CHAPTER-3

THE CONCEPT OF STATE ACTION UNDER ARTICLE 12 OF THE INDIAN CONSTITUTION

3.1 Introduction

The concept of State Action is not defined in the Constitution rather it is a concept which is implied in Article 12 of the Constitution of India. The Article is the first article in Part III of the Constitution and it enlists the fundamental rights guaranteed to the people. Defining State was necessary as the Fundamental Rights are expressly guaranteed against the State. The Article has been put to judicial scrutiny in a number of cases. In most of the cases the Court has analyzed the fact situations existing at the particular time and made the judicial meaning of the term in tandem with the political and economic changes and its impact on State and its role in the society. In this way an array of institutions are kept under the purview of judicial scrutiny.

Though the language in Article 12 is plain, the term ‘other authority’ is put to test quite a number of times. In order to extract the true meaning of the term and to further the purpose of fundamental rights the judiciary has evolved the test of instrumentality or agency under which various criteria’s are laid out, one such important test is ‘Public Functions Test,’ other tests being deep and pervasive state control test, government monopoly test etc. The cumulative effect of all the tests is necessary to hold an authority as ‘other authority’ and thereby state under Article 12. These tests try to render a meaningful link between the authority in question and the government.

Despite playing its role as ‘social engineer’ while analyzing the cases what can be seen is that the various tests acts as a limitation upon the further enlargement of the concept of State Action though constitution framers intended to give wide meaning to Article 12. The response of the judiciary towards the changing socio-economic transformations is also evident from the observations given in the judgment. In this background the Chapter presents a careful analysis of the development and scope of the definition of State under Article 12 and also how the strait jacket formulation of the tests to determine the State Action concept has
made the law static in extending its application to private bodies exercising public functions.

3.2 Enforcement of Fundamental Rights against the State

‘Every State is known by the right that it maintains.’\(^1\) Just as a written law evolved from the concept of natural law as a higher law so the Fundamental Rights may be said to have sprung from the doctrine of natural rights.\(^2\) As the Indian Supreme Court has put it “Fundamental Rights are the modern name for what have been traditionally known as natural rights.”\(^3\) The political implication of the theory of natural rights is that these rights being inherent in man existed even prior to the birth of the State itself and cannot, therefore, be violated by the State.

The doctrine of natural rights passed into the realm of practical reality for the first time in the form of *Magna Carta* when King John was made to acknowledge that there were certain rights of the subject which could not be violated even by a sovereign in whom all power was vested as per Social Contract Theory. Further the theory of natural rights entered into the realm of constitutional realism with two revolutionary documents American Declaration of Independence and French Declaration of Rights of Man.\(^4\)

The American Declaration of Independence drafted by Jefferson is clear and unequivocal on this point when he Stated that “all men are created equal, and are endowed by their Creator with certain unalienable Rights among these are Life, Liberty and the pursuit of happiness.”\(^5\) As per the American concept, fundamental rights are not matters to be drawn into the vortex of political controversy or to be placed at the mercy of legislative majorities instead they are to be definitely recognised in the constitution and protected against any violation either by the

\(^1\) HAROLD J. LASKI, A GRAMMAR OF POLITICS (1925).
\(^2\) (In the words of Blackstone natural rights were founded on nature and reason so they coeval with form of government) BLACKSTONE COMMENTARIES 127-28 (1765).
\(^4\) THE FRENCH DECLARATION OF THE RIGHTS OF MAN (1791) reinforces the concept of natural, inalienable, imprescriptible rights i.e.; the fundamental rights against the absolute monarchs. (French Declaration reads ii. The end of all political associations is the preservation of the natural and imprescriptible rights of the man and these rights are Liberty, Property, Security and Resistance of Oppression).
\(^5\) (The philosophy of John Locke and his tenets of Puritan Revolution permeates both the Declaration of Independence of 1776 and the Federal Convention of 1787. To him man is amenable to reason and susceptible to the claims of conscience, endowed by his creator with these potentialities, man can shape his role in society and determine the kind of government to which he will give his concept) MARIAN D. IRISH & JAMES W. PROTHRO POLITICS OF INDIAN DEMOCRACY 215 (2nd ed. 1964).
Legislature or through an independent or impartial judiciary. The doctrine of limited government – the idea that government may not deny the “unalienable rights” of the people – is thus fundamental in the American approach to civil rights.⁶

Similarly, the Indian Constitution Part III of the Constitution enlists fundamental rights and this chapter is called as the *Magna Carta* of the Indian Constitution. It is more elaborate than the Bill of Rights contained in any other existing Constitution of importance and covers a wide range of topics. The inclusion of this chapter on fundamental rights is to preserve the basic elementary rights such as right to life, liberty, fundamental freedoms which should be regarded as sacrosanct with least interferences from the people in power. Fundamental rights were incorporated on the idea that a code of social philosophy regulating the conduct of everyone will remind the legislatures and executive whenever they begin to trample over rights that they are treading on a prohibited area, and also to provide an opportunity for citizens to create public opinion against such measures.⁷

Indian Constitution preserves the natural rights against State encroachments and constitutes the higher judiciary of the State as the sentinel of the said rights.⁸ The reason is that the freedom fighters in India had learnt from their experience that even a representative assembly of men might be arbitrary and hostile to the cherished rights of men. As Laski wrote; “and Indians believed in the ‘federation of minorities’ a declaration of rights was as a necessary as it had been for the Americans when they first established their federal constitution”⁹

The constitution framers did not find State as a necessary evil but rather as a means to an end; welfare of the people being the end and State as a means and with that aim in mind they had imposed positive obligation on the State to realize certain socio-economic rights when it state capable of doing so¹⁰ and that forms a very important feature of Indian Constitution *viz*; Directive Principles of State Policy (DPSP) under Part IV of the Constitution which are the Directives given to the State.

---

⁶ On the contrary USSR established a Communist government wherein the State is more powerful and the private citizen enjoys only those liberties that the government finds it expedient to grant him.
⁷ M.V. PYLEE, CONSTITUTIONAL GOVERNMENT IN INDIA 190 (1968).
⁹ HAROLD J. LASKI, supra note 1, at p. 97
¹⁰ CONSTITUTION OF INDIA art.37 (“The provisions contained in this Part shall not be enforceable by any court, but the principles therein laid down are nevertheless fundamental in the governance of the country and it shall be the duty of the State to apply these principles in making laws.”).
under the Constitution for establishment of a Welfare State.\textsuperscript{11} “The fundamental Rights and Directive Principles together constitute the conscience of the Constitution.”\textsuperscript{12} Although the Rights and Directives appear in the Constitution as distinct entities, it was the Assembly that separated them; the leaders of the Independent movement had drawn no distinction between the positive and negative obligations of the State.\textsuperscript{13}

Although it is primarily against the might of the State that the individuals need protection, the Constitution barring a few exceptions protects fundamental rights of the people against the even private parties. Fundamental rights are protected against private persons under Articles 15 (2),\textsuperscript{14} 17,\textsuperscript{15} 23,\textsuperscript{16} 25(2)(b),\textsuperscript{17} 28(3)\textsuperscript{18} and 29(2).\textsuperscript{19} Thus the State in addition to obeying the Constitutions’ negative injunctions not to interfere with certain of the citizens’ liberties must fulfill its positive obligation to

\begin{itemize}
\item \textsuperscript{11}CONSTITUTION OF INDIA art.38(1) (“The State shall strive to promote the welfare of the people by securing and protecting as effectively as it may a social order in which justice, social, economic and political, shall inform all the institutions of the national life.”).
\item \textsuperscript{12}GLANVILLE AUSTIN, INDIAN CONSTITUTION: CORNERSTONE OF A NATION 50 (1985).
\item \textsuperscript{13}Id. at 52.
\item \textsuperscript{14}CONSTITUTION OF INDIA art. 15(2) (Prohibition of discrimination on grounds of religion, race, caste, sex or place of birth.-(2) No citizen shall, on grounds only of religion, race, caste, sex, place of birth or any of them, be subject to any disability, liability, restriction or condition with regard to-(a) access to shops, public restaurants, hotels and places of public entertainment; or (b) the use of wells, tanks, bathing ghats, roads and places of public resort maintained wholly or partly out of State funds or dedicated to the use of the general public).
\item \textsuperscript{15}CONSTITUTION OF INDIA art.17 (“Abolition of Untouchability. “Untouchability” is abolished and its practice in any form is forbidden. The enforcement of any disability rising out of “Untouchability” shall be an offence punishable in accordance with law.”).
\item \textsuperscript{16}CONSTITUTION OF INDIA art. 23 \textsuperscript{(1)} (“Traffic in human beings and begar and other similar forms of forced labour are prohibited and any contravention of this provision shall be an offence punishable in accordance with law (2) Nothing in this article shall prevent the State from imposing compulsory service for public purposes, and in imposing such service the State shall not make any discrimination on grounds only of religion, race, caste or class or any of them.”).
\item \textsuperscript{17}CONSTITUTION OF INDIA art. 25(1) (“Subject to public order, morality and health and to the other provisions of this Part, all persons are equally entitled to freedom of conscience and the right freely to profess, practice and propagate religion.(2) Nothing in this article shall affect the operation of any existing law or prevent the State from making any law-(a) regulating or restricting any economic, financial, political or other secular activity which may be associated with religious practice; (b) providing for social welfare and reform or the throwing open of Hindu religious institutions of a public character to all classes and sections of Hindus.”).
\item \textsuperscript{18}CONSTITUTION OF INDIA art. 28(3) (“No person attending any educational institution recognized by the State or receiving aid out of State funds shall be required to take part in any religious instruction that may be imparted in such institution or to attend any religious worship that may be conducted in such institution or in any premises attached thereto unless such person or, if such person is a minor, his guardian has given his consent thereto.”).
\item \textsuperscript{19}CONSTITUTION OF INDIA art. 29(1) (“Any section of the citizens residing in the territory of India or any part thereof having a distinct language, script or culture of its own shall have the right to conserve the same.(2) No citizen shall be denied admission into any educational institution maintained by the State or receiving aid out of State funds on grounds only of religion, race, caste, language or any of them.”).
\end{itemize}
protect the citizens ‘rights from the encroachment by society. Further for the purpose of Part III and Part IV State is particularly defined under Article 12 of the Indian constitution. Article 12 is the key to Part III and unless an authority can be said to be a ‘State’ within the meaning of Article 12 none of the provisions of Part III which relate to the ‘State’ will apply to such authority. Moreover for the effective enforcement of fundamental rights Article 32 is incorporated which is aptly described by Dr. B.R. Ambedkar as the very heart and soul of the Indian Constitution.

3.3 Constitutional Background of Article 12

A perusal of the Constitution Assembly Debates of India (CAD) itself will reveal that the Constitution makers wanted fundamental rights to be at a high pedestal than that of other rights. Under the Draft Constitution it was Article 7 which gave the definition of State. The definition has been used in order to avoid the inconsistency which existed under the Draft wherein the Indian State and Province was treated in a separate footing.

The objective behind defining state was to provide an impetus to the effective enforcement of fundamental rights. The expression state under Article 12

---

20) *Supra* note 8 (Moreover the framers appear to have taken the above precautions in view of the experience of U.S.A. where it had been held by the Supreme Court in Civil Rights Cases 109 U.S. 3 (1883) that the equal protection clause of the Fourteenth Amendment inserted after the civil war was limited in its application to only against the State Action).

21) The University of Madras v. Shanta Bai A.I.R. 1954 Mad. 67 (In this case the question was whether the direction issued by the University to its affiliated college to prevent it from admitting girl students was valid or not. The direction was given because the college lacked facilities to be accommodating girls. It was alleged by the respondent college that the direction violated Article 15 (1) and 29 of the Constitution).

22) VII CONSTITUTIONAL ASSEMBLY DEBATES 953 (1949).

23) VII CONSTITUTION ASSEMBLY DEBATES, (1948) DRAFT CONSTITUTION art. 7 (“In this part unless the context otherwise requires, ‘the State’ includes the Government and the 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.”).

24) DR. SUMAN SHARMA, STATE BOUNDARY CHANGES IN INDIA: CONSTITUTIONAL PROVISIONS AND CONSEQUENCES, 162 (1995) (In the First Schedule, the Indian States have been put in Part III while the Provinces have been put in Part I and in Article 3 Part I and II were treated separately. Whereas, in respect of the States under Part I their Legislature was only be considered, Shri Raj Bahadur of United States of Matsya wanted to change this state of affairs and he felt that people of the Indian States should be treated on equal footing with the people of the provinces and equal rights and opportunities should be provided to them. He observed that the Constituent Assembly was committed to the principle of unification and of democratization of the entire Union and as such cannot be contemplated by any provision of the Draft Constitution that there can be some sort of a different treatment between Provinces and the States).

25) VII CONSTITUTION ASSEMBLY DEBATES 607-610 (1948) (While initiating a debate on this Article in the Draft Constitution in the Constituent Assembly, Dr. Ambedkar described the scope of this Article and the reasons why this Article was placed in the Chapter on fundamental rights. According to him the object of fundamental rights is twofold firstly, to enable every citizen to claim
enumerates the authorities against which fundamental rights can be claimed and also it binds such authorities with the obligation to abide by and to respect the fundamental rights of the people. In the Constituent Assembly there had been divergent opinions concerning the phraseology of Article 12 since it was couched in the widest extent possible.  

But Dr. B.R. Ambedkar insisted on its retention so that fundamental rights could be claimed against anybody or authority exercising power over the people. By ‘authority’ he meant every authority which has got either power to make law or an authority on which discretionary power is vested. Besides a closer look at the Article reveals that the words have been added in such a manner as to help the law givers to interpret the term with the changing needs of the society and that is the spirit of the framers of the constitution to make it a 'living document' which will stand the test of the time.

The definition of the term State under Article 12 is inclusive and not exhaustive. The language of Article contains two important flexibility terms to cope up with the challenges posed by the society. The first one is the “inclusive nature” of the definition, which is evident through the use of the expression “includes” which can be used to accommodate new entities within the scope of Article 12. Therefore, authorities not specified in the Article may also fall within it if they otherwise satisfy the characteristic of the ‘State’ or if they perform any functions ordinarily performed by the Government. The second is use of the expression “unless the context otherwise” that allows the use of the concept of State in different situations in different manner and context. For instance, the context of Article 21, providing right to life or personal liberty, requires the widest and frequent use of the concept of State to make those rights a meaningful reality.

It is to be noted that the definition is applicable to Part III and as per Article 36 to Part IV as well. Merely because an authority is a ‘state’ does not make its

---

26 Id. Opposition was raised by Mahhoob Ali Baig Sahib Bahadur from Madras.
27 UDAI RAJ UDAI, FUNDAMENTAL RIGHTS AND THEIR ENFORCEMENT 690 (2011).
28 Id. at 17.
29 CONSTITUTION OF INDIA art. 36 (“In this Part, unless the context otherwise requires, “the State” has the same meaning as in Part III.”).
employees civil servants.\textsuperscript{30} Also ‘local authorities’ are ‘state’ but that does not entitle them to claim their status as State Government or Central Government. The reason is that there is distinction between ‘state’ and ‘government,’\textsuperscript{31} also public corporations cannot be considered as government departments under the state.\textsuperscript{32}

\textbf{3.4 Nature and Scope the Concept of State Action in India}

The doctrine of state action is not defined in the Indian Constitution rather it is implied in Article 12 of which defines State for the purpose of Part III. It enumerates a list of authorities against which fundamental rights can be enforced by invoking the writ jurisdiction if Supreme Court and High Court. As per the Article, State includes the Government and Parliament of India and government and legislatures of each state in India. It also includes local and other authorities within the territory of India and local and other authorities under the control of Government of India.\textsuperscript{33}

\textbf{(a) Government and the Legislatures}

It is explicitly mentioned in Article 12 that State includes Parliament of India and the State Legislature and State Executive by virtue of the functions and powers exercised by these bodies. Besides, Article 32 empowers the Supreme Court to issue writs against the Government of India as well as the State Government and also Article 226 expressly includes government as one of the persons against whom a writ may be issued.\textsuperscript{34} In case of legislature also Article 32 and 226 are enforceable.

\textsuperscript{30}Rajith Ghosh v. Damodar Valley Corporation AIR 1960 Cal. 549; S.L. Agarwal v. GM, Hindustan Steel Ltd. (1970). 3 SCR 363 (It was held that Hindusthan Steel Ltd. Was not a Department of the Government of India and the employees did not hold a civil post and as such were not entitled to the protection of Article 311 of the Constitution).

\textsuperscript{31}‘(Local authority’ shall mean a Municipal Committee, District Board, Body of Port Commissioners or other authorities legally entitled to, or entrusted by the Government with, the control or management of a municipal or local fund). Natwar Ghodidas v. District Panchayat, Jamnagar AIR 1990 Guj. 142 (In this case under Section 32 of the Bombay Civil Courts Act, 1869, a suit against Central or State Government could be filed only in the Court of Civil Judge (Senior Division) A suit was filed in the Court of Civil Judge (Junior Division), challenging the suspension of an employee of a Panchayat. It was held that the suit was correctly filed in that Court).

\textsuperscript{32}A.P. Road Transport Corporation v. Income Tax Officer (1964) 7 SCR 17.

\textsuperscript{33}CONSTITUTION OF INDIA art. 12 (“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.”).

and this was held on many occasions by the Court.\footnote{AIR 1965 SC 745.} As was observed in the \textit{Reference case}\footnote{Id. (In this case a non-member was detained by an order of the legislature for contempt of the House and he had moved the High Court for \textit{Habeas Corpus}. It was held that such a writ against the legislature is maintainable).} by Gajendragadkar S., Article 12 defines the State as including the legislature of such State and so \textit{prima facie} the power conferred on the High Court under Article 226 (1) can in proper case be exercised even against the legislature.\footnote{CONSTITUTION OF INDIA art. 361 (1) (“The President, or the Governor \textit{or Rajpramukh} of a State, shall not be answerable to any court for the exercise and performance of the powers and duties of his office or for any act done or purporting to be done by him in the exercise and performance of those powers and duties: Provided that the conduct of the President may be brought under review by any court, tribunal or body appointed or designated by either House of Parliament for the investigation of a charge under article 61: Provided further that nothing in this clause shall be construed as restricting the right of any person to bring appropriate proceedings against the Government of India or the Government of a State (2) No criminal proceedings whatsoever shall be instituted or continued against the President, or the Governor I of a State, in any court during his term of office. (3) No process for the arrest or imprisonment of the President, or the Governor of a State, shall issue from any court during his term of office.”).} 

\textbf{(b) Judiciary as State}

The definition of `State' under Article 12 does not explicitly mention judiciary. Since judiciary is the guardian of fundamental rights there may arise the question whether judiciary can violate the fundamental rights of the individual. In many of the cases it has been found that even judiciary can violate the fundamental rights of the people. If the judiciary is included under the State it must conform to the fundamental rights conferred by Part III of the Constitution.\footnote{For example Article 14 of the Constitution which says that “the State shall not deny to any person equality before the law or the equal protection of laws within the territory of India.” In U.S.it is well settled that the judiciary is within the prohibition of the 14th Amendment.} In India it is undisputed that the judiciary while exercising administrative powers is subjected to the fundamental rights but the position while adjudicating legal disputes is not settled till now.\footnote{Prem Chand Garg v. Excise Commissioner, U.P. 1963 Supp. (1) SCR 885.} In \textit{Ratilal v. State of Bombay},\footnote{AIR 1954 SC 388 (The question was relating to the rights of Hindu religious denomination to manage their affairs and their rights to spend property or income for religious purposes).} Bombay High Court expressed the view that the judgment of the Court cannot be challenged for violation of fundamental rights whereas Madras High Court held that equal protection clause of Article 14 applies to the judiciary with same force and spirit.
But the view of the Supreme Court on the matter is just the opposite. In *Parbhani Transport Co-operative Society v. Regional Transport Authority* a decision offending Article 14 was defended by the Supreme Court on the ground that as the authority was acting as a quasi-judicial body, its decision might be right or wrong, but there should not be any question that whether it is in violation of Article 14. Subsequently in *Ujjambai v. State of UP* it was unequivocally held by the Supreme Court that “an error of law or fact committed by a judicial body cannot in general be impeached otherwise than on appeal unless the erroneous determination relates to a matter in which the jurisdiction of that body depends”.

The question whether the judiciary is “State” was directly raised before the Supreme Court in *Naresh Sridhar Mirajkar v. Maharashtra*. In the instant case it was argued that the order of the trial judge restricting the press to publish the testimony of the defense witness given in the open court violates fundamental right to freedom of speech and expression. The High Court dismissed the petition on the ground that a judicial order is not amenable to writ jurisdiction. Supreme Court on appeal admitted the petition under Article 32 for violation of fundamental rights by the Trial Judge in the judicial order and it brought up the following issues- firstly, whether a judicial order suppressing evidence of a witness on the grounds that his business would suffer breaches the fundamental rights in order to entitle the petitioner to invoke Article 32 and secondly, whether the Supreme Court could issue a writ to the High Court in the instant case?

The majority held that the suppression of evidence was necessary to serve the cause of justice. It was also opined that the impugned order would not violate Article 19 (1)(a) since the power to withhold publication or to hold an in camera

---

41 (Similarly in Sahibzada Saiyed Muhammed v. State of Madhya Bharath AIR 1960 SC 786, Supreme Court observed; "Denial of equality before the law or the equal protection of laws can be claimed against the executive action or legislative process but not against the decision of a competent tribunal. The remedy of a person aggrieved by the decision of a competent judicial tribunal is to approach for redress before a superior tribunal, if there be one.).

42 1963 (1) SCR 778.

43 Ayyangar J. in a powerful dissenting opinion pointed out that by including writs of prohibition and certiorari in Article 32 the framers had clearly indicated that the fundamental rights in appropriate cases could be enforced against the judicial or quasi-judicial authorities in as much as these writs lay only against such authorities.

44 (1966) 3 SCR 744 (In this case a defamation suit was filed against the editor of a weekly newspaper, one of the prayed that the Court order that publicity should not be given to his evidence in the press as his business would be affected. After hearing the arguments the trial judge passed an oral order prohibiting the publishing of the evidence of the witness. The reporter and other journalists of the weekly filed writ petition under Article 32).
trial were both protected by Article 19 (2). Moreover, since the freedom of speech was affected only incidentally and indirectly, there was no violation of fundamental rights. Regarding amenability of judiciary to writ jurisdiction the majority held that the order was to be challenged under Article 136 and not under Article 32, since it being a judicial order. The Constitution did not contemplate the High Court to be inferior to the Supreme Court and therefore, their decision would not be liable to be quashed by a writ of certiorari issued by the Supreme Court.

The dissenting opinion of Hidayatulla J. deserves special attention here. He negated the findings of the Majority pointing out the fallacy in the procedure adopted by the judiciary viz; the trial was not conducted in camera by the judge but the testimony was barred 'perpetually from publication. The Court was not bound to protect the business interest of witness against the cost of an open and fair end of justice and Article 19 (1) of the petitioners. He found the case as one involving judge and the fundamental rights of the petitioner by reason of petitioners’ action. To him the word ‘state’ includes courts because otherwise courts will be enabled to make rules which take away or abridge fundamental rights and a judicial decision based on such a rule would also offend fundamental rights. The argument seems to be appropriate especially if due process has not been complied with. Here in the instant case the judge's action was not in conformity with the procedure. It was also mentioned that Article 20 and 22 (1) is addressed to the Court.

A similar question arose in A.R. Antulay v. R.S. Nayak, wherein Supreme Court granted relief for violation of fundamental rights in a proceeding other than a

---

45\textit{Id.} at para. 26 & 28 (According to Seervai the dissenting judgment is correct on all the questions raised by the petitioners. He is also of the opinion that the judiciary wield the judicial power of the State, and Article 144 emphasises the fact that judgments will be worth little if the full authority of state were not exerted to give effect to them. H.M. SEERVAI, CONSTITUTIONAL LAW OF INDIA 394, 399 (4th ed. 1999).

46\textit{COSTITUTION OF INDIA} art. 20 (1) No person shall be convicted of any offence except for violation of a law in force at the time of the commission of the Act charged as an offence, nor be subjected to a penalty greater than that which might have been inflicted under the law in force at the time of the commission of the offence. (2) No person shall be prosecuted and punished for the same offence more than once. (3) No person accused of any offence shall be compelled to be a witness against himself.

47\textit{CONSTITUTION OF INDIA} art. 22 (1) No person who is arrested shall be detained in custody without being informed, as soon as may be, of the grounds for such arrest nor shall he be denied the right to consult, and to be defended by, a legal practitioner of his choice.

48\textit{1988 (2) SCC} 602 (The case went to the Supreme Court by way of Special Leave Petition but no appeal would lay against it under Article 136 and also it was not a review petition nor did the Supreme Court treat it as such. Some majority judges specifically denied that they were exercising jurisdiction under Article 32).
writ petition. It was held that the order of the Constitution Bench transferring case pending from Special Court to High Court, wherein the case could only be tried in special court was violation of the fundamental rights of Antulay under Article 14 and 21 of the Constitution. It was held that the order of the Court be it administrative or judicial, against the provisions of the Constitution or violates the principles of natural justice, can always be remedied by the Court *ex debito justitiae*. This decision has given a ray of hope as it allowed reopening of the cases wherein final decision was already made. It was also made clear that the remedy against a wrong determination in the exercise of judicial adjudication functions by the Court is not to allege that the determination of the Court is not consistent with fundamental rights.

In *Triveni Ben v. State of Gujarat*, the Supreme Court held that judgment of a Court can never be challenged under Article 14 or 21 and therefore the judgment of the Court awarding the sentence of death is not open to challenge as violation of Article 14 and 21. But in the subsequent decisions involving patent violation of fundamental rights involving judiciary the Supreme Court has attempted sporadic interventions. Thus in *Rupa Hurra v. Ashok Hurra* the Constitution Bench has held that if the justice of a case so demands the Court can exercise curative jurisdiction even after the review application has been rejected and this has marked the beginning of a new era of 'curative petitions'.

There is no justifiable reason why the judiciary should not be included in the inclusive definition of the ‘State’ under Article 12. However unfortunately it has been held by the Court in a number of decisions that the judiciary is not involved in the definition of State. Judiciary must be held as a State. The courts are-setup by statutes and they exercise powers conferred by law. Besides if the Court found that a fundamental right has been trampled upon, it is not only its duty to act to correct it.

---

49 Of or by reason of an obligation of justice, as a matter of right etc.
50 (1989) 1 SCC 678 (The contention of the accused was that pursuant to being convicted under Section 302 of IPC, there was a long delay in executing punishment of sentence to death and that dehumanizing aspect is violates Article 21).
51 (2002) 4 SCC 388 (Prior to this case in Harbans Singh v. State of U.P. (1982) 2 SCC 103 and in Attorney General v. Lachma Devi AIR 1986 SC 467 the Court has reconsidered the judgment and the remedy was granted under Article 32. But nowhere was it mentioned whether the judiciary has to be brought under Article 12).
52 In Azadi Bachao Andolan v. Union of India (2004) 10 SCC 1 (In this case a curative petition was allowed to reconsider the validity of a circular regarding the Indo-Mauritius Tax Treaty).
but also its obligation to do so.”\textsuperscript{53} If the judiciary is excluded from the definition of State, no writ can be issued by the Supreme Court against any judicial institution and Part III of the Constitution would become futile.

In \textit{Surya Dev Rai v. Ram Chander Rai & ors.},\textsuperscript{54} by upholding \textit{Mirajkar} dictum Supreme Court has ruled that judicial orders of Civil Courts are not amenable to writ jurisdiction under Article 226. The Court also differentiated its jurisdiction under Article 227 from 226. A notable development in this line happened with the decision of the Supreme Court in \textit{Common Cause v. Union of India}\textsuperscript{55} wherein Supreme Court made a remark in the following lines that “Part IV of the Constitution is as much a guiding light for the judicial organ of the state as the Executive and legislature all three being integral parts of one State within Article 12 of the Constitution.” Though this observation can only be treated as ‘obiter’ this is a novel approach in looking at the judiciary as State under Article 12.

\textbf{Recommendation of National Commission on the Review to Review the Working of the Indian Constitution (NCRWC)}

\textit{NCWRC}\textsuperscript{56} has pondered over the question whether judiciary should be included in the definition of ‘State.’ Commission expressed its desirability over including State in Article 12. This recommendation was made on a comparative constitutional plane by taking instances from UK Human Rights Act, 1998 and Bill of Rights of South African Constitution. In UK ‘public authority’ under UK Human Rights Act, 1998 is defined to include Court or Tribunal and it is unlawful for a Court or Tribunal to act in a way incompatible with convention right as per the

\textsuperscript{53} V.G. RAMACHANDRAN, LAW OF WRITS 55 (1993) also in Unnikrishnan it was held by Jeevan Reddy J. that “under Article 37 of the Constitution it was the duty of the State to take into account the directives in making laws and observed that since the judiciary was part of the State, it was its duty to interpret the scope of fundamental rights in the light of the relevant directives.”

\textsuperscript{54} (2003) 6 SCC 675 (The respondent had contended that there was no reason to exclude the civil courts from the the expression “any person or authority” in Article 226 of the Constitution because conceptually writ of certiorari can be issued by a superior Court to an inferior Court).

\textsuperscript{55} 2015 (7) SCC 1 (In this case a PIL was filed seeking an appropriate writ to restrain the Union of India and State Government from using public funds in government advertisement which were primarily intended to project individual functionaries of the Government or a political party. It was also prayed in the petition that the Supreme Court may lay down appropriate guidelines to regulate government action in the matter to prevent misuse/wastage of public funds in connection with such advertisements).

Act. The Bill of Rights in South African Constitution is also applicable to the judiciary as per the Constitution of the Republic of South Africa, 1996.

Another strand of thought expressed by the judiciary is that inclusion of judiciary in ‘State’ should be confined to Article 21 of the Constitution. Thus as per the Commission a judicial order which is without jurisdiction and null and void is to be treated as violation of Article 12.

3.5 Authorities under the Control of Government of India

(a) Local Authorities- The expression ‘local authorities’ has not been defined in the Constitution but is defined in the General Clauses Act, 1897 so as to include municipal committee, district board, body of port commissioners or other authorities. These bodies must be legally entitled to or entrusted by the Government with the control or management of municipal fund. Thus autonomy regarding the affairs financial as well as administrative is necessary to fall under the term ‘local authority’ under Article 12.

Further, Article 367 of the Constitution lays down that unless the context otherwise requires, the General Clauses Act, 1897, shall subject to any adaptations

---


(1) It is unlawful for a public authority to act in a way which is incompatible with a Convention right.

(2) Sub-Section (1) does not apply to an act if - (a) as the result of one or more provisions of primary legislation, the authority could not have acted differently; or (b) in the case of one or more provisions of, or made under primary legislation which cannot be read or given effect in a way which is compatible with the convention rights, the authority was acting so as to give effect to or enforce those provisions.

(3) In this section ‘public authority’ includes - (a) a court or tribunal, and (b) any person certain of whose functions are functions of a public nature. But does not include either House of Parliament or a person exercising functions in connection with proceedings in Parliament.

(4) In sub-section (3) ‘Parliament’ does not include the House of Lords in its judicial capacity.

(5) In relation to a particular act, a person is not a public authority by virtue only of sub-section (3) (b) if the nature of the act is private.

(6) ‘An act’ includes a failure to act but does not include a failure to - (a) introduce in, or lay before, Parliament a proposal for legislation; or (b) make any primary legislation or remedial.

58 THE CONSTITUTION OF THE REPUBLIC OF SOUTH AFRICA 1996 art.8 (1) ("The Bill of Rights applies to all law, and binds the legislature, the executive, the judiciary and all organs of State.").

59 GENERAL CLAUSES ACT § 3 (LXI); CONSTITUTION OF INDIA Sch. VII, List II, Entry 5 ("Local government, that is to say, the constitution and powers of municipal corporations, improvement trusts, districts boards, mining settlement authorities and other local authorities for the purpose of local self-government or village administration.").

60 CONSTITUTION OF INDIA art. 367 (1) ("Unless the context otherwise requires, the General Clauses Act, 1897, shall, subject to any adaptations and modifications that may be made therein under
and modifications apply for the interpretation of the Constitution also. Thus the
definition can be well applied for the purpose of interpretation of Article 12.
According to the Court the criteria which must be present in order to hold an
authority as a local authority apart from the above are that it must have a separate
legal existence as a corporate body having an independent legal entity. It must have
function in a defined area and must ordinarily, wholly or partly, directly or
indirectly, be elected by the inhabitants of the area. It must enjoy a certain degree of
autonomy, with freedom to decide for it questions of policy affecting the area
administered by it. It must be entrusted by the statute with the performance of civic
duties and functions. Finally it must have power to raise funds for the furtherance of
its activities and fulfillment of its projects by levying taxes, rates, charges or fees in
addition to the monies provided by Government or obtained by borrowing or
otherwise.\textsuperscript{61}

Applying this test it was held that Local authorities like Municipalities,\textsuperscript{62}
District Boards,\textsuperscript{63} Panchayats,\textsuperscript{64} Improvement Trusts, Port Trusts,\textsuperscript{65} and Mining
Settlement Trusts etc. are local authorities and was also held by the court through
various judicial decisions.

The question whether housing boards can be considered as 'local authority'
came before the Supreme Court in many cases. The decision reveals the difficulty in
holding an authority as State even if it performs an important public function. In
\textit{Housing Board of Haryana v. Haryana Housing Board Employees Union}\textsuperscript{66}
the Supreme Court held that the Housing Board is not a ‘local authority’ and denied to
make applicable Payment of Bonus Act to employees of Haryana Housing Board.
The reason was that it does not enjoy a ‘local fund’ and the members are not elected like in other local authorities like panchayats, municipalities and also on the ground that it is not an autonomous body as there is government control in the functions performed by it. The legislature had given it the status of ‘local authority’ for the purpose of Land Acquisitions Act. But Court held that the status is given only for a limited purpose. Simultaneously, the Supreme Court also denied making it as ‘other authority’ under Article 12.

Further, in *M/S Andhra Pradesh Housing Board v. Department of IT* the question was whether Andhra Pradesh Housing Board is a government agency or not. Unlike the former case, in the instant case the independent character of the Housing Board was upheld. If in the first case the Housing Board was declared not an 'other authority' for the government control, in the instant case it was declared as not as an ‘other authority’ because it is functioning as an autonomous body. But in both cases the fact that the Housing Boards are performing an important government function and the element of public purpose in the respective activity was ignored by the Court. Thus it can be found that rather than nature of the activity importance is given by the Court to the tests or criteria’s in determining whether a body fall under the term ‘State' or not.

(b) Other Authorities

Article 12 ends up enumerating the authorities under Article 12 by referring finally ‘other authorities’ within the territory of India and under the control of

---

67 *Id.* (The Supreme Court observed that the functions as are indicated in the housing scheme are essentially performed by Municipal Boards and Council which are ‘local authorities’ but on that analogy the Haryana Housing Board cannot be treated to be a local authority as the extent of the control of the State Government under which the Board had to function is prominently pervasive that it is almost destructive to its independence which will also be apparent from the facts that in matters of settlement of its annual programmes, budget and establishment schedule, the Board has to obtain the sanction of the State Government. The Housing Board does not have the semblance of independence which are normally possessed by local self-government. The Board does not even partially consist of elected representative of the people).

68 *Id.* (Court observed that the legislature could well have given this status to the Board for the purpose of Payment of Bonus Act but this has not been done and so it cannot be treated as a 'local authority' under the Payment of Bonus Act, 1965).


70 It is also to be noted that Budha Veerinaidu v. State of Andhra Pradesh and anr.1983 (143) ITR 1021 Agricultural Market Committee functioning under Andhra Pradesh Agricultural Produce and Live Stock Markets Act, 1966 was held to be a ‘Local Authority’ As it was found that the Market Committee was entrusted by the Government with the control and management of “Local Fund” whereas Housing Board which also performs an equally or more important function was held to be not performing a governmental activity.
government of India. The term ‘authority’ is defined as the person or persons in whom government or command is vested.\(^71\) It is also defined as a public administrative agency or corporation having quasi-governmental powers and authorized to administer a revenue-producing public enterprise.\(^72\) This dictionary meaning of the word is clearly wide enough to include all bodies created by a statute on which powers are confined to carry out governmental or quasi-governmental functions and it was quoted with approval by the Constitutional Bench in *Rajasthan State Electricity Board*\(^73\) and later this was reiterated by the Apex Court in *Pradeep Kumar Biswas*.\(^74\)

3.6 Interpretation of ‘Within the Territory of India or Under the Control Government of India’

In the draft Constitution these words ‘under the control of Government of India’ were not there and it was subsequently made part of Article 12 by Dr. B.R. Ambedkar to expressly guarantee fundamental rights to those who are staying in the territories not under the control of Government of India for e.g. Trust territories. It was added despite the oppositions grounded on the inconclusive nature of Article 12 and especially of the words ‘other authorities’, which extended the definition beyond the category of authorities usually known to possess governmental power. But Dr. B.R. Ambedkar said that “anybody who cared for the fundamental rights could not object to the definition.”\(^75\)

Regarding the interpretation of the term ‘within the territory of India’ and ‘under the control of Government of India’ it can be seen that they are interconnected by the word ‘or’ which implies that they are disjunctive. The term ‘under the control of Government India’ is meant to bring into the definition of State, not only every authority within the territory of India but also those functioning outside, provided they are under the control of the Government of

---

\(^71\) *Rajasthan Electricity Board* v. Mohanlal 1967 SCR (3) 377 (The services of the permanent employees were placed at the disposal of the appellant, Electricity Board. While framing its own grades and conditions for promotions the Board discriminated the employees and this matter went in appeal before the Supreme Court from Madras High Court).

\(^72\) *Id.*

\(^73\) *Id.* at 378 (The Apex Court overruled Shanta Bai and declared incorrect its basic thesis on the ground that for the interpretation of ‘other authority’ in Article12 *ejusdem generis* rule would be applicable because there was no common genus present in the authorities specifically enumerated in the Article).

\(^74\) *Pradeep Kumar Biswas* v. Indian Institute of Chemical Biology (2002) 5 SCC 111.

\(^75\) VI CONSTITUTION ASSEMBLY DEBATES 608-09 (1948-49).
India.\textsuperscript{76} In \textit{N. Masthan Sahib v. Chief Commissioner, Pondicherry}\textsuperscript{77} and in \textit{K.S. Ramamurthi Reddiar v. Chief Commissioner, Pondicherry}\textsuperscript{78} it was said that the words ‘under the control of the government of India’ qualified the words ‘other authorities’ and not the territory.

Thus, the term ‘within the territory of India’ may also imply that there are a set of bodies that comes under Article 12 which are not under the control of Government of India. Those bodies may be under the control of the State Government. But to interpret the term in that way will cut down its scope of Article 12, also it may not be intended by the framers since that fact is expressly mentioned in the Article. To interpret the term in a very creative manner it is possible to say that ‘within the territory of India’ might be narrower than ‘under the control of the Government of India’ if it refers only to those bodies expressly set up under the statute and also this interpretation would make the former part superfluous. Thus within the territory must be read as covering a set of circumstances parallel to that of bodies ‘under the control of government’ i.e. private bodies not under the control of government, but performing governmental functions. This interpretation would be apt considering the philosophy and historical background in which our Constitution was made.

\subsection*{3.7 Judicial Interpretation of ‘Other authorities’}

The most important question regarding the interpretation of Article 12 is the construal of the term ‘other authorities’ so that one can know as to what are the entities against which the fundamental rights can be claimed. The answer to this crucial question can be both broad and narrow, and whether one accepts either view largely depends on one’s notion about the reach of the fundamental rights.\textsuperscript{79}

\textbf{(a) \textit{Ejusdem Generis Rule}}

\textit{Ejusdem generis} rule is the first test devised by the Court to construe the meaning of ‘other authorities’ under Article 12. The expression ‘other authorities’ is used after mentioning government of India, State Government, Union legislature

\textsuperscript{76}V.N. SHUKLA, \textit{THE CONSTITUTION OF INDIA} 27 (2003).
\textsuperscript{77}(1962) Supp (1) SCR 981.
\textsuperscript{78}(1964) 1 SCR 656.
and State legislature and local authorities, it is thus reasonable to construe this expression in relation only to government or legislature.\textsuperscript{80} If we apply this meaning it could only mean authorities exercising governmental or sovereign functions.\textsuperscript{81} Thus to invoke the application of \textit{ejusdem generis} rule, there must be a distinct genus or category running through the bodies already named.

This test was applied by Madras High Court in \textit{University of Madras v. Shantha Bai}\textsuperscript{82} wherein Madras High Court interpreted the term ‘other authority’ by applying the test of \textit{ejusdem generis} and by applying this test it was held that only such authorities could be included within the term 'other authorities' as possessed governmental power. The Court also drew distinction between government aided and maintained institutions and held that University of Madras is an autonomous institution receiving aid not only from the government but also from private sources like collection of fees from the students and in such a case it cannot be held as a ‘State’ under Article 12.\textsuperscript{83} This was a narrow interpretation of the term ‘other authorities.’

The above decision was open to many criticisms \textit{firstly}, if the word ‘authority’ comprises only authorities exercising governmental functions, the expression local authorities would have been sufficient for the purpose \textit{secondly}, University is also vested with the power to make subordinate legislations in the form of rules and regulations but this fact was not mentioned from which it is evident that the Court had considered it as a law making power without bearing any sovereign or peremptory authority. \textit{Thirdly}, the distinction between state aided institutions and state maintained institution as is applied in Article 28(1)(3)\textsuperscript{84} and

\textsuperscript{80}\textit{AIR} 1954 Mad. 67 (The question for consideration was whether the rule of the University restricting admission on the basis of sex is valid or not).
\textsuperscript{81}\textit{Id}. B.W. Devdas v. Selection Committee \textit{AIR} 1964 Mys.6; Krishne Gopal v. Punjab University \textit{AIR} Punj. 34.
\textsuperscript{82}In simple terms it means that where certain entities which are specifically enumerated have a common characteristic and this enumeration is followed by some general phrase leaving room to include some more, the additional cases to be covered in this residuary category should also possess the common characteristic of possessing power of a governmental nature.
\textsuperscript{83}\textit{Supra} note 80 at para. 7.
\textsuperscript{84}\textit{CONSTITUTION OF INDIA} art. 28 (1) (“No religious instruction shall be provided in any educational institution wholly maintained out of State funds. (3) No person attending any educational institution recognised by the State or receiving aid out of State funds shall be required to take part in any instruction that may be imparted in such institution or to attend any religious worship that may be conducted in such institution or in any premises attached thereto unless such person or, if such person is a minor, his guardian has given his consent thereto.”).
29(2) cannot be imported to interpret the general provisions of Article 12 and 15(1) because the purpose of both articles are totally different. The criteria for determining whether an authority falls under Article 12 cannot be made on the ground of such a narrow distinction as the question relates to the enforceability of fundamental rights. This was a very narrow interpretation of other authorities since it restricts the application of Article 12 to bodies exercising sovereign power.

(b) Sovereign Power Test

The criteria to find out authority as ‘other authority’ under Article 12 was further evolved in the case of Rajasthan Electricity Board v Mohanlal wherein the Apex Court overruled Shanta Bai and declared incorrect its basic thesis that for the interpretation of ‘other authority’ in Article12 ejusdem generis rule would be inapplicable because there was no common genus present in the authorities specially enumerated in the Article. In the instant case Rajasthan Electricity Board was unanimously held to be a ‘State.’ But the uncertainty over the criteria to be adopted in holding an authority as State is also reflected in the opinion of the judges.

According to the Court only such statutory or constitutional authorities are ‘state’ which possesses power to make law and to administer such law or have the power to make binding directions, the disobedience of which is punishable as offence. It is pertinent to note that according to this holding it is immaterial if such bodies are performing commercial functions because under Article 19(g) and 298

---

85CONSTITUTION OF INDIA art. 29 (2) (“No citizen shall be denied admission into any educational institution maintained by the State or receiving aid out of State funds on grounds only of religion, race, caste, language or any of them.”).


87 This view was further reiterated in the case of B. W. Devadas v. The Selection Committee for Admission of Students to the Karnataka Engineering College A.I.R 1964 Mysore 6 wherein the Court observed that: “there is an essential difference between a political association of persons called ‘the State’ giving rise to political power connoted by the well-known expression ‘imperative law’ and a non-political association of persons created for other purposes by contract, consent or similar type of mutual understanding related to the common object of persons so associating themselves together giving rise to a power which operates not in the manner in which imperative law operates, but by virtue of its acceptance by such associating persons.”

88CONSTITUTION OF INDIA art.19 (1) (g) (“All citizens shall have the right to practice any profession, or to carry on any occupation, trade or business.”).
the state is specifically empowered to carry on any business or trade. The importance was attached to the fact that the Board was established by a statute. This was the finding made by Bhargava J. 89

Though Shah J. agreed with the above order proposed by Bhargava J. he disagreed with the latter’s view that every constitutional or statutory authority on whom powers is conferred by law is ‘other authority’ within the meaning of Article 12. According to him ‘authority’ means a body invested with ‘sovereign power’ to make rules and regulations and to administer or enforce them to the detriment of the citizens and such a body will fall within the definition of State in Article 12. He also pointed out that if fundamental rights are available against the state, the state also has the power to put restrictions under Article 19(6) and thereby remarked that the true content of the expression ‘other authority’ in Article 12 must be determined in the light of this dual phase of fundamental rights. He did not concur to the wide proposition laid down by Bhargava J. that every statutory body on which powers was conferred by law as ‘State.’ 90

Thus we can see two approaches in interpreting Article 12 one is purely based on the standpoint of creation of a body/authority statutory or constitutional and the other is from the standpoint of Part III of the Constitution and the limitation upon fundamental rights of the individual. 91 As per Shah J.’s judgment bodies that can affect those rights in a manner similar to that of the state are assimilated to the state. Through this decision Court has differentiated the sovereign and non-sovereign functions of the State. Sovereign power means power to make rules or regulations and to enforce and administer them to the detriment of citizens and others. The approach of Shah J. is a wide approach to fundamental right approach

(b) the said executive power of each State shall, in so far as such trade or business or such purpose is not one with respect to which the State Legislature may make laws, be subject to legislation by Parliament.”).
89 Per Bhargava J. The Rajasthan State Electricity Board was a corporate body that had been constituted under Electricity Supplies Act, 1948 for the purpose of supplying electricity to the State of Rajasthan.
90 Thus as to the meaning of ‘other authorities’ there was a difference of opinion between the majority judgment delivered by Bhargava J. and the concurring judgment of Shah J. This difference does not call for discussion in subsequent developments of the law. H.M. SEERVAI, supra note 45, at 372.
91 Id. (“In my judgment, authorities constitutional or statutory invested with power by law but not sharing the sovereign power do not fall within the expression “State” as defined in Art. 12. Those authorities which are invested with sovereign power i.e., power to make rules or regulations and to administer or enforce them to the detriment of citizens and others fall within the definition of “State” in Art. 12, and constitutional or statutory bodies which do not share that sovereign power of the State are not, in my judgment, “State” within the meaning of Art.12 of the Constitution.”).
since it posits the individual and individual’s right at the centre. It is also in consonance with the limitations set by the constitution on fundamental rights. As per this approach if the private bodies like cooperative society’s which has the power to make bye-laws, rules etc. will fall under Article 12 if they encroaches fundamental rights of the individual.

(c) Agency or Instrumentality of State Test

The terms instrumentality or agency are not to be found place in Article 12. It is through the process of judicial that they have been included as falling within the net of Article 12 subject to satisfying certain tests. If we look into the definitions of instrumentality, Black’s Law Dictionary defines instrumentality as “a means or agency through which a function of another entity is accomplished, such as a branch of governing body.” Whereas agency is defined as “fiduciary relationship created by express or implied contract or by law, in which one party (the agent may act on behalf of another party (the principal and bind the other party by words or actions.” Having referred the dictionary meaning it is important to analyze the judicial view in the interpretation of ‘other authorities.’ Following is explained landmark decisions on the point in chronological order through which Court has developed the concept of instrumentality or agency test which stands as ever shining criteria to determine ‘other authorities’ as State under Article 12 of the Indian Constitution.

The test of instrumentality or agency was put forward by Mathew J. in Sukhdev Singh v. Bhagatram. The majority decision in Rajasthan Electricity Board was clearly the controlling precedent in this decision but the judges differed in its correct interpretation. Therefore the Corporations were State because they were statutory in origin and had been conferred with power to make regulations which had the status of law and law making is a sovereign power of the state. It is pertinent to note that only ONGC had the power to issue binding directions which could be made punishable as an offence, IFC and LIC does not possess such power. So Mathew J. relied on some other justification for calling corporations state relying on the functional aspect.

92 AIR 1975 SC 1331(The question that arose for consideration in this case was whether statutory corporations such as the Oil and Natural Gas Corporation, Life Insurance Corporation and the Finance Corporation would fall within the definition of State under Article 12).
As per Mathew J. the State unlike in the past is a ‘service corporation’ obliged to undertake welfare obligations under Part IV. When corporations act as arms of the State to exercise those functions they must be regulated by Constitutional limitations. To substantiate this view doctrine of State Action as applied in US was relied upon. Relying upon the US position and the decision in *Marsh v. Alabama*93 Court said that it is not necessary that the entity or organization must wield authority in the sense that it must have power to issue commands in the Austinian sense, or that it must have sovereign power to pass laws or regulations having the force of law.

It was observed that the power of the large corporations does not come from the statutes but rather they acquire power because produce goods and services upon which the public comes to rely. They play a vital role in the lives of many people and are a supply line of the country. Because of these reasons it was held that corporations are no longer a private phenomenon and so governing power which lies with the corporation must be subjected to the same constitutional limitations as that of other public bodies like in the US.

**What is an Agency or Instrumentality of State?**

In this case a more conceptual understanding of Article 12 was given by Mathew J. in his concurring opinion in *Sukhdev Singh*. He found Article 13 (2) as a limitation upon Article 12. Borrowing the dictum in *Civil Rights case*94 he said that it is the state action of a particular character that is prohibited individual invasion of individual rights is not covered under Article 13 (2).95 Taking hues from the US position of state action he devised some formulas to find out state action in an alleged activity. Does any amount of self-help however inconsequential make an act something more than an individual act like a direct financial aid from the state received by a privately managed and owned body. But financial aid alone does not render the institution a state agency a finding of it plus an unusual degree of control over the management and policies will render the operation a state action.96

94109 U.S. 3 (1883).
95Id at para. 95.
96Id at para. 97.
Public functions test was rendered as a major test. If the given function is of such public importance and so closely related to government functions as to be classified as a government agency then even the presence or absence of state financial aid might be irrelevant in making a finding of state action.\textsuperscript{97} Court also elaborated the various ways of state aid in a private operation than by direct financial assistance. It can be through giving the organization the power of \textit{eminent domain}, grant of tax exemption, grant of monopolistic status. All these are relevant in making an assessment whether the operation is private or savors of state action.\textsuperscript{98}

Mathew J. was explicit about the Public Functions test as a test to find out whether a body/authority is an instrumentality or agency of the state. For explaining the test he took cases from USA wherein State Action doctrine was applied by the Court against purely private actors unlike public corporation which was called in question in the instant case.\textsuperscript{99} Though his decision reflected the view that even private corporations need to be considered as a State at the concluding part he washed off his hand in the matter by making it clear that he does not have any opinion on the question whether private corporations or other like organizations though they exercise power over their employees which might violate their fundamental rights.\textsuperscript{100}

Uncertainty also lies in the fact when he stated the two preconditions for a subjecting Corporation to the Constitutional limitations. The public corporation should be created by State and the existence of power in the corporation to invade the Constitutional right of the individual. The major premise of this conclusion was that the Constitution should wherever possible be so construed as to apply to arbitrary application of power against individuals by centres of power.\textsuperscript{101} Though in \textit{Sukhdev Singh}’s the Court attempted to extend the meaning of State but could not come to a logical conclusion as to how and when an authority can be called as other authority under Article 12.\textsuperscript{102}

\textsuperscript{97} \textit{Id} at para 98.
\textsuperscript{98} \textit{Id.} at para 99 (Court referred Kerr v. Enoch Pratt Free library 149 F.2d 212 (4th Cir). wherein discriminatory practices in a private library was abolished by the Court since it enjoyed government support in supply of budget, property holding etc. and distinguished it from Dorsey v. Stuyvesant Corporation 299 N.Y. 512 wherein the Court had found only state financial aid in the private library and government control was found to be absent).
\textsuperscript{100} \textit{Id.} at para 113.
\textsuperscript{101} \textit{Id.} at para 90.
\textsuperscript{102} As pointed out by Seervai “but the discussion of cases cannot be set out profitably, because having considered each decision he (Mathew J.) has not deduced any principle or principles from those decisions. But subsequently Seervai opines that the line of reasoning developed by Mathew J. can also
Sabhajit Tewary v. Union of India also left doubt as to whether Mathew J. intended to apply his test to registered societies. The case was decided on the same day he decided Sukhdev Singh. The question was whether Centre for Scientific and Industrial Research (CSIR) is a State or not. Although government recognized that government takes special care in the promotion, guidance and co-operation of scientific and industrial researches, establishment or development and assistance to special institution or departments of the existing institutions for scientific study etc., the Court did not find any State Action in its activities mainly on two premises – (a) the society does not have a statutory character like ONGC, LIC, IFC since it is a society (b) the previous judgments of the Court denied protection under Article 311 to Corporations which has an independent existence under the Government.

be supported on the ground that it prevents a large scale evasion of fundamental rights by transferring the work in government departments to statutory corporations, while retaining control over the corporation. H.M. SEERVAI, supra note 45, at 373 & 375.

103 1975 (3) SCR 616 (In this case a junior stenographer with CSIR filed a writ petition under Article 32 claiming parity of remuneration with newly recruited employees of QM based on Article 14. The contention of the employee was that CSIR is an agency of the Central Government on the basis of the CSIR Rules).

104 CONSTITUTION OF INDIA art. 311 (“Dismissal, removal or reduction in rank of persons employed in civil capacities under the Union or a State; (1) No person who is a member of a civil service of the Union or an all India service or a civil service of a State or holds a civil post under the Union or a State shall be dismissed or removed by a authority subordinate to that by which he was appointed (2) No such person as aforesaid shall be dismissed or removed or reduced in rank except after an inquiry in which he has been informed of the charges against him and given a reasonable opportunity of being heard in respect of those charges Provided that where it is proposed after such inquiry, to impose upon him any such penalty, such penalty may be imposed on the basis of the evidence adduced during such inquiry and it shall not be necessary to give such person any opportunity of making representation on the penalty proposed; Provided further that this clause shall not apply (a) where a person is dismissed or removed or reduced in rank on the ground of conduct which has led to his conviction on a criminal charge; or (b) where the authority empowered to dismiss or remove a person or to reduce him in rank ins satisfied that for some reason, to be recorded by that authority in writing, it is not reasonably practicable to hold such inquiry; or (c) where the President or the Governor, as the case may be, is satisfied that in the interest of the security of the State, it is not expedient to hold such inquiry (3) If, in respect of any such person as aforesaid, a question arises whether it is reasonably practicable to hold such inquiry as is referred to in clause (2), the decision thereon of the authority empowered to dismiss or remove such person or to reduce him in rank shall be final.”).

(d) Government Control Test

The subsequent case in determining the criteria for ‘other authority’ was *R.D. Shetty v. International Airport Authority*. The matter whether International Airport Authority was a State could have been decided by following the majority decision in *Sukhdev Singh*. But Bhagwati J. who delivered the judgment of the Court used the agency test as an alternative ground for the decision and pointed out that the corporations acting as instrumentality or agency of government would obviously be subject to the same limitations in the field of administrative and constitutional law as the government itself. It was also observed that there cannot be any ‘cut and dried formula’ for determining agency and instrumentality of state.

The American doctrine of State Action where “extensive and unusual financial assistance” from the government is a relevant consideration was applied in the instant case, to a situation where there is unusual degree of state control over the policies and management of the corporation. It is to be noted that in this case the statutory character of the authority was not much noticed. As per the Court what is material is “whether the Corporation is an instrumentality of the Government in the sense that a part of the State is located in the Corporation and though the Corporation is acting on its own behalf and not on behalf of the Government its action is really in the nature of State Action.” While Mathew J. was unclear about the form in which corporate agency brought in to existence which will make it amenable to agency or instrumentality test, on the other hand Bhagwati J. was explicit in his opinion when he said “it is not the outer form that mattered, but its substance” Finally the following questions were held as important to determine whether a corporation is an instrumentality or agency of the government.

a. Does the state give financial assistance to the corporation, if yes, to what extent?

b. Is there any control of the management and policies of the corporation by the state if yes, the extent of such control?

---

106 1979 SCR (3) 1014 (International Airport authority invited tenders from registered second class hoteliers having five years of experience for running two second class restaurants and two snack bars. Out of the six tenders one tender from a person not fulfilling the required criteria was accepted and other tenders were rejected without mentioning any reason. This was challenged by one of the renderer whose was the highest tender amount).

107 *Id.* at para. 15.
c. Does the corporation enjoy any monopoly status which is state protected or state conferred?

Establishment of cumulative effect of all the factors is necessary. The presence of only a single factor will not field a satisfactory answer. The Court has also given importance to public functions test and illustrated a test as well in order to ease out the difficulty in determining what functions are governmental and what are not. As per the Court “the modern government operates a multitude of public enterprises and discharges a host of other public functions. If the functions of the corporation are of public importance and closely related to governmental functions, it would be a relevant factor in classifying corporation as an instrumentality or agency of government.”

To substantiate his view on public functions test Court relied on the American case of *Marsh v. Alabama* wherein it was held that a town may be privately owned and managed but that does not necessarily allow the corporation to treat it as if it was wholly in the private sector. The Court added by quoting from Marsh that “the more an owner opens up his property for his advantage for use by the public in general, the more does his right become circumscribed by the statutory and constitutional rights of those who use it.” Another finding by the Court was that the function exercised by the corporation was in the nature of municipal function and it was therefore, subject to the constitutional limitations placed upon State action. Thus in the instant case public functions test was treated in a separate pedestal. In conceptualizing the test the Court has done nothing better than importing the view of Mathew J. in *Sukhdev*.

(e) Government Instrumentality Test

In *R.D. Shetty* Bhagwati J. reiterated with approval Mathew J’s approach in *Sukhdev Singh’s Case* wherein it was held that an entity would be treated as an

---

108 Id. at 1017.

109 326 U.S. 501 (1946) (In the instant case a Jehovah witness was arrested for trespassing after attempting to distribute religious texts in privately owned company town in Alabama. Court held that company town served a public function and therefore its decisions were subjected to constitutional scrutiny under the First and Fourteenth Amendments).

110 BHAGWATI J. pointed out that the corporation acting as instrumentality or agency of government would obviously be subject to the same limitations in the same field of constitutional or administrative law as the government itself though in the eye of law they would be distinct and separate legal entities. But however the relief was refused to the appellant because of the conduct including delay and also because of the 4th respondent had already incurred expenditure to put up the restaurant.
instrumentality of the State, “where a Corporation is wholly controlled by Government not only in its policy making but also in carrying out the functions entrusted to it by the law establishing it or by the Charter of its incorporation.” Further, the Court held that a corporation created by statute which is otherwise autonomous in its functioning will answer to the test laid down in Article 12 when “extensive and unusual financial assistance is given and the purpose of the Government in giving such assistance coincides with the purpose for which the corporation is expected to use the assistance and such purpose is of public character.” The Court also noted that the existence of monopoly, which is either State conferred or State recognized, may also lead to an inference of “State Action.” Importantly, the Court hinted at the importance of the functional test and observed that, “the public nature of the function, if impregnated with governmental character or ‘tied or entwined with Government’ or fortified by some other additional factor, may render the corporation an instrumentality or agency of Government.”

The scope of Article 12 was further widened in Som Prakash Rekhi v. Union of India, wherein the Court observed that, “if only fundamental rights were forbidden access to corporations, companies, bureaus, institutes, councils and kindred bodies which act as agencies of the administration there may be a breakdown of the rule of law and the constitutional order in a large sector of governmental activity carried on under the guise of jural persons,” and held that a public corporation (Bharat Petroleum Corporation) would fall under the definition of Article 12.

The subsequent case Som Prakash Rekhi v. Union of India was set in the background of Nationalisation of Burmah Shell ltd. by Bharat Petroleum. By applying the criteria in International Airport Authority the Supreme Court held that Bharat Petroleum Corporation registered as a Company under the Companies Act, is

\(^{111}\) AIR 1981 SC 212 Subsequently in Star Enterprises v. C.T.D.C. of Maharashtra Ltd. AIR 1981 SC 212 wherein government company under Section 617 of the Companies Act was held to be a ‘State.’

\(^{112}\) (1981) 1 SCC 449 (Per V.R. Krishna Iyer, Bench O. Chinnappa Reddy, R.S. Pathak, V.R. Krishna Iyer. (In this case the petitioner who was an employee of India-Burmah Shell Oil Storage ltd. was entitled to pension from the respective company and a dispute regarding the same was pending before the Court. In the meantime by India-Burmah Shell (Acquisition of Undertaking in India) Act, 1976 the company came to be vested with Bharat Petroleum ltd. He filed a writ petition against BPL. Preliminary objection was raised on the ground that the corporation is neither a government department nor a statutory corporation but just a company and so writ is not maintainable under Article 12).
State within the enlarged meaning of Article 12. By noting the relevant provisions in the Burmah Shell Act, 1976 Court held that the Corporation is clearly a creature of the statute, a limb of the government, an agency of the State and is recognized and clothed with rights and duties by the statute. The Court embarked upon the growing governmental functions and observed that the governments, its agencies and instrumentalities, corporations set up or owned by the Government should be bound by the equality clause. The Court also took charge of its responsibility under Part III and IV and said that if the corporations are liberated from the basic obligations of Part III there would be a treachery on the founding fathers and a mockery of the Constitution.

While determining the criteria to determine instrumentality or agency Court culled out five criterions from R.D. Shetty and it was laid down on the basis of financial support in the form of holding of entire share capital by the state, existence of deep and pervasive state control, performance of functions which are of public importance or closely related to governmental functions, state conferred or protected monopoly status and transfer of a department of the Government to the Corporation. The Court distinguished the instant case from Sabhajit Tewary and supported the wide meaning adopted in Rajasthan Electricity Board that it is not material if some functions of the body are commercial functions and that the expression ‘other authority’ is wide enough to include all constitutional and statutory authorities on whom powers are conferred by law. The Court altogether rejected the criteria based on statutory character of the body.

In the end Court further expressed its opinion that ‘other authorities’ under the control of the Government of India’ is plain and there is no reason to make exclusions on sophisticated grounds such as that the legal person must be a statutory corporation, must have power to make laws, must be created by and not under a statute and so on.

\[113\] Id. ("According to the Court ‘Other authorities’ under the Control of the Government of India’ are comprehensive enough to take care of Part III without unduly stretching the meaning of ‘the State’ to rope in whatever any autonomous body which has some nexus with Government. A wide expansion coupled with a wise limitation may and must readily and rightly be read into the last words of Article 12.").
\[114\] Id.
\[115\] Id. ("To substantiate this he quoted Salmond who said that the jurisprudence of Third World countries cannot afford the luxury of besetting the sin of the legal mind. To him ‘Partly through the
The subsequent decision was *Ajay Hasia v. Khalid Mujib*. Since the question involved was whether a college registered under the Society's Registration Act is an 'other authority' or not, the ratio in *Sukhdev* and *International Airport Authority* would have been became the *obiter* but Bhagwati J. by applying Instrumentality test held that college was a ‘State.’ From the beginning the Court relied on Governmental control as the determining test for Article 12. Taking hues from *Som Prakash Rekhi* Court followed an approach similar to looking from behind the corporate veil. The most important aspect of the judgment lies in the matter that the court held that it is immaterial whether a particular entity was a statutory corporation created by law, or a government company incorporated in accordance with the provisions of Companies Act, 1956 or a mere registered society. What mattered was the substance, whether the particular entity had enough nexus with the government to be called it as an agency or instrumentality. Bhagwati J. specified the following six considerations to be taken into account in order to determine whether an ‘authority’ is an instrumentality or agency of State.

(a) whether the entire share capital of the corporation is owned by the Government
(b) whether the financial assistance given by the State is enough to cover the entire expenditure of the entity;
(c) whether the Corporation enjoys a monopoly status which is either Government conferred or Government protected;
(d) whether there is existence of deep and pervasive State control from the part of the Governmental;

---

1161981 AIR 487. (Per P.N. Bhagwati, Bench P.N. Bhagwati, Y.V. Chandrachud, V.R. Krishna Iyer, Fazal Ali, A.D. Syed Murtaza Koshal. The case was decided on the same day in which Som Prakash Rekhi was decided and both the cases reiterated the position of law in Sukhdev and International Airport Authority).

117Id. at 7 (“To the Court Article 12 was to cover those corporations where behind the formal ownership which is cast in the corporate mould, the reality is very much the deep and pervasive presence of the government. It is really the government which acts through the instrumentality or agency of the corporation and juristic veil of the corporate personality won for the purpose of convenience of management and administration cannot be allowed to obliterate the true nature of the reality behind which is government.”).

1181981 SCR (2) 79 at para. 82.
(e) whether the functions of the entity are of public importance or closely related to Governmental functions;

(f) whether a Government department is transferred to a corporation.

In the instant case it was said that the Courts should be anxious to enlarge the scope and width of fundamental rights by bringing within their sweep every authority which is an instrumentality or agency or through the corporate personality of which government is acting, so as to subject the government in all its myriad activities, whether through natural persons or through corporate entities, to the basic obligation of Fundamental Rights. It was made clear that the genesis of the corporation is immaterial and that that the concept of instrumentality or agency of the government is not limited to corporation created by a statute but is equally applicable to a company or society.

What can be seen regarding public functions test is that the Court has relegated it as one of the tests unlike in Sukhdev Singh and R.D. Shetty. The Court has diluted functional aspect of the case and instead gave importance to governmental control which could be either administrative or financial or both. The Court after examining the principles to the facts of the case concluded by saying that “the control of the state and the Central Governments is indeed so deep and pervasive” that the society was undeniably and instrumentality or agency of the state under Article12.\textsuperscript{119} The Court paid no attention to the fact that functions performed by the society i.e. higher education in its analysis.

Applying the test of ‘government control’ in Ajay Hasia, subsequently in P. K Ramachandra Iyer v. Union of India,\textsuperscript{120} and similarly in B.S. Minhas\textsuperscript{121} Indian Council of Agricultural Research and Indian Statistical Institute respectively was held as an “other authority” because the Central Government exercises deep and pervasive control over them. But in Chander Mohan Khanna v. National Council of

\textsuperscript{119}Id.\textsuperscript{120} (1984) 2 SCC 141, 1984 SCC (L&S) 214 (In this case the question was whether Indian Council of Agricultural Research (ICAR) registered under Societies Registration Act was a 'State' or not).

\textsuperscript{121} (1983) 4 SCC 141; 1984 SCC (L&S) 420 (Its composition is dominated by the members appointed by the Central Government. The money required for its functioning is provided entirely by the Central Government. The accounts of it have to be approved by the Central Government). Central Inland Water Transport Corpn. v. Brojo Nath Ganguly (1986). 3 SCC 156 and All India Sainik Schools Employees Association v. Defence Minister Cum Chairman, Board of Governors, Sainik School Society, (1989) Supp. (1) SCC 205.
‘authority’ under Article 12 because the exercise of control by the government was limited and because the activities of it are not wholly public functions. The final triumph of governmental control test can be seen in Pradeep Kumar Biswas with the majority decision by Ruma Pal J.123

**(f) Deep and Pervasive Control Test**

In Pradeep Kumar Biswas v Indian Institute of Chemical Biology124 the Hon’ble Supreme Court overruled the decision of the Court in Sabhajit Tewary.125 The Court distinguished the narrow test as applied in Shanta Bai and broader approach to the interpretation to Article 12 i.e. the interpretation of Article 12 from Rajasthan Electricity Board and onwards. The Court referred the ‘voice and hands’ approach in Sukhdev Singh and R.D. Shetty and in the end Court reformulated the agency and instrumentality test and it was held that “the picture which ultimately emerges here is that the tests formulated in Ajay Hasia are not a rigid set of principles so that if a body falls within any one of them it must ex hypothesi, be considered to be State within the meaning of Article 12. To the Court the question in each case would be — whether in the light of the cumulative facts as established, the body is financially, functionally and administratively dominated by or under the control of the Government. Such control must be particular to the body in question and must be pervasive and must not be merely regulatory. If this is found even if the body is created under a statute it is State.”

As far as CSIR is concerned it is a non-profit making body brought into existence at the initiative of the Government to serve a definite governmental objective of planned industrial development and Government plays a dominant role

---

122 (1991) 4SCC 578.
123 Id. at 21 (In the words of Court “normally, a precedent like Sabhajit Tewary which stood for a length of time should not be reversed, however erroneous the reasoning if it has stood unquestioned, without its reasoning being “distinguished” out of all recognition by subsequent decisions and if the principles enunciated in the earlier decision can stand consistently and be reconciled with subsequent decisions of this Court, some equally authoritative. In our view Sabhajit Tewary fulfils both conditions.”) para. 21).
124 Pradeep Kumar Biswas v. Indian Institute of Chemical Biology (2002) 5 SCC 111 (The question was whether CSIR is a State or not under Article 12. Reiterating Sabhajith Tewary the Court answered the question in negative).
125 (In Sabhajit Tewary, a junior stenographer with CSIR filed a writ petition under Article 32 claiming parity of remuneration with newly recruited employees of QM based on Article 14. The contention of the employee was that CSIR is an agency of the Central Government on the basis of the CSIR Rules. Although the Court noted that the Government takes “special care” in the activities of CSIR it dismissed the writ petition).
in the governing body of CSIR. It also receives substantial funds from the government and the assets and funds of CSIR are owned by the government. To cap it all, the Union Government had issued the order that cases relating to service matters of CSIR employees would be adjudicated by the Central Administrative Tribunal. Taking into account all these factors it was held that CSIR is administratively, financially and functionally controlled by the Government and thus it is held as a State under Article 12 of the Indian Constitution.126

Thus with Pradeep Kumar Biswas the focus of the instrumentality or agency test shifted from the six fold test in Ajay Hasia to the “deep and pervasive control” test. After Pradeep Kumar in the subsequent cases Court applied the six fold test and in addition to it the ‘deep and pervasive control’ test in Pradeep Kumar Biswas. With the reformulation of agency or instrumentality test in Pradeep Kumar Biwas, there is no further scope for extension of the reach of fundamental rights via Article 12 of the Constitution, the decision in is a bottleneck for all further expansion of Article 12. Though it overruled the narrow interpretation in Sabhajit Tewary there appears to be dim prospects of government patronized authorities bring recognized as State after Pradeep Kumar Biswas as well as Zee Televisions.127 It is to be noted that there is a difference between government sponsored and government patronized authorities. According to Pradeep Kumar Biswas, mere government patronization is not enough to hold an authority as ‘State’ under Article 12. There must be deep and pervasive governmental control over the financial, administrative and functional activities of the authority. If all these are cumulatively established then only an authority becomes an instrumentality or agency of the State.

A compelling factor in the dissenting opinion was the objection to the use of the term ‘instrumentality or agency’ as synonymous with the term ‘State’ under Article12. The Court made rational opinion that if an entity is veiled or disguised as a Corporation or society or in any other form found to be an instrumentality or agency of the State then in that case it is a State in itself in narrower sense acting through the instrumentality or agency and included in the ‘State’ in the wider sense

126 Supra 123, at para. 40.
127 UDAI RAJ UDAI, supra note 27 (Minority thus criticized the Ajay Hasia in this background by saying that when the society was found to be an instrumentality or agency of State piercing the veil of society what was seen was the State itself though in disguise in such a case it was not thereafter necessary to hold that society an ‘authority’ and proceed to record that the authority is an “instrumentality or agency” of State).
for the purpose of Article 12. Having found an entity, juristic or natural to be an instrumentality or agency of the State, it is not necessary to call it as an instrumentality or agency of the State or the Central Government and it is an ‘authority’ within the meaning of Article 12 by entirely obliterating the dividing line between ‘instrumentality or agency of State’ and ‘other authorities.’ This trend of the judiciary was found to have been a confusion and misdirection in the thought process. Further it was stated that an authority must be an authority sui generis to fall within the meaning of the expression ‘other authorities’ under Article 12. A judicial entity, though an authority, may also satisfy the test of being an instrumentality or agency of the State and in such cases such an authority may also be an instrumentality or agency of State but not vice versa.

The Minority decision in the instant case altogether gives a clear picture of the meaning of ‘other authorities’ in Article 12, that the authority should be created by or under a statute functioning with the liability or obligation to the public. Further, the statute creating the entity should have vested that entity with power to make law or power to issue binding directions amounting to law within the meaning of Article 13 (2) governing its relationship with other people or the affairs of the people—their rights, duties, liabilities and other legal relations. In either case it should have been entrusted with such functions as are governmental or closely associated therewith by being of public importance or being fundamental to the life of the people hence governmental. It is this criterion which in a given case depending on the facts and circumstances makes an authority as an instrumentality or agency of the State.

On the above basis various tests laid down in Ajay Hasia was put under two categories 1st, 2nd and 4th for determining government ownership and control and 3rd, 5th and 6th are the functional tests. Initially the tests were considered relevant for finding out whether an entity is an instrumentality or agency of State

128 (1) if the entire share capital of the corporation is owned by the Government; (2) when the financial assistance given by the State is enough to cover the entire expenditure of the entity; (4) existence of deep and pervasive State control may afford an indication that the entity is imbued with Governmental character.
129 (3) if the Corporation enjoys a monopoly status which is either Government conferred or Government protected; (5) if the functions of the entity are of public importance or closely related to Governmental functions; (6) if a Government department is transferred to a corporation, it will be a strong indicator of the fact that the entity is an instrumentality of the State.
130 (As per Lahoti J. the profounder of the test himself has used the words suggesting relevancy of those tests for finding out if an entity is an instrumentality or agency of State).
but when the difference between authority and instrumentality or agency obliterated these factors were considered relevant for testing if an ‘authority’ is a State or not. To determine instrumentality or agency neither all tests are required to be answered in positive nor would a positive answer to one or more tests suffice rather a combination of one or more of the relevant factors would be relevant in identifying the real source of governing power, if necessary by piercing the veil.

The minority decision contains factors which are very much relevant in the interpretation of Article 12 mainly with regard to the difference between term ‘other authority’ under Article 12 and the test of ‘instrumentality or agency.’ Both are different entities yet having some overlapping. The difference is mainly based on the degree of control exercised by the government over the body in question. The decision also reminds the alternative way of reading ‘other authorities’ with ‘within the territory of India’ or ‘under the control of government India’ a long forgotten phrase in Article 12. The decision also adhered to the majority view that a cumulative effect of all the tests and a deep and pervasive control of the government are necessary to hold an authority as an agency or instrumentality of State. The minority view though good at some points, presents a very narrow and constricted interpretation of ‘other authority’ and in the present scenario when the role of the state has underwent a paradigm shift this narrow construal will not do any good for the people. A right based approach rather than a rule oriented approach towards Article 12 is a fundamental right is what is required today.

Followed by Pradeep Kumar Biswas, in Zee Telefilms & Ors. v. Union of India &Ors., it was contended that taking into account the broad interpretation of Article 12 Board of Control for Cricket in India (BCCI must be held as a State. As per the majority judgment BCCI is an autonomous body and there is little control of government over the functions of it, and such control is purely regulatory which will not make it a ‘State’ under Article 12 as per Pradeep Kumar Biswas so as to indicate pervasive state control. Though the Board controls the right to profession of

---

131 (2005) 4 SCC 649 (In this case the petitioners were the bidders for the tender for the grant of exclusive television rights for a period of four years. After accepting the tender for a sum of Rs. 92.5 crore, BCCI cancelled the entire process of tender arbitrarily on the ground that no concluded contract was reached between the parties. In fact, in response to a draft letter of intent sent by the Board, the petitioners agreed to abide by the terms and conditions of the tender. The order of the Board terminating the contract was in question in the writ petition under Article 32 contending that the action on the part of the Board terminating the contract was arbitrary and thus violates of Article 14 of the Constitution).
cricketers under Article 19 (1)(g) of the Constitution, according to the majority verdict unlike Article 17, 21 etc., Article 19 (1) (g) cannot be claimed against non-state actors. But despite highlighting this fact, it, was not accounted for. Thus according to the majority the petitioners has failed to establish the prerequisite for invoking the enforcement of fundamental right under Article 12 i.e. the violator should be a State first.

The Court followed the precedent in *Pradeep Kumar Biswas* and concluded that the Board is not financially, functionally and administratively under the control of the government and so it cannot be a State under Article 12 and that mere regulatory control by the Government will not suffice to fulfill the requirements of Article 12. It was held that the tests formulated in *Ajay Hasia* are not a rigid set of principles so that if a body falls within any one of them it must, *ex hypothesi*, be considered to be a State within the meaning of Article 12. The majority judgment does not leave any scope for further extension of the reach of the fundamental rights via Article 12 of the Constitution and it is pertinent to note here that due to the strength of the Bench, the ratio in this case would be binding on all other Constitutional Benches, comprising of five judges unless the same were to be overruled by a larger bench. Court also noted that the State is distancing from its socio-economic obligations and is concentrating more on governance than on business. Therefore the situation prevailing at the time of *Sukhdev Singh* is not in existence. So there is no need to expand the meaning of Article 12.

According to the minority opinion the though a private body, BCCI discharges public duties which are in the nature of state functions like selection of team, making rules that govern the activities of the cricket players, umpires and other etc. These activities are all in the nature of state functions and therefore BCCI is an instrumentality of State. It enjoys a virtual monopoly over the game of cricket. It represents India in international tournaments. All these must be held to have changed the character of BCCI from private to public. Instances were taken from the judicial decisions and public laws of other countries and thereby opened a forum for

---

132 *Id.* at para 34 (But BCCI enjoys monopolistic control over not only the game of cricket but also has pervasive control a person's overall cricket career as it has the sole authority to decide on the membership and affiliation to any particular cricket association, which in turn would affect his right to play cricket at any level in India as well as abroad).
133 *Id.* at para. 28.
134 *Id.* at 704.
judicial review of actions taken by BCCI when it encroach the fundamental rights. The necessity to keep the law in consonance with the development taken place after independence was also stressed by referring John Vallamattom¹³⁵ and the concept of right to development as a human right.¹³⁶

By applying public functions test to the facts it was said that there cannot be a single test for defining public functions. Statutes are not the only means of conferring public functions in a body, it can be assumed voluntarily or through ‘prescriptive patterns of conduct.’¹³⁷ The decision also stated tests to find State Action, like whether the body is a public authority or has public duty to perform, obligation to protect public duties, regulation of fundamental right to profession or vacation of a citizen, presence of de jure or de facto monopoly, outsourcing of state’s legislative function, presence of positive obligation of public nature. Regarding applicability of Pradeep Kumar Biswas it was said that it would have application only when the body is created by the State itself for different purposes but incorporated under the Indian Companies Act or Societies Registration Act, the questions raised questions raised in Pradeep Kumar Biswas were neither canvassed and there was no necessity for that and therefore the case cannot be treated as a binding precedent under 141 of the Constitution.¹³⁸

The minority decision was well thought out it altogether placed BCCI as ‘other authority’ under Article 12 by drawing out new criterions like coercion test, joint action test, public function test, entertainment test, nexus test, supplemental governmental activity test, and the importance of sport test. The decision has thus combined many factors and viewed BCCI as a power centre in the era of globalization. The minority was also right in their rational behind rejecting the ratio

¹³⁶United Nations Covenant on Civil and Political Rights art. 18 (“To the Court right to development and the preservation and protection of human right precede form a common platform. Both reflect the commitment of the people to promote freedom, well-being and dignity of the individual.”).
¹³⁷(By reason of Prerogative, Charter or Franchise. To substantiate the view Court also referred A.J. Harding on ‘Public Duties and Public Law’ wherein it was mentioned “there is for certain purposes, particularly for the remedy of mandamus or its equivalent), a distinct body of public law, certain bodies are regarded under that law as being amenable to it, certain functions of these bodies are regarded under that law as opposed to merely permitting certain conduct, these prescriptions are public duties. In BCCI v. Cricket Association of Bengal, Court encountered again with the question on the status of BCCI as State under Article 12. It was held not a ‘state’ but reaffirmed the ration in Zee Television that though it is not a state under Article 12 writ can be filed against it under Article 226. The Court also recognized that the functions of BCCI as public functions).
¹³⁸CONSTITUTION OF INDIA art. 141 (“The law declared by the Supreme Court shall be binding on all courts within the territory of India.”).

115
in Pradeep Kumar since the functions performed by BCCI cannot be compared to an educational society or such other public corporations cannot be equated at any cost.

After analyzing the tests it can be seen that the approach of the Court regarding the interpretation of Article 12 is cumbersome. In US the position is much more clear and flexible. In India irrespective of the body in question and the nature of the rights involved the same tests are applied again and again. The test of instrumentality or agency as a condition precedent to establish an authority as ‘other authority’ is quite stringent especially in situations when the State is withdrawing from the welfare activities. There is no clarity in determining what is a public function, the trend adopted by the judiciary makes functions of private action/actor, private function forever. The Court is not willing to go beyond the earlier precedents. But in cases involving interpretation of ‘other authorities’ a case to case analysis will be more apt rather than devising a straitjacket formula for all cases.

3.8 Bodies under ‘Other Authority’

(a) Public Corporations

A public corporation is a hybrid organization combining the features of a business company and a government department.\(^{139}\) Their powers are set out in the Acts which created them and they are empowered to make regulations subject to the doctrine of *ultra vires*.\(^{140}\) Corporations have emerged in Indian scenario on account of the transformations in the nature of governmental functions in a Welfare State and they are regarded as the third arm of the government. The genesis of the emergence of corporations in India as instrumentalties and agencies of government can be found in the Government of India Resolution on Industrial Policy.\(^{141}\) The

\(^{139}\) D.D. BASU, ADMINISTRATIVE LAW 345 (2000). (‘A public corporation is set created by a statute whenever it is intended to take over some industry or social service from private enterprise and to run it in public interest. Instead of giving over the public corporation which has a separate legal entity and can carry on the function with autonomy subject to the ultimate control of Parliament and the Government., mainly on policy matters, so as to safeguard the interest of the public.’).

\(^{140}\) Id.

\(^{141}\) (It was in pursuance of this policy and subsequent resolutions on Industrial Policy that corporations were created by the Government for setting up and management of public enterprises and carrying out public functions. ‘With the advent of the welfare state the civil service, which traditionally carried out functions of Government through natural persons, was found inadequate to handle the new tasks of specialized and highly technical character. To fill the gap it became necessary to forge a new instrumentality or administrative device for handling these new problems and that is done by public
reason behind this was that the civil service was found inadequate to discharge governmental functions, which were of traditional vintage. Article 298 of the Indian Constitution\textsuperscript{142} also empowers the State to carry on a business or trade by virtue of its 'executive power.'\textsuperscript{143}

In India, Supreme Court in a number of decisions held that Public Corporations and Undertakings fall within the definition of State, therefore these corporations and undertakings are subject to Part III of the Constitution. Now there is little indeterminacy as to the status of Corporation in relation to Article 12 of the Constitution. Thus State Bank of India,\textsuperscript{144} Food Corporation of India,\textsuperscript{145} State Financial Corporation,\textsuperscript{146} Central Inland Water Transport Board,\textsuperscript{147} Steel Authority of India Limited,\textsuperscript{148} Warehousing Corporation\textsuperscript{149} etc. would fall in the category of ‘State’ and their acts have to be in conformity with the Fundamental Rights.

In the 145\textsuperscript{th} Report of the Law Commission,\textsuperscript{150} Bureau of Public Enterprises have recommended that Public Sector Undertakings must be excluded from the purview of Article 12 so as to ensure avoidance of judicial review and interference by the Courts in the functioning of these Undertakings. But it was found to be-not-a proper measure to-be adopted for-dealing with the difficulties experienced by PSU in the matter of award of contracts, rejection of tenders, service matters and the like arising out of the present applicability of Article 12 to such undertakings. It was also concluded that such an amendment will be against the constitutional philosophy and

\begin{itemize}
\item \textsuperscript{142} CONSTITUTION OF INDIA art. 298 ("The executive power of the Union and of each State shall extend to the carrying on of any trade or business and to the acquisition, holding and disposal of property and the making of contracts for any purpose: Provided that— (a) the said executive power of the Union shall, in so far as such trade or business or such purpose is not one with respect to which Parliament may make laws, be subject in each State to legislation by the State; and
(b) the said executive power of each State shall, in so far as such trade or business or such purpose is not one with respect to which the State Legislature may make laws, be subject to legislation by Parliament.").
\item \textsuperscript{143} As observed in RD. Shetty.
\item \textsuperscript{144} UDAl RAj UDAl, supra note 27, at 700.
\item \textsuperscript{145} State Bank of India v. Kalpaka Transport Company, AIR 1979 Born. 250.
\item \textsuperscript{146} Workmen , Food Corporation of India v. Food Corporation of India (1985) 2 SCC 136; Satpal v. Himachal Pradesh Food Corporation (1977) SLR 447.
\item \textsuperscript{147} Gujarat State Financial Corporation v. Lotus Hotels Pvt. ltd. AIR 1983 SC 848.
\item \textsuperscript{148} Balbir Kaur v. Steel Authority of India Ltd. (2006) 6 SCC 493.
\item \textsuperscript{149} Steel Authority of India Ltd v. National Union Water Front (2001) 7 SCC 1.
\item \textsuperscript{150} K.L. Mathew v. Union of India AIR 1974 Ker.4; U. P. Warehousing Corp. v. Vinay AIR 1980 SC at 845-46.
\end{itemize}
would take away a large slice of activities, conducted practically under the control of the State, from the ambit of fundamental rights especially Article 14 of the Constitution.\textsuperscript{151}

(b) Government Companies

Apart from corporations created by statute there are a number of non-statutory companies sprung up with the advent of State into the commercial sphere. These are to all intents and purposes, limited liability companies registered under the Companies Act. But owing to the fact that the Government is the owner of the share capital or the major portion thereof, these companies raise the question whether they should be treated as government or public bodies for any purposes. It was held by the Supreme Court that “unless entrusted with any public duties, by statute\textsuperscript{152} or it constitutes an agency of the government,” no relief can be had against a government company, in a proceeding against Article 32 or 226 of the Constitution.\textsuperscript{153}

Notwithstanding the predominant Government control, Government Company was not identified with the Government and the employees could not invoke Article 311 (2)\textsuperscript{154} The reason is that there is no relationship of master and servant between these employees and the State: The status of a government company is only for the purposes of that Act, namely, to confer upon it special rights and obligations. Later the position regarding the applicability of Article 311 (2) transformed with the decision of Supreme Court in \textit{U. P. Warehousing Corpn. v. Vinay},\textsuperscript{155} and \textit{Kalra v. Projects & Equipment Corpn.}\textsuperscript{156} and it was held that even though Article 311 (2)\textsuperscript{157} may not be attracted to a government company yet, when a government company or a public corporation constitutes an agency or instrumentality of the State for the purposes of Article 12 of the Constitution, the principles underlying Article 311 (2) should be applicable to employees of this

\textsuperscript{151} \textsc{Constitution of India} art. 14 (“The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India.”).
\textsuperscript{154} supra note at 103.
\textsuperscript{155} AIR 1980 SCC at 845-46.
\textsuperscript{156} AIR 1984 SC 1361 at para. 20.
\textsuperscript{157} Supra note 103.
category of government companies as for principles of natural justice read with Article 12.\textsuperscript{158}

As regards Article 12 of the Constitution too, the consensus of opinion in the High Court was that notwithstanding the share or management control by the government, a government company did not lose its juristic entity as a company registered under the Companies Act, 1956 so as to be identified with the State under Article 12. But this stand was later changed with the decision of the Supreme Court in \textit{R.D. Shetty}\textsuperscript{159} and \textit{Ajay Hasia}.\textsuperscript{160} In \textit{Som Prakash Rekhi v. Union of India}\textsuperscript{161} wherein for the first time Supreme Court encountered the question as to whether a Government Company is a ‘State’ or not, and it was held that Government Company is a ‘State’ under Article 12.\textsuperscript{162}

For the application of state agency it is immaterial whether a corporation has been created by or under a statute.\textsuperscript{163} What is essential is that the company must exercise some function of the government and should be acting on behalf of the government and not on its own behalf.\textsuperscript{164} By applying this test \textit{Central Water Transport Corporation ltd. v. Brojo Nath Gangulay}\textsuperscript{165} a government company was held as a ‘State’ within the meaning of Article 12. Court held an unconscionable term in the employment contract of the respondent as invalid as per Section 16 and

\begin{itemize}
  \item \textsuperscript{158}\textit{Id.}
  \item \textsuperscript{159} (It was held that anybody or authority, whether constituted by statute or not may come within the definition of ‘State’ under Article 12 if it acts as an ‘agent’ or ‘instrumentality of the government.’ Agency means the ‘factum’ of such body exercising governmental powers or functions, so that its acts may be treated under constitutional law, to be ‘State Action’).\textsuperscript{159}
  \item \textsuperscript{160} In \textit{Ajay Hasia}, V.R. Krishna Iyer J. held that the enquiry has to be not as to how the juristic person is born but why it has been brought into existence. The same test has been applied by him in \textit{Som Prakash Rekhi v. Union of India AIR 1981 SC 212}.\textsuperscript{161}
  \item \textsuperscript{161} \textit{1981 (1) SCC 449; AIR 1981 SC 222} decided on the same day (Nov. 30, 1980) on which \textit{Ajay Hasia} was decided.
  \item \textsuperscript{162}\textit{Id.}
  \item \textsuperscript{163} (Hence a Government Company or an ordinary company or Society registered under the Society's Registration Act would be regarded as agency or instrumentality of government for the application of Article 12 if the tests of state control over it are established) \textit{MINHAS v. Indian Statistical Institute AIR 1984 SC 363}, \textit{Ramachandra v. Union of India AIR 1984 SC 541}; \textit{Sabhajit Tewary v. Union of India AIR 1975 SC 1`329.}
  \item \textsuperscript{164}\textit{R.D. Shetty} at para. 20.
  \item \textsuperscript{165} \textit{1986 (3) SCC 156; AIR 1986 SC 1571} (In this case the plaintiff worked in a company which was dissolved by Court’s order and they were inducted into the defendant corporation. After serving for a long period of time the plaintiff’s services were terminated arbitrarily on three months’ notice. The termination was done in accordance with a clause in the terms and conditions of the employment contract. The question was whether the term can be held void/voidable under Indian Contract Act by declaring the term as unconscionable).
\end{itemize}
23 of Indian Contract Act, 1872\textsuperscript{166} as it afforded only a less bargaining power to the employee. The term was held to be opposed to the public policy as it affected the rights and interest of the employees and created a sense of insecurity.

In \textit{Air India Statutory Corporation & ors.v. United Labour Association & ors.},\textsuperscript{167} the Court directed that all contract workers shall be regularized as employees of the Air India Ltd. It is pertinent to note the view expressed by the Court, according to the Court “while interpreting the Act, judicial orientation should shift towards public law orientation rather than private law. Such an interpretation would elongate the spirit and purpose of the Constitution. The individual interest must give way to the broader purpose of establishing social and economic justice.”\textsuperscript{168}

But subsequently, this case was overruled in \textit{Steel Authority of India ltd. v. National Union, Water Front Workers}\textsuperscript{169} wherein Court held that abolition of prohibition of contract labour under Section of the Contract Labour (Regulation and Abolition) Act, 1970 will not automatically become the employees of the principal employer. The main thrust behind this decision is the New Economic Policy of 1991 and not the socio economic principles which were put into limelight in \textit{Air India}. The decision also restricted the scope of public law by holding that the divide

\textsuperscript{166}Indian Contract Act, § 16 defines undue influence wherein it says that if the relationship subsisting between the parties are such that one of the parties is in a position to dominate the will of the other and uses is position to obtain an unfair advantage over the other, whereas § 23 says that considerations or object of an agreement is unlawful \textit{inter alia} if it is opposed to public policy.

\textsuperscript{167}AIR 1997 SC 645 (In this case a writ petition was filed to abolish the contract labour system adopted by the Steel Authority Steel Authority by engaging in Contract Labor for sweeping, cleaning, dusting and watching of the building owned and occupied by the appellants. Despite the order from the Central Government prohibiting Contract Labour under the provisions of Contract Labor Act, 1970) appellants continued contract labour and thereafter a writ was filed to absorb the contract labourer as employees of the corporation by the respondent).

\textsuperscript{168}Id. at para 26 (It was observed by the Court that that the instrumentality, agency or person must have an element of public service and should be accountable to health and strength of the workmen and women, adequate means of livelihood, the security for payment of living wages, reasonable conditions of work, decent standard of life and opportunity to enjoy full leisure and social and cultural activities to the workmen. Their action should be guided by public interest in exercise of public power or action hedged with public element and is open to challenge. It must meet the test of arbitrariness, fairness and justness and should not prescribe any unconstitutional conditions or limitations in their actions).

\textsuperscript{169}(2001) 7 SCC 1 (In this case the appellants were a Central Government Company engaged in the manufacture and sale of iron, steel etc. in various plants in India and also their business includes import and export of several products. The goods were handled in the stockyards by contractors rough calling tenders. Government of West Bengal issued a notification prohibiting contract labour in stockyards against which writ was filed. During the pendency of the petition Air India case was delivered which stated that in case of Central Government Companies, Central Government is the appropriate regulating authority under Contract Labour Act, 1970. Thus remedy was sought on two grounds.)
between public law and the private law is material only with regard to the remedies availed for enforcing rights and not in regard to interpretation of the statute.

In *BALCO v. Union of India*\(^{170}\) it was held disinvestment which is a policy decision of the government have consistently refrained from interfering economic decisions because of the fact that economic expediencies lack administrative adjudication. It was also held that Article 12 does not place any embargo on an instrumentality from changing its character. By holding so Court invalidated the claim of the employees of the BALCO that the disinvestment policy of the Union to disinvest and transfer 51% of shares of Bharat Aluminum Company ltd. is invalid. It was the claim of the employees that disinvestment affects the rights given to them under Article 14 and 16 of the Constitution.

As far as the economic or political policy decision is concerned government enjoys immunity and the Court can strike down a policy decision only if it is arbitrary, discriminatory or mala fide.\(^{171}\) This position was affirmed in the recent case of *State of Madhya Pradesh & ors. v. Mala Banerjee*\(^{172}\) wherein it was held that “where a policy is contrary to law or is in violation of the provisions of Constitution or arbitrary or irrational the Courts must perform their constitutional duties by striking it down.”

In *Mysore Paper Mills ltd. v. Mysore Paper Mills Officers Association*\(^{173}\) Mysore Paper Mills was held to be a State since more than 97% of the share capital was contributed by the state government and the company was entrusted with important public duties obliging to undertake, permit, and sponsor rural development. Besides out of 12 directors 5 are government and department persons and other directors were also to be appointed with the concurrence of the government which shows that the state government has deep and pervasive control over the said company. In *Balmer Lawrie & Co. Ltd & ors. v. Partha Sarathi Sen*\(^{174}\) 2002 (2) SCC 333.

\(^{170}\)2002 (2) SCC 333.
\(^{171}\) Permian Basin Area Rate cases 390 U.S. 747 (1968)
\(^{172}\) 2015 (3) SCALE 721 (In this case discriminatory conditions in the pay scale was challenged by the petitioner who was working as teachers in the Educational and Tribal Welfare Department, Government of Madhya Pradesh).
\(^{173}\) AIR 2002 SC 609 at para. 6; Federation of Railway Officers Association v. Union of India 2003(4) SCC 289.
Roy & ors.,\textsuperscript{174} by applying the test in Pradeep Kumar Biswas Court held that the company is an ‘authority’ amenable to writ jurisdiction of the High Court.\textsuperscript{175}

Thus we have seen the cases where the public policy of the realm and the fundamental rights of the individual came face to face. Though Court can strike out public policy it can be done sparingly. In the era of LPG most of the policy decisions are done through executive actions and with least consideration of the individual rights. In such situations by giving leeway to the policy decisions, the judiciary should be giving wide scope for public policy at the cost of fundamental rights of the individual. It can also be seen that after Pradeep Kumar Biswas the cumulative effect of all the criteria is a mandatory condition to hold an authority as ‘State’ and it limits the scope of Article 12 as well as of fundamental rights.

(c) Registered Societies

Applying the rationale in Ajay Hasia several non-statutory bodies were also held to be authorities under Article 12. The Council for Indian School Certificate Examinations (CBSE), a society for imparting education and holding examinations was held to be an authority in Vibhu Kapoor v. Council of ISC Examinations\textsuperscript{176} Indian Council of Agricultural Research\textsuperscript{177} Sainik School were held to be an authority since it was ‘fully funded’ by the Central and state Government and the Central Government exercises complete control over it. Similarly, in Sheela Barse v. Secretary, Children Aid Society,\textsuperscript{178} a registered body having Chief Minister of Maharashtra as the ex-officio President and the Minister of Social Welfare as the Vice President was held to be amenable to Article 12.

In Tekraj v. Union of India\textsuperscript{179} the Supreme Court has held the Institute of Constitutional and Parliamentary Studies as not being an ‘authority’ under Article 12. The institute was receiving grants from the Central Government and has the President of India, Vice-President and the Prime Minister among its honorary

\textsuperscript{174} 2013 (2) SCJ 818 (In this case the question was whether the appellant a public limited company is a State or not. It was a subsidiary of Indo-Burma Petroleum C. ltd. which was also a government company holding 61.8 % of the shares of the appellant company).
\textsuperscript{175} In deciding so the Court taken into account the objectives, functions, management and control, extent of domination by the government, and control by Government being not regulatory and cumulative effect of all these factors.
\textsuperscript{176} AIR 1985 Del 142.
\textsuperscript{177} P.K. Ramachandrallyer v. Union of India AIR 1984 SC 541.
\textsuperscript{178} (1987) 3 SCC 50.
\textsuperscript{179} AIR 1988 SC 469.
members. The Central Government exercises a good deal of control over the Institute. But in spite of Government funding and control, the Court has refused to hold it as an authority with the remark that “ICPS is a case of its type-typical in many ways and the normal tests may perhaps not properly apply to test its character.”

Similarly, in *Chander Mohan Khanna v. NCERT*, 180 National Council of Educational Research and Training, a largely autonomous body was held to be outside the purview of Article 12 since its activities are not wholly related to governmental functions; government control is mostly confined to ensuring that its funds are properly utilized and because its funding is not entirely from the government sources. In *Zee Telefilms* the Court held that ‘BCCI’ is not a State taking into account the fact that it is not financially, functionally and administratively under the control of the Government. Subsequently in *Sindhi Education Society v. Chief Secretary, Govt. of NCT of Delhi* 181 it was held that unless all the three aspects of state control viz; ‘financial control,’ ‘managerial control’ and ‘administrative control’ are exercised by the State over any other authority, society, organization or private body it will not be permissible to term that society, organization or body is State. Thus it can be seen that in the case of registered societies extensive state control is mandatory. The functional test, grant-in-aid cannot play a prominent role here.

**(d) Nationalized Banks**

The question whether banks are ‘state’ or not had been answered in a number of cases. 182 As per various decisions nationalized banks are purely an instrumentality of state under Article 12 of the Constitution. In *State Bank of India, Canara Bank v. Ganesan*, 183 Madras High Court held that “nationalized banks are falling within the ambit of the other authority, the right to get salary is a right to property and the nationalized banks shouldn’t act arbitrarily and illegally

---

180 (1991) 4 SCC 578.
181 I.T. 2010 (7) SC 98 (In this case the question was whether the provisions of Delhi School Education Act, 1973 violates the minority character of Sindhi School Education Society).
183 (1981) 1 LLJ 64 (In this case the employees of the Canara Bank held a strike and during the proposed strike hours they did not do the allotted work. As a result the Bank withheld the pay and allowances for the whole day during which they conducted the strike).
withholding the salary of their employees for the period during which they had worked.”

In the case of nationalized banks the test which is applied is ‘test of control.’ As mentioned in the 145th Report of Law Commission of India “tests are not exhaustive sometimes one or other factor may come to be emphasized but essentially, it is the totality of the circumstances which would be taken into account. The fact that share contribution of the government is very dominant may, along with other factors become material, as happened in the case of *Hyderabad Commercials v. Indian Bank & ors.* wherein Court has recognized Indian Bank as ‘instrumentality of state’ and directed to perform its function honestly to serve its customers.

3.9 Scope of Article 32 and 226 vis-a-vis Article 12

The language used in Article 32 and 226 of the Constitution is very wide. Under Article 226 every High Court has the power to issue directions, orders

---

185 Supra note 149.
186 1991 (2) Supp. SCC 340 (In this case the appellant had been depositing money through cheques in its current account from time to time without authorization).
187 CONSTITUTION OF INDIA art. 32 (1) (“The right to move the Supreme Court by appropriate proceedings for the enforcement of the rights conferred by this Part is guaranteed.

(2) The Supreme Court shall have power to issue directions or orders or writs, including writs in the nature of habeas corpus, mandamus, prohibition, quo warranto and certiorari, whichever may be appropriate, for the enforcement of any of the rights conferred by this Part.

(3) Without prejudice to the powers conferred on the Supreme Court by clauses (1) and (2) Parliament may by law empower any other court to exercise within the local limits of its jurisdiction all or any of the powers exercisable by the Supreme Court under clause (2).

(4) The right guaranteed by this article shall not be suspended except as otherwise provided for by this Constitution.”).
188 CONSTITUTION OF INDIA art. 226 (1) (“Notwithstanding anything in article 32 every High Court shall have power, throughout the territories in relation to which it exercises jurisdiction, to issue to any person or authority, including in appropriate cases, any Government, within those territories directions, orders or writs, including writs in the nature of habeas corpus, mandamus, prohibition, quo warranto and certiorari, or any of them, for the enforcement of any of the rights conferred by Part III and for any other purpose.

(2) The power conferred by clause (1) to issue directions, orders or writs to any Government, authority or person may also be exercised by any High Court exercising jurisdiction in relation to the territories within which the cause of action, wholly or in part, arises for the exercise of such power, notwithstanding that the seat of such Government or authority or the residence of such person is not within those territories.

(3) Where any party against whom an interim order, whether by way of injunction or stay or in any other manner, is made on, or in any proceedings relating to, a petition under clause (1), without—

(a) furnishing to such party copies of such petition and all documents in support of the plea for such interim order; and

(b) giving such party an opportunity of being heard, makes an application to the High Court for the vacation of such order and furnishes a copy of such application to the party in whose favour such order has been made or the counsel of such party, the High Court shall dispose of the application within a
or writs to any person or authority including in appropriate cases any Government within the territories in relation to which it exercise its jurisdiction. It can also be issued for “for the enforcement of any of the fundamental rights and for any other purpose.” The term authority used in Article 226 has a wider ambit than the term authorities in Article 32. It is because Article 12 is relevant only for the purpose of enforcement of fundamental rights under Article 32 whereas Article 226 confers power on the High Courts to issue writs for the enforcement of fundamental rights as well as non-fundamental rights.  

When Article 32 is silent about against whom a remedy would lay against Article 226 expressly allows the High Court to issue such remedies against ‘any person or authority, including any government.’ This wide definition of Article 226 often helps the Court in enforcing fundamental rights against bodies performing functions in public interest or against bodies performing public duties without invoking Article 12 and 32.

In *Anandi Mukta Sadguru* it was held that; the words “any person or authority” used in Article 226 are, therefore not to be confined only to statutory authorities and instrumentalities of the State. They may cover any other person or body performing public duty. The form of the body concerned is not very much relevant. What is relevant is the nature of the duty imposed on the body. The duly must be judged in the light of positive obligation owed by the person or authority to the affected party. No matter by what means the duty is imposed. If a positive obligation exists mandamus cannot be denied.”

3.10 Private Actors as State: Position in India and US

In the above mentioned cases the question encountered by the Court was the applicability of Article 12 as against public corporations, registered societies, government companies etc. The Court found enough nexus between the

---

189 Shri Anandi Mukta Sadguru Trust v. V.R. Rudani AIR (1989) 2 SCC at 1097-98 (In this case a dispute between teachers association and university and teachers were referred to the Vice-chancellor and he ordered for payment to the teachers. In view of this order the college run by the trustees of the appellant college retrenched it employees. The retrenched employees filed writ petition demanding arrears of salary, gratuity, and provident fund).

authority/body in question and the government. Both in Indian and in the US context some nexus between the two is very much essential to constitute State Action. The cases are also decided in the background of the political and economic developments taken place during those times and the same is reflected in the decisions as well. For instance the decision in *Sukhdev Singh* was decided taking into account the ‘Welfare State’ functions and *R.D. Shetty* reflects the recognition of new forms of government wealth in the form of largess which was in the backdrop of ‘License Raj’ Government.

This attitude of the judiciary is a testimony to the fact that judiciary played its part as a ‘social engineer’ in the changing ‘politico-legal’ scenario. But the situations have further changed due to the foray of neo-liberalism developments in India. The judiciary has to move again one step further if it wants to dispense with the constitutional responsibility as the protector and guarantor of the fundamental rights of the people despite the fact that other organs are distancing away from the constitutional obligations. In India in none of the cases there was a declaration to the effect that private actors are state.

In *M.C. Mehta v. Union of India*\(^\text{191}\) the Court had the opportunity to hold Shriram Gas and Fertilizer Industry as ‘State Actor’ since it was performing a public function which and the activities of it involved great public interest since it could affect the lives of large number of people. But Court declined to give such a verdict. The Court gave an opinion that the historical context in which the doctrine evolved in US is not applicable to Indian situation but US doctrine of State Action can serve as useful guide and the principles behind various doctrines of state action can be Indianised and harmoniously blended with Indian Constitutional jurisprudence.\(^\text{192}\)

In US, the doctrine is mainly applicable to state and authorities who violate the mandate of Bill of Rights. It is also held applicable to situations where state officials acted either in violation of or in excess of their authority

\(^{191}\)AIR 1987 SC 1086 (The question that arose in MC Mehta was whether victims of a gas leak from a private chemical and fertilizer plant could sue for compensation under Article 32 of the Constitution).

\(^{192}\)Id. at para. 825 (“The historical context in which the American doctrine of State action evolved in the United States is irrelevant for the purpose of Indian Courts, especially in view of Art. 15 (2) of the Indian Constitution. But, it is the principle behind the doctrine of State aid, control and regulation so impregnating a private activity as to give it the colour of State action which can be applied to the limited extent to which it can be can be Indianised and harmoniously blended with Indian constitutional jurisprudence.”).
under ‘colour of law theory’ and also against the acts of private persons under particular circumstances under ‘instrumentality theory.’ Thus the prohibitions under the Fourteenth Amendment are also applicable even to the acts of private persons. But the major difficulty posed by this doctrine is the problem of identifying the standards by which ‘private action’ is converted to state action without obliterating the two.

The State Action doctrine focuses upon actions which are subject to constitutional review namely actions that are attributable to the government. All the cases involving, state action issue has an essentially similar fact pattern. In these cases the aggrieved party feels that his rights or freedoms have been violated by the actions of another. The issue is regarding which party's rights are of the greater constitutional significance. This question is answered by determining whether the challenged party's activities involve sufficient governmental action so that they are subjected to the values and limitations reflected in the Constitution and its amendments.

If the Court finds sufficient connections to the government it will declare that the aggrieved party's rights must prevail. If the Court finds that the alleged party does not have sufficient contacts with the government to justify subjecting him to constitutional limitations, his activity will be free from-constitutional limitations and his rights will prevail. Thus the concept of state action is about finding governmental element in the act which is done by the alleged party so as to make it fall under the purview of the constitutional limitations. If the alleged activity happens to be one which is traditionally performed by the government

---

195 JOHN E. NOWAK, RONALD D. ROTUNDA, NELSON J. YOUNG, CONSTITUTIONAL LAW, 497-498 (1983) (In US whether a private authority is ‘state’ or not is determined by analyzing the answers to the questions such as (i) did the government grant any aid to the private person? (ii) did the government give any authority to him? (iii) Is he carrying on a function of a governmental nature? If these questions are answered in affirmative then lastly whether there is enough aid or ‘authority’ or ‘function’ to make the private person into some sort of ‘instrumentality’ by reason of an affinity to the movement).
198 JOHN E. NOWAK, supra note 196, at 497-498.
then it will be a case fit for applying the doctrine of state action.\textsuperscript{199} The doctrine was effectively used to prohibit racial discrimination in US.

3.11 Conclusion

The words ‘State’ and ‘Authority’ used in Article 12 remain as great generalities of the Constitution the content of which has been and continuously supplied by the Court from time to time. Initially the definition was treated as exhaustive and confined to the authorities or those which could be read \textit{ejusdem generis} with the authorities mentioned in the definition of Article 12. The next stage was reached when the ‘State’ came to be identified with the conferment of sovereign power by law. A considerable change happened when Mathew J. applied the test of instrumentality and agency i.e. ‘the voice and hands approach’ in \textit{Sukhdev Singh}, according to which the government must be acting through the body in question. \textit{R.D. Shetty} and \textit{Ajay Hasia} took the test to another level and established that the cumulative effect of the entire test i.e. government monopoly, public functions, financial and administrative control, transfer of a government department as necessary to call an entity as an ‘instrumentality or agency’ and thereby ‘other authority’ under Article 12. These tests were crystallized and became a single test in \textit{Pradeep Kumar Biswas} which stated that if a body or entity is financially functionally and administratively controlled by the government, then the body or authority can be held as a state.

Constitution should be kept adept to meet the social transformation. This role is in the hands of the judiciary. Now non-state actors are the power-centers in the society. Most of the essential services are at their hands and there is a diminution in the role of the state as ‘service provider.’ In this context the judiciary needs to relook into the feasibility of tests are devised by the Court under Article 12 to enforce fundamental rights against private actors. A declaration of private actors as ‘State’ is necessary because of the changing role of State in the light of the neo-liberal reforms inducted from 1991 onwards. Now the most of the functions traditionally performed by the states are performed by private actors. If the fundamental rights are rendered ineffective against private bodies when they violate fundamental right it is a clear negation of constitutional values and principles. The US doctrine of state action can

\textsuperscript{199} \textit{Id.}
serve as a tool to interpret and include private actors as ‘State’ under Article 12. For the same purpose the following chapter analyses the US doctrine of State Action by giving emphasis to the various tests employed by the Court in finding state action in private actions and actors.