



Expanding scope of article 12 of the constitution of India and recent developments

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Abstract

The concept of State has been discussed by many political thinkers and defined in different ways under various literatures. This article discusses about the scope of the definition of the State under article 12 of the Constitution of India. The scope of article 12 has been expanded through judicial decisions from time to time. The term other authorities has been widely interpreted by the judiciary in a number of cases. The discussion also includes the recent developments and the role of judiciary in this field. In this paper it is mentioned that how the fundamental rights are protected through judicial activism. It is important to note that any company or institution and cooperative societies may also be included within article 12 if they satisfy the test of agency or instrumentality of the State.

Keywords: definition of the state, constitution of India, fundamental rights

Introduction

.....It is the business of the State.....to maintain the conditions without which a free exercise of the human faculties is impossible. T.H. Green

The term 'State' has been defined in various ways by different political philosophers. After making a study on the various ideas and opinions of different classical, medieval and modern philosophers one can better understand the importance and significance of the relationship between the individual and the State. The political thinkers from ancient time through middle age and modern time have provided divergent and sometimes diametrically opposite ideas about the nature, purpose, functions and relationship with the individuals and the State. The Greeks mentioned polis for City States because at that ancient time there were City States existing in Greece. Aristotle's 'Polis' refers to a city community. MacIver was of the opinion that the Greek city communities were existing as transitional forms rather than a complete State. MacIver said "perhaps they should not be included within the classification of States any more than the pithecanthropus is to be included among the races of man ^[1].

Professor Gilchrist defines the State as: "The State is a concept of political science and a moral reality which exist where a number of people living on a definite territory, are unfit under a Government which in internal matters is the organ for expressing their sovereignty and in external matters is independent of the Governments ^[2].

Robert A. Dahl defined the State as: "The political system made up of the residents of the territorial area is a State ^[3].

In the United States, a judicial decision is included in the concept of state action for the purpose of enforcement of the

fundamental rights conferred by the 14th amendment. In *Virginia v. Rives* ^[4], the Supreme Court observed that a State acts by its legislative, its executive, or its judicial authorities. It can act in no other way.

Definition of the State under article 12 of the Indian Constitution

The Constitution of India defines the State under article 12. It is said under this article that State means and includes the Government and the parliament of India and all the State Governments as well as the Legislatures of each state in India and all local authority and other authorities inside the territory of India or under the control of the Government of India. In this definition everything is clear except the term other authorities. Therefore, for the protection of the fundamental rights it is important that the definition of the state must be a very comprehensive one. Therefore, article 12 gives an extended meaning to the words 'the state' wherever they occur in Part III of the Constitution. Under this definition not only the Executive and Legislative organs of the Union and the States, but also local bodies for example municipality and 'other authorities' which include the instrumentalities or agencies of the State.

Scope of Article 12

The term "State" has been very widely defined with a view to securing the guarantee of fundamental rights in respect of all possible institutions. The scope of this definition has been further expanded by judicial interpretation of the term 'other authorities'. This expansive interpretation promotes the expansion of administrative law as more bodies are covered under its scope. It helps in the expansion of judicial review as many more bodies become subject to the writ jurisdiction, and it also makes bodies amenable to the restrictions of

¹ MacIver, *The Modern State*, at 338

² Professor Gilchrist: "Principles of Political Science" at 17, 1957.

³ Robert A. Dahl: "Modern Political analysis", at 12.

⁴ *Virginia v. Rives*, (1880)100 U.S. 313 (318).

fundamental rights.

For better understanding the expanded meaning of the term “other authorities” in article 12, it is necessary to trace the origin and scope of article 12 in the Indian Constitution. Present article 12 was introduced in the Draft Constitution as article 7. The Court quoted with approval the observation of Dr. Ambedkar in the Constituent Assembly. While initiating a debate on this article in the Draft Constitution in the Constituent Assembly, Dr. Ambedkar Described the Scope of this article and the reasons why this article was placed in the Chapter on fundamental rights as follows:

“The object of the fundamental rights is twofold. First, that every citizen must be in a position to climb those rights. Secondly, they must be binding upon every authority. I shall presently explain what the word ‘authority’ means – upon every authority which has got either the power to make laws or the power to have discretion vested in it. Therefore, it is quite clear that if the fundamental rights are to be clear, then they must be binding not only upon the Central Government, they must not only be binding upon the Provincial Government, they must not only be binding upon the Governments established in the Indian States, they must also be binding upon District Local Boards Municipalities, even village panchayats and taluk boards, in fact, every authority which has been created by law and which has got certain power to make laws, to make rules or make bye-laws.

..... There are two ways of doing it. One way is to use a composite phrase such as ‘the State’, as we have done in article 7; or, to keep on repeating every time, the Central Government, the Provincial Government, the State Government, the Municipality, the Local Board, the Port Trust, or any other authority. It seems to me not only most cumbersome but stupid to keep on repeating this phraseology every time we have to make a reference to some authority. The wisest course is to have this comprehensive phrase and to economise in words ^[5].

This definition of State under article 12 of the Constitution of India applies only for the purpose of provisions mentioned under Part III of the Constitution. So if a body of persons not coming under the definition but still a writ under article 226 may lie against it on non-constitutional grounds or on the ground of contravention of any provision of the Constitution outside Part III that means where such body has some public duty to perform or where its acts are supported by the State or Public Officials ^[6].

Under article 12 the word ‘includes’ indicates that this definition of the ‘State’ is not confined to a Government Department and the legislature but extends to any administrative ^[7] action which may be either statutory or non-statutory, judicial or quasi-judicial. And those actions can be said to be the State action ^[8] in case of violation of fundamental rights ^[9]. Hence in this way the scope of the State has been widened by interpretation of words mentioned under article 12.

⁵ Constituent Assembly Debates, Volume. VII 1948 at 610, Quoted in Zee Telefilms Ltd. V. Union of India, AIR 2005 SC 2677 at 2685.

⁶ Kartik Chandra Nandi v. W.B.S.I. corpn., AIR 1967 Cal. 231(234).

⁷ Gulam Abbas v. State of U.P., AIR 1981 SC 2198.

⁸ R. D. Shetty v. I.A.A.I., AIR 1979 SC 1628

⁹ Som Prakash Rekhi v. Union of India, AIR 1981 SC 212

The expression local authorities include a ‘Panchayat’ a ‘Port trust’ or other bodies coming within the definition of ‘local authority’ in S.3 (31) of the General Clauses Act, 1897.

A local authority is a representative body. Merely because the Housing Board, constituted under S.3 of Haryana Housing Board Act, 1971, is authority under article 12 and it cannot be treated as a local authority. So also are Calcutta State Transport Corporation and U.P. Forest Corporation.

The expression other authorities has different dimensions and, thus, must be a liberal interpretation.

In Concise Oxford English Dictionary ^[10] the word ‘authority’ has been defined as under:

“1, the power or right to give orders and enforce obedience. 2, a person or organization exerting control in a particular political or administrative sphere. 3, the power to influence others based on recognized knowledge or expertise.”

Broadly, there are three different concepts which exist for determining the question which fall within the expression “other authorities”:

1. The corporations and the societies created by the State for carrying on its trading activities in terms of article 298 of the Constitution wherefrom the capital infrastructure, initial investment and financial aid etc. are provided by the State and it also exercises regulation and control thereover.
2. Bodies created for research and other developmental works which is otherwise a governmental function but may or may not be a part of the sovereign function.
3. A private body is allowed to discharge public duty or positive obligation of public nature and furthermore is allowed to perform regulatory and controlling functions and activities which were otherwise the job of the government.

The rule of *ejusdem generis* cannot be applied to interpret this expression in as much as there is no common feature running through the named bodies ^[11].

The expression “other authorities” also includes instrumentalities ^[12] or agencies ^[13], of the Government and Government Departments ^[14]. But every instrumentality of the Government is not necessarily a Government Department ^[15]. The instrumentalities or agencies, even though performing some of the functions of the State, cannot be equated with a government department and if they have an independent status distinct from the State e.g. government companies and public undertakings though for the purpose of enforcing fundamental rights, they could be held to be State ^[16].

¹⁰ Concise Oxford English Dictionary, 10th Edition.

¹¹ Rajasthan State Electricity Board v. Mohanlal, AIR 1967 SC 1857(1861-63); Railway Board v. Observer Publications Private Limited, AIR 1972 SC 1792.

¹² R.D. Shetty v. I.A.A.I, AIR 1979 SC 1628(1638); State of Punjab v. Raja Ram, AIR 1981 SC 1694.

¹³ Som Prakash Rekhi v. Union of India, AIR 1981 SC 212; Tejender Singh v. B.P.C., AIR 1987 SC 51

¹⁴ Bidi Supply Co.v. Union of India, AIR 1956 SC 479.

¹⁵ State of Punjab v. Raja Ram, AIR 1981 SC 1694, not a Government Department, Steel Authority of India Ltd. V. Sri. Ambica Mills Ltd. AIR 1998 SC 418, following S.L. Agarwal (Dr.) v. G.M. Hindustan Steel Ltd, AIR 1970 SC 1150 and Western Coal Fields Ltd. Special Area Development Authority, AIR 1982 SC 697.

¹⁶ Mohd. Hadi Raza v. State of Bihar, (1998) 5 SCC 91.

In determining whether a corporation or a Government Company^[17] or a private body is an instrumentality or agency of the State, the following tests would be applicable:^[18]

1. Whether the entire share capital is held by the Government.
2. Whether the corporation enjoys monopoly status conferred by the State.
3. Whether the Functions of the corporation are governmental functions or functions closely related thereto.
4. If a department of the government has been transferred to the corporation.
5. The volume of financial assistance received from the State^[19].
6. The quantum of State Control^[20].
7. Whether any statutory duties are imposed upon the corporation^[21].
8. The character of the corporation may change with respect to its different functions^[22].

Any private educational institution cannot become the instrumentality of the State just because of the reason that it received the recognition or affiliation from the State^[23].

Regarding Judiciary it can be said that while the inclusive definition of the State includes judiciary^[24], in some earlier cases, it was observed that a judicial order could not possibly violate fundamental right^[25] and no remedy under article to can be enforced on the ground that a judicial order violated a fundamental right^[26].

Judicial Activism

Judicial activism has no statutory definition. It means the function of the judiciary representing its active role in promoting justice. It is the assumption of an active role on the

part of the judiciary^[27]. In the words of Justice J.S.Verma, Judicial Activism must necessarily mean “the active process of implementation of the rule of law, essential for the preservation of a functional democracy”.

The judiciary operates as a mechanism for correction and judicial activism serves as strong trendsetter to correct as far as possible, malfunctioning in violation of the Constitutional mandates and to stimulate the State organs to function in the right direction. Balanced judicial activism is necessary for establishing the rule of law in a welfare state^[28].

In a series of cases like *S.P. Gupta v. Union of India*^[29], The Supreme Court through public interest litigation, has liberalized the *locus standi* and inspired the public spirited citizens to invite judicial intervention against abuse of power or misuse of power or inaction of the government. The Apex Court has come to the rescue a grossly under –paid workers^[30], bonded labour,^[31] prisoner,^[32] pavement dwellers^[33], under-trial detainees,^[34] inmates of protection homes,^[35] Victims of Bhopal Gas disaster^[36] and many other cases from time to time.

The Courts through judicial activism are encroaching upon the exclusive domain of the other instrumentalities because the ultimate goal of the Court is to render justice. It is the primary duty of the executive to provide a fair and just government. It is not for the Courts to function as an extended arm of the executive^[37].

Judicial activism is not just a matter of serial affirmation of judicial power over other domains and instrumentalities of State power; it is as much a narrative of evolution of new constitutional culture of power^[38].

Recent Important Judgements

In the course of time, the Supreme Court has been expanding the horizon of the term “other authority” in article 12. A large number of bodies statutory and non-statutory, have been held to be ‘authorities’ for the purpose of article 12. Even if the entire share capital of a company is subs cribbed by the government, it cannot yet be treated as a government department. The company has its own corporate personality distinct from the government. But such a government company can still be treated as an authority under article 12^[39]. Government Companies, such as Bharat Earth Movers

¹⁷ Central Inland Water Corporation v. Brojo Nath Ganguly, AIR 1986 SC 1571, 24, 69; Bhandari O.P. v. I.T.D.C., AIR 1987 SC 111.

¹⁸ Central Inland Water Corporation v. Brojo Nath Ganguly, AIR 1986 SC 1571, 24, 69; Bhandari O.P. v. I.T.D.C., AIR 1987 SC 111. Ajay Hasia v. Khalid Mujib Sehravardy, AIR 1981 SC 487 (496); LIC v. Escorts, AIR 1986 SC 1370; Gujarat State Financial Corporation v. Lotus Hotels Pvt. Ltd., AIR 1987 SC 848; Kalra A.L. v. P & E Corporation, AIR 1984 SC 1361.

¹⁹ Manmohan Singh v. Commr. U.T. Chandigarh, AIR 1985 SC 364; Workmen Food Corporation v. Food Corporation of India, AIR 1985 SC 670; Ganapati national Middle School v. M. Durai Kannan, AIR 1996 SC 2803.

²⁰ Manmohan Singh v. Commr. U.T. Chandigarh, AIR 1985 SC 364; Workmen Food Corporation v. Food Corporation of India, AIR 1985 SC 670.

²¹ Ajay Hasia v. Khalid Mujib, AIR 1981 SC 487(496); LIC v. Escorts, AIR 1986 SC 1370; Gujarat State Financial Corporation v. Lotus Hotels Pvt. Ltd., AIR 1983 SC 848; Kalra A.L. v. P. & E. Corporation AIR 1984 SC 1361.

²² M.C. Mehta v. Union of India, AIR 1987 SC 1086; LIC v. Escorts, AIR 1986 SC 1370.

²³ *Unnikrishnan J.P. v. State of A.P.*, AIR 1993 SC 2178.

²⁴ *Budhan choudhury v. State of Bihar*, AIR 1955 SC 191.

²⁵ *Amirabbas Abbasi Sehabzada Saiyed Muhammed v. State of M.B.* AIR 1960 SC

²⁶ *Ujjam Bai v. State of U.P.* AIR 1962 SC 1621; *Antulay, A.R. v. Nayak, R.S.* AIR 1988 SC 1531.

²⁷ Chaterji, Susanta, “For Public Administration: is judicial activism Really deterrent to legislative anarchy and executive tyranny?”, The Administrator Volume XLII, April-June 1997, at 9,11.

²⁸ Bhattacharjee, G.R. “Judicial Activism: Its message for administrator”. *The Administrator*,”Volume XLII April-June 1997, at 31,32.

²⁹ AIR 1982 SC 149.

³⁰ *People’s Union for Democratic Right v. Union of India*, AIR 1982 SC 1473.

³¹ *Bandhua Mukti Morcha v. Union of India*, AIR 1984 SC 802.

³² *Sunil Batra v. Delhi Administration*, AIR 1978 SC 1675.

³³ *Olga Tellis v. Bombay Municipal Corporation*, (1985)3 SCC 545.

³⁴ *Hussainara Khatun v. State of Bihar*, AIR 1979 SC 1360.

³⁵ *Upendra Baxi v. State of U.P.*, (1983)2 SCC 308; (1986) 4 SCC 106.

³⁶ *Union Carbide Corporation v. Union of India*, (1991) 4 SCC 584.

³⁷ Palkhiwala, Nani, “Role of Judiciary; Government by the Judiciary “. CMLJ, Vol. 31, October- December 1995 at 193.

³⁸ Prof. U. Baxi, Preface to Sathe, S.P., *Judicial activism in India; Transgressing Borders and Enforcing limits*, Oxford University Press, 2005 edition, at xvi

³⁹ *Hindustan Steel Works Construction Ltd. V. State of Kerala*, AIR 1997 SC 2275; *Steel Authority of India Ltd. V. Sri. Ambica Mills Ltd.*, AIR 1998 SC 418.

Ltd., Indian Telephone Industries Ltd., in which the government holds 51% share capital, and which are subject to government control have been held to be “other authorities” under article 12 of the Constitution of India ^[40].

In *U.P. State Coop. Land Development Bank Ltd. V. Chandra Bhan Dubey* ^[41], the Court held that, U.P. State Cooperative land development Bank Ltd. Was a cooperative society but it was under the control of the State Government and was an extended arm of the government. So it was an instrumentality of the State. In *Biman Kishore Bose v. United India Insurance Co. Ltd.* ^[42] The Court was of the opinion that a company enjoying the monopoly of carrying on a business under an Act of Legislature is an authority under article 12. Mysore paper mills, a government company was held to be an instrumentality of the State Government and therefore decided as an authority under article 12 ^[43].

The expansive interpretation of the expression “other authorities” in article 12 is furnished by the recent decision of the Supreme Court in *Pradeep Kumar Biswas v. Indian Institute of Chemical Biology* ^[44]. In this case The Supreme Court has overruled *Sabhajit Tewary* ^[45] and held that the Council of Scientific and Industrial Research is an authority under article 12.

In *Zee Telefilms Ltd. V. Union of India* ^[46], a five-judges bench of the Supreme Court examined the question whether BCCI comes under the definition of the State or not. It was contended before the Court that the BCCI should be treated as “State” because it controlled and regulated cricketers right guaranteed under article 19 (1) (g). Rejecting the contention outright, the Court held that this right could be claimed only against the State. Article 19(1) (g) applied only when it was established that the regulating authority in question fell within the scope of ‘State’ under article 12.

In *Punjab Water Supply and Sewerage Board v. Ranjodh Singh* ^[47] the Court held that the Punjab Water Supply and Sewerage Board was a ‘State’ as per the definition given under the Constitution of India. The statutory bodies are bound to apply the rules of recruitment mentioned under statutory rules. Therefore this body is bound to follow the constitutional scheme of equality.

In the year 2014 the Supreme Court observed in *K.K. Saxena v. International Commission on Irrigation and Drainage (ICID)* case that it was not discharging any public duty. ICID is a private body which has no State funding. Functions are voluntary in nature and no statutory duty was imposed on that body. Hence it held not to be the ‘State’ or ‘other authority’ as per article 12 of the Constitution.

Conclusion

Thus, the State cannot exist without individuals as the king cannot rule without his subjects. It is for the protection of the

interests of the individual that the State came into existence. The State, being a sovereign authority, may any time turn into tyrannical way and the basic rights of the individual may be endangered and under this circumstances the fundamental rights are the only weapon in the hands of the individual through which they can seek justice against arbitrariness of the State. Therefore, it is suggested that more and more private institutions and other bodies should be included within the sweep of article 12. Lastly, I would like to conclude that a number of judicial decisions by the Supreme Court on fundamental rights have established that the Court have looked at the Constitution as a living document and have gone beyond the literal interpretation of words occurring in the specific articles on fundamental rights. The Constitution is drafted not only to take care of the present but also to protect the future of a nation.

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⁴⁰ *M. kumar v. Earth Movers Ltd.*, AIR 1999 Kant 343.

⁴¹ AIR 1999 SC 753.

⁴² (2001) 6 SCC 477.

⁴³ *Mysore Paper Mills Ltd. V. The Mysore Paper Mills Officer’s Association*, AIR 2002 SC 609.

⁴⁴ (2002) 5 SCC 111.

⁴⁵ AIR 1975 SC 1329.

⁴⁶ (2005) 4 SCC 649

⁴⁷ AIR 2007 SC 1082