

# Instrumentalities of State for the Purpose of Article 12 of the Constitution of India

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## Introduction

*"It is the business of the State to maintain the conditions without which a free exercise of the human faculties is impossible."*

*- T H Green*

The constitution of India is the common law of the land. Justice, equality, and liberty is guaranteed by the constitution. The concept of the rule of law establishes "structure, procedures, powers, and duties of the government institution." Similarly, the notion of limited government contains a set of fundamental rights, duties of citizens, and directive principle which shall apply for "welfare state". The state cannot take any action which is detrimental to the fundamental rights of the people. Only the state's actions can be challenged, and the remedies will be available only against them. However, in the present era, the developments in the field of privatisation and globalisation, there are many private entities which perform works related to public importance. The limited enforcement of fundamental rights involves serious implications and asks what would happen if private entities or non-state actors violate individuals fundamental rights.

Instruments of the state are those who perform any function through an entrusted authority. Though they are duty-bound to work in consonance with the constitution of India. In order to define instruments of state in an exhaustive manner, it shall be a strenuous task for the lawmakers, in response to this the responsibility is on the courts to extend the scope of instruments of state with relation to the constitution of India. However, the words used under the definition of article 12 are of wide amplitude, moreover are inclusive of comprehending authorities which have been formed under a statute and "functioning within the territory of India, or under the control of the government of India."<sup>[1]</sup>

## State Action Doctrine And Functional Public Authority

The state action doctrine commonly refers to state laws or is designed to solve a state problem but which have anticompetitive effects, and to acts by states or by private parties implementing laws or rules."<sup>[2]</sup> The onus to perform the work with values of "equal protection and due process" is on the government as it is the only body of the institution to perform the public functions.<sup>[3]</sup> In various cases, the US Supreme Court has expanded the scope of the state action doctrine. Mainly, the cases were related to the exploitation and discrimination with Negros or Asian race from "occupying the property in real estate."<sup>[4]</sup>

However, in the Indian context, the present state action needs to be expanded since the government is transferring its functions to the private entities. In the age of globalisation and privatisation, private individuals or entities deal with the liberties of the people. If the courts take limited meaning to the state action, it will become difficult for individuals to enforce their liberties against private individuals or entities.

## Definition of State: Perspective

The fundamental rights enshrined under part III can be enforced against the state action only or the action by "other authorities" who may come within the purview of article 12 of the constitution. Most of the fundamental rights are claimed against the state and its instrumentalities and not against private bodies.[5] An extended significance has been given to the term 'state' under article 12. Article 12 elucidates that the term 'state' occurring in article 13(2), or any other provision concerning fundamental rights, has an expansive meaning.[6]

## Scope and Purpose

The definition in article 12 cannot be used to interpret any provision outside part III, e.g., article 309,310,311 of the constitution. Therefore article 12 is only for the purpose of application of the provisions contained in the part III. Hence, if any body does not come within the scope of this article it could still be sued on the constitutional or non-constitutional grounds under article 226 whereas such body performs a public duty. The ambiguity arose regarding the wide interpretation of the term 'other authorities' as if this term should be construed with respect to the test being satisfied of 'within the territory of India' or being 'under the control of government of India.' Now it has been settled that the expression 'under the control of government of India' under article 12 does not qualify the word 'territory'; it qualifies 'other authorities'. [7]"

## Doctrine of Instrumentality

Under article 12, the term "instrumentality or agency" has not been defined though it depends upon incessant judicial interpretation by the courts. There are certain tests which need to be satisfied before being recognised as the instrument of the state. Moreover, the term 'includes' indicates that the definition is not exhaustive in nature. It is possible that the instrumentalities or agencies may not be a part of a government department, but when there is a violation of fundamental rights, they shall be construed as a state under the definition e.g., government companies and public undertakings.[8]

## Test to Determine Instrumentality of the State

*The Supreme Court laid down certain tests in the case of **Ajay Hasia v. Khalid Mujib**[9] to adjudge whether a body is an instrumentality of the government or not:*

- The government holds the entire share capital of the body; it goes a long way towards indicating that the body is an instrumentality of the government.
- The entire expenditure of the body is dependent or incurred on the financial assistance provided by the government, it may indicate that the governmental character has been impregnated in the body.
- Monopoly status is one of the relevant factors where it has been conferred by the state.
- State may control the said body through deep and pervasive method which surely indicates that the body is state instrumentality.
- Moreover if the body performs such functions which are of public importance considering its relevancy with governmental functions, it may be a relevant factor in determining the state instrumentality.

Though the tests have been evolved in *Ajay Hasia* case but these tests cannot be considered as an exhaustive list. Further, it would not be sufficient in many cases to establish an "instrument or agency of the state or a company carrying on the functions of public nature." [10] Meanwhile, it is tough to restrict the interpretation to a "close-ended category" of the bodies to be considered as the state within the meaning of article 12. The question of state instrumentality must be based on the merits of the cases including facts which may further include the criteria that the body is financially, administratively and functionally governed by or under the control of the government.

The concept of instrumentality or agency may be differentiated with "other authorities" on the terms of that "other authorities" is that authority must be an authority "sui juris" to fall within the meaning of "other authorities". In order to satisfy being an instrumentality of the state, a juridical entity may also qualify for that test and can be considered as an instrumentality of the state, but it is not necessary that an instrument of state may be considered as "other authorities".[11]

## **The Functional And Structural Turn in the Instrumentality Or Agency Doctrine**

**Structuralism**, as a method of constitutional interpretation, attempts to derive constitutional rules from the relationships and interactions between various constitutional 'structures' or institutions.[12] The main focus of structuralism in the present scenario with respect to individual rights is on the structure of the government and its relationship with the individuals who are governed by this government. Mere regulatory control, over the body, would not suffice of being an instrument under article 12. To qualify for this domination, one must construe all three fronts: financially, functionally and administratively. However, this case has ruled out the "attribution of 'state' character" to autonomous authorities like Board of Control for Cricket in India (BCCI) which does not satisfy its onerous three-pronged standard. Though as a structural test, it has worked very well except where the judiciary has applied its discretion in interpreting the three tests as "disjunctive as opposed to conjunctive."

**Functionalism**, on the other hand, works on inductive method, developing the constitution and the policies related to it through "case by case application of the independent normative values that the law ought to promote." [13] But this approach

suffers from the amorphous situation which remains dissected from the constitutional texts. This results in the acceptability of the structural approach rather than a functional approach.

The seeds of "functionalism" in the Supreme Court's "interpretive approach" to Article 12 were sown by Mathew J's concurring opinion in ***Sukhdev Singh v. Bhagat Ram***[14]. Two conceptions of state has been evolved by him; "one, 'a coercive machinery wielding the thunderbolt of authority', and the other, a 'service corporation'." [15] Meanwhile, he preferred the second one in order to set the demarcations of article 12. According to him, a body could qualify as the 'state' even if it has not been facilitated with any financial funding from the government if its functions were of "high public importance" and closely related to, or allied with, those of the government. The ratio followed by the Justice was based on "meta-analysis" that factored in the "totality of the circumstances" before branding an authority a 'state factor'. [16]

## Conclusion

From the above analysis, it could be construed that the definition of 'state' under article 12 of the Indian Constitution cannot be confined or restricted to only one interpretation. Wherefore, the concept of 'state' has been evolving since time immemorial. Meanwhile, the incessant interpretation of the definition of 'state' apart from its literal interpretation has included a new doctrine named as 'instrumentality or agency' of the state. As far as the 'instrumentality of the state' is considered, it is the product of a functionalist approach which is more comprehensive than the structuralist approach. When these approaches were compared, it was found that both have their own applicability in their respective spheres. However, it is totally based on the court's discretion regarding which approach they should go for.

[1] Jyoti Dogra Sood, "State" For Purposes of Fundamental Rights, p. 7

[2] Eleanor M. Fox, The Supreme Court And The Confusion Surrounding The State Action Doctrine, *Antitrust Law Journal*, Vol. 48, No. 4, Twenty-Seventh Annual Meeting: Part I (August 13-15, 1979), p. 1571-1582

[3] Maimon Schwarzschild, Pluralism and the Constitution: In Defense of the State Action Doctrine, *the Supreme Court Review*, Vol. 1988 (1988), p. 129-161.

[4] *Shelly v Kraemer*, 334 US 1(1948).

[5] *Shamdasani v. Central Bank of India*, AIR 1952 SC 59; *Vidya Verma v. Shivnarain*, AIR 1956 SC 108.

[6] M.P. JAIN, *Indian Constitutional Law*, 7<sup>th</sup> ed., p. 856.

[7] *Virendra Kumar Srivastava v. U.P. Rajya Karmchahri Kalyan Nigam*, AIR 2005 SC 918.

[8] *Mohd. Hadi Raza v. State of Bihar*, (1998) 5 SCC 91.

[9] AIR 1981 SC 487.

[10] *Federal Bank Ltd. v. Sagar Thomas*, AIR 2003 SC 4325.

[11] *Pradeep Kumar Biswas v. Indian Institute of Chemical Biology*, (2002) 5 SCC 111.

[12] Casey L Westover, 'Structural Interpretation and the New Federalism: Finding the Proper Balance Between State Sovereignty and Federal Supremacy' (2005) 88 *Marquette Law Review* 693,695.

[13] William Eskridge, 'Relationship between Formalism and Functionalism in Separation of Powers Cases' (1999) 22 *Havard Law Journal of Law and Public Policy* 21. See also, AnanthPadmanabhan, *Rights: Breadth, Scope and applicability*, *The Oxford Handbook of The Indian Constitution* (2016), 585.

[14] AIR 1975 SC 1628.

[15] AnanthPadmanabhan, *supra* note 51.

[16] Ronald J Krotoszynski, Jr, 'Back to the Briarpatch: An Argument in Favour of Constitutional Meta- analysis in State Action Determinations' (1995) 94 *Michigan Law Review* 302, 314.

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