

Constitutional Law and Public Administration in India

Prof. (Dr) Sairam Bhat

Centre for Environmental Law, Education, Research and Advocacy (CEERA)

National Law School of India University, Bengaluru

Week- 04

Lecture-02

Article 12 Definition of State – II

It is pertinent to understand the definition of state under Article 12 of the constitution through some landmark cases of the judiciary. Some of these are the *Rajasthan State Electricity Board v. Mohan Lal*, a 1967 Supreme Court judgment, *Ajay Hasia v. Khalid Mujib*, 1980 and *R. D. Shetty v. Airport Authority of India* which are the most landmark judgments given by Justice P. N. Bhagwati in understanding Article 12. Article 12 defines state which has four parameters. First, the government of India and the parliament of India is the state. The legislature of each state is also state. local and other authorities within the territory of India is also a state once it has an authority of the state. Finally, understanding ‘other authorities’ as state is interesting and challenging because local authorities are the municipalities, the boards, and the trust. These are local authorities because they do local administration.

The local authorities are the local government and administer local public administration because in a vast democratic country, peculiar landscape and challenges and large number of citizens, the authorities must be divided. In terms of centralization versus decentralization of governance, this becomes a very critical factor. Other authorities may either be included or excluded under Article 12, which is subject to a test, because finally, in case of other authority, the basic distinction is whether such authority is a state authority or a private authority.

If an ‘other authority’ is a state authority, it is covered under Article 12. But not if it is a private authority. An authority is someone who can determine something about you. Like, a father may have authority over his family, or an institution has certain authority to lay down the rules of regulation of admission. And sometimes they say the right of admission is reserved. The question arises, who are these authorities who are accountable under the constitution, who can be held responsible for the protection of the rights of the citizen and who can be exercising public administration while trying to understand authorities under Article 12. Once an authority is an authority of the state or is a state under Article 12, even if you are not an authority, very often the employees seem to be working for the state and are called government employees. The government pays the salary of the public servants.

There is a degree of ownership in creation of that authority by the state or it could be a degree of control that the state exercises as well. So, control and ownership of the entity will determine whether it is to be included within the definition of state or not. And hence, the constitution makes a distinction between public authority and private authority. Public authorities have a different set of accountabilities under the constitution, private authorities have also a set of accountabilities, but they are of a different scale and magnitude. And an authority may be a sovereign body. A sovereign body is the body of the government itself, State, or center. We say the government is sovereign.

When something is supreme, it is said to be sovereign and because they perform core governmental functions which no one else can perform and because they reflect the interest of the citizens. When any entity is a direct reflection of government and governments, they are sovereign bodies. Today we have the concept of a welfare state. A welfare state is a state not only focusing on governance, but at the same time is providing a lot of civic amenities and a lot of facilities. A welfare state can get into production of goods and services, or extraction of mineral resources. It can facilitate and provide water supply by accessing water in the river, building dams, supplying it to canals and trying to give it to citizens.

It is needless to mention that the service of water is not necessarily a core government service of essential sovereignty, but a welfare function. Taking an example of an electricity port, the Rajasthan state electricity was in one line. Now, electricity ports have the power of promoting, coordinating the development of electricity including generation, supply, distribution and transmission. And hence, the state has invested quite a bit in the transmission lines, in the generation lines and so on.

Privatization is largely spoken of in present times, but in 1967 there was no privatization. Today there can be privatization and hence, private power companies will not be determined as state. Whether a public private partnership region should be covered under the definition of a state. The answer is yes, it should be because it is still a public part, though it is partly in the private sector. However, if it is purely private, it is not state but if it is government in some form in which the government has established the state board, or the government funds the state board in terms of the finances, then it is a state. Functionally, most of the electricity boards are directly under a minister in the government. Administratively also, in case of the appointments as many such boards have now become corporations.

A corporation is like a company of which the managing director or the directors are appointed to the government. In all these cases, financially, functionally and administratively, if there is an element of control by the government, whether state or central, these entities shall be considered as state. So, either it is the creationist test, or it is a functional test, that test will determine if these entities are going to be called a state. This

is irrespective of the fact that, the electricity board may not be covered under strict definition of sovereign function of the state.

Again, Article 12 has several components to it. The sovereign entities and the sovereign functions are under Article 12. However, when the term other authority appears in Article 12, all these entities can be covered and they will be regulating or effecting or determining any of the rights of the citizens and they would be held accountable for any of their public functions, public administrations and, the element of good governance that brings in efficiency and effectiveness of the realization of rights. In this context, the *Rajasthan State Electricity Board v. Mohan Lal*, is an important case along with two other landmark decisions.

In the case of *Ajay Hasia v. Khalid Mujib*, the issue was which body or organization is included under the definition of state. As well as about the fact that once you are a state, it opens a whole gamut of judicial review of your actions. So, who can be regulated by the judiciary in terms of their public administration? Any agency that is covered under the definition of state under Article 12 gets easily covered by the writ jurisdictions of the court, by which you can appeal to the Supreme Court directly under Article 32 of the Constitution, finally or can challenge the same under Article 226 of the Constitution in the High Courts.

In *R.D. Shetty v. Airport Authority of India*, decision delivered by Justice P.N. Bhagwati stated how to test a state and laid down six guiding factors for the same. The first factor is to see whether capital to this entity comes from the government, say the share capital, or any other funding or investment. If for any corporation, cooperative, society, trust or board, if the share capital comes from the state funds, which is the funding of the citizens and the tax-based money, which is in some sense, the chief financial resource or the main financial funding, is coming from the government, or is held by the government, then that entity should be concluded as being the state. In later stages, such an entity can fund it from other factors, but in the base funding or the founders' funding, the share funding, or the first money, must come from the government as we call it if it. Second, very often, the financial assistance of the states will be given to such corporations. So, initially, it will not be funded by the government. It may not be the base funding, the foundation funding, but the state is continuously giving assistance. This could be in the case of a private aided college, in terms of, giving financial assistance to an institution as financial aid or state aid on a year-to-year basis. Now, if this is the case, then these private- aided institutions will not be covered on the state,

But even state aided institutions in any form, be it the salary or be it any other component in which they are getting some financial assistance with the state to meet their expenditure, then those corporations or entities shall also be covered as state under Article 12. If a corporation enjoys some kind of a state monopoly or state is protecting their business as a

monopoly business; if the state is controlling the affairs or the functionality such that it is of a government character or nature of importance, then in those circumstances, notably in pre liberalization-privatization-globalization era, if the government, looks at an entity to do the sole business on behalf of the government, then in those functional characteristics, that corporation will be held to be a state.

It will have the character of the government, despite the fact that the funding has not come. This is where the character and the nature of the organization will matter. Though the funding may come from somewhere else, if the nature of the organization is such that the government is protecting its monopoly status or its status of public importance, and has every character to do government functions, then it will also be considered as a state.

The next character is the deep and pervasive control of the state, meaning core and continuous control. If deep and pervasive control is there in an organization, then such organization shall also be considered as state. The control is not weak. Say, if you are opening a restaurant or an institution or a business, the government has control. But these are just controls. Deep and pervasive control would mean that the control is of continuous character and nature and deep would mean something that is fundamental to the management of that entity itself. A department of government can be transferred to a corporation. This is possible like in the instance when initially the electricity department was there, then it was transferred to corporations for better efficiency.

So, generation companies were made different, distribution companies were made different. So, these were made for better and efficient management. Once the department of the government is split into a corporation it does not lose out the character of being a state. Which is something that must be taken into consideration. These tests were put by R.D. Shetty, who works in the Airport Authority of India. The Airport Authority manages airports in India. Many of these airports have been given for private lease. The Bangalore airport, Bombay and Delhi airports privatization has taken place. Many of the airports are a Public private partnership (PPP) project. Many of the airports are managed by the Airport Authority of India. The Airport Authority of India is a body or agency owned by the Ministry of Civil Aviation which is the nodal agency for establishing airports in India. But it must be remembered that Airports still have a governmental character function.

And being governmental in character, the government may finance it directly or indirectly. Initially, creation is financed, later it may not do that regularly. The Airport Authority of India has started to generate its own money through tickets with the usage of space in airports. This is a monopoly status that is given to the Airport Authority of India as a regulator. It involves private players because that is where efficiency of administration comes in. The question in *R.D. Shetty* was wondering whether the Airport Authority of India is a state because it is a kind of an independent organization, which is independent

functionally and can be autonomous too, functionally. But the purpose of AAI is to perform what the government ought to perform. That is the creation of the airport. It is the central government that has the domain in the constitution for creation of airports and not the state government. So, they need their regulators to manage these efficiently, so to create a corporation or company style of administration it gives an element of functionality. A look at the various aspects reveals a deep and pervasive control of the state.

Whether the Airport Authority of India there is deep and pervasive control of the state, is affirmatively answered. Everyone who works over there is appointed and responsible to the government and they are performing a character which is of public importance, but at arm's length distance. The government wants to have the airport authority a little bit farther from it because it can work efficiently and there is no government regular bureaucratic interference. It can bring in standards, improve services and improve the experience of citizens as well. However, that being the purpose, it will not lose out as being treated as a state under Article 12.

Can someone file a writ petition against an entity which is a state under Article 32 and go to the Supreme Court directly for the enforcement of his or her fundamental rights? If an entity is a state, it is required to follow certain government norms. It cannot go in for a private agreement, must go in for a public recruitment, show transparency, accountability, and ought to follow the principles of natural justice. The principle of good governance applies to an entity which is a state under Article 12. It means corruption must be investigated by the Lokpals and the Lokayuktas and follow the process of tendering. Tendering is very important because that is where transparency and accountability lies.

Participation approach and all these aspects of good governance namely, equity, efficiency, rule of law, become inevitably a rule for the entities like state who are so called local authorities. They are then made responsible to follow the rules of good governance. So, there are implications once an authority is declared a state, which could be application of the Prevention of Corruption Act. Though it applies to any other institution, primarily it applies to the state. Once aid from the government is taken, the authority is a state, and some degree of control from the government also seeps in. There is no prohibition on seeking aid from the government, but the implication is accountability arises under Article 12, irrespective of whether the entity is commercial or non-commercial, once you take aid. Even commercial entities which are established by the state, can be purely for profits. For example, the public sector undertakings, the basic purpose of these is commercial.

Hindustan, ONGC limited, Core India limited, all these are commercial entities and are unlike non-commercial entities. Whether AAI is a commercial entity? It is a semi-commercial entity, though it has so many public welfare functions in terms of establishing these airports, running the airports, creating a kind of a facility for the same. However, all these implications become very critical because while looking at so many other authorities

that must be declared under Article 12 and we bring in a constitutional accountability for that same purpose.

The government can establish companies as well. Under the Companies Act of 2013, the government can register a company as a government company. It is a company in which the government state or central has more than 51% of shares. Today there are so many of these companies in which the shares have been diluted and disinvested. The government may be a major shareholder when it holds 51% very clearly calling such a company a state. But in many cases where the government is a minor shareholder, a test of other authorities will have to be applied. An investor will not be considered as a state. For example, LIC or the Life Insurance Corporation of India, is a state. But if Infosys makes an investment into LIC, it does not mean Infosys is going to be treated as a state. Life Insurance Corporation of India and other entities which are created as a commercial window of the government are held accountable. That indirect accountability can be established with direct accountability is something that will have to be tested from time to time.