

ARTICLE 12- CRITICAL ANALYSIS AND JUDICIAL INTERPRETATION BY ROHIT BAFNA & NITIN MITTAL*

Introduction

Part III of the Constitution¹ contains a long list of fundamental rights and protects substantive as well as procedural rights. Apart from guaranteeing certain basic civil Rights and freedoms to all, they also provide few safeguards to minorities, protecting religious freedoms and cultural rights. The basic aim of having a declaration of fundamental rights is that certain elementary rights such as right to life and personal liberty, freedom of speech, freedom of faith, etc. shall be regarded as inviolable under all conditions. During emergency, however, some curtailment of the Fundamental rights does take place.

The Fundamental Rights² in the Indian Constitution have been grouped under six heads as follows:

- Right to Equality [Article 14-18]
- Right to Freedom [Article 19-22]
- Right against Exploitation [Article 23-24]
- Right to Freedom of Religion [Article 25-28]
- Cultural and Educational Rights [Article 29-30]
- Right to Constitutional Remedies [Article 32-35]

Analysis and Interpretation

State Defined

The word 'STATE' is defined under Article 12 of Part III of the Constitution which says, "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 of the States and all local or other authorities within the territory of India or under the control of the Government of India."

Essentials

Most of the fundamental Rights are claimed against the state and its instrumentalities and not against private bodies. Article 13(2)³ bars the 'state' from making any laws infringing any Fundamental Right.

Article 12⁴ gives an extended significance to the term 'state'. Article 12 clarifies that the term 'state' occurring in Article 13(2) or any other provision concerning Fundamental Rights, has an expansive meaning.

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¹Constitution of India, 1950

²Part III of the Constitution of India, 1950

³Constitution of India, 1950

According to Article 12 the term 'State' includes:

- The Government and Parliament of India i.e., Executive and Legislature of the Union
- The Government and the Legislature of each State i.e., Executive and Legislature of States.
- All Local Authorities.
- Other Authorities within the territory of India, or under the control of the Central Government.

Scope and Purpose of State

John Locke says that the purpose of state is "common good or good of mankind". State is a body that which comes into existence for maintaining the life and upholds the dignity of its individuals. Its purpose is to maintain the dignity and lifestyle of its individual by holding their rights. Individual cannot have rights if state fails in its function⁵

The framers of the constitution wanted to create a society in which all its citizen shall acquire all the basic fundamental rights. Thus it became a duty on state to enforce all the fundamental rights to the citizen so that they could overcome the oppression casted upon them in British Era. Individuals need constitution protection against state⁶. The rights provided in Part III of the Constitution⁷ are guaranteed against the state and are distinguished from violation of rights by privates. Private actions are protected by sufficient laws⁸. Majority of fundamental rights are enforceable against state only⁹

Supreme Court observed that the object of Part III is to provide protection to the rights and freedoms guaranteed under this part by the invasion of State. Part III and Part IV carry a theme of Human Rights, Dignity of Individual and also of the unity and dignity of the nation. These parts respectively act as a Negative Obligation of the State and that is not to Interfere with the Liberty of the Individual, and Positive Obligation of the State which is to take steps for the welfare of the Individual.¹⁰

Thus to enforce the liability of the right defining state was a mandate and by virtue of article 12 it could have been done. 'In this part' 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 the ground of

⁴ Id

⁵Gokle G.K., " Modern views of political science" Himalayan Publication, Pg. 50

⁶Pandey, JN, "The constitutional law in India", Central Law Agency, 49th edition pg 59

⁷ Constitution of India, 1950

⁸Shamdasani V Central Bank of India AIR 1952 SC 59

⁹VidyaVerma v Shivnarain AIR 1956 SC 108

¹⁰State of West Bengal v. Subodh Gopal Bose, 1954 SCR 587.

contravention of some provision of the constitution outside Part III, example- where such body has a public duty to perform or where its acts are supported by the State or public officials.¹¹

Article 226 confers wide powers on the high courts to issue writs in the nature of prerogative writs. The words “any person or authority” used in article 226 are not confined to statutory authorities and instrumentalities of State. They may cover any person or body performing public duty. The form of the body concerned is not very much relevant. What is relevant is the nature of duty imposed on the body. The body must be judged in the light of positive obligation owned by the person or authority to the affected party, no matter by what means the duty is imposed.¹²

Delhi High Court has held that for the purpose of issuing a writ of mandamus that the office should be a creature under a statute. Public office is one where the powers and duties pertaining to the office relate to a large section of the public. It was therefore held that Principal of a private college is amenable to writ jurisdiction.¹³

Where the Statutory corporations are the “voice and hands” of Central Government, they are ‘authorities’ under Article 12 of the constitution and will be considered as a ‘state’. A public authority is a body, which has public or statutory duties to perform and which performs these duties and carries out its transactions for the benefit of the public and not for the private profit. It was held that State is an abstract entity. It can only act through the instrumentality or agency of natural or juridical persons. Therefore, there is nothing strange in the notion of the State acting through a corporation and making it an agency of the State.¹⁴

Even though a government company may be a “State” within the meaning of Article 12, as an agency or instrumentality of State, there does not exist a relationship of principal and agent and only the action of the said authorities would be state action.¹⁵

Conversely, the definition in Article 12 cannot be used to interpret any provision outside Part III, e.g., Article 311. Hence even though a statutory corporation, exercising statutory powers, would be ‘State’ for the purpose of enforcing fundamental rights against it, its employees cannot take advantage of Articles 309-11, for, their services are held not under the Government of India or of a State, but under a separate legal entity, even though that entity may be regarded as ‘State’ for the purpose of Article 12, and its employees may resort to Article 32 for violation of their fundamental rights by the corporation.

‘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, ‘security of state’ in Article 19(2) refers not to the persons carrying on the administration of the State but to the State as an organized political society.

¹¹Kartick v. W.B.S.I.C., AIR 1967 Cal 231 (234)

¹²Shri Anandi Mukta Sadguru Shree Muktaji Vandas Swami Suvarna Jayanti Mahotsav Smarak Trust v. V.R. Rudani, AIR 1989 SC 1607 : (1989) 2 SCC 691 : 1989 (II) LLJ 324

¹³KumKum v. Principal, Jesus & Mary College, AIR 1976 Del 35.

¹⁴Sukhdev Singh v. Bhagatram Sardar Singh Raghuvanshi, AIR 1975 SC 1331 : (1975) 1 SCC 421

¹⁵Indian Banks Association v. Devkala Consultancy Services, (2004) 11 SCC 1

‘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 indicate that the Courts are intended to be excluded from the definition.¹⁶

Authority

‘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.¹⁷

“Authority” means a “public administrative agency or corporation having quasi-governmental powers and authorized to administer revenue producing public enterprise. “Authority” in law belongs to the province of power. Authority in administrative law is a body having jurisdiction in certain matters of a public nature.

A government company carrying on commercial activities incorporated under the Companies Act which does not have any power of making rules or regulations binding as law, nor the power to administer or enforce such rules or regulation is not an authority under this Article. The word “authority” includes Central and State Government.

It also includes all constitutional or statutory authorities on whom powers are conferred by law, including even autonomous bodies, and whether or not they are under the control of the government or whether or not they may be regarded as agents or delegates of the government.¹⁸

The ‘State’ also includes following bodies on the principal that if the body has the power of making subordinate legislation or statutory orders, with the power to compel obedience to them, it would be an ‘authority’ under Article 12:

A religious endowment Board having the power to make rules or bye-laws under a statute.

The Chief Justice of high Courts having the power to make rules having the force of law.

¹⁶UjjamBai v. State of U.P., (1963) 1SCR 778 (968-9)

¹⁷ CAMBRIDGE INTERNATIONAL DICTIONARY

¹⁸Basu, D.D. “Commentary on Constitution of India” Vol. I pg. 641

The object of including all ‘authorities’ within the term ‘State’ in this Part is to enlarge the scope of the Fundamental Rights which shall thus be binding upon every authority in India has the power to make laws, bye-laws, etc. or the power to enforce them. But the widening of the scope of the word ‘State’ also widens the number of authorities who are entitled to impose limitations upon the fundamental rights.

Local Authorities within the Territory of India

‘Local Authority’ means an authority legally entitled to or entrusted by the Government with the control or management of a local fund. Hence Dock Labour Board is a local authority.¹⁹ But a “Gram Panchayat” does not come within the ambit of ‘local authority’.

Local authorities are under the exclusive control of the States, by virtue of entry 5 of List II of the 7th Schedule which contains a list of some local authorities. A ‘local authority’ is defined in section 3 (31) of the General Clauses Act X of 1897.²⁰

The authority concerned must have separate legal existence as a corporate body, it must not be mere government agency but must be legally an independent entity; it must be a function in a defined area and must ordinarily, wholly or partly, directly or indirectly, be elected by the inhabitants of the area. It must also enjoy a certain degree of autonomy either complete or partial, must be entrusted by statute with such governmental functions and duties as are usually entrusted to municipal bodies such as those connected with providing amenities to the inhabitants of the locality like health and education, water and sewage, town planning and development roads etc. Finally, such a body must have the power to raise funds for furtherance of its activities and fulfillment of its objectives by levying taxes, rates, charges or fees.

Case Laws Relating To Local Authorities

In the case of *Calcutta State Transport Corporation v. Commissioner of Income-tax, West Bengal*.²¹; Supreme Court refused to characterize the corporation as a ‘local authority’. The corporation is meant only for the purpose of providing road transport services and has no element of popular representation in its constitution. Its powers and functions bear no relation to the powers and functions of a municipal committee. It is more in the nature of a trading corporation.

In *Premji Bhai Panwar v. Delhi Development Authority (DDA)*²²; the Delhi Development Authority, a statutory body, has been held to be a ‘local authority’ because it is constituted for the specific purpose of development of Delhi according to plan which is ordinarily a municipal function. The activities of the Delhi

¹⁹*Bhikhari Behara v. Dhanapatia*, AIR 1970 Cal 176

²⁰“ ‘local authority’ shall mean a municipal committee, district board, body of port commissioners or other authority legally entitled to, or entrusted by the Government with, the control or management of a municipal or local fund.”

²¹AIR 1996 SC 1316 : (1996) 8 SCC 758

²²AIR 1980 SC 738 (1980) 2 SCC 129

Development Authority are limited to Delhi. It has some element of popular representation in its composition and enjoys a considerable degree of autonomy.²³

²³Other Cases Related to Local Authorities: *Ajit Singh v. State of Punjab* (AIR 1967 SC 856 : (1967) 2 SCR 143), *State of Gujarat v. Shantilal Mangaldas* (AIR 1969 SC 634 : (1969) 1 SCC 509), *J. Hiralal v. Bangalore Municipality* (AIR 1982 Knt. 137)

3.5 OTHER AUTHORITIES

It refers to authorities other than those of local self-Government, who have the power to make rules, regulations, etc., having the force of a law.

The interpretation of the term 'other authorities' in Article 12 has caused a great difficulty and judicial opinion has undergone changes over time. Thereby the most debatable topic of the article is the crux of authorities covered in ambit of "other authorities" in article 12. The meaning and scope of this could be left only to the interpretation of courts. It could be observed that "other authorities" could be authorities of like nature²⁴ i.e. Ejusdem Generis.

However this doctrine was rejected by Supreme Court and it was observed that "Ejusdem Generis rule could not be restored in interpreting this expression". There is no common genes running through these named bodies nor can these bodies so placed in one single category on any rational basis²⁵ and thus there is no common genes in 'other authorities' under Article 12.²⁶

The expression of "other authorities is so wide in itself that it could have covered all authorities created by constitution or state on whom power are conferred by law. It is not necessary that statutory authority should be engaged in performing governmental or sovereign function²⁷. Supreme Court of India came up with more broad and liberal interpretation of "other authorities" so as to include all those bodies or instrumentalities which are though not created by the constitution or by a statute of government. They evolved the Doctrine of Instrumentality.

DOCTRINE OF INSTRUMENTALITY

The ambiguities laid to the establishment with contradicting interpretation were given a kind of stability with the evolution the doctrine so as to provide a better interpretation.

Therefore to provide the clear and liberal interpretation the supreme court in the case of *RamanaDayaramShetty v International Airport Authority of India*:²⁸ it held pointed out that the corporations acting as instrumentality or agency of government would obviously be subject to the same limitations in the field of constitutional or administrative law as the government itself, though in the eyes of law they would be distinct and independent legal entities.

Held that if a body is an agency or instrumentality of the government it may be an authority in art 12. The court also laid down few of the test which can test that the authority can fall within the limit of authority in article 12 of the constitution. These tests are as follows:

The cumulative effect of all the following factors has to be seen:

²⁴University of Madras v Santa Bai AIR 1954 SC 67

²⁵Basu, D.D. "Commentary on Constitution of India" Vol. I pg. 643&Pandey, JN, "The constitutional law in India", Central Law Agency, 49th edition pg. 60

²⁶Housing Board v. H.H.B.E.U., AIR 1996 SC 434 (para. 52)

²⁷Rajasthan Electricity Board v Mohan Lal, AIR 1967 SC 1857

²⁸AIR 1979 SC 1628

Analysis and Interpretation- Other Authorities

1. "If the entire share capital of the corporation is held by government, it would go a long way towards indicating that the corporation is an instrumentality or agency of government."
2. The existence of "deep and pervasive State control may afford an indication that the Corporation is a State agency or instrumentality."
3. "It may also be a relevant factor... whether the corporation enjoys monopoly status which is State conferred or State protected."
4. "If the functions of the corporation are of public importance and closely related to governmental functions, it would be a relevant factor in classifying the corporation as an instrumentality or agency of government."
5. "Specifically, if a department of government is transferred to a corporation, it would be a strong factor supportive of this inference" of the corporation being an instrumentality or agency of government.

However Court said that these tests are not conclusive but illustrative only and will have to be used with care and caution

WHO ALL COMES UNDER THE AMBIT OF OTHER AUTHORITIES?

There is no common feature running through the various bodies, which have been held to be covered by the expression 'other authorities'.

The expression refers to-

- Instrumentalities or agencies, of the Government and Government Departments. But every instrumentality of the Government is not necessarily a 'Government Department'.²⁹

Every type of public authority, exercising statutory powers, whether such powers are governmental or quasi-governmental or non-governmental and whether such authority is under the control of Government or not, and even though it may be engaged in carrying on some activities in the nature of trade or commerce.³⁰

An authority set up under a statute for the purpose of administering a law enacted by the legislature, including those vested with the duty to make decisions in order to implement them.³¹

- A private body or a company
- Society registered under the Societies Registration Act
- Corporation set up under the State Financial Corporation Act, 1951
- A non-statutory body, exercising no statutory powers³² is not 'State':
- A company
- Private bodies having no statutory power, not being supported by a State act.

²⁹State of Punjab v. Raja, (1981) 3 SCC 66 (paras. 9-10).

³⁰Railway Board v. Observer Publications, (1972) 1 SCWR 696 (704)

³¹Mashtan v. Chief Commissioner, AIR 1963 SC 533

³²Debdas v. K.E. College, AIR 1964 Raj 6 (11)

- A society registered under the Societies Registration Act, unless it can be held that the Society was an instrumentality or agency of the State, or exercises statutory power to make rules, bye-laws or regulations having statutory force.
- An autonomous body which is controlled by the Government only as to the proper utilization of its financial grant.
- Even a private body or a corporation or unaided private school may, however, be included within the definition of 'State' if it acts as an 'agency' of the Government.³³
- In determining whether a corporation or a Government company or a private body is an instrumentality or agency of the State, the following tests would be applicable:³⁴
 - Whether the entire share capital is held by the Government.
 - Whether the corporation enjoys monopoly status conferred by the State.
 - Whether the functions of the corporation are governmental functions or functions closely related thereto which are basically the responsibilities of a Welfare State.
 - If a department of the Government has been transferred to the corporation
 - The volume of financial assistance received from the State.
 - The quantum of State control.
 - Whether any statutory duties are imposed upon the corporation.
 - The character of the corporation may change with respect to its different functions.
 - Even amongst these factors, no one single factor may not yield a satisfactory answer, the court will have to consider their cumulative effect.³⁵

SOME IMPORTANT CASE LAWS RELATING TO "OTHER AUTHORITIES" UNDER ARTICLE 12

In *Rajasthan State Electricity Board v. Mohanlal*³⁶; the Supreme Court ruled that a State electricity board, set up by a statute, having some commercial functions to discharge, would be an 'authority' under Article 12. The court emphasized that it is not material that some of the powers conferred on the concerned authority are of commercial nature. This is because under Article 298, the government is empowered to carry on any trade or commerce. Thus, the court observed: "The circumstance that the Board under the Electricity Supply Act is required to carry on some activities of the nature of trade or commerce does not, therefore give any indication that the 'Board' must be excluded the scope of the word 'state' is used in Article 12.

³³Sukhdev v. Bhagatram, AIR 1975 SC 1331 (1335, 1359-60)

³⁴Central Inland Water Corporation v. BrojoNathGanguly, AIR 1986 SC 1371 (paras. 23, 24, 69)

³⁵Tekraj v. Union of India, AIR 1988 SC 489

³⁶AIR 1967 SC 1857 : (1967) 3 SCR 377

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In *Sukhdev Singh v. Bhagatram*³⁷ the Supreme Court following the test laid down in Electricity Board Rajasthan's case by 4:1 majority held that Oil and Natural Gas Commission, Life Insurance Corporation and Industrial Finance Corporation are authorities within the meaning of Article 12 of the Constitution and therefore they are 'State'. All three statutory corporations have the power to make regulations under the statute for regulating conditions of service of their employees. The rules and regulations framed by the above bodies have the force of law. The terms of contract with a particular employer is prescribed by the statute itself. These regulations are binding on these bodies. The employees of these statutory bodies have a statutory status and they are entitled to declaration of being in employment when their dismissal or removal is in contravention of statutory provisions. The employees are entitled to claim under Articles 14 and 16 against the corporation.

In *RamanaDayaramShetty v. International Airport Authority of India*³⁸, Justice Bhagwati preferred the broader test as suggested by Justice Mathew in *Sukhdev v. Bhagatram* case. In this case the Court has held that if a body is an agency or instrumentality of government it may be an 'authority' within the meaning of Article 12 whether it is statutory corporation, a government company or even a registered society. Accordingly, it was held that the International Airport Authority which had been created by an Act of Parliament was the "State" within the meaning of Article 12. The Central Government had power to appointment of any member form the Board. The capital needed by it was provided only by the Central Government. But what is the test whether a body is an agency or instrumentality? The Court laid down the following tests for determining whether a body is an agency or instrumentality of the Government:

- Financial Resources of the State
- Existence of Deep and Pervasive State Control
- Function of Governmental Essence
- Department turned into a Corporation
- Monopoly Status

In *SomPrakash v. Union of India*³⁹; the company was held to fall under Article 12. The Court emphasized that the true test for the purpose whether a body was an 'authority' or not was not whether it was formed by a statute, or under a statute, but it was "functional". In the instant case, the key factor was "the brooding presence of the state behind the operations of the body, statutory or other". In this case, the body was semi-statutory and semi-non-statutory. It was non-statutory in origin; it was also recognized by the Act in question and thus had some "statutory flavour" in its operations and functions. In this case, there was a formal transfer of the undertaking from the Government to a government company. The control by the Government over

³⁷ AIR 1967 SC 1857

³⁸ AIR 1979 SC 1628

³⁹ AIR 1981 SC 212

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the corporation was writ large in the Act and in the factum of being a government company. Agency of a state would mean a body which exercises public functions.

In *Ajay Hasia v. Khalid Mujib*⁴⁰; 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 ambit of Article 12. Its composition is determined by the representatives of the Government. The expenses of society are entirely provided by the Central Government. The rules made by the society require prior approval of the State and is completely controlled by the Government. The government has the power to appoint and remove the members of the society.

Thus, the State and the Central Government have full control of the working of the society. In view of these elements the society is an instrumentality of the State or the Central Government and it is therefore an “authority” within the meaning of Article 12.

In *S.C. Chandra v. State of Jharkhand*⁴¹; the question which arose for decision was whether the teachers of a school not owned by BCCL and was run by Managing Committee and whose teachers were never appointed by BCCL, although BCCL used to release non-recurring grants subject to certain conditions would result in such teachers to be considered as the employees of BCCL and entitled to all benefits available to the regular employees of BCCL.

⁴⁰ AIR 1981 SC 487

⁴¹ (2007) 8 SCC 279 : AIR 2007 SC 3021

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The Supreme Court judgement in this case was a common one and involved, amongst others Bharat Coking Coal Limited. Without any discussion, the Court approved the view taken by the Division Bench of the Jharkhand High Court that BCCL was “not an instrumentality of the State as per Section 617 of the Companies Act as its dominant function was to raise coal and sale and imparting education was not its dominant function.

3.6 WHETHER ‘STATE’ INCLUDES JUDICIARY?

In USA it is well-settled that the judiciary is within the prohibition of the 14th Amendment.⁴² The judiciary, it is said, though not expressly mentioned in Article 12 it should be included within the expression ‘other authorities’ since courts are set up by statute and exercise power conferred by law.⁴³

Judiciary in India to be included under the ambit of ‘State’ arose in the case of *Naresh v. State of Maharashtra*⁴⁴ which observed that "while exercising the rule making powers the judiciary is covered by the expression state with Art.12 but while performing its judicial functions it is not so included."

Thereby a court may be sued for a violation of the fundamental right to the extent only till it is performing its administrative function. The point it began its judicial function it does not violate any fundamental right and cannot be taken as “State”.

3.7 STATE AS NON-GOVERNMENTAL BODIES

It could be observed that any society registered under society Registration Act of 1898 is an “agency” or “instrumentality of the state”.⁴⁵ It shall be seen that individual or an organization performing the essence of government or in support of a government or is discharging a duty of state can be considered as a “State”.

The composition is determined when the representative of government, its expenses are at the cost of the government. The rules made for society are in accordance with the government and it shall also comply with all directions of the government and it should be obviously governed by government then it can be noticed that Non-Statutory bodies are a ‘State’.

The Supreme Court by a majority judgement held that the Board of Control for Cricket in India (BCCI) is not a ‘State’ or ‘authority’. It was held that merely because a non-governmental body exercises some public duty, that by itself would not suffice to make such body a State for the purpose of Article 12.

Hon’ble Supreme Court held since the State is today distancing itself from commercial activities and concentrating on governance rather than business, situation prevailing at the time when, was decided is not in existence and there is no need to further expand the scope of “other authorities” in Article 12 by judicial interpretation

⁴²*Virginia v. Rives*, (1880) 100 US 313 (318)

⁴³ Shukla, V.N. “Constitution of India”, pg. 20 (5th edition)

⁴⁴ AIR 1967 SC 1

⁴⁵ *Ajay Hasia v Khalid Mujib*, AIR 1981 SC 487

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“at least for the time being”. It was further held that in a democracy there is a dividing line between a State enterprise and a non-State enterprise which is distinct and the judiciary should be an instrument to erase the said dividing line, unless the circumstances of the day requires it to do so.⁴⁶

Unaided Schools even do not cover the ambit of state even though the providing education is a chief essence of the government. Thus it shall be observed that all authorities which are performing the essence of the government and directly or indirectly under or over the control of government form the State⁴⁷

An authority which is located outside India may still come under the definition of ‘State’ under Article 12 if it is under the control of the Government of India. These words extend the application of the fundamental rights to areas outside the territory of India, which may be under the control of the Government of India for the time being, e.g., mandatory and trust territories which might be placed by international organizations under the control of the Government of India. This article explains that India would not discriminate, so far as the fundamental rights of individuals are concerned, between its own nationals and the people of other countries, which might come under the administration of India under some international arrangement, agreement or the like.⁴⁸

The Supreme Court has however given to the above words a meaning different from that given in the Constituent Assembly. According to the Supreme Court, the words ‘under the control of the Government of India’ control the word ‘authorities’ and not the word ‘territory’.⁴⁹

3.8 WHETHER THE STATE ITSELF CAN CLAIM OR ENFORCE A FUNDAMENTAL RIGHT

In *State of West Bengal v. Union of India*,⁵⁰ SINHA, C.J., for the majority, set forth a proposition that under the Indian Constitution fundamental rights may be claimed not only by individuals and corporations but sometimes also by the State. His Lordship was obliged to assert this proposition as a concomitant of his major conclusion that the Union may acquire the property of a State Government by making a law of

⁴⁶Zee Telefilms Ltd. V. Union of India, (2005) 4 SCC 649

⁴⁷Chandra Mohan Khanna V. NCERT, AIR 1992 SC 76

⁴⁸Dr. Ambedkar, Constituent Assembly Debates, Vol. VI, pg. 607

⁴⁹Pradeep Kumar Biswas v. Indian Distribution of Chemical Biology, (2002) 5 SCC 511 (supra)

⁵⁰(1964) 1 SCR 371 (430)

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compulsory acquisition under Article 31 (2) gives rise to a right to compensation in favour of the expropriated owner which should logically belong to the State when property belonging to it is compulsorily acquired by the Union.

According to my view point, I would criticize this majority judgement in this above case from various standpoints. The observation does not deal with the question whether, according to juristic principles, a fundamental right is intended for protection of individuals or for the State as well and that a corporation can claim some of the fundamental rights do not warrant the extension of that principle to the State

The proposition that fundamental rights were intended for the State as well runs counter to the basic philosophy and history of fundamental rights that certain minimal rights of the individuals were guaranteed by a written Constitution against the exercise of arbitrary government authority; there was no question of protecting one limb of the same federal State against another.⁵¹

This can be possible only if there is an express provision to that effect, such as Article 131, and the conditions of that article are satisfied. But the enforcement of fundamental rights would not be covered by any of these exceptions to Article 131. Hence, Union or State Governments cannot sue each other for violation of their supposed fundamental rights.⁵²

⁵¹State Trading Corporation v. C.T.O., (1964) 4 SCR 99 (155)

⁵²State of Bihar v. Union of India, AIR 1970 SC 1446 (1449)

THE CONCEPT OF 'STATE ACTION'

United States of America

Since the First Ten Amendments and The Fourteenth Amendments are intended to protect the fundamental rights from arbitrary invasion by the State, it has become necessary to interpret the word 'State' whenever an individual complains of such invasion by the State. In order to give adequate protection to the individual against all forms of arbitrary action by the governmental authority, the American Supreme Court has enlarged the concept of 'State action' as far as possible. Thus it has been held that the prohibition in the 14th Amendment extends to any State action, legislative, executive or judicial and against any agency exerting any of these powers of the State.

The concept has been extended to the functions of a Committee of the Legislature while exercising the privileges of the House, e.g., the power to summon a witness and to compel him to testify for the purpose of a legislative investigation⁵³ and a political party which performs a statutory function in connection with an election.⁵⁴

India

Early Judges of the Supreme Court who sought to avoid American Constitutional decisions as much as possible would be shocked to see what their successors are doing in infusing American Constitution into our Constitution as much as possible. An instance to the point is the doctrine of 'State action'

The expansion on this subject has been due to the anxiety of the recent judges to exclude arbitrariness from all State action, by applying the expanded meaning of Article 14.

The ambit of the application of the Doctrine of State Action has been widened in two directions:

By expanding the list of authorities coming under the definition of 'State' in Article 12.

Extension of the sphere of governmental action which would be hit by Article 14.

According to this facet of expansion, Article 14 will be attracted not only where the impugned State act is discriminatory or where the classification made is irrational, but where the State act, as such as arbitrary, unreasonable or unfair.⁵⁵

The latest development in this sphere is the extension of the doctrine to contracts entered into by the Government.⁵⁶

EXPANDING THE SCOPE OF ARTICLE 12

⁵³Watkins v. U.S., (1956) US 178 (197)

⁵⁴Steele v. L. & N. R. Co., (1944) 323 US 192

⁵⁵Maneka Gandhi v. Union of India, AIR 1978 SC 597

⁵⁶Dwarkadas v. Board of Trustees, AIR 1989 SC 1642 (paras. 25-27)

The Recommendation of the National Commission to Review the working of the Constitution, 2002

The recommendation of the national commission to review the working of the Constitution to increase the scope of the article 12 represents the need of the day to include the private bodies under the purview of judicial review in certain cases. The commission has recommended that in article 12 of the Constitution, the following explanation should be added; 'Explanation: - In this Article, the expression "other authorities" shall include any person in relation to such as it functions which are of a public nature.'

The debate is bound to continue because most of the cases coming up in the past relate to service matters. However, considering the recent trends from the side of the government towards divestment and privatization of government undertakings, the issue regarding the government undertakings being considered as state can escape its responsibility or liability for the protection of fundamental rights on the plea of that they are the actions of private bodies or persons and not of the State.

Therefore, the only solution lies in this aspect that India must take note of the reality, the might of the private bodies or persons is comparable to that of public authorities and it must be put under the constitutional discipline of fundamental rights.

The concept of "the State" in the Constitution of India which has created various interpretational controversies is the meaning of the term "the State" as defined in article 12 of the Constitution of India, to avoid these controversies there is a need to expand either as recommendations given by the National commission to review the working of the Constitution or new article 12A should be inserted relating to for the purpose of particularly private bodies or persons to making them subject to fundamental rights.

Contemporary concept in the United Kingdom

The section 6(3)(b) of the United Kingdom Human rights Act, 1998 defines 'Public Authority' as "any person certain of whose functions are functions of a public nature", this is a positive move towards the definition of public authority, emphasizing much on the function and not the source of power.

In *R v Panel on Take-overs and Mergers, ex parte Datafinplc and another*⁵⁷, the Court exercised the power of the judicial review over a private body. Lloyd L.J. in his separate speech opined: "... But the reason why a club is not subject to judicial review is not just because it is self-regulating. The panel wields enormous power it has a giant's strength. The fact that it is a self regulation, which means, presumably, that it is not subject to regulation by others, and in particular the Department of Trade and Industry makes it not less but mere appropriate that it should be subject to judicial review by the courts".

Therefore, the source from which the body derives power is not determinative, but rather the nature of the power being exercised must be looked into. Thus it shall be deemed as the restriction of "State" is not a matter of subjectivity of the governmental essence in England rather than subject to the nature of administration and derived authority.

⁵⁷1987 WLR 699.

CONCLUSION

The word 'State' under Article 12 has been interpreted by the courts as per the changing times. Through various case laws & their judgements given by The Court and also through various different viewpoints of different judges in giving those judgements or different law writers in their books or law scholars or law students is what which has gained wider meaning for the term 'other authorities' and there is a need now to finally define this important term in context to Article 12 i.e. "STATE"