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Identifying Persons of Incidence under Part III of the Indian Constitution

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ABSTRACT

Fundamental Rights constitute a basic guarantee of dignified life. The respect for these rights has been deeply embedded in the structure of our Constitution – in the Preamble, in a distinct Part III dealing with fundamental rights and also through the Directive Principles of State Policy. The guarantee of fundamental rights has been concretised by the Constitution by incorporating Article 32 which not only makes them enforceable but also guarantees constitutional remedies for their enforcement as a distinct right. This paper shall discuss the persons of incidence of fundamental rights. It shall attempt to identify the persons upon whom the correlative duty of fundamental rights is cast; against whom the court may be moved for remedy. The paper has identified the persons of incidence of Part III by assessing the scheme of entrenchment of fundamental rights, the inclusive definition of State under Article 12 and through individual provisions of Part III.

I. INTRODUCTION

Democracy popularly means rule by the people. The people's rule is generally realised in the present era through representative governments. But democracy is not limited merely to the idea of people electing those that shall govern. Those who have been elected to govern are to govern in the welfare of the people and not for their own personal or ideological ends.[2] The democratic state is formed through a constitution which is both the fountain of power, and also imposes many limitations on the exercise of those powers. In this constitutional democracy, where good of the people is the end of the state, the delineated powers are also given a specific direction. This 'good of the people' is often expressed in the practicable form of 'fundamental rights' in the constitutional texts. Fundamental rights, therefore, exist not merely as entitlements of those to whom they are promised, rather they also act both as a limitation on the powers and as an affirmative field of action of the government, which is organised to act in the furtherance of these rights. Thus, constitutional democracy is not 'elective despotism'[3], and operates upon several doctrinal presuppositions. Fundamental Rights operate as one such

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2 Jonathan R. Macey, *Representative Democracy*, 16 HARV. J. L. & PUB. POL'y 49 (1993).

3 *See*, JOYCE APPLEBY & TERENCE BALL, JEFFERSON: POLITICAL WRITINGS 326 (1999).

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protection against elective despotism. This paper attempts to assess the shield of fundamental rights, not by its contents but by studying the entities against whom it may be used, by answering the question: Who are the persons of incidence under Part III of the Indian Constitution?

II. RIGHTS, FUNDAMENTAL RIGHTS AND PERSONS OF INCIDENCE

Before we attempt to answer the question posed above, we need to establish certain operative concepts that shall aid us throughout our study. The definitions of rights are plentiful. It is a term of complex connotation and varied usage. It might connote a claim or entitlement enforceable through law, or an interest recognised and protected by a rule of justice[4], or even as capacity of a person to control the actions of others with the aid and assistance of the state[5]. It is used as a reason for establishing the legitimacy of political demands[6], as a ground for enforcing a pattern of behaviour on the others, and also as the basis of plea before the court for supporting one's prayers.

Rights may be in many forms – moral, legal, statutory, constitutional or fundamental. Here, we are concerned only with Fundamental Rights as guaranteed by the Constitution of India. Part III of the Constitution enumerates certain rights as fundamental. The essentiality of these rights is not merely nominal; it has a functional counterpart. The Constitution envelops Part III within two levels of entrenchment. At the first level, the protections afforded by Part III cannot be abridged, or taken away by any law, and any law that acts in contravention of this principle shall be void to the extent of the contravention[7]. The protection is available against both pre-constitutional[8] and post-constitutional laws[9], and covers not only legislations or statutes but also tools of executive action like ordinances, orders, bye-laws, rules, regulations, notification, and even covers customs and usages[10]. Hence, the first level of entrenchment protects fundamental rights from the vagaries of ordinary laws – whether sourced in legislative forums, or executive bodies, or developed through societal practice and adherence. Fundamental rights are, in fact, not merely protected against vagaries or ordinary laws; rather they guide the ordinary laws, which can act only in consonance with the fundamental rights. The second level of entrenchment has been made available to fundamental rights against Acts which amend the

[4] P. J. FITZGERALD, SALMOND ON JURISPRUDENCE 217 – 221 (UNIVERSAL PUBLISHING COMPANY 2014) (1970).
[5] THOMAS ERSKINE HOLLAND, THE ELEMENTS OF JURISPRUDENCE 70 (1887).
[6] *See*, Francis Fukuyama, *Natural Rights and Human History*, 64 The National Interest 19 – 30 (2001).
[7] *See*, Constitution of India, 1950, Article 13.
[8] *See*, Constitution of India, 1950, Article 13(1).
[9] *See*, Constitution of India, 1950, Article 13(2).
[10] *See*, Constitution of India, 1950, Article 13(3)(a).

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Constitution. This protection, however, is not absolute. An Amendment Act enacted under Article 368 may amend provisions of Part III, but if the amendment tends to violate any feature of the basic structure of the Indian Constitution, then the amendment shall be unconstitutional, and shall be void[11]. This protects the Fundamental Rights from the excesses that may be caused under a rule of a super majoritarian Parliament. The twin level of protection reflects the strong will to maintain our constitutional democracy by constructing fortifications not only against ordinary laws but also against the exercise of constituent power.

The scheme of entrenchment, mostly directed against the exercise of legislative, executive, and constituent power (though partially in this case), shows that the Constitution has incorporated fundamental rights as the prime shield against state action. This, however, cannot be taken to mean that the protection is only against state action, and not otherwise. For now, we can take the inclusion of the words 'custom or usage' in Article 13 (3) (a) as one of the indicators towards a wider application of fundamental rights. This discussion shall be dealt with comprehensively in subsequent portions of this paper.

Another term that we need to establish is 'person of incidence'. Salmond has described five characteristics of rights – the owner of right or the person of inherence, the subject of duty or the person of incidence, the content of the right (the obligated act or omission on the part of the other), the subject-matter with respect to which the right constitutes its content, and the title of the right (facts through which the right came to be vested in the person of inherence).[12] In this scheme, person of incidence is the subject of duty. He is the person upon whom the duty correlative to the right has befallen. He is the person who is obliged to perform any act or omission that constitute the content of the right. Even in Hohfeld's conception[13], when one person has a right, there is a corelative duty on the other to act or forbear from acting in respect of his right. It is by imposing duty on the other that fundamental rights have been made enforceable. It is important to identify the persons of incidence because if there is any breach of fundamental rights by the person of incidence, they may be legally made to perform their duty through a court. Holland's definition reflects this tripartite notion of rights: the person of inherence has the capacity to control the actions of the person of incidence through the aid and assistance of the state. In the preceding paragraphs we have seen that the entrenchments around Part III have been directed mostly against State action, hence it might be correctly presumed

[11] Kesavananda Bharati v. State of Kerala, (1973) 4 SCC 225.
[12] P. J. FITZGERALD, SALMOND ON JURISPRUDENCE 221 (UNIVERSAL PUBLISHING COMPANY 2014) (1970).
[13] *See*, WESLEY NEWCOMB; COOK HOHFELD, WALTER WHEELER, EDITOR. *FUNDAMENTAL LEGAL CONCEPTIONS AS APPLIED IN JUDICIAL REASONING AND OTHER LEGAL ESSAYS* 36 – 38 (1923).

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that the prime person of incidence for fundamental rights is the State. What comprises 'the State' for enforcement of fundamental rights? Can private individuals, organisations or institutions also be regarded as persons of incidence under Part III? Would there be any difference in the tools of enforcement of duties upon public and private entities? These questions have been discussed in the next part of the paper.

III. PERSONS OF INCIDENCE IN PART III OF THE CONSTITUTION

Part III of the Indian Constitution is not homogenous regarding the persons to whom the rights are guaranteed nor regarding the persons against whom the guaranteed rights may be enforced. A perusal of the relevant articles would show that the persons of inherence of rights may be 'person'[14], or 'citizen'[15]. Also, there are provisions which have not explicitly specified the owner of guaranteed rights[16]. Further, certain rights have been availed to some identities alone – minorities[17], children[18], etc. Even the language in which the rights have been guaranteed is not uniform. In some cases, for example, Articles 14, 17, 23 and 24, the rights have been guaranteed by imposing a prohibition. While the prohibition of Article 14 is directed against 'the State', Articles 17, 23 and 24 are general prohibitions on all.

The lack of homogeneity visible among the persons of inherence may be found among the persons of incidence as well. The scheme of entrenchment of fundamental rights provided by the provisions of Article 13 and by the basic structure doctrine shows that the fundamental rights work as shield against the vagaries that may be imposed through ordinary laws, executive action, and, to a limited extent, even through the exercise of constituent power. This seems to support the inference that Part III of the Indian Constitution is aimed to protect against the State. However, the task of identifying the persons upon whom a corelative duty has been imposed may be done in ways more than one, and is not simply limited to the test of assessing the scheme of entrenchment. The attempt to identify the persons of incidence in Part III of the Constitution in two ways, one, by assessing Part III as a whole and through the lens of Articles 12 and 13, and two, by assessing each provision guaranteeing a right separately.

(A) Identifying persons of incidence generally in Part III:

In this part, we shall try to identify the persons of incidence through three measures: a) through scheme of entrenchment of provisions in Part III, b) through the definition of 'the State'

[14] *See* for e.g., Constitution of India, 1950, Articles 14, 20, 21, 22, 25.
[15] *See* for e.g., Constitution of India, 1950, Articles 15, 16, 19.
[16] *See* for e.g., Constitution of India, 1950, Articles 17, 23.
[17] *See* for e.g., Constitution of India, 1950, Article 30.
[18] *See* for e.g., Constitution of India, 1950, Article 24.

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provided under Article 12, and c) through interpretation of the expression 'other authorities' used in Article 12.

(B) Identification through the Scheme of Entrenchment:

Fundamental rights are entrenched with the aid of Article 13 and the Basic Structure Doctrine. Article 13 provides entrenchment to fundamental rights against legislative and executive action[19]. These actions are those of the State, the entity of political power constituted by the Constitution. Hence, we may say that fundamental rights protect the interests of the rights-holder against state action. This protection is broadly available to all rights guaranteed by Part III of the Constitution, and no distinction has been made between various fundamental rights for this purpose. Clause (1) of Article 13 makes void such provisions of pre-Constitutional laws which "are inconsistent with the provisions of this Part (Part III)." Clause (2) of Article 13 prohibits the State from making any law "which takes away or abridges the rights conferred by this Part." Therefore, both clause (1) and clause (2) of Article 13 have made use of a language that admits no exception with respect to the fundamental rights to which the protection has been afforded.

An argument may be made that the scheme of entrenchment of fundamental rights under Article 13 is directed not only against the State but may also be used to challenge the encroachment of fundamental rights by socially generated customs or usages. Clause (2) of Article 13 has explicitly barred the State from making any law which "takes away or abridges the rights conferred" by Part III. Further, it provides that "any law made in contravention of this clause shall, to the extent of the contravention, be void." It is worthwhile to note that the word "law" has been defined in clause (3) of Article 13 for the purposes of the article. The meaning of law is not exclusive, and includes 'custom or usage having in the territory of India the force of law."[20] Now, it is the nature of custom or usage that they are not results of explicit legislation or order. They refer to concretisation of practices, giving them a normative value. Hence, it is the nature of customs that they cannot be 'made' by the State. This leads to a conundrum vis a vis clause (2) of Article 13. The State cannot be said to make customs, yet a prohibition has been placed on the State from making any customs or usages. Is this a case of 'abundant caution' being shown by the drafters of the Constitution or are the words 'custom or usage' used in Article 13 without any intention of them carrying any meaning? The conundrum is visible in the Bombay High Court judgment of **State of Bombay v. Narasu Appa Mali**[21].

[19] *See*, Constitution of India, 1950, Article 13(3).
[20] Constitution of India, 1950, Article 13(3)(a).
[21] AIR 1952 Bom 84.

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An argument had been made by the Solicitor General that "law" as defined in Article 13(3)(a) shall apply only to Article 13(2), and not to Article 13(1). Justice Chagla did not accept this contention, and gave the following remarks:

> "That contention is difficult to accept because custom or usage would have no meaning if it were applied to the expression "law" in Art. 13(2). The State cannot make any custom or usage. Therefore, that part of the definition can only apply to the expression "laws" in Art. 13(1). Therefore, it is clear that if there is any custom or usage which is in force in India which is inconsistent with the fundamental rights, that custom or usage is void."[22]

Justice Chagla read Art 13(2) as directed only against the post-Constitutional State, and as State cannot make customs or usages, it appeared to him that as the words "custom or usage" cannot be considered to be devoid of meaning, it can only be said that they define pre-Constitutional laws under Article 13(1). But even in the pre-Constitutional era, the then State cannot be said to have made any custom. There is (at least) an equal chance of new customs being created in the post-Constitutional State as they were in the pre-Independence era. Thus, restricting the application of the meaning of law as including 'custom or usage' would allow development of rights-violative customs in post-Constitutional India. We ought not to read the Constitution in a way that leads to the social domain of norm-creation to be excluded from any constitutional assessment even though it violates 'fundamental' rights. Such a reading would not only diminish the sanctity of fundamental rights, rather it would also leave the social space open for continued suppression and oppression through the tools of customs. Further, if laws do include customs or usages, then the entrenchment cannot be said to be available only against the State. Customs not being the exclusive tool of action of State may also be made by other stakeholders in the society. And as customs or usages ought not to contravene fundamental rights lest they be held void, they too are governed by the discipline of Part III of the Constitution. Hence, we may argue that it is not the State alone that is targeted by the scheme of entrenchment under Article 13 of the Constitution. The provision, in appropriate cases, may also be attracted against other bodies that make right-violating customs or usages.

Another level of entrenchment has been granted to fundamental rights through the Basic Structure Doctrine. This doctrine imposes certain limitations on the power of the Parliament to amend the Constitution, even though the provisions of the empowering Article (Article 368) do not mention any explicit limitations. The doctrine operates on the idea that amendment can

[22] AIR 1952 Bom 84, 88.

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only mean change within the framework of the Constitution, and therefore cannot mean changing the essential features of the text so that it loses its identity and becomes an altogether different constitution[23]. Recognising the need to protect the basic identity of the Indian Constitution, the Supreme Court of India devised the basic structure doctrine as a shield against whims of majority. The Court employs the doctrine to assess the validity of Acts attempting to amend the Constitution. Further, the substantive contents of the doctrine have not been frozen in place, and the Court has retained the power to define its boundaries on a case-to-case basis. The protection of basic structure doctrine is available to the entire text of the Constitution (including Part III) against any attempt of the Parliament to do away with its essential features by the exercise of constituent power. In this scheme, the Parliament of India may be perceived as the person of incidence. This is because constituent power has been given only to the Parliament and to no other body in India[24]. It may also be argued that it only a limited constituent power that has been granted to the Parliament. The Constitution creates the Parliament, and therefore, the Parliament cannot have the power to do away with the source of its powers; it may only make such changes to the text of the Constitution as are required to help it suit the needs of the time.

(C) Identification with the aid of article 12

Article directly serves to identify the persons of incidence by defining the expression 'the State' for the purposes of Part III. It shall be noted at the outset that Article 12 makes no claim of definitively answering the question of the persons of incidence under Part III. It defines the expression 'the State', which has been used numerous times in the Fundamental Rights Chapter. It is interesting to note that many provisions guarantee fundamental rights without making any direct reference to 'the State' as the person of incidence. Some examples of the same are Articles 15(2), 17, 19(1), 21, 23(1), 24(1), 25(1), 26, 29(1) and 32. The absence of mention of 'the State' in these provisions does not absolve the State of its duty to respect fundamental rights. The sanction of Article 13 continues to operate over the State even in the case of these provisions, as Article 13 has made no distinction between fundamental rights that ought to be respected and those that ought not to be respected. Further, the observance of fundamental duties mentioned in Part IV-A of the Constitution on the part of the person of inherence is not a pre-condition for the protection and enforcement of their fundamental rights. Each fundamental right casts its own distinct duty on the person of incidence, and fundamental duties are neither corelative to nor necessary for the enforcement of rights conferred by Part

[23] Kesavananda Bharati v. State of Kerala, (1973) 4 SCC 225.
[24] Constitution of India, 1950, Article 368.

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III.

'The State' under Article 12 is not a reference to the body politic named India created by the Constitution mentioned in the Preamble. Several provisions in Part III of the Constitution were directed against numerous authorities like Central Government, State Government, State Legislature, Parliament, local authorities, etc. Rather than repeating all such terms in all the provisions, the Constitution-makers thought it appropriate to use a composite phrase – "the State" – to refer to them all. Dr. Ambedkar, the Chairman of the Drafting Committee, explained the use of the words 'the State' during the Constituent Assembly Debates around Draft Article 7 (Article 12 of the Constitution of India) on November 25, 1948:

> "…it is quite clear that if the Fundamental Rights are to be clear, then they must be binding not only upon the Central Government, they must not only be binding upon the Provincial Government, they must not only be binding upon the Governments established in the Indian States, they must also be binding upon District Local Boards, Municipalities, even village panchayats and taluk boards, in fact, every authority which has been created bylaw and which has got certain power to make laws, to make rules, or make by-laws. If that proposition is accepted…then, what are we to do to make our intention clear? There are two ways of doing it. One way is to use a composite phrase such as "the State", as we have done in article 7; or, to keep on repeating every time, "the Central Government, the Provincial Government, the State Government, the Municipality, the Local Board, the Port Trust, or any other authority". It seems to me not only most cumbersome but stupid to keep on repeating this phraseology every time we have to make a reference to some authority. The wisest course is to have this comprehensive phrase and to economies in words."[25]

Ambedkar's statement reveals two important things about the nature of Article 12: a) that it is a definition clause for a phrase 'the State' wherever found in Part III, and b) 'the State' was intended to refer to the widest notion of authority so that people's rights may be given the most comprehensive protection.

A careful consideration of Article 12 shows that 'the State' as defined therein applies to Part III of the Constitution, the definition is contingent upon the context[26], and the definition is

[25] Dr. B. R. Ambedkar in Constituent Assembly on November 25, 1948, available at https://www.constitutionofindia.net/constitution_assembly_debates/volume/7/1948-11-25 . (Last accessed on July 5, 2022)

[26] *See*, Constitution of India, 1950, Article 12. "…, unless the context otherwise requires, …"

inclusive and not exclusive[27]. It provides an inclusive meaning to 'the State' including:

a) Government and Parliament of India,

b) Government and Legislature of each of the States,

c) all local authorities, and

d) other authorities within the territory of India or under the control of the Government of India.

The authorities explicitly mentioned in the Article include legislative and executive organs of the Union and State level of governance, local authorities and other authorities. It is latter two kinds of authorities – local and others – that have invited serious engagement on the part of the Courts and the scholars. The term 'local authority' has been defined under Section 3(31) of the General Clauses Act, 1897 as follows:

> ""local authority" shall mean a municipal committee, district board, body of port commissioners or other authority legally entitled to, or entrusted by the Government with, the control or management of a municipal or local fund;"

In **Union of India v. R. C. Jain[28],** the Supreme Court has provided the distinctive characteristics of local authorities:

> "First, the authorities must have separate legal existence as corporate bodies. They must not be mere governmental agencies but must be legally independent entities. Next, they must function in a defined area and must ordinarily, wholly or partly, directly or indirectly, be elected by the inhabitants of the area. Next, they must enjoy a certain degree of autonomy, with freedom to decide for themselves questions of policy affecting the area administered by them. The autonomy may not be complete and the degree of the dependence may vary considerably but, an appreciable measure of autonomy there must be. Next, they must be entrusted by statute with such governmental functions and duties as are usually entrusted to municipal bodies, such as those connected with providing amenities to the inhabitants of the locality, like health and education services, water and sewerage, town planning and development, roads, markets, transportation, social welfare services etc. etc. Broadly we may say that they may be entrusted with the performance of civic duties and functions which would otherwise be governmental duties and functions. Finally, they must have the power to

[27] K. K. Kochhuni v. State of Madras, AIR 1959 SC 725.
[28] (1981) 2 SCC 308.

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> raise funds for the furtherance of their activities and the fulfilment of their projects by levying taxes, rates, charges, or fees. This may be in addition to moneys provided by government or obtained by borrowing or otherwise. What is essential is that control or management of the fund must vest in the authority."

The mention of government, legislature and the manner of defining local authority, all, are directly related to or part of the State (simpliciter) machinery. This might lead one to conclude that that there is no difference between 'the State' of Article and the State, as generally understood. However, the Article takes us into interesting terrains through the use of the expression 'other authority, which has been discussed in the next part.

(D) Identification through the interpretation of the expression 'other authorities' used in Article 12:

The Constitution has left the expression 'other authorities' open for interpretation. Since the Constitution came into force, we have noticed an evolution in the manner of reading 'other authorities' under Article 12. The manner of identifying other authorities has gone through several changes from being looked at as inclusive only of bodies performing sovereign function[29], to being understood as bodies on whom powers are conferred by law[30], to bodies which function as instrumentality of the State[31] and also those which are performing important public functions[32]. The evolution of meaning in the courts has not necessarily been whiggish, and the certain interpretations were suggested by the court much earlier than their actual application[33]. We shall discuss each of the phases of development of meaning of other authorities separately.

In **University of Madras v. Shantha Bai[34]**, the Madras High Court read the words 'other authority' as ejusdem generis to the words 'government, legislature, or local authority' used in Article 12. The Court understood that all the authorities mentioned in Article 12 share a common genus – all possessed governmental powers or exercised sovereign functions. Thus, by applying the ejusdem generis principle[35], the general word 'other authority' was made to share in the common genus of the specific words preceding it; defining it as any authority that

[29] University of Madras v. Shantha Bai, AIR 1954 Mad. 67.
[30] Rajasthan State Electricity Board, Jaipur v. Mohan Lal, AIR 1967 SC 1857.
[31] R D Shetty v. International Airports Authority of India, (1979) 3 SCC 489 ; Pradeep Kumar Biswas v. Indian Institute of Chemical Biology, (2002) 5 SCC 111.
[32] Janet Jayepaul v. SRM University, AIR 2016 SC 73; Zee Telefilms Ltd v. Union of India, AIR 2005 SC 2677.
[33] Sukhdev v. Bhagatram, AIR 1975 SC 1331. The public function test was introduced by Justice Mathew in this judgment.
[34] AIR 1954 Mad. 67.
[35] *See*, Amar Chandra Chakraborty v. Collector of Excise, Govt. of Tripura, (1972) 2 SCC 442, 447.

performs sovereign function. As education was not understood as a sovereign function by the Court, the University of Madras was not recognised as 'other authority' under Article 12.

The application of rule of ejusdem generis for interpreting 'other authority' was overruled by the Supreme Court in **Rajasthan State Electricity Board, Jaipur v. Mohan Lal**[36]. The court found no common genus among the specific words used in Article 12, and therefore found it to be an erroneous application of the rule of ejusdem generis[37]. The court construed 'other authority' to include:

> "…all constitutional or statutory authorities on whom powers are conferred by law. It is not at all material that some of the powers conferred may be for the purpose of carrying on commercial activities…"

Hence, conferment of power by constitution or statute was taken to be the yardstick of identifying 'other authority'. It is interesting to note that the court also used Directive Principles of State Policy to read the scope of Article 12. The court observed:

> "In Part IV, the State has been given the same meaning as in Article 12 and one of the Directive Principles laid down in Article 46 is that the State shall promote with special care the educational and economic interests of the weaker sections of the people. The State, as defined in Article 12, is thus comprehended to include bodies created for the purpose of promoting the educational and economic interests of the people."

This creative manner of extending the responsibility of public actors, and making them accountable for their actions may be used in the present day when private actors have increased their participation in public functions, both through the policies of disinvestment and increased regulatory governance.

In **Sukhdev v. Bhagatram**,[38] Justice Mathew provided a comprehensive perspective of 'the State' which is capable of guiding the changing needs of our society. He acknowledged the changes that the concept of State had undergone, and recognised its transformation from a "coercive machinery wielding a thunderbolt of authority" to a "service corporation". With a manifold increase in the tasks of governance, 'the State' cannot be confined to archaic notions. The State has increased the tools of governance, and performs its tasks even through autonomous institutions. Hence, any attempt to limit State to bodies created or empowered through constitution or statute would not be capable of meaningfully guaranteeing the promise

[36] AIR 1967 SC 1857.
[37] AIR 1967 SC 1857. *See* para 4 of the judgment.
[38] AIR 1975 SC 1331.

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of rights under Part III. Therefore, Justice Mathew held other authorities to mean not only bodies created or empowered by constitution or statute but also bodies receiving financial support from State along with an unusual degree of control over the management and policies of the body by the State. Even in absence of financial aid, if the operations carried out by the body are important public functions, the same may read as 'other authority' under Article 12.

In **R D Shetty v. International Airports Authority of India**[39], the court gave an additional test for identifying 'other authority' as State – instrumentality or agency test. The court enumerated several factors which may be used to assess whether a body is an instrumentality of the government or not, such as whether any financial or other assistance is given by the State, whether any control of management or policies by the State, whether the body enjoys State conferred or State protected monopoly, whether the functions of the body are important public functions, etc. It must be noted that the list of factors given by the court is not meant to be exhaustive. The court also gave guidance as to the manner in which the test may be used:

> "Moreover even amongst these factors which we have described, no one single factor will yield a satisfactory answer to the question and the Court will have to consider the cumulative effect of these various factors and arrive at its decision on the basis of a particularised inquiry into the facts and circumstances of each case…It is not enough to examine seriatim each of the factors upon which a corporation is claimed to be an instrumentality or agency of Government and to dismiss each individually as being insufficient to support a finding of that effect. It is the aggregate or cumulative effect of all the relevant factors that is controlling."[40]

The test of 'the State', therefore, shifted from the question of its creation to the question of its purpose. It was no longer essential for a body to be created by the Constitution or by a statute to be recognised as 'the State'. If the body functioned as an arm of the government, aiding the government in the fulfilment of its purpose, it could be recognised as 'the State'.[41] In **Pradeep Kumar Biswas v. Indian Institute of Chemical Biology**[42], the Supreme Court expressed the test of instrumentality as under:

> "...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

[39] (1979) 3 SCC 489.
[40] (1979) 3 SCC 489, 510.
[41] Ajay Hasia v. Khalid Mujib, AIR 1981 SC 487.
[42] (2002) 5 SCC 111.

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> 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."

The general direction of application of the instrumentality test, through R D Shetty and Pradeep Kumar Biswas, became contingent on the proof and extent of control that government exercised over the body. This proved to be particularly challenging for cases where arguments of performance of public functions by or State protected monopoly of a body were forwarded. This trouble was evidently visible in judgments where litigants were trying to argue that the BCCI (Board of Control for Cricket in India) shall also fall under the ambit of Article 12 as it performs public function and has a functioning monopoly which seems to be protected by the State. In one of such cases[43], the court rejected to accept BCCI as State, but did grant that it performs public functions and, therefore, is amenable to writ jurisdiction under Article 226. If the role of State control in the test of instrumentality could be reduced, bodies like BCCI may also be brought within the ambit of Article 12. It shall be edifying to note a portion of the court's observance regarding performance of public functions by BCCI:

> "It regulates and controls the game to the exclusion of all others. It formulates rules, regulations, norms and standards covering all aspects of the game. It enjoys the power of choosing the members of the national team and the umpires. It exercises the power of disqualifying players which may at times put an end to the sporting career of a person…It sells broadcast and telecast rights and collects admission fee to venues where the matches are played. All these activities are undertaken with the tacit concurrence of the State Government and the Government of India who are not only fully aware but supportive of the activities of the Board. The State has not chosen to bring any law or taken any other step that would either deprive or dilute the Board's monopoly in the field of cricket. On the contrary, the Government of India has allowed the Board to select the national team which is then recognised by all concerned and applauded by the entire nation including at times by the highest of the dignitaries when they win tournaments and bring laurels home…Any organisation or entity that has such pervasive control over the game and its affairs and such powers as can make dreams end up in smoke or come true cannot be said to be undertaking any private activity."[44]

In **Janet Jayepaul v. SRM University**[45], the Supreme Court of India held a private deemed

[43] *See*, for e.g., Zee Telefilms v. Union of India, (2005) 4 SCC 649.
[44] BCCI v. Cricket Association of Bihar, (2015) 3 SCC 251, 281 – 282.
[45] (2015) 16 SCC 530.

University to be 'authority' within the meaning of Article 12. Though the judgment lies as an exceptional case, it follows the growth that Article 12 has witnessed over the years. If the creativity of Justice Mathew in Sukhdev v. Bhagatram is borrowed today, and the changing nature of the State is acknowledged, it would be necessary to recognise private actors performing public functions as State as well. On one hand the government has receded from direct intervention, and now operates through regulatory bodies. The non-acceptance of private bodies performing public functions under regulatory control of government would severely limit the ambit of fundamental rights protection. The disinvestment in Air India has transformed it into a private entity. The transformation of form has had severe consequences for the employees. While in the employees of Air India were capable of getting redressal in the Supreme Court of India[46], the recent disinvestment has resulted in their incapacity in getting their concerns addressed at the High Courts[47]. In many spaces of public function like civil aviation, education, telecom services, etc., the private actors largely dominate. Excluding them from the application of fundamental rights would severely limit the promise of the Constitution, and reduce fundamental rights to mere paper promises.

(E) Identifying persons of incidence through individual reading of each provision in Part III:

Apart from identifying persons of incidence under Part III through the scheme of entrenchment and through Article 12, we may specifically recognise the duty-bearer for each right by reading the provision guaranteeing the said right. While Articles 14, 15 and 16 specifically mention 'the State' as bearing the obligation to respect the right to equality, Articles 19 and 21 have not mentioned 'the State' as the only bearer of the obligation. Though the aforementioned articles do allow the State to place restrictions[48] on the right to liberty, the enjoyment of the right has not been specifically limited against the State. Further, Articles 17, 23 and 24 have made no mention of any person of incidence, and operate by imposing general prohibition on all. In this way, the rights guaranteed by Part III of the Constitution are not promised against a singular entity, and the best guide for identifying the person of incidence in any matter of rights-claim is to first recognise the nature of the right, and then refer the specifically applicable provisions of Part III along with Articles 12 and 13.

[46] *See*, Air India v. Nergesh Meerza, (1981) 4 SCC 335.
[47] *See*, Ms Padmavathi Subramaniyan v The Ministry Of Civil Aviation, 2022 Livelaw (Kar) 125.
[48] See, Constitution of India, 1950, Article 19 (2) – (6); Article 21 "…except according to procedure established by law."

IV. Conclusion

Any guarantee of right without a meaningful process to provide for its remedy is merely a paper promise. Part III of the Indian Constitution guarantees various rights, and one way of ensuring the enforcement thereof is to identify the persons who bear the legal duty to respect the right. This way, in case of any violation, it would be helpful to move the Court against a definite person or body, and express our claims for enforcement of rights or desired remedy for violation. Restraining ourselves to the idea that fundamental rights are guarantees against the State is not recommended. First, the Constitution provides a wide protection to the fundamental rights, and the State (simpliciter) is not the only person of incidence. Though it might appear from the scheme of entrenchment and Article 12 that the State is the sole target of Part III, a closer look at the provisions shall remove this confusion. The entrenchment is also targeted against customs and usages, which are not exclusive tools of State action. Further, the judicial interpretation of Article 12 - especially the words 'other authority' used therein – allows for expanding the meaning thereof to include private actors performing functions as well. Additionally, each Article of Part III that guarantees a right does so in its own premises – with their own persons of incidence and inherence. Therefore, a homogeneous treatment of the various Articles in Part III of the Constitution is not recommended even for the identification of the persons of incidence. A perusal of Article 32 – guaranteeing the fundamental right to constitutional remedies – accommodates the individual niceties of each of the guaranteed rights by not mentioning any person of incidence or person of inherence. If one wishes to find out who may move the Court under Article 32 or against whom could the court be moved under the same provision, one would have to first engage in a study of the nature of the claim that is being made, and thereafter place the claim under specific provisions of Part III, which shall finally help in identifying the targeted persons of incidence.

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