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**DEFINITION OF STATE UNDER ARTICLE 12 IN THE ERA OF
LIBERALISATION, PRIVATISATION AND GLOBLISATION: A
CRITICAL ANALYSIS**- Balamurali. B¹**ABSTRACT**

The liberalization, privatization, and globalization (LPG) reforms in India has significantly altered and transformed the functions of the state, prompting a critical reassessment of Article 12 of the Indian Constitution, which defines "State" in relation to fundamental rights. As private entities increasingly take on roles traditionally held by the state, it becomes essential to expand the interpretation of Article 12 to ensure that constitutional protections and fundamental right protection evolve alongside the changing socio-economic environment. This paper will throw light on the current legal framework and judicial interpretations of "State" under Article 12, examining both its inclusions and limitations concerning corporate and quasi-state actors. This paper will analyse various factors which posed challenge to the current definition of state and accountability of private entities, this research highlights deficiencies in the existing Article 12 framework that hinder citizens' rights against influential non-state entities. The paper proposes amendments aimed at redefining the enforcement of fundamental rights against "State" and "Private entities" more inclusively, thereby enabling the Constitution to meet contemporary societal demands and enhance the protection of fundamental rights within the LPG context.

Keywords: State, Indian Constitution.

1. Introduction

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The Indian constitution is considered to be the lengthiest written constitution and it is almost 75 years old constitution, which plays vital role even today in this contemporary world, in protecting the rights of individuals. The Indian constitution not only confers rights on individuals, but it also imposes a negative duty on the state to not violate the fundamental rights of the people, which is conferred under Part III from article 12 to 35. It further provides for enforcement mechanism, in case of violation of fundamental rights of the people suitable remedies are also provided under Indian constitution.

At the time of framing of our Constitution of India, the fundamental rights are made enforceable against state and state only. Further at 1950's there is no wider concept of liberalisation, globalisation and privatisation (LPG). Even the constitution makers would not have thought about all these so called LPG, at the time of enactment of constitution. But in this today's world the private players in the market plays a vital role in development of economy of the country and at the same time, it created an ample of employment opportunities for the people and thereby employed people, and in this today's situation, majority of the our population are working under private entities and corporates. Now the big question and challenge before us is, if the private entities violate the fundamental rights of people, whether fundamental rights are enforceable against private entities? If so how. This research article seeks to examine the legal provisions, and need for amendment into the existing legal framework, to make it fit for our contemporary nation and protect the fundamental rights of individuals.

2. Object of research

The contemporary development in the society due to liberalisation, privatisation and globalisation has posed several challenges before us in society and law. One among them may be traced as the difficulty in enforcement of fundamental rights of people against private entities, as their role in society is developing every day. So this research focuses on impact of liberalisation, privatisation and globalisation towards the enforcement of fundamental rights and further suggests the required amendments to the definition of the term state under article 12 in order to meet the changing society.

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3. Research Methodology

This research paper is intended to be carried out in doctrinal method of research. This study will make use of sources with relevant information to the Constitution of India, definition of the term state, liberalisation, privatisation, globalisation and its impact on enforcement of fundamental rights. This will be obtained from a documentary analysis of case laws, books, commentaries, research papers, articles and websites describing the fundamental rights, scope and its challenges on enforcement.

4. Hypothesis

The definition of state under article 12 is insufficient to meet the contemporary developments and challenges of liberalisation, privatisation and globalisation. The definition of state and its scope needs to be widened.

5. Need for expansion of definition of Article 12

“Ubi jus ibi remedium” – where there is a right there is a remedy. A right without a remedy is meaningless. The Indian constitution in part III guarantees various fundamental rights to people. There is no meaning to guarantee rights, without being a remedy provided to it. In order to give effect to fundamental rights, article 32 and article 226 of our Indian constitution grants powers to the Supreme Court and high court respectively to issue writs in case of violation of fundamental rights. But, in this situation there arises a big question as “Against whom fundamental rights can be enforced?” or in other words, who has the duty not to infringe the fundamental rights of the people.

By answering these questions, article 12 of our Indian Constitution defines the term “state”, against whom the fundamental rights can be enforced or in other way the constitution imposes a negative duty upon the state, not to infringe the fundamental rights guaranteed to the people. The Indian constitution had given an inclusive definition for the term state as,

“12. Definition

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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.”²

The constitution of India gives a inclusive definition The constitution of India gives an inclusive definition of article 12 for the term state, rather an exhaustive definition. It shows the intention of the constitution draftsman that, they recognise the changing aspects of definition of state. This definition of article 12, especially the word “other authorities under the control of the government of India” has left space for the judicial interpretation to include every authority, who is under the control of government of India.

6. Interpretation of Article 12

6.1 Constituent assembly debates

At the time of drafting the constitution the definition of state was existed in article 7 of draft constitution, after debates it was finally enacted in article 12 of our Indian constitution. On, 25 November 1948, the Definition of state was debated by the constituent assembly members at the time of debate as the Members of the Assembly were dissatisfied with the wording of the Article 12, state as it was too vague and some moved amendments³. One member of the constituent assembly debated with the use of the term ‘other authorities’, he raised concern that, the word other authorities has the ability to bring in almost every government agency or officer under the ambit ‘State’. Another member was concerted that, it was inappropriate to include the district boards and municipalities as the ‘State’. In this situation, the Chairman of the Drafting Committee, clarified that ‘other authorities’ would refer to those authorities that had *‘the power to make laws or the power to have discretion vested in it’*. He further stated that it would not be possible to list the various institutions upon whom Part III was to be applied and binding, so the term ‘State’ was useful in this regard⁴.

²The Constitution of India, 1950, Article 12

³Constituent Assembly Debates: Official Report (Vol. 7) (2014), Lok Sabha Secretariat, New Delhi.

⁴Article 12: Definitions, <https://www.constitutionofindia.net/articles/article-12-definitions/> (accessed on 07.10.2024)

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6.2 Judicial interpretation:

The definition of “State” under article 12, and the authorities included in the definition of state was disputed before the Hon’ble Madras High court in the case of University of Madras vs Shanta Bai⁵. In this case the dispute was “Whether university can be considered as a state under article 12 of our Indian constitution?”, the court answered that, “*University of Madras is not a state as defined in Article 12 of the Constitution*”, because ‘other authorities’ could only include the authorities of a like nature i.e. ejusdem generis, exercising governmental or sovereign functions. It cannot include University of Madras. In this case, the court gave narrow and restrictive interpretation to the term ‘other authorities’. But the decision of the above case was rejected in the case of Ujjammabai v. the State of U.P.⁶ and held that, the doctrine of ejusdem generis could not be used to interpret the term other authorities. Because the authorities included under article 12 did not hold any common genus among them. So the ejusdem generis cannot be applied to interpretation of article 12 and they cannot be placed in one single category on any rational basis. When the meaning and definition of the term “other authorities” was called into question before courts, two tests were evolved to identify an entity as “other authorities” under article 12. They are

a) Public function test

The public function test is a test evolved by court in various cases, which is fixed as a legal criterion to identify a entity as state covering under the word “other authorities” under article 12 of Indian constitution. This test is seen as a very crucial step of judicial activism in protecting the fundamental rights of individuals by extending its applicability to entities beyond the traditional branches of government, which in turn facilitated the protection of fundamental rights of large number of individual. In this test, the nature of function, significance of function and public interest of a particular entity will be taken into account to decide the nature of the entity, these entities, which needs to be covered under the definition of other authorities, must has its functionality, which is of public nature or functions

⁵ *University of Madras vs Shanta Bai* AIR 1954 Mad 67.

⁶ *Ujjammabai v. State of U.P.*, 1963 SCR (1) 778

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once performed by state. In the case of *R.D. Shetty vs. International airport authority*⁷, the question placed before the Hon'ble Supreme Court of India was, whether airport authority is a state under article 12? The court held that, the airport authority is state, because it performs the functions once performed by state. This case emphasised the importance of public function test to determine the nature of an entity to be covered under article 12.

b) Control test

The control test is a test evolved by court in various cases, which is used as a legal criterion to identify a entity as state, to be included under the definition of state under article 12 of our constitution. The control of government over a particular entity is the primary consideration for including an entity into the definition of state. An entity can be considered as state under the definition of "other authorities" if that entity is significantly controlled by government or funded by government. This test focussed on the extent of control exercised by government over the decision making powers of that particular entity. In the case of *Ajay Hasia vs. Kalib mujib*⁸, the court held that, university has to be included in the definition of state under "other authorities", as state exercises substantial control over the administration and decision making of that institution.

7. Case laws – Interpretation of state :

The ambit of the term other authorities under definition of the state is an evolving topic, and it is expanding everyday by way judicial interpretation on case to case, as this term was liberally given wider interpretation to safeguard the fundamental rights of individuals. Some of the landmark cases in addition to the above seen cases are,

1) *Pradeep kumarbiswas vs. Indian institute of chemical biology*⁹

In this case court held that, financing of an entity by the government and enhanced the definition of the state to include such entities under the definition of other

⁷*Ramana Dayaram Shettyv. International Airport Authority*, AIR 1979 SC 1628

⁸*Ajay Hasia v Khalid Mujib*, (1981) 1 SCC 722

⁹*Pradeep Kumar Biswas v. Indian Institute of Chemical Biology*, (2002) 5 SCC 111

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authorities under article 12. In other words, to consider an institution as state, the government has to have a financial or administrative control for that matter concerned.

2) *Zee Tele films vs. Union of India*¹⁰

In this case the Hon'ble Supreme Court addressed the question of whether private entities performing public functions could be subjected to constitutional scrutiny under article 12 of constitution of India. The public function test was established firmly in this case, where court held that, Private entities engaged in the activities of public interest or public function could be treated as state under article 12 of constitution of India.

From the above research on constitution and case laws, we could find that, the court initially given a narrow interpretation to the term state under article 12, but it does not last longer. The definition and interpretation of the term state has been broadened to an extent to include entities performing public function and entities funded or controlled by state are made to cover within the ambit of article 12 of constitution of India.

8. Need for widening the scope of article 12 of constitution

Part three of our Indian constitution confers several rights to its citizens as well as to all people. It is an undeniable fact that, all rights are not absolute and every right has its own set of restrictions. Now these many rights starting from article equality, freedom of speech, expression, profession, trade, religion, right against unlawful detention and arrest and even right to constitutional remedies is also a fundamental rights, but now arises a question against whom we have to claim our remedy, or Fundamental rights infringement. Now the definition of state plays a vital role to identify against whom the fundamental rights can be enforced or in other words, who has the duty to ensure fundamental rights to people. Part III of the Constitution is to provide protection for the freedoms and rights mentioned therein against arbitrary invasion by the State, which as defined by article 12¹¹.

We have discussed earlier the scope of article 12 and its extent of application. One point to be noted that, the constitution of India has been enacted nearly before 74 years. Law always need to be dynamic and changing according to the changes in the society. But the definition of article 12 has not been amended, inspite of globalisation, privatisation and liberalisation. At the time of 1950s the conditions prevailing at that time

¹⁰*Zee Telefilms Ltd. v. Union of India*, (2005) 4 SCC 649

¹¹*State of West Bengal v. Subodh Gopal Bose*, 1954 SCR 587

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were totally different, where the role of private entities and multinational companies in India was less even negligible. Some of the challenges faced by article 12 and reason for its amendment may be traced as,

i) Privatisation of public services

The services including education, healthcare and infrastructure development are under the purview of public sector. These services are under the control of government and public sector services. The role of state has totally changed and evolved from police state to welfare state. The role of state is expected starting from birth till graveyard, from issuing birth certificates, providing education, healthcare services till issuing of death certificates. But the trend has changed where nowadays all the services under the public sector were slowly changed and vested in the hands of private entities, for which liberalisation, globalisation and privatisation has played a vital role. Now in the advent of increasing role of private entities, it posed a challenge before us in the enforcement of fundamental rights.

ii) Globalisation and multinational corporation

The scheme of globalisation in India paved way for the increased participation of multinational corporations in India's economy within the country. It actually paved way for more human right violation, especially fundamental rights guaranteed by constitution, but part III of constitution cannot be invoked or enforced against them. This actually led to grave violations. The concept of globalization has a very long history and it is a multifaceted phenomenon having social, cultural, economic, legal and political dimensions. Liberalization and privatization have its base on the economic dimension of globalization¹². But at the same time, widening the corporations whether public or private within the ambit of state for enforcement of fundamental rights can cause adverse effects and will surely lead to struggle. So a wise solution has to be given for protection of fundamental rights of individuals.

iii) Public Private partnership

¹²Moore K. & Lewis D.V, *The Origins of Globalization*, (1st edn, Routledge 2009). *Liberalization and privatization are the economic rules set by globalization to amplify the goal of achieving a free market economy*)

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Nowadays, government often involves in partnership with private entities for delivering public services. The reason for this may be traced as the increased role expected from government and efficiency of private entities, which makes the government to enter into public private partnership for fulfilment and delivery of public services. These private public partnerships are also often entered for the purpose of development of infrastructure and its projects. But the question whether public private partnership are within the purview of article 12, the answer would be, on broader interpretation of the term state under article 12, these PPP's can be included in state, for the purpose of protection of fundamental rights guaranteed by part III of Indian constitution, in other words they can be held liable and accountable for upholding the constitutional values in their activities. The emerging trend of globalization tends to bring to India a neo-liberal culture and that is quite evident from the economic measures adopted by the government¹³.

iv) Adapting to evolving societal structure

The society will not be static, and it is a dynamic and changing concept. Law has its direct relation to society. When the law changes, society has to be changed at the same time to ensure that law fulfils the needs of society. Our constitution and definition of state has come into force around 50 years back. From its inception the definition of state has not been amended by parliament to meet the changes and needs of society. Our society have seen lots of evolution and transformation, but whether the law is transformed according to the changes and needs of society, especially when concerning about the definition of state, the answer is no. Because the definition of state remained unchanged, and failed to adapt to the evolving societal structure.

v) Accountability and transparency

Accountability and transparency ensures fairness and promotes belief among people in a system. This makes sure that, every activities of an institution are under monitoring and they are always held accountable for their action among people. Transparency in a system gives fear and responsibility of officers of a particular

¹³ Chandrasekhar, *For the sake of Foreign Investments*, *FRONTLINE*, 2019 available at: <https://frontline.thehindu.com/profile/author/?page=2&urlSuffix=C.P.-CHANDRASEKHAR> (last accessed at March 8, 2024)

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institution. Liberalisation and privatisation have led to the significant increase in the involvement of private entities in the sectors traditionally dominated by government. If private entities are not held liable, they may infringe the rights of people without any enforcement mechanism. As far as the contemporary development of our nation is concerned, the role of private parties has drastically increased and they are not accountable to the people, or in other words, these entities have no obligation to safeguard the fundamental rights of people, neither they don't have any restriction not to violate the fundamental rights of the people nor they cannot be prosecuted for the same. This increased participation of private entities is harm to the people, as they will have unrestricted power to violate the fundamental rights of the people.

vi) Ensuring fundamental rights of people

As the participation and role of the private entities are increasing to an extent which could not have been imagined before 75 years at the time of enactment of constitution, which is at the time of independence of India. The intention of the constitution makers is to ensure and safeguard the fundamental rights of people. The constitution makers have defined the term state for protection of fundamental rights. The reason behind that may be, at the time of enactment of constitution, state played a vital role and it was in a dominant position for such violations. International Corporations, Multi-National Companies etc. are increasingly performing the functions that were traditionally associated with the State¹⁴. But due to recent developments in the various sectors because of LPG reforms, the role of private entities in the economy has drastically increased, which posed a threat to the protection of fundamental rights. Therefore, in order to ensure the fundamental rights to people as intended by constitution, definitely an amendment is needed to address these emerging issues with regard to the meaning of the term state under article 12, we have to widen the definition to accommodate the new needs of changing society.

9. Suggestions

¹⁴ Nolan, Aoife, 'Holding non-state actors to account for constitutional economic and social rights violations:

Experiences and lessons from South Africa and Ireland, 12 IJOCL 61-93 (2014).

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The purpose of the fundamental rights incorporated in the part III of constitution can be traced with the intention of the constituent assembly as understood from the debates of constituent assembly. Before independence, the rights of people were violated to an unimaginable extent, where only few were able to fight for their rights and reach till the top adjudicating authority before independence. Some measures that can be taken to widen the scope of definition of state are

i) Inclusion of private entities in article 12

As we have seen earlier this researcher is of the opinion that, the private entities are the major stakeholders in violation of fundamental rights of the citizens as they play a vital and inevitable role in our economy. They are necessary evil. So, we have to include them in article 12, so that fundamental rights can be enforced against them in other words, they will be bound to ensure the fundamental rights of people under them. Initially, Supreme Court expressed its concern to bring private bodies¹⁵. But definite criteria have to be fixed to ensure proper implementation of the article and further it also restricts its abuse. This recommendation would be the primary, first and foremost recommendation of this researcher.

ii) Judicial activism

Judicial activism had played an important role in expanding the definition of article 12 state, from restricted interpretation in the case of *University of Madras vs Shanta Bai* to the wider interpretation in cases like *R.D. Shetty vs. International airport authority*¹⁶ and *Ajay Hasia vs. Kalib Mujib*¹⁷ etc. In another case the Hon'ble supreme court held that¹⁸ BCCI is in a position to fulfil the dreams of people, hence it is duty bound to practice fairness in it. As a guardian of constitution, the role of supreme court is huge. Supreme court in another case¹⁹ settled that, controversy that High Court under Art 226 has writ jurisdiction against national sports federations but the doubts related to Art 32 still prevail. Further, as the society evolves, we need a more liberal interpretation to include private entities to the definition of state, but it

¹⁵*M C Mehta v. Union of India* (1987)

¹⁶*Ramana Dayaram Shetty v. International Airport Authority*, AIR 1979 SC 1628

¹⁷*Ajay Hasia v Khalid Mujib*, (1981) 1 SCC 722

¹⁸*Pradeep Kumar Biswas v. Indian Institute of chemical biology* (2002) 5 SCC III

¹⁹ *Board of cricket Control of India v. Cricket association of Bihar*, AIR 2015 SC 3194

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may lead to judicial overreach, as it exceeds the intended application of state under article 12. So as a first step, the constitution needs to be amended to include private entities under the ambit of state, and then the term of private entities and its scope shall be left to the interpretation of court.

9.1 Suggested amendment to Indian constitution:

As there is a change and development in society since the enactment of constitution, it mandates the amendment in order to adapt to the changing needs of society. Law and society are directly related to each other and law cannot be static without adapting to the contemporary needs of society. So, this researcher thinks that, this is the right time to make amendments to the constitution, and suggested amendments are,

A. Amendment to article 12

A new clause shall be included in the article 12 as article 12(2) as

Article 12(2) – In this part, “Private entities” includes every private institution or employer or any person, who is in a controlling authority or discharges a public function.

B. Amendment to article 15

The constitution under Article 15 ensures the protection right to equality to people. It can be amended as

Article 15(1) - “The state” in clause (1) of article 15 shall be substituted as “The state or private entities”

C. Amendment to article 16

The constitution under article 16 ensures protection of right to equality in public employment. It can be amended as,

Article 16(1) – The state clause (1) of article 16 shall be substituted as “The state or private entities’

Article 16(2) - The state clause (2) of article 16 shall be substituted as “The state or private entities’

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D. Amendment to article 19

The constitution under article 19 guarantees a list of freedom to its citizens, as there is not specific mention about, article 19 can be enforced only against state, but the diverse interpretation of this article should be clarified, so a new clause needs to be added as

Article 19(7) –The right guaranteed under article 19(1)(a), 19(1)(c) and 19(1)(g) shall be enforced against state and private entities.

E. Amendment to Article 32

Article 32 is termed to be the heart and soul of Indian constitution, as it gives authority to Supreme Court to issue orders and writs for enforcement of fundamental rights guaranteed under part III of Indian constitution.

Article 32 – The words “Decree or injunction” shall be added after the word “orders”

This researcher deems these amendments fit and proper, to incorporate private entities into the fundamental rights, in order to protect the fundamental rights of people and for efficient enforcement of fundamental rights.

10. Conclusion

Our constitution has completed around 73 years, and one of the largest written constitutions in the world. Since the time of enactment of constitution the definition of state under article 12 stands unamended. Judicial interpretation plays a vital role in shaping the meaning, definition of state under article 12 and widening the ambit of the state and application of fundamental rights. This ensures that, the fundamental rights people are protected to a possible extent and legislative intent is fulfilled. The contemporary development in our society due to liberalisation, privatisation and globalisation has impacted badly in the enforcement of fundamental rights. This posed a challenge before the courts to ensure fundamental rights of citizens against the private entities, as their role is inevitable in our society and economy. So law needs to be changing according to the needs of society and amendment to constitution is necessitated. Hence hypothesis is proved. Therefore the constitution can be considered to be amended as proposed by this

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researcher or in such a way to safeguard the fundamental rights of people, addressing the contemporary needs of society.



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