

CONSTITUTIONAL LAW-I

PROJECT ON:

The term "other authorities" under Article 12 of the Constitution and state whether Judiciary is considered as a State under Article 12

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CHAPTER 1- INTRODUCTION

The Constitution of India had followed the U.S. precedent and enacted Fundamental Rights in the Constitution itself. The United States Constitution has defined their legislative and executive powers in two Articles, which makes it easier to define their correlation. However, Indian Constitution being an elaborative one, it is difficult to correlate the legislative and executive powers because those powers are to be found in widely separated parts of our Constitution.

Whilst enacting the Fundamental Rights in Part-III of our Constitution, the founding fathers showed that they had the will, and were ready to adopt the means to confer legally enforceable fundamental rights. The question that was required to be answered is as to against whom were the fundamental rights to be enforced? Broadly speaking, against “the State” not as ordinarily understood but as widely defined under Article 12 of the Constitution of India.¹

¹¹ H.M. Seervai, Constitutional Law of India: A critical commentary, 4th Edition, Universal Law Publishing Co. Pvt. Ltd., Vol.1, Pg. No. 349

CHAPTER 2- MEANING OF STATE UNDER ARTICLE 12 OF THE CONSTITUTION OF INDIA

The term “State” is defined under Article 12 of Part III (Fundamental Rights) of the Constitution of India.

It states that:

In this Part, unless the context otherwise requires, “the State” includes the Government and Parliament of India and the Government and the Legislature of each States and all local or other authorities within the territory of India or under the control of the Government of India.²

The definition in Article 12 is only for the purpose of application of the provisions contained in Part III. Hence, even though a body of persons may not constitute ‘State’ within the instant definition, a writ under Article 226 may lie against it on non constitutional grounds or on grounds of contravention of some provision of the Constitution outside Part III, e.g., where such body has a public duty to perform or where its acts are supported by the State or public officials.³

² D.J. De’s Constitution of India, Asia Law House, Vol. 1, Pg. No. 133

³ Durga Das Basu, Commentary on Constitution of india, 8th Edition 2007, Wadwa Nagpur, Vol. 1, Pg. No. 635, refer: Kartick v. W.B.S.I.C., AIR 1967 Cal 231 (234)

In *Ujjain Bai v. State of U.P.*⁴, the Supreme Court observed that Article 12 winds up the list of authorities falling within the definition by referring to “other authorities” within the territory of India which cannot, obviously, be read as ejusdem generis with either the Government or the Legislature or Local authorities. The word “State” is of wide amplitude and capable of comprehending every authority created under the statute and functioning within the territory of India. There is no characterization of the nature of authority set up under a statute for the purpose of administering laws enacted by the Parliament or by the State including those vested with the duty to make decisions in order to implement those laws.

The preponderant considerations for pronouncing an entity as State agency or instrumentality are: (1) financial resources of the state being the Chief finding source; (2) functional character being governmental in essence; (3) plenary control residing in government; (4) prior history of the same activity having been carried on by government and made over to the new body; (5) some element of authority or command. Whether the legal person is a corporation created by a statute, as distinguished from under a statute, is not an important criterion although it may be an indicium.⁵

⁴ AIR 1962 SC 1621

⁵ Som Prakash v. Union of India, AIR 1981 SC 212 (para 52) relying on Ramana v. International Airport Authority of India, AIR 1979 SC 1628

CHAPTER 3- SCOPE OF ARTICLE 12

When the body is financially, functionally and administratively dominated by or under the control of the government and such control is particular to the body and is pervasive, then it will be “State” within Article 12. If the control is merely regulatory, it will not be a State.⁶

➤ UNLESS THE CONTEXT OTHERWISE REQUIRES

The Context of a provision in Part III may exclude the meaning given by Article 12 to the word ‘State’. For instance, the expression ‘security of the State’ I Article 19(2) refers not to the persons carrying on the administration of the State but to the State as organized political society.

➤ INCLUDES

This word indicates that the definition is not exhaustive. Hence, even though the definition expressly mentions only the Government and the Legislature, there might be other instrumentalities of State Action within the sweep of the definition. The non mention of the Judiciary does not, therefore, necessarily indicate that the courts are intended to be excluded from the definition.⁷

⁶ Pradeep Kumar Biswas v. Union of India, (2002) 5 SCC 111 : 2002 (3) SCR 100; Durga Das Basu, Commentary on Constitution of India, 8th Edition 2007, Wadwa Nagpur, Vol. 1, Pg. No. 638

⁷ Ujjam` Bai v. State of U.P., (1963) 1 SCR 778 (968-9); ibid

The author is definitely of the opinion that by reason of the word ‘includes’ the definition of Article 12 enables the Indian Supreme Court to include within the definition all the three organs of the State (executive, legislative and judicial) as well as all other authorities which have been included within the concept of State action in U.S.A., and that any narrowing down of the ambit of the definition would be defeating the object of inserting the definition of Article 12.

➤ **AUTHORITY**

Literally ‘authority’ means a person or body exercising power or having a legal right to command and be obeyed. An ‘Authority’ is a group of persons with official responsibility for a particular area of activity and having a moral or legal right or ability to control others. If a particular cooperative society can be characterized as a “State” under Article 12, it would also be “an authority” within the meaning of Article 226 of the Constitution.⁸

“Authority” means a public administrative agency or corporation having quasi governmental powers and authorized to administer a revenue producing public enterprise. It is wide enough to include all bodies created by a statute on which powers are conferred to carry out governmental or quasi- governmental functions.⁹ “Authority” in law belongs to the province of power.

⁸ K. Morappan v. Dy. Registrar of Co-operative Society; (2006) 4 MLJ 641. Refer: Durga Das Basu, Commentary on Constitution of India, 8th Edition 2007, Wadwa Nagpur, Vol. 1, Pg. No. 641

⁹ Rajasthan State Electricity Board v. Mohal Lal, AIR 1967 SC 1857

The word “State” and “Authority” used in Article 12 remain among “the great generalities of the Constitution” the content of which has been and continues to be applied by Courts from time to time.¹⁰

➤ LOCAL AUTHORITIES WITHIN THE TERRITORY OF INDIA

Local authorities are under the exclusive control of the States, by virtue of entry 5 of List II of the 7th Schedule. That entry contains a list of some local authorities. This expression will, therefore, include a Municipal Committee¹¹; a Panchayat¹²; a Port Trust¹³; Municipality is a “State” within the meaning of Article 12¹⁴. But that does not mean that the authorities are State Government or Central Government and there is distinction between State and Government.

In **Union of India v/s R.C.Jain**¹⁵, to be considered a “local authority”, an authority must fulfill the following tests-

- 1) Separate legal existence.
- 2) Function in a defined area.
- 3) Has power to raise funds.
- 4) Enjoys autonomy.
- 5) Entrusted by a statute with functions which are usually entrusted to municipalities.

¹⁰ Pradeep Kumar Biswas v. Indian Institute of Chemical Biology, (2002) 5 SCC 111 (Supra)

¹¹ State of Gujarat v. Shantilal, AIR 1969 SC 634 (643)

¹² Ajit Singh v. State of Punjab, AIR 1967 SC 856 (866)

¹³ R.I. Handicraft Manufacturing Association v. Kottayam Municipality, AIR 2000 Ker 30

¹⁴ Natwarlal Khodidas Parmar v. Dist. Panchayat, Jamnagar, AIR 1990 Guj. 142

¹⁵ 1981 SCR (2) 854

➤ OTHER AUTHORITIES

It refers to authorities other than those of local self- government, who have power to make rules, regulations, etc. having the force of law. “Instrumentality” and “agency” are the two terms, which to some extent overlap in their meaning. The basic and essential distinction between an “instrumentality or agency” of the State and “other authorities” has to be borne in mind. An ‘Authority’ must be authority sui juris within meaning of expression “other authorities” under Article 12. A juridical entity, though an authority may also ratify the list of being an instrumentality or agency of the state in which event such authority may be held to be an instrumentality or agency of State, but not vice versa.¹⁶

In the case of **R.D.Shetty v/s International Airport Authority**¹⁷, the Court laid down five tests to be considered “other authority”:

- 1) Entire share capital is owned or managed by State.
- 2) Enjoys monopoly status.
- 3) Department of Government is transferred to Corporation.
- 4) Functional character governmental in essence.
- 5) Deep and pervasive State control.
- 6) Object of Authority

¹⁶ Pradeep Kumar Biswas v. Indian Institute of Chemical Biology, (2002) 5 SCC 111 (para 97)

¹⁷ 1979 SCR (3)1014

In the case of **Ajay Hasia v. Khalid Mujib Sehravardi**¹⁸

It has been held that whether a statutory body falling within the purview of the expression “other authorities” is to be considered differently. In the opinion of minority, the tests laid down in this case are relevant only for the purpose of determining whether an entity is an “instrumentality or agency of the State”.

In **Electricity Board, Rajasthan v. Mohan Lal**¹⁹,

The Supreme Court held that the expression “other authorities” is wide enough to include all authorities created by the Constitution or statute on whom the powers are conferred by Law. It is not necessary that the statutory authority should be engaged in performing governmental or sovereign function.

In **U.P. Warehousing Corporation v. Vijai Narain**²⁰,

It was held that the U.P. Warehousing Corporation which was constituted under a statute and owned and controlled by the Government was an agency or instrumentality of the Government and therefore “the State” within the meaning of Article 12.

¹⁸ (1981) 1 SCC 722; refer H.K. Saharay’s Constitution of India, An Analytical approach, 4th Edition, Eastern Law House, Pg. No. 56

¹⁹ AIR 1967 SC 1857

²⁰ (1980) 3 SCC 459

In *Ajay Hasia v. Khalid Mujib*²¹,

It has been held that a Society registered under the Societies Registration Act, 1898, is an agency or “Instrumentality of the State” and hence a State within the meaning of Article 12.\

In *Sheela Barse v. Secretary, Children’s Aid Society*²²,

The Court held that Central Inland Water Transport Corporation, a Government Company which was wholly owned by the Central Government and managed by the Chairman and Board of Directors appointed and removable by Central Government, was the “State” within the meaning of Article 12 and therefore an instrumentality of the State.

In *Sukhdev Singh v. Bhagatram*²³,

The Supreme Court held that Oil and Natural Gas Commission, Life Insurance Corporation and Industrial Finance Corporation are authorities within the meaning of Article 12.

In *Som Prakash v. Union of India*²⁴

The Supreme Court held that a Government company (Bharat Petroleum Corporation) fell within the meaning of the expression ‘the State’ used in Article 12.

²¹ AIR 1981 SC 480 at p.489

²² (1987) 3 SCC 395

²³ AIR 1975 SC 1331

²⁴ AIR 1981 SC 212

The expression 'other authorities' will include all constitutional or statutory authorities on whom powers are conferred for the purpose of promoting economic activities. It is not only confined to to statutory corporations alone but may include a government company, a registered society, or bodies which have some nexus with the government.²⁵

However, the important question that was raised before the Court²⁶ was whether a private corporation fell within the ambit of Article 12. Unfortunately, the answer is yet to be decided.

In Tekraj Vasandi v. Union of India²⁷,

The Court held that "Institute of Constitutional and Parliamentary Studies", a society registered under the Societies Registration Act, 1860, is not a State within the meaning of Article 12. The Institute of Constitutional and Parliamentary Studies is neither an agency nor an instrumentality of the State. It is a voluntary organization.

²⁵ Dr. J.N. Pandey's The Constitution of India, 48th Edn., Central Law Agency, Pg. No. 62-63

²⁶ M.C. Mehta v. Union of India, (1987) 3 SCC 50, refer Dr. J.N. Pandey's The Constitution of India, 48th Edn., Central Law Agency, Pg. No. 64

²⁷ (1988) 1 SCC 236

CHAPTER 4- WHETHER “STATE” INCLUDES THE JUDICIARY

The definition of State under Article 12 of the Constitution does not explicitly mention the Judiciary. Hence, a significant amount of controversy surrounds its status vis-a-vis Part III of the Constitution. Bringing the Judiciary within the scope of Article 12 would mean that it is deemed capable of acting in contravention of Fundamental Rights. It is well established that in its non-judicial functions, the Judiciary does come within the meaning of State. However, challenging a judicial decision which has achieved finality, under the writ jurisdiction of superior courts on the basis of violation of fundamental rights, remains open to debate.²⁸

On the one hand, the Judiciary is the organ of the State that decides the contours of the Fundamental Rights. Their determination, of whether an act violates the same, can be right or wrong. If it is wrong, the judicial decision cannot ordinarily be said to be a violation of fundamental rights. If this were allowed, it would involve protracted and perhaps unnecessary litigation, for in every case, there is necessarily an unsatisfied party. On the other hand, not allowing a decision to be challenged could mean a grave miscarriage of justice, and go unheeded, merely because the fallibility of the Judiciary is not recognized.

The erroneous judgment of subordinate Court is subjected to judicial review by the superior courts and to that effect, unreasonable decisions of the Courts are subjected to the tests of Article 14 of the Constitution.

²⁸ Article by Kalyani Ramnath, guarding the guards: The Judiciary As State Within The Meaning Of Article 12 Of The Constitution

The Bombay High Court²⁹ expressed the view that the Judgment of the Court cannot be challenged for violation of Fundamental Rights.

However in the case of **Keshavan Iyenger v. State of Madras**³⁰, the Madras High Court held that equal protection clause of Article 14 applies to Judiciary with same force and spirit.

It is pertinent to note that the Supreme Court did not appear to be consistent as it decided in a case³¹ that guarantee of equal protection as provided under Article 14 of the Constitution extends to all the three organs of the State viz executive, legislative and judicial. The arbitrary and unreasonable judicial decisions are subjected to judicial review by the superior courts.

In the case of **Naresh v. State of Maharashtra**³²

The issue posed before the Supreme Court for consideration whether judiciary is covered by the expression 'State' in Article 12 of the Constitution. The Court held that the fundamental right is not infringed by the order of the Court and no writ can be issued to High Court.

²⁹ In *Ratilal v. State of Bombay*, AIR 1953 Bom 242

³⁰ AIR 1956 Mys 20

³¹ 1955 (1) SCR 1045

³² 1966 (3) SCR 744

However in yet another case³³, it was held that High Court Judge is as much a part of the State as the executive.

In **Rati Lal v. State of Bombay**³⁴, it was held that Judiciary is not State for the purpose of Article 12.

But Supreme Court in cases of **A.R. Antulay v. R.S. Nayak**³⁵ and **N. S. Mirajkar v/s State of Maharashtra**³⁶, it has been observed that when rule making power of Judiciary is concerned it is State but when exercise of judicial power is concerned it is not State.

In **Amirabbas v. State of M.B.**³⁷, the Court made the following observation:

“Denial of equality before the law or the equal protection of the laws can be claimed against executive or legislative process but not against the decision of a competent tribunal.”

³³ Budhan Chaudhary v. State of Bihar; 1955 SCR (1)1045

³⁴ AIR 1953 Bom 242

³⁵ 1988 SCR Supl. (1) 1

³⁶ 1966 SCR (3) 744

³⁷ (1960) 3 SCR 138 (142)

The scope of challenging a judicial decision on the ground of contravention of fundamental right is much narrower in India, for several reasons:

- 1) There being no 'Due Process' clause, there is no scope for challenging a judicial decision on a constitutional ground of unfairness
- 2) The decisions of the Supreme Court being binding upon all Courts within the territory of India [Art. 141], there is no scope for a decision of the Supreme Court being challenged as violative of a fundamental right. But there is no reason why the decision or order of a subordinate court shall not be open to be questioned on the ground that it contravenes a fundamental right.

In fact so far as the guarantee of equal protection in Article 14 is concerned, our Supreme Court, in the early case³⁸ held that any State action, executive, legislative or judicial, which contravenes Article 14, is void.

But the Supreme Court limited the application of Article 14 to judicial decisions by the qualification that they will hit by the Article only when they involved a 'willful and purposeful discrimination'.³⁹

³⁸ Budhan v. State of Bihar, AIR 1955 SC 191

³⁹ Referred Durga Das Basu, Commentary on Constitution of India, 8th Edition 2007, Wadwa Nagpur, Vol. 1, Pg. No. 662-664

However, In the landmark case of **Rupa Ashok Hurra v Ashok Huna**⁴⁰, the Constitution Bench of five judges examined whether a writ petition can be maintained under Article 32 to question the validity of a judgment of this Court after the review petition has been dismissed. Firstly, it was contended that there would be a re-examination of the case only where the judicial order was passed without jurisdiction, in violation of the principles of natural justice, in violation of fundamental rights or where there had been gross injustice, under the inherent jurisdiction of the Court. It was admitted that, in the rarest of rare cases, a petition under Article 32 could be entertained where even a review petition had been rejected. The "corrective jurisdiction" of the Court, it was argued, arose from those provisions of the Constitution conferring power on the Supreme Court such as Article 32 and Articles 129-40. Secondly, the remedy for the above rare cases was, since no appeal lies from the order of the Apex Court, an application under Article 32, if senior counsel were able to discern some permissible ground for the same. In this case, Justice Syed Shah Mohammed Quadri pointed out that Article 32 can be invoked only for the purpose of enforcing the fundamental rights conferred in Part III and that no judicial order passed by any superior court in judicial proceedings can be said to violate any of the fundamental rights, since superior courts of justice do not fall within the ambit of State or other authorities under Article 12 of the Constitution. The Court adopted an unusual unanimous approach by holding that even after exhausting the remedy of review under Article 137 of the Constitution, an aggrieved person might be provided with an opportunity to seek relief in cases of gross abuse of the process of the Court or gross miscarriage of justice, because the judgment of the

⁴⁰ (2002) 4 SCC 388

Supreme Court is final. It was held that the duty to do justice in these rarest of rare cases shall have to prevail over the policy of certainty of judgment.⁴¹

Several grounds were laid down whereby a "curative petition" could be entertained and a petitioner is entitled to relief *ex debito justitiae*. It could be used, for example, in cases of violation of principles of natural justice, where interested person is not a party to the lis and where in the proceedings a Judge failed to disclose his connection with the subject-matter or the parties giving scope for an apprehension of bias. The petitioner would have to specifically mention the grounds on which he was filing the curative petition.

The Supreme Court in **Ujjam Bai v. Union of India**⁴², held that a writ of *certiorari* could also lie to bodies which are under an obligation to act judicially or quasi judicially. Since such a writ lies, it follows that there are some fundamental rights which can be violated by a judge acting judicially in a court. Since the binding power of any judgment of the Supreme Court is based on the fact that it is backed by State which has the power and necessary resources to enforce, it would only be logical that the Judiciary itself be considered part of the State.

⁴¹ Id. at 413, 414. Quadri, J. observed:

Though Judges of the highest Court do their best, subject of course to the limitation of human fallibility, yet situations may arise, in the rarest of the rare cases, which would require reconsideration of a final judgment to set right miscarriage of justice complained of. In such case it would not only be proper but also obligatory both legally and morally to rectify the error.

⁴² AIR 1962 SC 1621

Jurists like H.M.Seervai, V.N.Shukla consider Judiciary to be State. Their view is supported by Articles 145 and 146 of the Constitution of India.

CHAPTER 5: CONCLUSION

The preponderant considerations for pronouncing an entity as State agency or instrumentality are: (1) financial resources of the state being the Chief finding source; (2) functional character being governmental in essence; (3) plenary control residing in government; (4) prior history of the same activity having been carried on by government and made over to the new body; (5) some element of authority or command. Whether the legal person is a corporation created by a statute, as distinguished from under a statute, is not an important criterion although it may be an indicium.

The definition of State under Article 12 of the Constitution does not explicitly mention the Judiciary. Hence, a significant amount of controversy surrounds its status vis-a-vis Part III of the Constitution. Bringing the Judiciary within the scope of Article 12 would mean that it is deemed capable of acting in contravention of Fundamental Rights. It is well established that in its non-judicial functions, the Judiciary does come within the meaning of State. However, challenging a judicial decision which has achieved finality, under the writ jurisdiction of superior courts on the basis of violation of fundamental rights, remains open to debate.

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- 5) <http://www.mightylaws.in/661/reform-article-12-constitution-obligation-private-entities-protect-fundamental-rights>
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