to the changing times and conditions^[21]. This new test laid down by Justice Mathew was followed by the Supreme Court in the landmark case of *RD Shetty v. International Airport Authorities*^[22]. Thus, we observe that the attitude of the Supreme Court gradually swung from a "legal approach" of interpreting Article 12 to a more "functional approach".

The author wants to highlight the most oddly contradictory ruling made by the Supreme Court in *Sabhajit Tiwary v. Union of India*^[23] during that same period. The court determined that a society registered under the Societies Registration Act, 1860 was not a "State" under Article 12, even though it was the same bench that heard the *Sukhdev Singh* case. Although the ruling was overturned in later cases, the Supreme Court's unpredictable behaviour remains a mystery. For this reason, the author has referred to the process of interpreting Article 12 as a shift that veers in both liberal and profoundly conservative directions. Following this significant reversal, the Supreme Court makes a breakthrough in *Ajay Hasia v. Khalid Mujib*^[24]. Rather than providing an open-ended definition as it did in the *Sukhdev Singh* case, the Supreme Court limited itself and ultimately established the criteria for determining whether a body is a state.

The Court devised five tests to determine whether a body was State.

- First, a sizable portion of the body's share capital is owned by the government.
- Second, substantial financial support from the government.
- Third, monopoly status granted or safeguarded by the state.

- Fourth, existence of deep and pervasive state control.
- Fifth, the public nature of the duties performed by the concerned body.

Hence, these tests also ensured that the government do not hide behind a "corporate veil"^[25]. It remained unclear, nonetheless, if all of these requirements must be met or if meeting just a few of them would be sufficient to establish jurisdiction under Article 12. One of the criteria outlined in the case is that a company will be regarded as a state if it is carrying out "public importance" and closely linked "governmental functions." The American idea of State Action was symbolically incorporated into Indian jurisprudence as a result of this significant shift in favour of liberalism.

The judiciary was so positivist during *Ajay Hasia's* time that it applied Article 14 discipline to private educational institutions in *M.C. Mehta v. Union of India*^[26] without addressing the question of whether the party in question was a "state." This suggests that the judiciary likely believes that determining whether an entity qualifies as a "State" is not necessary. It was quite clear that fundamental rights were being applied horizontally against non-state actors.

The Supreme Court later eliminated the statutory requirements entirely in *Pradeep Kumar Biswas v. I.I.C.B*^[27], and created a new test in addition to the ones established in the *Ajay Hasia* case. In the current case, Justice Ruma Pal concluded that the primary inquiry in every instance would be to assess whether a body is "financially, functionally and administratively" controlled by the State in light of cumulative circumstances. This extra criteria may not have been a significant difference in 2002, but it did allow the judiciary more latitude.

As anticipated, the Supreme Court's final ruling in favour of *BCCI*^[28] in *Zee Telefilms v. Union of India* clearly demonstrates that the Court disregarded every test established in earlier cases to define "State," with the exception of the test of "whether a body is financially, functionally and administratively controlled by the State." The author believes that this was a significant regression to the judiciary's conservative and constrictive stance. It should be mentioned that the court would have applied the "public service" standard established in the *Sukhdev Singh* case if it had not been restrictive in the *Zee Telefilms* case.

In the case of *Binny Ltd. v. V. Sadasivan*^[29] the key issue was whether a private corporation could be sued under Article 226 for breach of employment contract.

It concluded that the writ of *mandamus* is essentially a public law remedy employed to uphold the obligations of statutory or public authorities. It can only be used against a private entity if it carries out a public function or incorporates elements of public law into its operations. Writ jurisdiction does not apply to purely commercial disputes between private parties; instead, civil or labour law remedies apply.

Hybrid Approach: Contemporary Balancing of Control and Function

The present phase reflects a hybrid doctrinal model, where courts apply a combined analysis of control, function and public impact. This approach is visible in recent decisions such as *Ravi Khokhar v. Union of India*^[30] and related jurisprudence. A body performing State-linked welfare functions under substantial governmental nexus and control may qualify as 'State' under Article 12, irrespective of its formal private character.

1. Doctrinal viewpoint

Courts now examine:

- Degree of governmental control.
- Nature of functions performed.
- Extent of public duty or welfare role.
- Impact on fundamental rights.

No single factor is decisive; instead, a multi-factor balancing test is applied.

2. Illustrative Trends

- Inclusion of welfare-linked bodies (e.g., insurance schemes linked to State policy).
- Continued exclusion of purely private or autonomous bodies.
- Increased reliance on functional indicators alongside structural ones.

3. Despite functional advances

- Courts still require some degree of State nexus.
- Purely private bodies often escape Article 12.

In the Co-operative societies case (2025-2026) the SC followed the ruling in the case of Thalappalam Service Cooperative Bank Ltd v State of Kerala^[31], where the key issue was that whether cooperative societies registered under State Cooperative Acts qualify as 'State' or 'other authority' under Article 12. The apex court held that co-operative societies are typically not considered "states." Writ jurisdiction is not applicable unless deep and widespread state control exists or the body carries out explicit public and legal obligations. Mere statutory regulation or supervision of cooperative societies does not render them 'State' under Article 12 in the absence of deep and pervasive governmental control or public duty. The Supreme Court's recent recognition of cooperative societies' non-State status highlights the judiciary's ongoing adherence to Article 12's control-based constraint, preventing its growth into the realm of voluntary and member-driven organizations.

Ravi Khokhar v. Union of India is a step in the right direction to acknowledge the changing nature of state authority in a privatized economy. However, the transformative potential of the case is curtailed by the lack of a coherent and cohesive doctrinal framework. Given the transformation of the governing systems, there is a need to change towards a functional, rights-based and impact-oriented interpretation of Article 12 in order to prevent constitutional guarantees from becoming illusory.

The judgment advances Article 12 jurisprudence but remains constrained by doctrinal ambiguity and selective application.

The current legal position may be concluded as follows

An entity will be considered 'State' under Article 12 if it demonstrates a sufficient nexus with governmental authority, either through deep control or the performance of public functions of significant constitutional importance, evaluated through a case-by-case balancing approach.

Impact of Privatization on Article 12

Privatization has fundamentally altered governance structures^[32]. Functions such as education, healthcare, infrastructure, welfare schemes are increasingly performed by private entities. This leads dilution of constitutional accountability and emergence of a "constitutional vacuum".

A change from a control-based framework to a functional and rights-oriented interpretation is required since privatization has revealed the structural limitations of Article 12 by permitting the exercise of governmental power without constitutional responsibility.

As seen in post-disinvestment examples (e.g., Air India), entities that were previously regarded as "State" may lose that status upon privatization. This demonstrates that Article 12 status is contingent rather than permanent.

Citizens affected by such entities often lack remedies under Part III.

Critical Evaluation of the Judicial Approach

- **Over-Reliance on Control Test:** The emphasis on control fails to capture functional realities and indirect State influence.
- **Inconsistency in Case Law:** Courts have included some bodies (AFGIS) but excluded others (cooperatives, private institutions)
- **Artificial Public-Private Divide:** Modern governance renders this distinction obsolete.
- **Weak Protection of Fundamental Rights:** The current framework allows Constitutional obligations to be bypassed through privatization.

The Need for Expansion

a. Constitutional Morality

The Constitution must be interpreted to uphold justice, equality and dignity.

b. Welfare State Principle

The State cannot abdicate its responsibilities by delegation.

c. Transformative Constitutionalism

Interpretation must adapt to social realities and institutional evolution.

Suggested Doctrinal Reforms

1. Functional Test as Primary Standard

Entities performing public functions should be treated as 'State'.

2. Rights Impact Test

Focus on whether the action affects Fundamental Rights.

3. Reformulation of Control Test

Replace rigid "deep control" with meaningful nexus standard.

4. Horizontal Application of Rights

Extend certain rights against private actors.

5. Judicial Guidelines for PPP Models

Ensure accountability of hybrid entities.

Conclusion

Hence, the State cannot exist without individuals, as the king cannot rule without his subjects. The State came into being for the protection of the interests of the individual. The State, as a sovereign authority, may at any time change into tyrannical fashion and the basic rights of the individual may be threatened and under these conditions the basic rights are the only weapon in the hands of an individual to claim the justice against arbitrariness of the State. It is therefore suggested that more and more private institutions and other bodies should be brought within the scope of article 12. In conclusion, I would like to say that a number of judicial decisions of the Supreme Court on fundamental rights have established that the Court has considered the Constitution as a living document and has gone beyond the literal interpretation of words occurring in the specific articles on fundamental rights. The Constitution

is not only written to take care of the present but also to protect the future of a nation.

The case law on Article 12 demonstrates a shift from formalism to functionalism but is not yet complete. Recent rulings such as the one by Ravi Khokhar are indicative of progress but there remains a lack of certainty without a clear doctrinal framework. The Constitution must change so that the Fundamental Rights are not only paper rights impacted by shifting political systems. Not only is a functional, rights-based reading of Article 12 desirable but the Constitution mandates it.

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