

ISSN :2582-6433



INTERNATIONAL JOURNAL FOR LEGAL RESEARCH AND ANALYSIS

Open Access, Refereed Journal Multi Disciplinary
Peer Reviewed 6th Edition

VOLUME 2 ISSUE 6

www.ijlra.com

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Megha Middha, Assistant Professor of Law in Mody University of Science and Technology, Lakshmangarh, Sikar

Megha Middha, is working as an Assistant Professor of Law in Mody University of Science and Technology, Lakshmangarh, Sikar (Rajasthan). She has an experience in the teaching of almost 3 years. She has completed her graduation in BBA LL.B (H) from Amity University, Rajasthan (Gold Medalist) and did her post-graduation (LL.M in Business Laws) from NLSIU, Bengaluru. Currently, she is enrolled in a Ph.D. course in the Department of Law at Mohanlal Sukhadia University, Udaipur (Rajasthan). She wishes to excel in academics and research and contribute as much as she can to society. Through her interactions with the students, she tries to inculcate a sense of deep thinking power in her students and enlighten and guide them to the fact how they can bring a change to the society

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Avinash Kumar



Avinash Kumar has completed his Ph.D. in International Investment Law from the Dept. of Law & Governance, Central University of South Bihar. His research work is on "International Investment Agreement and State's right to regulate Foreign Investment." He qualified UGC-NET and has been selected for the prestigious ICSSR Doctoral Fellowship. He is an alumnus of the Faculty of Law, University of Delhi. Formerly he has been elected as Students Union President of Law Centre-1, University of Delhi. Moreover, he completed his LL.M. from the University of Delhi (2014-16), dissertation on "Cross-border Merger & Acquisition"; LL.B. from the University of Delhi (2011-14), and B.A. (Hons.) from Maharaja Agrasen College, University of Delhi. He has also obtained P.G. Diploma in IPR from the Indian Society of International Law, New Delhi. He has qualified UGC - NET examination and has been awarded ICSSR - Doctoral Fellowship. He has published six-plus articles and presented 9 plus papers in national and international seminars/conferences. He participated in several workshops on research methodology and teaching and learning.

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THE STATE – CONCEPT AND NEW CHALLENGES

Authored By - Nikita Raj

Abstract

Political scientists have always been intrigued by the amorphous nature of the Concept State especially when it comes to meaning, definition and understanding in contemporary global political economy. Even though theorists and philosopher have attempted to define it in the past, its definition and meaning are still engulfed with mystery and ambiguity especially in today world with the emergence of new entities in the society. The present paper seeks to analyse the concept from constitutional lens and thereby ascertain the trend with reference to new challenges to the concept.

KEYWORD: STATE, CONSTITUTIONAL STATUS, JUDICIAL TREND, NEW CHALLENGES.

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The Origin

There exist several theories that seek to explain how State came into being. These theories include the theory of the divine origin, the force theory and the social contract theory.

(a) THE DIVINE ORIGIN THEORY

According to the proponents of this belief, God created the state directly and deliberately out of nothing. Despite the popular belief that the state was established for the benefit of "Man", "men (both male and female) have had little influence on the development of the state". His desire was for men to be able to live in a political society everywhere on the planet, therefore He selected His deputy to be in charge of them. Subscribers to this school of thought believe that "*the ruler is a divinely appointed agent who is completely responsible to God for his or her actions, rather than to the people or subjects*".

(b) FORCE THEORY

The philosophy of force emphasises the weak's submission to the strong as the foundation of the state. According to this view, "Man" (which includes both male and female in this text) is naturally argumentative. He/she desires power, and as Lord Acton said, absolute power corrupts completely. Both urges drive him/her to show off their strength. The main motivations of "Man" are power and self-assertion, according to proponents of this theory.

"War begets Man"

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(c) SOCIAL CONTRACT THEORY

To the contrary of the divine genesis of the state idea, the social contract theory holds that man consciously formed the state in the form of a social contract. That group of people came up with the state's compact. The social contract is a theory or model in moral and political philosophy that covers issues such as the origins of society and the legitimacy of state authority over individuals. For the sake of their remaining rights, such as security (broadly defined), physical security, emotional security, employment, health, right to life, and right to possess and preserve property, people have agreed to give up some of their liberties and submit to rulers or magistrates' power.

Further, at the International front statehood is a characteristic of a political body that exists in the international community and complies with the Montevideo Principles and Criteria. In an attempt to define the legal and political idea of state, the Montevideo Convention of 1933 said that:

"A state must have - (a) a defined area; (b) a permanent population; (c) a government; and (d) the capability of entering into connections with other states."

The Constitutional Perspective

THUS WE MAY SAY THAT : “A State is a community of considerable number of persons, occupying a territory permanently, independent of external control and having an organized Government to which habitual obedience is rendered by the inhabitants within its jurisdiction.”

"The entire objective of Part three is to defend the freedoms and rights mentioned therein from arbitrary state invasion."

- *State of West Bengal vs. Subodh Gopal Bose*,¹ the Chief Justice of India, Patanjali Shastri.

It was necessary to create certain fundamental rights in Part III of the constitution in order to provide constitutional protection against the state, which led to the establishment of certain fundamental rights in Part III. Their enforcement against an individual or authority is limited to situations in which an individual or authority has violated the standards set forth in Article

12. They are offered to every citizen as a safeguard against the operations of the government. According to this concept, basic rights are asserted against the state, as opposed to other legal rights that are created by the state itself. The effect of this is that, regardless of whether a Constitution expressly declares this or not, it is widely understood that the fundamental rights stated in it apply solely to the State, i.e., only to the activities of the government and its employees.

In *P.D. Shamdasani v. Central Bank of India Ltd*², one of the Supreme Court's earliest decisions, the court confirmed this point of view. In that case, the petitioner sought the court's assistance in asserting his rights under Articles 19(1)(f) and 31 against the Central Bank of India Ltd, which was the defendant. The Court found that "the content and structure of article 19 as well as its location in part III of the Constitution clearly suggest that the provision was intended to secure those liberties against state action," according to the court's ruling in dismissing the petition. In this article, individual abuses of property rights are not included." The upshot is that the United States Constitution, despite the fact that it was the first modern written constitution to provide for fundamental rights, limited the application of such rights to governmental activity.

Similarly, the application of our Constitution's fundamental rights has been guided by the same frame of mind, even if some of them are explicitly relevant to non-state activities and others are not.

"Any governmental authority, legislative or executive, central, state, or local," according to Article 12 of the

¹ AIR 1954 SC 92.

² AIR 1952 SC 59.

constitution, as well as the rights safeguarded against infringement by each of these authorities, are defined. The definition of "state" includes the government and parliament of India, the governments and legislatures of each of the states, the local authorities and other authorities located within the territory of India or under the administration of the government of India, and any other authorities located within or under the administration of the government of India.

Article 12 defines the term 'state' it says that-*"Unless the context otherwise requires the term 'state' includes the following –*

- 1) *The Government and Parliament of India that is Executive and Legislature of the Union.*
- 2) *The Government and Legislature of each states.*
- 3) *All local or other authorities within the territory of India.*
- 4) *All local and other authorities under the control of the Government of India.*"³

Article 12 of the constitution provides an all-inclusive definition of "state" covering every governmental authority, legislative or executive, central, state or local and the rights as guaranteed against violation by every one of these authorities. The characterization of the word "state" implies the authorities and instrumentalities functioning within or outside the territory of India: The Government and Parliament of India, The government and legislatures of each of the states, all local authorities and other authorities within the territory of India or under the control of the government of India.

Article 12 of the Constitution defines "state" to include the *Government and Parliament of India, the Government and the Legislature of each of the States, all local authorities, and other authorities within the territory of India or under the control of the Government of India.*

³ Article-12;THE CONSTITUTION OF INDIA, 1950

The Elements

In order to understand the term “State” under Article 12, we clearly have to understand its three most essential elements. They are:

- (a) Authority
- (b) Local Authority, and
- (c) Other Authorities

(a) Authorities

Authorities are defined as individuals or organisations who exercise power or who have the legal authority to command and be obeyed. An authority is a group of persons who have official responsibility for a certain area of activity as well as the moral or legal authority or power to regulate others.⁴

This includes any constitutional or statutory authority, including autonomous institutions, that has been granted powers by law, regardless of whether or not they are within the jurisdiction of the government or whether or not they can be considered agents or delegates of that government.⁵

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‘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.⁶ 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, 1897-

“‘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.”⁷

⁴ CAMBRIDGE INTERNATIONAL DICTIONARY

⁵ Basu, D.D. “Commentary on Constitution of India” Vol. I pg. 641

⁶ BhikhariBehara v. Dhanapatia, AIR 1970 Cal 176

⁷ Section 3(31), The General Clauses Act, 1897

(c) Other Authorities

A legal instrument that grants authority to enact rules, laws, and other legal documents to authorities other than local self-government is known as a statute.

It has been read in a variety of ways, and judicial opinion has changed over time in regard to the term "other authorities" as used in Article 12. As a result, the substance of authority encompassed by the scope of "other authorities" in article 12 is the most disputed issue in the article 12. Only the courts could judge what this means and how broad it should be interpreted. It is probable that the "other authorities" are authorities of a similar type to Ejusdem Generis, which is a legal concept.⁸⁹

But the Supreme Court rejected this approach, ruling that "the Ejusdem Generis norm could not be reintroduced in this context." In the 'other authorities' category under Article 12, there are no common genes that run across all of the listed bodies, and these bodies cannot be grouped together on any rational basis,¹⁵ hence there are no common genes in the 'other authorities' category under Article 12.¹⁰ As a wide word, "other authorities" might have referred to any authority constituted by a constitution or state and granted authority by law. If statutory authority is being used to carry out governmental or sovereign responsibilities, it is not necessary to be employed. It has been decided by the Supreme Court of India that "other authorities" now includes all entities or instrumentalities that are not established by the constitution or by a statute of government, and that this definition should be liberalised. They were the ones that came up with the Instrumentality Doctrine.¹¹

The Doctrine of Instrumentality

With the development of the doctrine, the uncertainties that had been posed to the institution by opposing readings were given a degree of stability in order to provide a more accurate interpretation in the future. Because of this, the Supreme Court held in the case of *Ramana Dayaram Shetty v International Airport Authority of India*¹⁸ that corporations acting as government instrumentalities or agencies would be subject to the same constitutional and administrative limitations as the government itself in the field of constitutional and administrative law, despite the fact that they would be distinct and independent legal entities in the eyes of the law. A body can be an authority under Section 12 if it is a government agency or instrumentality,

⁸ University of Madras v Santa Bai AIR 1954 SC 67

⁹ Basu, 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

¹⁰ Housing Board v. H.H.B.E.U., AIR 1996 SC 434 (para. 52)

¹¹ <https://journal.lawmantra.co.in/wp-content/uploads/2015/05/221.pdf> ¹⁸ AIR 1979 SC 1628

according to the court's decision. In addition, the court devised a number of tests to examine if the authority falls within the parameters set forth in Article 12 of the constitution, among other things. "The tests are:

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, the aforementioned tests are not conclusive, rather only illustrative and it will have to be used with great caution.¹²



The New Challenges

When the Indian Constitution was drafted in 1947, it was evident that the state had a major responsibility in its citizens' welfare. As a result, Part VI of the Indian Constitution has various sections defining a welfare state. As stated in *Air India Statutory Corporation v. United Labour Union*,¹³ the Apex court held that:

"The directive principles have been described as forerunners of the United Nations Convention on Right to Development as an inalienable human right".

For instance: (1) Article 38 of the Constitution provides that -*"The State must work to improve people's lives by constructing and safeguarding a social order based on economic, social, and political justice."*

¹² <https://journal.lawmantra.co.in/wp-content/uploads/2015/05/221.pdf>

¹³ AIR 1997 SC 645

(2) Article 39 of the Constitution mandates the state to enact specific policies to ensure adequate living standards for residents, fair wealth distribution, equal pay for equal effort, and child and worker protection.

(3) Article 39A of the Constitution directs that: *"The State shall ensure that the legal system promotes equal justice and shall offer free legal assistance, through appropriate laws or programmes or in any other means, to ensure that no citizen is denied access to justice owing to economic or other disadvantages."*

The state's organs are organised into three categories: legislative, executive, and judicial. A "State action" is any action done by one of these organs. A century after the Constitution was ratified, a succession of judicial rulings gave rise to the "State action" idea. The Supreme Court of India, on the other hand, invented the concept of "State action." The broad meaning of "the State" in Article 12 and the actionable nature of Part III of the Constitution have resulted in a judicial explosion of the term "the State." The Indian Constitution also grants the state authorities to conserve National Monuments, historic works of art, people's education and culture, as well as forests and wildlife.

The State has been compelled to promote policies to attain the socio-economic objective of India expressed in Part-IV of the Constitutional framework, which on one hand assures the protection of fundamental rights enshrined in Part-III. As a result, in 1948, Dr. Babasaheb Ambedkar stated that :

"The Basic Rights serve two purposes. Those rights must first be accessible to all citizens. Second, all authorities must enforce them. When he declared "upon every authority," he meant the authority that can create laws or exercise judgement. Because of this, it is evident that Fundamental Rights must bind not only the Central or Provincial/State levels of government but also district level boards and municipalities, even village panchayats and taluk boards."¹⁴

Due to the frequent usage of "State action," the Supreme Court has widened the concept of state in numerous cases. Many judicial decisions have deemed public corporations "the state," placing them in the category of "all other authorities inside India's borders or under the Government of India's supervision."

¹⁴In the Constituent Assembly (1948 CAD, Vol. VII, 610)

The Judicial Trend: Meeting The New Challenges

The Indian Courts have given widest possible interpretations to the term “State” in order to meet the emerging challenges of the aforesaid concept. Hon’ble courts have taken turn from the strict interpretation of the term “other authorities” to the most liberal interpretation.

In *University of Madras v. Santa Bai*,¹⁵ the Madras High Court held that "other authorities" could only apply to authorities of a comparable kind. It may only denote governmental or sovereign authority. Unless backed by the state, it cannot encompass natural or legal persons.

The Apex Court however rejected the Madras High Court's narrow interpretation in *Ujjambai v State of U.P.*¹⁶, stating that the Ejusdem generis criterion did not apply. Article 12 clearly defines the Union and State governments, as well as all local and other authorities. There is no common genus among these listed creatures, and they cannot be grouped together on any rational basis.

In *Rajasthan State Electricity Board v. Mohan Lal*²⁴, the Supreme Court held that, “*the expression “other authorities” is wide enough to include all authorities created by the Constitution or Statute on whom powers are conferred by law. It is not necessary that, the statutory authority should be engaged in performing governmental or sovereign functions.*”

In *Sukhdev Singh v. Bhagatram*,¹⁷ the Supreme Court, following the requirements laid down in the case of the Rajasthan State Electricity Board, found that “*ONGC, LIC, and IFC are authorities within the meaning of Article 12 of the Constitution, and as a result, they constitute "the State."* According to the Act, all three statutory corporations have the competence to adopt regulations governing the working conditions of their respective personnel. The laws and regulations of the organizations listed above are binding on the public. Employees of these statutory bodies have statutory standing, and as a result, if they are fired or removed in violation of the statutory constraints, they have the right to sue the corporation under Articles 14, 16, and 21 of the Constitution, among other remedies.”

The shift in the government's role from that of a police state to that of a welfare state necessitated the expansion of the definition of "other authorities" in Article 12 to include all bodies that, despite the fact that they are not established by the Constitution or a Statute, perform the functions of government agencies or instrumentalities. In today's society, a government must carry out a wide range of responsibilities. In order to

¹⁵ AIR 1954 Mad 67.

¹⁶ AIR 1962 SC 1621. ²⁴ AIR 1967 SC 1857.

¹⁷ AIR 1975 SC 1331.

accomplish this, it will need to seek the assistance of a number of other organizations. Following this ruling, the Supreme Court applied a broad and liberal interpretation to the phrase "other authorities" in subsequent decisions in order to bring it within the ambit of the term "the State" in Article 12 of the Constitution.

Similarly, the Supreme Court of India in the case of *R.D. Shetty v. International Airport*

Authority,¹⁸ further broadened the definition of "the State," holding that the International Airport Authority, which was established by a statute passed by Parliament to be a "agency or instrumentality" of the Central Government, is also an authority within the meaning of

Article 12 of the Constitution. **Justice Bhagwati** further stated that,

“The Corporations acting as agency or instrumentality of the Government would obviously be subject to the same limitations in the field of Constitutional and Administrative law as Government itself, though in the eye of law they would be distinct and independent legal entities. If Government acting through its officers is subject to certain Constitutional and public law limitations, it must follow a fortiori that Government acting through the agency or instrumentality of Corporations should equally be subject to the same limitations”.

The Supreme Court in the leading case of *Ajaya Hasia v. Khalid Mujib*¹⁹ P.N. Bhagwati, J, observed that:

“The Constitutional philosophy of a democratic socialist republic requires the Government to undertake a multitude of socio-economic operations and the Government having regard to the practical advantages of functioning through the legal device of a corporation embarks on myriad commercial and economic activities by resorting to the instrumentality or agency of a corporation, but this contrivance of carrying on such activities through a corporation cannot exonerate the Government from its basic obligation to respect the fundamental rights and not to override them. The mandate of a corporation may be adopted in order to free the Government from the inevitable constraints of red tapism and slow motion but by doing so, the Government cannot be allowed to play truant with the basic human rights. Otherwise, it would be the easiest thing for the Government to assign to a plurality of corporations almost every State business such as Post & Telegraph, TV & Radio, Rail, Road and Telephones-in short every economic activity and thereby cheat the people of India out of their Fundamental Rights guaranteed to them. The Courts should be anxious to enlarge the scope and width of the Fundamental Rights by bringing within their sweep every authority which is an instrumentality or agency of the Government or through the Corporate Personality of which the Government is acting”.

Ajay Hasia's decision was followed by another decision in the case of **Som Prakash Rekhi V.**

Union of India,²⁰ in which **Justice Krishna Iyar** said,

¹⁸ AIR 1979 SC 1628

¹⁹ AIR 1981 SC 487,

“Any authority under the control of the Government of India comes within the definition. While dealing with the Corporate Personality, it has to be remembered that while the formal ownership is cast in the corporate mould, the reality reached down to State control. The core fact is that the Central Government chooses to make over for better management of its own property to its own offspring. A Government Company is a mini-incarnation of Government itself, made up of its blood and bones and given corporate shape and status for defined objectives and not beyond. The device is too obvious for deception. A Government Company though, is but the alter ego of the Central Government and tearing of the juristic veil worn would bring out the true character of the entity being “the State”. It is immaterial whether the corporation is formed by a statute or under a statute, the test is functional”.

In *G.M. Kisan Sahkari Chini Mills Ltd. v. Satrughan Nishad*,²¹ the Apex Court ruled that, “There can be no hard and fast formula and in different facts / situations and in different factors, it may be found to be overwhelming and indicating that the body is an authority under Article 12 of the Constitution”.

Conclusion

Thus it can be concluded that, Article 12 of the Constitution should be amended to include the following clarification: "In this article, the term "other authority" must include any person who is assigned to any of its functions that are of a public nature." As a result of this explanation, all such authorities performing public functions would be subject to Constitutional requirements, and the requirement for widening the definition of "the State" in Article 12 would be satisfied in an era of liberalisation, among other things. A thought process in this direction has yet to be initiated by any Indian government, leaving the subject totally in the hands of Indian judiciaries. As is it rightly said that:

“IN A PROGRESSIVE COUNTRY CHANGE IS CONSTANT; CHANGE IS INEVITABLE.”

²⁰ AIR 1981 SC 212

²¹ (2003) 8 SCC 639