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## ARTICLE 12 – EVALUATION & INSIGHTS

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### INTRODUCTION

Article 12<sup>1</sup> stands on the foundation of the framework of fundamental rights because it sets forth an explanation of the word "State" as used in the Constitution. Hence, Article 12 becomes very important and much needed to enforce fundamental rights when such infringement can be alleged against the State. Therefore, the State becomes a guarantor of fundamental rights and undertakes an obligation to protect them.

### SCOPE AND SIGNIFICANCE

The notion of "State" under Article 12 is a variable, undergoing a transformation rapidly due to a jurisprudential change that affected the distance between private and public enterprise and constitutional protection.

Article 12 is an expansive provision. The definition of state stands fluid in order to accommodate changing social conditions, evolving morals, and concepts. Whenever new groups or organizations arise with similar functions as that of a government in the present, they may be held to be "State" according to their functions and the extent to which they are governed by the government. Living constitutionalism concerns the flexibility concept as a theoretical argument.

### COMPONENTS OF STATE UNDER ARTICLE 12

#### (1) Government and Parliament of India

The Government of India has two main parts the executive and the legislature. The executive is headed by the President and includes the Union Cabinet and other government officials.

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<sup>1</sup> INDIA CONST. art. 12.

When we look at the legislative branch is the Parliament, sorted into two houses namely the Lok Sabha and Rajya Sabha.

#### (2) Government and Legislature of States

So, in a state, the executive side is made up of the Governor, the Chief Minister and their team of ministers that is the State Government and when it comes to making laws, that is handled by the State Legislature, which is mostly just the elected Legislative Assembly.

#### (3) Local Authorities

The different local authorities are municipalities, district boards, panchayats, municipal boards, port trusts, improvement trusts, etc.<sup>2</sup>

#### (4) Other Authorities

Some of the High Courts thought that "other authorities" were mentioned in a suggestive sense, meaning the Government and Parliament of India, the Government and legislature of all States, and local authorities. It would be reasonable, therefore, to interpret this phrase, ejusdem generis, with government or legislature,<sup>3</sup>. So construed, it would mean only authorities in the exercise of governmental or sovereign authority and functions. Such a limited construction of the phrase "other authorities," however, the Supreme Court did not accept. For invoking the rule of ejusdem generis, there must exist some well-defined genus or class running throughout the bodies previously enumerated, and the "other authorities" would include all those authorities set up under the Constitution or a statute on whom the law confers power.

It was not necessary that statutory authority should be engaged in carrying out governmental or sovereign functions. Statutory corporations like the ONGC, IFC and LIC were set up under statutes and thus possessed the statutory authority to promulgate binding rules and regulations while remaining under pervasive governmental control.

### **SUKHDEV SINGH V. BHAGATRAM ANALYSIS**

The court considered whether statutory corporations like the Oil and Natural Gas Corporation, Industrial Finance Corporation, and Life Insurance Corporation, respectively established under the Oil and Natural Gas Commission Act, 1959, Industrial Finance Act, 1948, and Life Insurance Act, 1956, fell within the meaning of 'the State'. By a ratio of 4:1, the court held the

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<sup>2</sup> §3(31), General Clauses Act, 1897.

<sup>3</sup> University of Madras v. Shantha Bai, AIR 1954 Mad 67; B.W. Devadas v. Karnataka Regl. Engg. College, AIR 1964 Mys 6; Krishan Gopal Ram Chand Sharma v. Punjab University, AIR 1966 Punj 34.

three corporations to be State. They were thus 'other authorities' within the meaning of Article 12,<sup>4</sup>.

Mathew J., in the majority, was of the view that public corporations were a new institution arising out of the new social and economic roles of government and, rather than being placed in the old legal category, it should be realigned with the modern times and circumstances.

Being human agency, the State could conduct trade or business as envisaged under Article 298 of the Constitution, or by way of an agency or instrumentality or a juristic person. Statutory corporations are agencies or instrumentalities of the State for the conduct of trade or business which would have otherwise been undertaken by the State departmental-wise. Therefore, the question arises as to whether a body is functioning as an agency or an instrumentality of the State.

### **THE RD SHETTY TESTS**

The Supreme Court established 5 tests to ascertain whether a body can be termed as an "instrumentality" or "agency" of the state, and thereby is included in the definition of "State".<sup>5</sup> These tests were created to ascertain whether a government possesses the powers and authority over an entity and whether the functions of such an entity are pure or commercial

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#### **(1) Enacted by Statute<sup>6</sup>**

A corporation can be formed in two ways: it may either be created by a statute or enshrined in law such as Companies Act, 1956, or the Societies Registration Act, 1860. A corporation formed under a law is controlled by a board of directors or committee of management as per the rules laid down in the statute.

Where a corporation is directly controlled by the government in both policy-making and the performance of functions entrusted to it by the law or its charter, If the govt owns 100% of the share capital, then it's pretty obvious the corporation's basically a govt body like an instrumentality or agency, no doubt about it.

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<sup>4</sup> Sukhdev Singh v. Bhagatram Sardar Singh Raghuvanshi, A.I.R. 1975 1SCC 421.

<sup>5</sup> Ramana Dayaram Shetty v. International Airport Authority of India, A.I.R. 1979 SC 1628.

<sup>6</sup> *Ibid.*

## (2) Large Scale Government Financial Support<sup>7</sup>

If the government is giving a massive amount of the money to run a big corporation like almost the whole thing and the purpose of that funding matches the public goals of the corporation, then yes, you can say the corporation is basically working like a government agency.

## (3) Deep and Widespread State Control<sup>8</sup>

In other situations where the financial assistance is not so pervasive, it may not by itself render the corporation an instrumentality or agency of the State since there are several private institutions that are being availed of financial assistance by the State and on the ground or basis of which alone they cannot be said to be State agencies; it being argued that bare finding of some control by the State would not be decisive of the issue "since a State has significant measure of control under its police power over every kind of business operations." However, the finding of State financial backing plus extraordinary level of control of said operation in respect of its policies and management could force one to speak of "State action." Deep and widespread State control shall be one pointer as to whether the Corporation is a state agency or instrumentality.

## (4) Pleasure in Monopoly Position<sup>9</sup>

Here relevant will be an enquiry as to whether the corporation enjoys monopoly status which is either State conferred or State protected. Once the State granted a monopoly to a corporation or even protected that monopoly, it becomes big when you're trying to ascertain the link between the corporation and the government. It basically exists to help the analysis of whether the corporation acts as a government agency or instrumentality.

## (5) Public importance functions closely linked to governmental activities<sup>10</sup>

A corporation performing a public function which is meant for public benefit is subject to state regulation. When the public character of the function, if impregnated with governmental character or "tied or entwined with the Government," or augmented by some other factor, may turn the corporation into an instrumentality or an agency of Government.

## **CRITIQUE OF RD SHETTY TESTS**

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<sup>7</sup> *Ibid.*

<sup>8</sup> *Ibid.*

<sup>9</sup> *Ibid.*

<sup>10</sup> *Ibid.*

My view is that these tests can be faulted for being too wide, vague and susceptible to multiple interpretations so that they are applied unevenly by the court. They are not clinching or conclusive, but are only an indicative indicium which must be applied with caution and prudence, because in emphasizing the need for a broad meaning to be accorded to the term "other authorities", it must be remembered that it should not be extended so far as to include every independent body which has some connection with the government within the ambit of the expression. A broad expansion of the sense has to be balanced by a discerning restraint.

This case has confused the lines between public and private organizations, since public institutions function on constitutional obligation, while private agency's function based on market forces. The likelihood of being held accountable to constitutional scrutiny may make private bodies follow strict laws, curbing their independence to innovate or make autonomous business decisions. Even if a commercial company has some government support, it can still be run and managed independently. By establishing such organizations as being on the same level as government institutions, the court disregards the complexities of how such institutions function, thus denying them independence. In general, it is submitted that making private entities account for violation of fundamental rights imposes too much burden on the judiciary. It can put pressure on judicial capacity without necessarily supporting effective enforcement of basic rights.

While R.D. Shetty enhances accountability and widens constitutional protection, its liberal interpretation can lead to unforeseen consequences. There is a requirement for precise guidelines on how and when to apply these standards so that there can be a balance between constitutional rule and economic freedom in the private sector.

### **THE AJAY HASIA CASE AND ITS CONTRIBUTION**

The guidelines established in *Ramana Dayaram Shetty v. International Airport Authority of India and Ors.* can be further analysed vis-à-vis the case of *Ajay Hasia v. Khalid Mujib Sehravardi*<sup>11</sup> wherein the parameters for determining whether a private institution financed by the government is a "State" and hence accountable under the constitution were elucidated. It does not matter for this purpose whether the corporation is brought into existence by a statute or in pursuance of one. The test is whether it is an agency or instrumentality of the Government and not how it comes into being. The question is really not as to how a juristic person comes into existence but as to the reason why it was created.

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<sup>11</sup> *Ajay Hasia v. Khalid Mujib Sehravardi*, A.I.R. 1981 SC 487.

For the court, Bhagwati, J., pointed out that corporations as instrumentalities or agencies of Government would clearly be subjected to the same constraints in the field of constitutional or administrative law as the Government itself, even though in the eyes of the law they may be separate and independent legal entities. If the Government is bound by the constitutional and public law constraints in exercise of its functions through its officers, then it must follow that governments in exercise of their functions through the agency of corporations must be bound by the same. Assuming no exhaustive listing, he elaborately discussed some of the factors if a body is an agency of the state.

The Ajay Hasia case upholds the principles of accountability and transparency by making sure that the private bodies discharging public functions or receiving government monies are subject to the same scrutiny as government departments and subject to constitutional standards. The test established in the Ajay Hasia case gives a deeper and more detailed perspective to examine whether a corporation should be considered an instrumentality or agency of the government.

If upon a consideration of these factors, it is determined that the corporation is an instrumentality or agency of the government, then it would be an authority and hence the State within the meaning of Article 12. The picture that at last emerges is not so much that the tests laid down in Ajay Hasia are not a fetter but the plain and simple fact that the tests in Ajay Hasia (supra) are not any hard and fast and rigid set of rules so that wherever a body falls under any one of these it should, *ex hypothesi*, be taken to be a State under Article 12.

### **PRADEEP KUMAR BISWAS CASE: CLARIFYING TESTS**

The court said:

“The image finally to emerge is that the tests drafted in Ajay Hasia are not a strict set of rules so that where a body comes within any one of them it must, be held to be a State. But yes, that kind of control can’t just be general it has to be specific to that particular body and needs to be all over the place, like in every major aspect of how it runs. If it is so, then the body is a State under Article 12. Alternatively, where control is only regulatory, either under statute or otherwise, it would not operate to render the body a State,<sup>12</sup>.

### **INSTRUMENTALITY TEST BEYOND STATUTORY CORPORATIONS**

An incorporation may be that which has become a statutory corporation through a statute or a government company or may be a company set up under the Companies Act, 1956, or perhaps

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<sup>12</sup> Pradeep Kumar Biswas v. Indian Institute of Chemical Biology, A.I.R. 2002 5 SC 111.

a society. Under the Societies Registration Act, 1860 or any other enactment for that matter, whatever may be its genesis, when it functions as an agency or instrumentality of the government, then it shall count as an authority within Article 12. The concept of instrumentality or agency of the Government does not cover solely a corporation created under a statute but also may be ascribed to a company or society, and in a given case, having regard to relevant factors, a company or society might be considered an instrumentality or is functioning as a government agency and therefore will come within the expression “authority” in Article 12; this is the idea.

## **CONCLUSION**

The framework for determining "State" can be made more effective and relevant in today's complex environment by refining the criteria for substantial control, distinguishing between public and private functions, addressing modern governance models, increasing accountability, balancing protections with autonomy, and clarifying the role of government in mixed entities.

In conclusion, I am of the opinion although the existing system serves as a strong basis, a shift in perspective that conforms to the challenges of contemporary governance would better fulfil Article 12's goals of ensuring that all institutions performing major public functions remain accountable to the Constitution.

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