Plebs Journal of Law (Vol.-II, No. I, June 2016)
p-ISSN : 2454-4124, e-ISSN : 2455-5096
pp-123-134

JUDICIARY WITHIN THE AMBIT OF THE EXPRESSION *"STATE"*

Anuraag Mitra and Biswaroop Mukherjee[*]

ABSTRACT

When our Constitution was enacted in the year 1950, the makers had decided to make theJudiciary its guardian. They had also decided that the judiciary would be independent and alsoprotect the Fundamental Rights of the individuals from any arbitrary State action. But as weknow, the ambit of 'State', as defined under Article 12 of Constitution, is expanding and now some jurist claim that the Judiciary also comes under the ambit of 'State'.

Even though the Supreme Court has now ruled that the Judiciary does come under the ambit of 'State' for all the non-judicial functions it performs, it still does not come under 'State's' ambit for the judicialactivities the courts performs. There have been many cases where the courts have ruled that thejudiciary falls under the ambit of 'State' but the courts in some cases have also limited the scopeof the Fundamental Rights that no writ can be issued against them. The very idea why judiciaryshould not come under article 12 is that the makers of the Constitution had wanted to keep aseparation between the judiciary and the executive. Therefore, the complete inclusion of thejudiciary under the article 12 removes this fine line of demarcation.

We also know that in everycase there would be an unsatisfied party who would claim that's there has been a miscarriage ofjustice and file a writ petition against the court. Instead of this one can always go for an appeal. Due to such confusion regarding the inclusion or non-inclusion of the Judiciary within the ambit of State, the

[*] By Anuraag Mitra (B.B.A.LL.B. Hons.) And Biswaroop Mukherjee (B.Com. LL.B. Hons.), (2nd Year), College of Legal Studies, University of Petroleum and Energy Studies, Dehradun.

authors have endeavoured to quell such dispute by bringing the relevant facts to light.

INTRODUCTION

The Constitution of India had been enacted by following various constitutions of different countries. The makers of the Constitution continued with the judicial system which had been established by the British in India. The Constitution mentions that the judiciary is the guardian of the Constitution and shall protect the fundamental rights of the people. The makers of the Constitution had also decided that the judiciary would have its own independence and protect the individuals from any arbitrary actions of the executive. Therefore, not only did they empower the judiciary but also made a clear line of demarcation between the powers of the judiciary and the executive.

If a person's Fundamental Right would be violated then he/she could easily approach the court and pray for remedy. All the doubts regarding this situation were cleared but one. The question emerged that against whom could the violation of Fundamental Rights be enforced? This question was answered by Article 12 of the Constitution according to which, it was only state that could be held responsible for the violation of Fundamental Rights. The definition of State therefore, has a much wider perception in the legal terminology than the one which we normally could think of.

There has been a long standing debate whether Article 12 which defines State also includes the Judiciary. Before coming to any conclusions it is best that one understands the concept of State and then decides whether or not it covers Judiciary.

STATE AS A LEGAL TERMINOLOGY

The State or rather the interpretation of the word 'State' and what it entails is under the Part III of the Constitution, under Art.12.

Article 12 states that **'*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.'**

It is generally assumed that the Fundamental Rights can only be applicable against the state. Therefore, it is necessary for us to know the meaning of state. The Constitution gives us an idea of what the makers of the Constitution had in mind while drafting the Constitution. However, there are some parts which the makers of the Constitution had decided not to touch. These parts were meant to be decided in the future.

The terms local authorities and other authorities were left to be decided later.

MEANING OF 'STATE' UNDER ARTICLE 12

The Executive and Legislature of the Union and states comprise the Union & State governments along with Parliament and the state legislatures. The Governors of the states as well as the President of the country can also be referred to as 'State', as they too are a part of the Executive. Any government department or any institution under its control falls within the ambit of 'government' e.g. The Income Tax Department.

'Local authorities', as has been interpreted, refer to a **Municipal Committee**[1] **Municipalities,**[2] **Panchayats,**[3] and **District Boards** similar authorities that have the power to make laws & regulations and also enforce them. Any entity exercising governmental or sovereign functions could come within the purview of 'Other Authorities'. A juridical entity, though an authority may also ratify the list of being an instrumentality or agency of the state in which event such authority may be held to be an instrumentality or agency of State, but not vice versa.[4]

NOT ALL STATUTORY BODIES MAY BE TERMED AS 'STATE'

There have been many tests performed to check whether a body is considered to be a state or not. In ***Electricity Board, Rajasthan* v. *Mohan Lal,***[5] The Supreme Court held that the expression "other authorities" is wide enough to include all authorities created by the Constitution or statute on which the powers are conferred by Law. It is not necessary that the statutory authority should be engaged in performing governmental or sovereign function.

In the case of ***R.D.Shetty* v. *International Airport Authority,***[6] the Court laid down five tests to be considered "other authority";

- Whether the entire share capital of the institution or body is owned or managed by State.
- Whether the body enjoys monopoly status.
- Whether it so happens that a department of the government is transferred to Corporation.
- Whether the functional character of the body is governmental in essence.
- Whether there is deep and pervasive State control.
- The object of the authority must also be considered.

The test for determining as to when a corporation can be said to be an instrumentality or agency of Government may be culled out from the judgment in the International Airport Authority's case.

In ***Sukhdev Singh* v. *Bhagatram,***[7] The Supreme Court held that Oil and Natural Gas Commission, Life Insurance Corporation and Industrial Finance Corporation are authorities within the meaning of Article 12.

However, in ***Tekraj Vasandi* v. *Union of India,***[8] The Court held that "Institute of Constitutional and Parliamentary Studies," a society registered under the Societies Registration Act, 1860, is not a State within the meaning if Article 12. The Institute of

Constitutional and Parliamentary Studies is neither an agency nor an instrumentality of the State. It is a voluntary organization.

In 2002, however, the accomplishment of the legal test was fulfilled in the case of ***Pradeep Kumar Biswas* v. *Indian Institute of Chemical Biology,***[9] the judgment was delivered by a seven-judge bench. The factual matrix of the case was quite complexas it involved the reassessment of ***Sabhajit Tewari's*** case. The aforesaid case was one in which the Council of Scientific and Industrial Research was declared by a Constitution bench that it was not "State" within the meaning of Article 12.

Justice Ruma Pal, in ***Pradeep Kumar Biswas***, delved into the record of the Supreme Court's Article 12 jurisprudence.Here the Hon'ble Justice distinguished and differentiated between a "broad" and a "narrow" to Article 12. For her, however, the difference was not between the legal and the functional approach, as we have discussed, but between the *statutory* approach (in the earliest cases), and the legal approach (*Rajasthan Electricity Board* onwards).[10] In her judgment, the functional test is erased out of history: Justice Mathew's concurrence in ***Sukhdev Singh*** and the judgment in ***R.D. Shetty*** are simply treated as affirming the legal approach, which was ultimately crystallised in *Ajay Hasia*.[11]

Justice Ruma Pal, after having listed ***Ajay Hasia's*** six factors, resolved to elucidate and crystallise the factors even further. The philosophy of the cases, which ultimately gave birth to the factors or tests as held in ***Ajay Hasia***, she held, was "*whether in the light of the cumulative facts as established, the body isfinancially, 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. If this is found then the body is a State within Article 12. On the other hand, when the control is merely regulatory whether under statute or otherwise, it would not serve to make the body a State.*"Here, the entire focus is

on control, and the public-function aspect has disappeared altogether.

IS THE JUDICIARY STATE UNDER THE BOUNDARIES OF ART. 12?

It is imperative to note that the definition of 'State' under Art.12 contains the word 'includes'. This word almost certainly indicates that the definition is not thorough. Therefore, although the definition explicitly mentions only the Legislature and the Government, there could be various other instrumentalities of State Action included within the scope of the definition.' Hence, the non-citation of the Judiciary does not, necessarily signify that the Courts are intended to be excluded from such definition.

Although the judiciary has not been mentioned specifically under Article 12, legal experts do opine that the judiciary should be incorporated in the definition of State. 'According to one school of thought, the Supreme Court has the power to make rules (to regulate practice & procedure of courts), appoint its staff and decide its service conditions (as mentioned in Articles 145 and 146 of the Indian Constitution). Hence, it performs the role of a State.'[12]

The apex court has held, in one of its recent decisions that in so far as its rule-making power is concerned, the Judiciary may be regarded as a 'State'; nevertheless it would not be considered so if and when it exercises its judicial powers.

DIVERGENCE AMONGST THE WINGS OF THE GOVERNMENT AND JUDICIAL ACTIVISM

The Indian Constitution is quite vocal about separation of powers between the three wings of the state, with each wing reigning supreme in its respective domain. The Legislature has the exclusive power of making laws, the Executive, of executing the said laws, while the Judiciary has been invested with the power of

adjudicating various disputes involving question or interpretation of law.

Article 50 of the statute book professes that **"*The State shall take steps to separate the judiciary from the executive in the public services of the State.*"**

It was Montesquieu (1689-1755), A French jurist, who lived during the Age of Enlightenment, who propounded his theory of separation of powers, with the intent to care for the personal liberty from any superfluous dictatorial and unqualified concentration of power in a single entity. Towards such end, he proposed this dogma advocating that there be a lucid separation of functions amongst the Government's three organs, viz- the Legislature, the Executive and the Judiciary. This separation of power, however, is not as severe as Montesquieu's hypothesis had provided for. We have numerous checks and balances that ensure that none of the bodies become supreme and totalitarian-

- The Legislature may seek answers from the Executive, and may even vote it out of power.
- The Legislature has the power to remove the judges of the High Courts and the Supreme Court.
- The Executive appoints the various judges of both the apex court and the High Courts, (even though the Judiciary has already twisted this constitutional mandate, in the 1990s).
- The Judiciary may nullify any law, so prepared by the Legislature, or any act of the Executive, if it is arbitrary and/or unconstitutional.

These are but some of the measures and checks enumerated under the Constitution. The President, the leader of the Executive, one may observe, forms a part of the Legislature as well. Of late however, eyebrows have been raised, at the alleged trespass of the Judiciary, in the domain of the other bodies of the state.

This separation, however, is not absolute in nature, for the President of the country is empowered by Article 103, to disqualify the members of the Parliament. Moreover, the appointment and removal of judges is undertaken by the President and he derives such power from Articles 124, 126 and 127. Presently though, there has been serious debate on the collegium method of selection of the judges.

The Independence of the Judiciary is 'safeguarded' by the Constitution of India, by three-fold method:-

- By the guarantee of absolute safety of tenure to the Judges save in cases of removal due to such incapacity or misbehaviour, which is not just a complex and intricate procedure but an onerous and difficult one as well;
- By providing total independence to the Judges, to adjudicate the cases in accordance with their judicial knowledge and conscience;
- In case of the subordinate judiciary, the provisions of Arts.223 – 236 vest complete control over them in the High Court.[13]

An independent, unbiased and fearless judiciary was what our constitutional fathers had envisaged—a Judiciary uninfluenced by outside forces. The purpose of the Judiciary, as an institution 'is to lay down the law and redress grievances within the parameters of law enacted by the Legislature.'[14] In order to fathom the true essence of judicial activism, one needs to understand the various circumstances which have forced the Courts into an activist role. In recent times, the process of degeneration of Parliament's conduct has influenced the functioning of other institutions. There have been instances where a certain organ of the Government has ceased to comment or has avoided addressing a certain issue, which is generally politically sensitive, by passing it on to another organ or wing, the latter not in the slightest imagination expected to make that decision. When sensitive issues remain unaddressed or avoided by the Executive or the Legislature, the common man has

no other choice but to take shelter of the Courts, and the Judiciary takes the onus upon itself to address the issue. The decline in the role played by the other two institutions of the State has inexorably changed the role of the Court from being a "Sentinel on the quivive to a saviour on call"[15] During the primary years, the citizen was content with the policies of the Government; in recent past however, the incumbents of the Parliament have turned out to be improper ambassadors of the will of the people, and in such a dire situation, there is increasing disbelief in the democratic process, and the Superior Courts are left with little choice but to act. In this context, the words of *Justice Lentin* have great relevance. He emphasized that who would act as a check on the judiciary, if the judiciary was to assume, either intentionally or unintentionally, the role of the Government, and thus evolve into a 'Super Government'? Who would then be the guardian of the guardian and the custodian of the custodian? Lord Acton had the foresight to exclaim that 'power corrupts and absolute power corrupts even further'; in such a case absolute superiority would no wonder corrupt the Judiciary. Credit however, must be bestowed on the apex Court, for it has shown commendable restraint while dealing with petitions, such as the ones challenging the Telecom policy; Babri Masjid issue, and many more.[16]

Judicial activism assists in the industrial growth and development of the democracy. The Indian judges are now in a commanding position, such a position where it is possible for them to expose the grim truth about the Executive, about the area of darkness that has impregnated the Executive of the Indian democratic setup. The Judiciary has upheld the rule of law and has appreciated the truth, and has acknowledged our fundamental rights by preserved certain fundamental constitutional values. For instance, in the present scenario, the Right to life and personal liberty of an individual cannot be preserved, unless the necessary rights that have been so propounded by the Supreme Court under Art.21 are effectively

protected. The great strength of the Judiciary must therefore be utilized for public welfare and always in the interest of the public and also in the services of the people.[17]

ARGUMENTS FOR& AGAINST 'STATE' TO INCLUDE JUDICIARY

Ordinarily we know that the Judiciary is a part of the State which determines whether an individual's fundamental right has been violated or not. Now the case can be decided with the correct judgment or with an incorrect one. Even If the court has not provided the correct decision the aggrieved party cannot claim it to be a violation of his fundamental right. The reason behind it is simple. It is done to reduce unnecessary litigation being filed under the writ jurisdiction of the superior court as every case would have an unsatisfied party. They would all claim that the decision has violated their Fundamental Right.

However, one can also argue that if writ petition filed against the court for the violation of a Fundamental Right then there might be a chance of miscarriage of justice. But even though they do not have the right to issue a writ petition against the court, the aggrieved party can always appeal to the superior courts because that is permissible and the superior court can decide whether there was miscarriage of justice or not. During this time the test of Article 14 of the Constitution can be applied to check whether there was a violation of a Fundamental Right by any purposeful discrimination made by the court against the party.

In the case of ***Ratital v. Sate of Bombay,***[18] the High Court ruled that the Judgment of the Court could not be challenged for the violation of any Fundamental Right.

But in the case of ***Keshavan Iyenger v. State of Madras,***[19] the Court held that Article 14 did apply to the Courts in the same manner and spirit it does to the State.

In the case of ***A.R. Antulay v. R.S. Nayak,***[20] the court held that the rule making authority of the court falls under the ambit of 'State' but it doesn't come under this ambit for any judicial decisions it takes.

CONCLUSION

In a hypothetical situation, let us assume that the Judiciary falls under Article 12. If a writ petition is filed against the High Court under article 226 then the matter would be decided by the High Court itself. Even if the writ petition is filed under article 32 then it is the same as an appeal to the Supreme Court. If a writ petition is filed under 226 against a tribunal or a District/Sessions Court then it would have the same effect as an appeal to the High Court. Therefore, the very thought that the Judiciary falls under the ambit of Article 12 rebels against rational understanding.

Even though this topic remains open to be debated upon, and the Supreme Court has held, very recently, that in so far as its rule-making power is concerned, the Judiciary may be regarded as a 'State'; nevertheless it would not be considered so if and when it exercises its judicial powers.

REFERENCES

---

[1] State of Gujarat v. Shantilal, AIR 1969 SC 634.
[2] Natwarlal Khodidas Parmar v. Dist. Panchayat, Jamnagar, AIR 1990 Guj. 142.
[3] Ajit Singh v. State of Punjab, AIR 1967 SC 856.
[4] Pradeep Kumar Biswas v. Indian Institute of Chemical Biology. 2002. 5 SCC 111.
[5] AIR 1967 SC 1857.
[6] 1979 SCR (3)1014.
[7] AIR 1975 SC 1331.
[8] 1988. 1 SCC 236.
[9] 2002. 5 SCC 111.
[10] *What is the State III: Adopting the "Instrumentality or Agency" Test (accessed on 24th May 2016 at 18:30pm),* indconlawphil.wordpress.com.
[11] *Ibid.*
[12] Shubhojit, *Article 12 of Indian Constitution: Meaning of 'State'*(December 15, 2014), www.elections.in/politicalcorner.

[13] S.P.Gupta v. President of India AIR 1982 SC 149.
[14] S.A.K.AZAD, JUDICIAL ACTIVISM INDIAN JUDICIARY: A SAVIOUR OF LIFE AND PERSONAL LIBERTY, A.I.R. J.17 (2000).
[15] Raju Ramchandran, "*Judicial Activism II The sentinel turns saviour*", Times of India, February 29, 1996.
[16] S.A.K. AZAD, JUDICIAL ACTIVISM INDIAN JUDICIARY: A SAVIOUR OF LIFE AND PERSONAL LIBERTY, A.I.R. J.22 (2000).
[17] *Ibid*.
[18] AIR 1953 Bom 242.
[19] AIR 1956 Mys 20.
[20] 1988 SCR Supl. (1) 1.

❑❑❑