

INTERNATIONAL JOURNAL OF LAW MANAGEMENT & HUMANITIES

[ISSN 2581-5369]

Volume 3 | Issue 4

2020

© 2020 *International Journal of Law Management & Humanities*

Follow this and additional works at: <https://www.ijlmh.com/>

Under the aegis of VidhiAagaz – Inking Your Brain (<https://www.vidhiaagaz.com>)

This Article is brought to you for “free” and “open access” by the International Journal of Law Management & Humanities at VidhiAagaz. It has been accepted for inclusion in International Journal of Law Management & Humanities after due review.

In case of **any suggestion or complaint**, please contact Gyan@vidhiaagaz.com.

To submit your Manuscript for Publication at **International Journal of Law Management & Humanities**, kindly email your Manuscript at editor.ijlmh@gmail.com.

The Definition of State – *Not Expansive Enough*

ANANDINI SAHA¹

ABSTRACT

The law surrounding the definition of State as laid down by Article 12 of the Indian Constitution has been expanded by the Indian judiciary over the years due the interpretation of the term ‘other authorities’ used in the article. I disagree that the definition provided by the courts is an over-expansive one. Rather, based on the judgement passed by the apex court in Zee Telefilms which was further affirmed by the judgement passed in Cricket Association of Bihar it can be argued that the interpretation of the judiciary was not expansive enough. This paper will elucidate upon the need for an expansive definition while tracing its evolution.

The Indian judiciary has expanded the definition of State under Article 12 of the Indian Constitution over the years through the explanation of the term ‘other authority’. But a grey area in jurisprudence has emerged when it comes to the status of private bodies who arguably have some functional, financial, and administrative control exerted by the State upon them. The definition of State has not yet been expanded to accommodate such private entities within its fold. In the interest of safeguarding the Fundamental Rights of individuals these entities should also be considered State in a step towards achieving equitable and efficient delivery of public services to the masses through private service providers.

The law surrounding the definition of State as laid down by Article 12 of the Indian Constitution has been expanded by the Indian judiciary over the years due the interpretation of the term ‘other authorities’ used in the article. I disagree that the definition provided by the courts is an over-expansive one. Rather, based on the judgement passed by the apex court in *Zee Telefilms*² which was further affirmed by the judgement passed in *Cricket Association of Bihar*³ it can be argued that the interpretation of the judiciary was not expansive enough. This paper will elucidate upon the need for an expansive definition while tracing its evolution.

Article 12 of the Indian Constitution provides: ‘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

¹ Author is a student at O.P Jindal Global University, India.

² *Zee Telefilms v UOI* (2005) 4 SCC 649

³ *Board of Cricket Control of India v Cricket Association of Bihar and others* [2015] 3 SCC 251

control of the Government of India.' The definition is important as traditionally, fundamental rights were only enforceable against the State. To quote Justice Patanjali Sastri, "The whole object of Part III of the Constitution is to provide protection for the freedoms and rights mentioned therein against arbitrary invasion by the State."⁴ However, a gradual shift from this traditional view has been seen with the development of the concept of horizontal application according to which fundamental rights are being enforced against private individuals as well⁵. This is necessary as the very nature of the State and the functions that it used to carry out have changed due to the advent of privatisation and globalization. With the increase in power and influence of private enterprises, it is imperative to safeguard the fundamental rights of individuals against them as well.

Beginning with the judgment delivered by the court in the *Rajasthan State Electricity Board*⁶ matter, the words 'other authority' were expanded to include bodies created by statute which were carrying out government functions. Thus, even those bodies which were engaged in commercial activities of the State fell under the ambit. This meant that statutory corporations came within the purview of State as they had the power to make binding rules and regulations which were essentially controlled and framed by the State⁷. Even though a public corporation had its own legal personality separate from that of the State, it did not mean that it was not an instrument of the State. The State was no longer a single department, it had new branches delivering important public functions which used to be performed by it directly. In the words of Justice Bhagwati⁸ instrumentalities or agencies of the government should be bound by the same administrative and constitutional laws.

But what determines whether a body qualifies as an agency or instrumentality of State? This question was answered by the bench in *Ajay Hasia v Khalid Mujib*⁹ where it laid down that the factors which need to be considered while addressing this question are the percentage of shares held by the government, amount of financial assistance given by the State, whether a monopoly status has been conferred by the State in lieu of protection, the extent of State control, whether it was previously a government department and has newly been transformed into a corporation and most importantly whether the functions carried out by the corporation are important public functions. This approach was confirmed in *Som Prakash Rekhi v. Union of India*¹⁰ where it

⁴ State of W.B. v. Subodh Gopal Bose, AIR 1954 SC 92

⁵ Murray Hunt, *The 'Horizontal Effect' of the Human Rights Act* (1998).

⁶ Electricity Board, Rajasthan v. Mohan Lal AIR 1967 SC 1857.

⁷ Sukhdev v Bhagatram AIR 1975 SC 1331.

⁸ R.D. Shetty v Airport Authority AIR 1979 SC 1628.

⁹ Ajay Hasia v Khalid Mujib AIR 1981 SC 487.

¹⁰ Som Prakash Rekhi v. Union of India AIR 1981 SC 212

was held that the Bharat Petroleum Corporation came within the definition of State as it was a registered government company. This is not to say that the scope of defining 'other authority' is solely based upon to its creation by or under a statute. The extent of government control exerted on the working of the body is a relevant factor as per the *R.D. Shetty*¹¹ case. The state must exercise functional, financial, and administrative control which is dominant and pervasive in nature upon the body in question as laid down in *Pradeep Kumar Biswas*.¹²

Despite the precedent laid down by the judgements mentioned above, the court took a rather precarious stand when it passed an order in the *Zee Telefilms*¹³ case. Here, the Supreme Court passed a verdict saying that the Board of Control for Cricket in India (BCCI) which is a society registered under the Tamil Nadu Societies Registration Act, 1975 did not fall within the definition of State as per Article 12 of the Indian Constitution. It refused to admit a petition under Article 32 by giving the justification that the BCCI does not fall within the ambit of State and so fundamental rights cannot be enforced against it. The reasoning behind not recognizing the BCCI as 'other authority' was because, even though a public duty was being discharged there was no pervasive control exerted by the government on the organization. The Government of India had not created it by the order of a statute, nor was it a shareholder; in other words, it had no functional control over the organisation. The government did not provide any financial assistance and had no financial involvement with the organisation.

When the matter came before the apex court again in *Cricket Association of Bihar*¹⁴ even though the court found that the functions carried out by the BCCI were public functions, it did not change its position, on it not being State. But it is far overdue that this stance be reviewed. In accordance with the directions of the court the Lodha Committee was formed to investigate the workings of the BCCI and suggest necessary reforms. The committee recommended that the BCCI be declared a public authority so that the Right to Information Act, 2005 becomes applicable upon the body. But the court did not issue directions on the matter. It recommended that the issue be examined by the Law Commission of India and that the legislature could make necessary changes by acting on its findings.

The 275th Report of the Law Commission of India¹⁵ recommended that the BCCI be included as 'other authority' so that it may be brought under the definition of State. This was because

¹¹ R.D. Shetty v Airport Authority AIR 1979 SC 1628

¹² Pradeep Kumar Biswas v Indian Institute of Chemical Biology (2002) 5 SCC 111

¹³ Zee Telefilms v UOI (2005) 4 SCC 649

¹⁴ Board of Cricket Control of India v Cricket Association of Bihar and others [2015] 3 SCC 251

¹⁵ Law Commission of India, 'Legal Framework: Bcci Vis-À-Vis Right to Information Act, 2005' (Government of India 2018).

the BCCI regulates the sport of cricket in India and makes rules and regulations regarding the same which impact the playing of the sport in the country. It enjoys a monopoly status when it comes to selection of teams, training, and organization of tournaments. While it may not receive any funding from the government directly, both State and Central governments give the organisation subsidies and tax benefits. This is a substantial amount which would otherwise have been collected by the government and should be viewed as financial assistance. Despite such recommendations neither has the court subsequently declared the BCCI to fall within the purview of State nor has the legislature brought about any notification/ statute to give effect to the directions of the Law Commission. Thus, there continues to be no transparency or accountability in the workings of an organisation carrying out functions of such an important public nature.

The Constitution of India envisions a wide scope for the application of Fundamental Rights. While some Fundamental Rights are enforceable against both the State and private individuals like the abolition of the practice of untouchability under Article 17, the Constitution also directs “the State to take positive steps for the realization of fundamental rights either through affirmative action or under directive principles of state policy.”¹⁶ In consonance with this principle justice should be fairly and uniformly applicable and a set standard must be observed so as to avoid arbitrary behaviour. The judiciary has laid emphasis on the agency and instrumentality test in declaring *SRM University*¹⁷ as State because it is governed by the University Grants Commission Act, 1956 and is engaged in imparting higher education which is a public function. But there is still a grey area when it comes to private bodies which provide public services.

Many other private bodies like the BCCI provide public services. Public-Private-Partnership has emerged over the years and common service centres provide government services such as enrolment into government schemes and documentation services. These service private service providers then receive a commission for their services from the State. Thus, should they not fall under the scope of ‘other authorities’ as agencies or instrumentalities of the State? The degree of financial, functional, and administrative control exerted by the State is unclear as there are no clear rules governing their working. The lack of transparency and accountability leads to corruption and mismanagement. Privatisation can be an efficient way to deliver public services to such a large population but at the same time it is important to ensure that Fundamental Rights of the people do not take a back seat.

¹⁶ M P Singh, 'Fundamental Rights, State Action and Cricket in India' (2005) 13 Asia Pac L Rev 203

¹⁷ Janet Jeyapal v SRM University 2015

CONCLUSION

Any legal system that protects fundamental rights will have to decide how far those protections are to apply. The traditional sphere of application for such protections is 'vertical, operating between state and individual. An important issue is how far they can apply 'horizontally' as between private individuals, or between a public body acting in a private capacity and an individual.

- P P Craig¹⁸

The Indian judiciary has expanded the definition of State under Article 12 of the Indian Constitution over the years through the explanation of the term 'other authority'. But a grey area in jurisprudence has emerged when it comes to the status of private bodies who arguably have some functional, financial, and administrative control exerted by the State upon them. The definition of State has not yet been expanded to accommodate such private entities within its fold. In the interest of safeguarding the Fundamental Rights of individuals these entities should also be considered State in a step towards achieving equitable and efficient delivery of public services to the masses through private service providers.

The test of agency and instrumentality should be examined from a broader perspective than what was held in the *Zee Telefilms*¹⁹ case. The recommendations made in the 275th Law Commission Report should be taken into account by the legislature not just for converting the position of the BCCI from a private entity to State but also for laying down the status of and rules governing Private-Public-Partnerships. The options available to individuals for enforcing their rights against such bodies should not just be limited to approaching the Consumer Forum and filing a writ under Article 226 before the High Court. Individuals should be able to enforce their Fundamental Rights to the fullest extent by also being allowed to approach the Supreme Court under Article 32.

¹⁸ P. P Craig, Administrative Law (5th ed, London: Sweet & Maxwell, 2003), at p 599.

¹⁹ Zee Telefilms v UOI (2005) 4 SCC 649