

Need to Extend the Scope of Article 12

Vivek Sharma¹ & Monika Maheshwari²

¹Assistant Professor of Law, SRMS College of Law, Bareilly, UP

²AMO, Food & civil Supply Department, UP

Abstract

From Independence India as a state has covered a long distance from policing state to welfare state. With this development, significance of the definition under Article 12 has increased many folds. Vignette of State under Article 12 has been deciphered differently by courts as per the requirement of time, especially the last line ‘Authority within the territory of India or under the control of the Government of India’. Judiciary Interpreted, that it covers not only the department of state also various agencies, Instrumentality of the state through which the state is performing welfare activities for its citizens. An opinion of extending further the scope of this article has increased in recent times. Few questions are to be answered before extending the ambit of State. Doubt prevails, whether Judiciary falls within the scope of words of Art. 12? Sentiments are raising that, various sports governing bodies that perform almost similar functions which are expected from state must be brought within the purview of the state. With the opening up of higher education for the private sector, private Universities have been created under statutes, should we extend the meaning of state to cover these universities. This paper is an endeavor to answer these questions comprehensively.

Keywords: Definition_of State, Agency & Instrumentality of state, Judiciary as State, Private Bodies as a state, University as a state.

1. Introduction

Dr. Bhim Rao Ambedkar declared Art. 32 as heart & soul of the Indian Constitution but we can't ignore the significance of Art. 12¹. If Art. 32 enlighten us, about a forum where Fundamental Rights can be claimed than Art.12 throws light on the question, against whom fundamental rights can be claimed. Without reference to Article 12, Articles .32, 226 will become insignificant to give remedy for the breach of the fundamental right. Definition of state is tied up with writ jurisdiction of Supreme court and High court with a golden thread which strengthens, empowers individuals to stand in front of court against violation of their rights.

Definition of State as given under Article 12, envelope Union Parliament, State Legislature, Union and State Executives, local authorities², Other Authorities within the territory of India, and working under the control of the government of India. This definition open with the phrase 'state shall Include' which means the definition is an inclusive one. The Principle of interpretation says inclusive definitions are not exhaustive³, but merely illustrative one, many other things may fall in the definition. So without taking the help of Article 368⁴ there is scope to extend the meaning of state by the judiciary.

We know after World War II worldwide the concept of State has changed from a policing state to a welfare state. India also experienced similar conversion. Indian Judiciary has interpreted Article12 with changing demands. When India got freedom, various statutory authorities were created to perform welfare activities. Such statutory authorities were declared a state by Supreme Court⁵ for reason firstly there was a likelihood of breach of fundamental rights of the Individuals in their functioning. Secondly, its state was functioning, in the disguise of these statutory authorities. Further, when State being welfare state started performing commercial activities by the creation of the instrumentality of state other than the statutory authority, Supreme Court developed a formula to hold such

¹ Original Draft Constitution, Article 7

² Naziruddin Ahamad, honorable Member of the constituent assembly proposed an amendment to remove these words and insert a clause 2 in the same article reading "provision of this part, so far as may be, shall apply to local and other authority.

³ Syed A. Rouf, honorable member of the constituent assembly, wanted to make this definition exhaustive one rather illustrative.

⁴ Amending power of the parliament

⁵ Sukhdev Singh V. Bhagat Ram 1975 SCR 619

authority to be agency, Instrumentality of State⁶ hence falls within the purview of Article 12. While extending the scope of state definition to such authority Supreme court emphasizes two aspects, one these Instrumentalities are merely sham, in reality, its state only who is working in disguise. Two the natures of functions performed by these instrumentalities are similar to those of the welfare state. By applying these principles Supreme Court has held even a society registered under The Registration Act can be regarded as state⁷. Still, doubts prevail on whether Judiciary, Private Bodies can be regarded as state or not.

2. Judiciary as State

According to the worldwide accepted definition in political science, the state has three essential organs Legislature, Executive, and Judiciary, this view is also widely endorsed by Jurist. From the ancient to the modern era, the existence of the state cannot be presumed without a Justice delivery system. Judiciary and States are inseparable today. Providing justice to its subject is considered to be an important function of the state. The existence of the Justice delivery system makes the difference between state and group of dacoits⁸.

Art. 12 of the Indian Constitution define State in clear terms, the definition includes both legislature and executive, and surprisingly the word ‘Judiciary’ is not given any place in this Article. Were framers of the constitution ignorant to the position prevailing in the world or they deliberately omitted the word judiciary from the definition of the state. On this question, Constitutional Assembly Debates⁹ does not throw any light. We can only surmise, perhaps framers of the constitution never thought that the Judiciary bestowed with the responsibility of protector of fundamental right will ever start breaching people’s fundamental rights through its judgments. Even during the British period when courts were having British judges’ judgments of higher courts never been doubted, hence framers of the constitution didn’t feel the need to tame the judiciary for breach of Fundamental Rights.

⁶ RD Shetty v. International Airport Authority 19753 SCR

⁷ Ajay Hasia V Khalid Mujib AIR 1981SC 487

⁸ This thought is originally of Prof. Shaukat, Ali Head of the department of law MJP Rohailkhand University, he shares it with his students during a lecture.

⁹ 25th November 1948, CAD Volume II

Another reason may be the authority which has been entrusted with work can't be doubted for the same.

Various parts of the Indian Constitution, tell us about various organs of the Indian state, their functions, powers, and duties, also consist of provisions related to Judiciary¹⁰. This eludes that the framers of the constitution were having no reason for suspecting the judiciary as an organ of the state.

There is no doubt the judiciary performs executive functions¹¹ and legislative¹² function, to that extent it can be regarded as a state. The real controversy is when Judiciary performing the judicial function it can be regarded as a state. Under Article 32 writs of Certiorari and Prohibition can be issued against the court also. This leaves the impression that in the definition of the state Judiciary must be included. In the United States, it is well established that the state Includes Judiciary.¹³ In the UK where sovereignty lies in parliament until 2009 the judiciary was part of the House of Lords, hence leave no doubt that the Judiciary is part of the state.

It's tough to digest that legislature being state cannot violate Fundamental Right and Judiciary being the custodian of an individual's rights is not state hence can breach Fundamental right. It's also tough to believe that Judiciary can't violate part III while functioning under Articles 145, 146¹⁴ but cannot do so while performing the Judicial Function. Let's consider few questions a court which refuses a person being untouchable entry to his court or a Court which compel an accused to answer incriminating questions, should not be answerable, for breach of Fundamental Rights Articles 17 and Art. 20 (3) respectively. Supreme Court in various Judgments¹⁵ has shown its reluctance to directly bring courts under the definition of the state. An Interesting trend has been seen Supreme Court has no hesitation to accept the writ of certiorari and prohibition against subordinate courts but when the question is of accountability of Higher Judiciary it has the different

¹⁰ Chapter iv constitution of India

¹¹ Under Art. 146, Supreme Court employee's welfare association v. Union of India AIR 1990 SC 334

¹² Under Article 145, Prem Chand V Excise Commissioner AIR 1963 SC 996

¹³ The constitution of the United states of America, Analysis and Interpretation, 4th edi. p1462

¹⁴ Administrative power of the supreme court.

¹⁵ A R Antulay V R S Nayak, Naresh Mirajkar v state of Maharashtra

view¹⁶. Higher Judiciary cannot be considered to be infallible. Though Supreme Court reviews its judgment¹⁷ but in practice very few judgments are reversed are very few. There are two reasons for that first review petition lies to the same judge/bench, who are reluctant to accept anything against their intellect reflected in Judgment. Supreme Court while recognizing curative petition¹⁸ has accepted that even the apex court is not infallible but so far, the fate of such petition¹⁹ is the same as of review petitions. All most in Similar fashion High court has entertained writ of Certiorari, Prohibition against subordinate courts but reluctant to respond against themselves. SC and HC are tactfully giving remedies to petitioners without answering the question, Judiciary is state or not.

Fear of Including the Judiciary as a state is, even the Judgment of the apex court can be challenged, and there will be no ending of litigation. Can we in the name of the Principle of finality allow higher Judiciary to continue to cross the Constitutional limit which has been defined in a plethora of judgment by the judiciary itself for other organs of the state? This fear seems to be without support as it can be mitigated by importing the rule of res-judicata in cases decided by the Supreme Court with exception of review and curative petition.

An institution that is bestowed with the responsibility to prevent other organs of the state from violation of fundamental rights cannot be given free hand to do the same. Apex court cannot be made so feeble that it cannot rectify its error. An effective review of the judgments will be available if the judiciary is held to be a state. For oblivious reasons so far, judiciary is reluctant to declare themselves as a state under Art. 12. What is opaque must become crystal clear, a constitutional amendment inserting 'Union and State Judiciary' in Article 12. has becomes imperative.

3. Need to Include Private Bodies under Art. 12

¹⁶ Prem Chandra Garg v. Exice Commissioner UP [1963] Supp. 1 S.C.R. 885,

¹⁷ Art. 377 of Constitution of India

¹⁸ Rupa Hurra v. Ashok Hurra AIR 2002 SC 1771

¹⁹ Re coloring the colored walls of constitution; Futile judicial exercise of creating Curative petition Dhruv Tiwari and Nand Vardhan Narayan ocs.manupatra.in/newsline/articles/Upload/D62B3121-7DF5-404F-8A0A-3F199FF29B38.2-e_constitution.pdf as accessed on 16th feb 2019

Independent India in the first phase of economic development experienced, the transformation of a policing state into a welfare state and also formation of instrumentality, agency for delivering welfare objectives, almost all of them were declared state by Judiciary, whenever they were in the position to breach citizens Fundamental rights. In the second phase of economic development (started from 1991) many private bodies erupted, which are performing the same function as of being performed by instrumentality, an agency created through statute or otherwise were executing in the first phase of economic development. Just like statutory corporations, instrumentality these private bodies are also in the position to play with citizen's fundamental rights. This led to the emergence of thought if instrumentality or agency created in the first phase was state, functioning in the same field, with almost similar power to private bodies in the second phase than why not the definition of Art. 12 should extend to cover private bodies. Why the burden of complying with part III of the Indian constitution be only on the shoulder of the state and its Instrumentality, why the private individuals should be put in an advantageous position. When State and its instrumentality is in commercial rivalry why state and its instrumentality function with downsize, which are not available to private bodies. Initially, Supreme Court expressed its concern to bring private bodies²⁰ under the purview of Art. 12, but so far not much has changed. Bringing private bodies under Article 12 will certainly mitigate cleavage between state and private organizations, this may have wide repercussions. A private Individual doesn't owe constitutional duty towards other individuals but certainly under statutory obligations. Similarly, private organizations cannot be bound by similar obligations as of state.

Private University: Very first time question of a university as the state emerged before the court in *University of Madras v. Shanta Bai*²¹ where Madras High court after applying the rule of "edjusdem generis" held other authority means the authority which have sovereign function and University of Madras is not having sovereign power hence university is not state.. It was held that the university is not covered in expression other authority. Subsequently, Supreme Court held in Art 12 no Separate genus or class being

²⁰ M C Mehta v. Union of India (1987)

²¹ AIR 1954 MAD. 67

formed hence no question of applying the rule of edjusdem generis²² finally, Patna High court held that university is state²³. If we go with the reason all instrumentalities or agency of the state are also state and extend it to private bodies performing the same functions which till yesterday supposed to be a function of the state, then it will be against the well-established principle of English law, where the writ of mandamus is confined only to public authorities to compel for public duty which is created by the statute or their powers and duties are defined by the statute. But it is interesting to note that writ jurisdiction under Art.226 does not create any bar for issuing writ against private bodies performing public duty²⁴. Supreme Court recently²⁵ accepted age-old principle of English law that to be amenable to writ jurisdiction, authority duties and powers must be fix by statute. It held Deemed University is state on the reason that once an educational institute is declared 'Deemed University' its function is to impart higher education (a function till yesterday was supposed to be function of the state) a public function. Once an educational institute is declared deemed university necessary consequences will be its power and function will be governed by the UGC Act.

It is submitted not only a state but every person should respect others fundamental rights, but legal position before Janet Jeypaul case cannot be amended on this premise. An abrupt vicissitude in law is very rare and Supreme Court while declaring Deemed University state has ignored the difference between Art. 32, 226. The Power of the high court under 226 is to issue writ not only against authority but also against a person. An accepted view for Art.226 cannot be applied for Art.32. Moreover, reason is given that once an institute is declared deemed university is being governed by the statute hence the state is completely wrong, because a company registered under the Company Act, cannot be regarded a state merely its power, the function is being regulated by an Act. Almost all private bodies are being regulated by some statute or by authority created under any statute.

²² Ujjamabai v. state of UP AIR 1962 SC 1621

²³ Umesh Singh v. V N Singh AIR 1968 Pat 3

²⁴ [Praga Tools Corporation v. Shri C.A. Imanual & Ors.](#), [1969] 3 SCR 773; [Anandi Mukta Sadguru Shree Mukta v. V.R. Rudani](#) 1989 AIR 1607

²⁵ Janet Jeypaul v. SRM university AIR 2016 SC 73

Sports regulating bodies: In India, most of the regulating bodies of sports are non-government bodies. Their functions are the same as of state, public nature they control, regulate sports, sports events in India, represent India at the international level and send their selected team in international sports events. Can we extend the concept of agency, the instrumentality of state to them? Delhi High Court in case²⁶ has held that the nature of duty performed by BCCI (Board of Cricket Control of India) certainly a public duty which is of widest general public interest, modern education policy regard sports as essential for good education and held writ jurisdiction is maintainable against authority which is neither state instrumentality nor agency²⁷. Though in another case²⁸ the same court without answering the question of BCCI as an instrumentality, the agency declared writ against BCCI is maintainable.

Supreme court held²⁹ that BCCI is fulfilling the aspirations of millions of people, hence duty- bound to practice fairness in all its activities. In the case of sports bodies Supreme Court's³⁰ approach is different from accepting deemed university as a state it rejected the plea of holding BCCI as a state. Supreme Court In the matter of BCCI taking the help of reasoning of another case³¹ held mere regulatory control under the statute would not serve to make a body state. The Difference here with Deemed University is imparting higher education was always supposed to function of the state but controlling sports, organizing sports events was never supposed to function of state. As there is a difference between the function of the state and sovereign function, Sovereign Function is supposed to be limited but the function of the state is not limited to policing function but to welfare activities.

Supreme court in another case ³²has now settled controversy that High Court under Art. 226 has writ jurisdiction against national sports federations but the doubts related to Art. 32 still prevail.

²⁶ Ajay Jadeja v. Union of India 95(2002) DLT 14

²⁷ Since court ordered this must not work as precedent on the reason petition was withdrawn and matter was settled by arbitration.

²⁸ Rahul Mehra v. Union of India

²⁹ BCCI v. Netaji Cricket Club

³⁰ Zee telefilms v. union of India AiR 2005 SC 2677

³¹ Pradeep Kumar Biswas v. Indian Institute of chemical biology (2002) 5 SCC III

³² Board of cricket Control of India v. Cricket association of Bihar, AIR 2015 SC 3194

4. Conclusion

In law nothing is perennial, the mutation is inevitable, disparaging the old legal thinking and ushering new one may seem to be clumsy at a particular time. It's too early to bring Private bodies under the purview of Art. 12, but accepting high court jurisdiction under Art, 226 against private bodies is embarking of long toil. When authorities which govern Private bodies are subjected to part III of the constitution than why not private bodies be subjected to the same on this reasoning Deemed university has been held state but to cover sports bodies thought has to develop that sport is equally important as of education. Currently not a myriad of people approves this view, seasoned Judges meticulously; deliberately may bring change at the right time.

On the question of including the judiciary within Art 12, it seems time has ripened if the judiciary is reluctant to cover itself under state definition than legislature must act by constitutional amendment. When neither judiciary nor legislature is showing interest in bringing change it means changes are either not accepted or they are against the set position of law, this supposition is away from the truth. Judiciary very cleverly without going into the question of inclusion into the definition of the state is accepting cases against judiciary for violating Fundamental Rights. The Inclusion of the Judiciary in the definition of state will mean giving effect to prevailing practices this will lead to transparency in the judiciary, higher court in particular.