

**“The Concept of State under Article 12 of Indian Constitution”**

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**ABSTRACT**

The researcher do research on the concept of state under article 12 of Indian constitution has undergone a paradigm shift due to liberalization privatization and globalization. The state is not a service provider rather it is a service facilitated or regulated of the economy. Most of the function earlier performed by the state are private actors now as a result protection of the fundamental rights has also fallen into the hand of private actor. As per the constitution of India barring a few exception fundamental rights are enforceable against the state, as defined under article 12 of the constitution thus the concept of state under article 12 is the threshold through which fundamental rights can be claimed. As per the definition state is defined as 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 state and all local or other authorities within the territory of India or under the control of the government of India. Though the constitution explicitly defines the term state over time the term other authority under 12 was interpreted to include any instrumentality or agency of the state various criteria were also formulated for bringing an authority/ body under the concept of the instrumentality or agency of state.

INTRODUCTION- part 3<sup>rd</sup> of the constitution contains a longlist of fundamental rights and protect rights and freedom to all, they also provide safeguard to minorities, protecting religious freedom and cultural rights. The basic aim of having a declaration of fundamental rights is that certain elementary rights such as rights to life and personal liberty, freedom of speech, freedom of faith etc. shall be regarded as inviolable under all condition during emergency, however some curtailment of the fundamental right does tale place.

The fundamental rights in the Indian constitution have been grouped under six heads as follows.

- Rights to equality (article 14-18)
- Right to freedom(article19-22)
- Right against exploitation( article 23-24)
- Right to freedom to religion(article 25-28)
- Cultural and educational rights (article29-30)
- Right to constitutional remedies (article32-35)

**Analysis and interpretation:****STATE DEFINED:-**

The word state is defined under article 12 of part 3<sup>rd</sup> of the constitution which says. In this part, unless the context otherwise requires the the state includes the government and parliament of India and the government and the legislature of Each of the state and all local or other authorities within the the territory of India or under the control of the government of India.<sup>1</sup>

**ESSENTIALS-** most of the fundamental rights are claimed against the state and its instrumentalities and not against private bodies. Article 13(2) bars the state from making any laws infringing any fundamental rights.<sup>2</sup>

Article 12(4) 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.<sup>3</sup>

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 state.
- 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 and upholds the dignity of its individual its purpose is to maintain the dignity and life style of its individual by holding their rights individual cannot have rights if state fails in its function.

The framer 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 right to the citizen so that they could overcome the appression casted upon them in british era

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<sup>1</sup> Part 3 of the constitution of india, 1950

<sup>2</sup> Constitution of india, 1950

<sup>3</sup> Constitution of india, 1950

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individuals need constitution protection against state<sup>4</sup>. The rights provided in part 3 of the constitution<sup>5</sup> are guaranteed against the state and are distinguished from violation of rights by private.<sup>6</sup> Private actions are protected by sufficient laws.<sup>7</sup> majority of fundamental rights are enforceable against state only.<sup>8</sup>

Supreme court observed that the object of part 3 is to provide protection to the right and freedom guaranteed under this part by the invasion of state. Part 3 and part 4 carry a theme of human right. 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 interfere with the liberty of the individual and positive obligation of the state which is to take steps for the welfare of the individual

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 person with official responsibility for a particular area of activity and having a moral or legal right or ability to control others.<sup>9</sup>

Authority means a public administrative agency or corporation having quasi- governmental powers and authorized to administrative 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.<sup>10</sup>

A government company carrying an commercial activites incorporated under the companies act. Which does not have any power of making rules or regulation binding as law, nor the power to administrative enforce such rules or regulation is not an authority under this article. The word authority includes central and state government.<sup>11</sup>

It also includes all constitutional or statutory authorities an whom power or conferred by law, including even autonomous bodies and whether or not they may be regarded as agents or delegates of the government

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<sup>4</sup> Gokle g.k modern views of political science Himalayan publication, pg.50

<sup>5</sup> Constitution of india 1950

<sup>6</sup> Pandey, J.N, "the constitution law in india, central law agency, 49<sup>th</sup> edition pg 59

<sup>7</sup> Shamdasani v central bank of india AIR 1956 sc 59

<sup>8</sup> Vidya verma v shivnarain AIR 1956sc 108

<sup>9</sup> Ujjambai v state of u.p (1963)1SCR778(968-9)

<sup>10</sup> Cambridge international dictionary

<sup>11</sup> Basu D.D commentary on constitution of india pg 641

The state also includes following bodies on the principal that if the body has the power of making subordinates legislation or statutory orders, with the power to compel to 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 court having the power to make rules having the force of law.

**LOCAL AUTHORITY-** 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 but a gram panchayat does not come within the ambit of local authority.<sup>12</sup>

Local authorities are under the exclusiveness control of the state by virtue of entry 5 of list 2 of the 7<sup>th</sup> schedule which contains a list of some local authority a local authority is defined in sec 3(31) of the general clauses act x of 1897.

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 function and duties are as usually entrusted to municipal bodies such as those connected with providing amenities to the inhabitants of the locality like health and 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.

**OTHER AUTHORITIES-** it refers to authorities other than those of local self government who have the power to make rules regulation etc having the force of a law.

The interpretation of the term other authority 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 nature i.e ejusdem generis.<sup>13</sup>

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

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<sup>12</sup> University of madras v santa bai AIR 1954 sc 67

<sup>13</sup> Basu, D.D "commentary on constitution of india vol.1 pg 643

through the named bodies nor can these bodies so placed in one single category on any rational basis and thus there is no common genes in other authorities under article 12.

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 engaged in performing governmental or sovereign function. Supreme court of India came up with more board 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 state of government. They evolved the doctrine of instrumentality.

**DOCTRINE OF INSTRUMENTALITY**- the ambiguities laid on the establishment with contradicting interpretation were given a kind of stability with the evolution the doctrine so as to provide a better interpretation.<sup>14</sup>

Therefore to provide the clear and liberal interpretation the supreme court in the case of ramana dayaram sheety v international airport authority of India. it held painted out that the corporation acting as instrumentality or agency of government would obviously be subject to the same limitation in the field of constitutional or administrative law as the government it self 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 article 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 test are follow.<sup>15</sup>

The cumulative effect of all the following factor has to be seen.

- ❖ If the entire share capital of the coroporation is held by government it would go a long way towards indicating that corporation is an instrumentality or agency of government.
- ❖ The existence of deep and pervasive state control may afford an indication that the corporation is a state agency or instrumentality.
- ❖ It may also be a relevant factor.... Whether the corporation enjoys monopolystatus which is state conferred or state protected.
- ❖ If the function of the corporation are of public importance and closely related to governmental function, it would be a relevant factor in classifying the corporation as an instrumentality or agency of government.

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<sup>14</sup> Pandey J.N ,the constitutional law in india 49<sup>th</sup> edition pg 60

<sup>15</sup> Rajasthan electricity board v mohan lal AIR 1967 SC 1857

❖ **SOME IMPORTANT CASE LAWS RELATING TO ARTICLE 12:-**

In rajasthan state electricity board v mohanlal, the supreme court ruled that a state electricity board, set up by a statute, having some commercial function to discharge, would be an authority under article 12 the court emphasized that it is not material that some of the power conferred in the concerned authority are of commercial nature. This is because under article 298, the government is empowered to carry trade or commerce. Thus the court observed, the circumstances 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.<sup>16</sup>

In sukhdev singh v bhagatram the supreme court following the test laid down in electricity board rajasthan 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 corporation have the power to make regulation under the statute for regulating condition. Of service of their employees the rules and regulation framed by the above bodies have the force of law. The term of contract 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 provision. The employees are entitled to claim under article 14 and 16 against the corporation.

In ramana dayaram shetty v international airport authority of India 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 an instrumentality of government it may be an authority it is statutory corporation, a government company or even a registered society. According, it was held that the interpretation airport authority which had been created by an act of parliament was the state within meaning of article 12 the central government had power to appointment of any member from 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 test for determining whether a body is an agency or instrumentality of the government<sup>17</sup>.

1. Financial resource of the state.
2. Existence of deep and pervasive state control

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<sup>16</sup> AIR 1967 SC 1857 :(1967)3SCR377

<sup>17</sup> AIR 1967 SC 1857

### 3. Function of government.

In som prakash v union of India<sup>18</sup> 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 formulated 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 operation 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 recognized by the act in question and thus had some statutory flavor in its operation and function. In this case, there was a formal transfer of the undertaking from the government to a government company the control by the government over 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 function.<sup>19</sup>

In ajay hasia v Khalid mujib 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 requires prior approval of the state and is completely controlled by the government. The government has the power to appoint and remove the member 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 the question which arose for decision was whether the teacher of a school not owned by BCCL and was run by managing committee and whose teacher were never appointed by BCCL although BCCL used to release non-recurring grants subject to certain conditions would result in such teacher to be considered as the employees of BCCL and entitled to all benefits available to the regular employees of BCCL.

The supreme court judgment in this case was a common one and involved, amongst other things, 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 sell and imparting education was not its dominant function.

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<sup>18</sup> AIR 1981 SC 212

<sup>19</sup> AIR 1979 SC 1628



**WHETHER “STATE” INCLUDES JUDICIARY :-**

In U.S.A it is well settled that the judiciary is within the prohibition of the 14<sup>th</sup> amendment the judiciary it is said though not expressly mentioned in article 12 it should be included within the expression other authorities since court are set up by statue and exercise power conferred by law.

Judiciary in India to be includes under the ambit of state arose in the cae of naresh v state of maharastra which observed that while exercising the rule making power the judiciary is covered by the expression stste with article 12 but while performing its judicial function it is not so included.

There by 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 it judicial function it does not violate any fundamental rights and caanot be taken as.<sup>20</sup>

**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. It shall be seen that individual or an organization performing the essence of government or in support of a government or in discharging a duty of state can be considered as a state.

The composition is determined when the representatives of government, it express 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 direction of the government and it should be obviously governed by government then it can be noticed that non-statuory bodies are a state.

The supreme court by a majority judgement held that board of control for cricket in India BCCI is not a state or authority. It was held that merely because a non governmental body exercise some public duty that itself would not suffice to make such body a state for the purpose of article 12.

Honble supreme court held since the state is today distancing itself from commercial activites and concertaing 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<sup>21</sup>

At least for the time being. It was further held that in a democracy there is a divinding line between a state enterprise and a non-state enterprise which is distinct and the judiciary should be

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<sup>20</sup> Shukla V.N “constitution of india 5<sup>th</sup> edition pg 20

<sup>21</sup> Ajay hasia v khali mujib AIR 1981 SC 487



an instrument to erase the said dividing line unless the circumstances of the day requires it to do so.

Unaided school even do not cover the ambit of state even through 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 under or over the control of government from the state.<sup>22</sup>

An authority which is located outside India may still come under the definition of state under article 12 is 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 government of India for the time begins e.g mandatory and trust territories which might be placed by international organization under the control of government of India. this article explains that India would not discriminate, so far as the fundamental right of individual are concerned, between its own national and the people of other countries, which might come under the administration of India under some international arrangement agreement or the like. The supreme court has however given to the above words a meaning different from that given in the constitutional 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.

**CONCLUSION**- The State society framework of analysis focuses proudly on the quantity and quality of the state ties with society. The relation between state and society is complementary and supplementary. The state governs over a society and the society forms the subject of the state both the state and society are mutually empowering forces and mutually destructive forces each tries to control and influence the other in its own unique manner and since states are not rarely free from the social forces, the latter can curb their powers.

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<sup>22</sup> Pandey J.N ,the constitution law in india 49<sup>th</sup> edition pg.60