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Tracing the Ambit of State under Article 12

Satyaveer Singh^a

^aNational Law University, Jodhpur, India

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The Constitution of India is not just the fundamental law of the land it is in itself a thought, a dream, a symbol of valor, sacrifice and is a consolidated treasure of imprescriptible rights and guiding principles that vitalize the perpetuity of a nation that has emerged from centuries of misrule and subjugation. The constituent assembly members were very well aware of the necessity to ensure the availability of basic rights to citizens and hence incorporated several rights under Part III of the constitution terming them as the “fundamental rights”. When we think of fundamental rights, we must answer two substantial questions before we even get down to analyzing their contents substantially. Against who can the rights be enforced and who are entitled to enforce these rights. The second question can be answered by plainly reading the respective rights, some of which are exclusively available to the citizens while some to even non-citizens as well. This article aims at answering the first question – against whom are the rights enforceable?. Article 12 of the constitution does superficially answer the question that it is enforceable against the “State” but in over seven decades of us availing the rights has raised many pertinent questions and aroused several debates some of which are settled while many still languish a satisfactory conclusion. The article will dwell deep into these questions tracing the meaning of “state” interpreting its ambit and the shape it has taken over the years.

Keywords: *imprescriptible, fundamental rights, enforceable, article 12, state.*

INTRODUCTION

The Constitution of India is the first and foremost document of the nation with its provisions majorly aimed at achieving the goal of social revolution or an attempt to foster the revolution by establishing conditions or developing a suitable environment crucial for its achievement. The core of these social commitments lies in part III of the constitution – the fundamental rights. These rights are a bridge connecting the bitter past experiences with a hopefully bright future. The fundamental rights are those rights of citizens or those negative obligations of the state that aim to prevent any encroachment upon individual liberty and ensure rightful conditions for the holistic development of individual personality all culminating in the achievement of the goal of social revolution. These rights are broadly divided into seven parts¹: the Right of Equality, the Right of Freedom, the Right Against Exploitation, the Right to Freedom of Religion, Cultural and Educational Rights, the Right to Property, and the Right to Constitutional Remedies. The fundamental rights protect individuals and minority groups from arbitrary and unjust state action and are crucial for the achievement of the goals of social revolution to the extent that the enforcement of these rights is a fundamental right under Article 32 of the constitution enabling citizens to move the supreme court or other courts for the enforcement of these rights.

These rights are enforceable against the state and there exists a constitutional obligation upon the state from making any law that abridges these rights². Article 12 defines the state and tries to establish its ambit ending it with a generic term “other authorities” creating ambiguity in the interpretation of the meaning of state. However, the judiciary has through a series of jurisprudential developments tried to settle the debate by sketching the ambit of state trying to reach an amicable ground between upholding the conscience of fundamental rights and not intervening with government functioning.

¹ Granville Austin, *The Indian Constitution: Cornerstone of a Nation* (OIP 1999)

² Constitution of India 1950, art 13(2)

WHY IS IT NECESSARY FOR THE JUDICIARY TO INTERPRET THE AMBIT OF “STATE”?

Part III of the constitution does not confer any fundamental rights. It validates their existence and shields them from violation. Its purpose is to withdraw certain subjects from the area of political controversy to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts³. Fundamental rights are “fundamental” mainly due to two reasons. Firstly, because they flow from the fundamental law of the country and secondly they cannot be overridden by the legislature as there is an authority to pronounce any law as invalid if they violate these laws. For the Indian constitution, this authority is the judiciary. The judiciary is the interpreter and the guardian of the constitution tasked with the job to protect and preserve the constitutional provisions in the governance of the nation.

The protection of fundamental rights and the extent of reasonability of the restrictions imposed upon them had remained a point of contention between the judiciary and the other organs of governance until the matter was for once and all settled with the evolution of “basic structure doctrine” the *Kesavananda case*⁴. Article 12 of the constitution defines the meaning of the word “state” in context for enforcement of fundamental rights as follows:

“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.”⁵

The article explained the meaning of the word “state” for enforcement of fundamental rights. But the term ‘other authorities’ mentioned has always risen significant controversy over its interpretation. Its rightful interpretation is necessary as wider the scope of meaning of ‘other authorities’ wider is the scope for enforcement of fundamental rights. The article explicitly mentions parliament, legislatures, and local authorities as a state but what about the bodies

³ DD Basu, *Commentary On The Constitution Of India* (Vol 1, Lexis Nexis 2014)

⁴ *Kesavananda Bharati v State of Kerala & Anr* (1973) 4 SCC 225

⁵ Constitution of India 1950

which are financed by the government, administered by the government, and also wield powers to affect our fundamental rights? For instance, the railways which is a monopolistic agency of the government wielding enormous powers primarily affecting our right to equality (article 14) our right movement (article 19(d)), and various others, is it not necessary to include such bodies within the purview of “other authorities”? There are several such bodies which under the veil of being independent of the government, function as one of its agencies being operated and controlled by it cannot be left unfettered capable of infringing the rights of individuals without being accountable for it.

To uncover the ambit of “state” we need to first discover the true meaning and criterion for a body to be included in “other authorities” of article 12 and second try to answer the question of whether the judiciary can also be included in the ambit of state capable of violating fundamental rights?. The former can be traced from a series of judicial pronouncements which have given a rough shape to the extent of inclusion in other authorities by developing various approaches time and again to establish criteria for bodies to qualify as a state under article 12.

OTHER AUTHORITIES UNDER ARTICLE 12.

The term “authorities” is defined by the dictionary as a body having the power or right to give orders, decide matters and enforce obedience and compliance. The interpretation of the term by the judiciary was first attempted in the case of the University of Madras v Shantabai⁶. The Madras high court invoked the principle of “*Ejusdem Generis*” according to which when a legal text has a general term mentioned which is preceded by several specific terms, then the general term must be interpreted to contain only that which would broadly be in relation or inconsistent with the specific terms. The court held that “other authorities” can include only those bodies which exercise governmental or sovereign functions.

The next time the court was called upon to interpret the meaning of the term was in the case of Rajasthan State Electricity Board v Mohan Lal⁷. The case involved a promotion dispute between workers and the issue of violation of articles 14 and 16 of the constitution was raised.

⁶ *The University of Madras v Shantabai* AIR 1954 Mad 67

⁷ *Rajasthan State Electricity Board v Mohanlal* AIR 1967 SC 1857

The preliminary question to be answered was whether the Rajasthan electricity board was “State” for article 12? The court rejected the contention of application of the principle of “*Ejusdem Generis*” as there was no common class or relation running through article 12 and instead devised a two-pronged test to interpret the ambit of “other authorities”. The majority decision held that since the body was (a) created by a statute and is (b) under the control of the government it can be regarded to be “state” itself. Justice Shah on the other hand advanced a concurring opinion but based on different reasoning held that since the body wielded “sovereign powers” that is the power to create rules and regulations and enforce them with the ability to infringe the fundamental rights guaranteed to the citizens and also performed such functions which is essentially a function of “public importance” it can be regarded as State under article 12. Thus the case led to the discovery of two approaches of interpreting the ambit of Other authorities – the “legal approach” which meant to incorporate bodies that are either created by the government through a statute or have a close resemblance to government by virtue of being controlled or financed by it and the “functional approach” which meant to include those bodies which perform such functions which give them the power to affect the rights of the citizens in a matter as the state.

The next turn in the debate came in the case of *Sukhdev Singh vs Bhagat ram*⁸ which led to the emergence of agency and instrumentality test for the very first time, and the concurring opinion of Mathew J with different reasoning altogether sparked a new idea. The case involved three parties – the ONGC (Oil and Natural Gas Corporation), the LIC (Life Insurance Corporation), and the IFC (Industrial Finance Corporation). The majority decision of the court held all the three bodies fell within the ambit of article 12. The majority decision held that as the corporation had the authority to give directions and disobedience of which was punishable furnishes a reason for the bodies to be called a state. The bench rejected the contention that since they were not immune from paying taxes they could not be considered as a state. Justice Mathew concurred with the decision of the majority but advanced different reasoning for the same. He argued that the function of the state has changed from merely ensuring appropriate law and order to providing public welfare, most of which welfare functions are being

⁸ *Sukhdev Singh, Oil & Natural Gas v Bhagat Ram* AIR 1975 SC 1331

performed with help of corporate entities. The corporations being a creation of the state should be subjected to the same limitation as to its creator itself. He further advanced reasons for including the corporations within the meaning of state :

- The corporation being created by the state has the power to invade the constitutional rights of individuals. (structural approach)
- The power that the corporation has is derived not only from the statutes creating them but also from the goods and services they produce and from their performance of activities of public importance. (functional approach)

Thus he evolved a different approach altogether termed as the agency or instrumentality test by merging the legal approach and the functional approach making it apparent that for the body to be included in other authorities it should be state-controlled and perform functions by virtue of which is capable to infringe upon fundamental rights of citizens. Next, in the case of *R.D Shetty vs international airport authority*⁹, the court cited the *Sukhdev Singh* case as precedent and further elaborated on the principle. The case involved a challenge against the authority which was a corporate entity constituted under the International Airport Authority Act of 1971, it sent out invitations for tenders for running restaurants and snack centers at Bombay international airport, and while awarding the contract of tender it failed to abide by the principles of equality and thus violated Article 14 of the constitution. The court held that AAI was established through the International Airport Authority Act, 1971 and was, therefore, a statutory body, an agency of the Government, carrying out a public function. Hence even when the government is acting in the capacity of a contractor it is bound by the principles of equality, non-discrimination, and non-arbitrariness. The court held based its argument on agency and instrumentality test developed in the *Sukhdev Singh* case but assimilated in it both the legal or structural approach and functional thereby developing a composite test for determining a body as a state based on the following points: (a) Extensive financial assistance by the government (b) An unusual degree of financial and administrative state control (c) Performing public function or a function closely related to governmental functions.

⁹ *Ramana Dayaram Shetty v The International Airport Authority of India & Ors* AIR 1979 SC 1628

An extract from the judgment authored by Justice P.N Bhagawati is worth to be noted here, the learned judge wrote “today with the tremendous expansion of welfare and social service functions, increasing control of material and economic resources and large scale assumptions of industrial and commercial activities by the state, the power of the executive government in affecting the lives of the people are steadily growing.... there is a vast and inevitable increase in frequency with which ordinary citizens are coming in direct relationship to the state power holders. This renders it necessary to structure and restrict the power of the executive government to prevent its arbitrary exercise¹⁰”.

The next important case was of *Ajay Hasia v Khalid Mujib*¹¹, wherein the court developed a six-pronged test for qualifying bodies as a state. The case involved Ajay Hasia and a few others who failed to secure admission to Regional Engineering College, Srinagar. They challenged before the Supreme Court that the admission process was unjust and violative of the fundamental right of equality in article 14 of the constitution, the point of contention that arose was whether a college registered under the J&K societies act being a non-statutory body be considered as a state. The court held that “The concept of instrumentality or agency of the government is not limited to a corporation created by a statute, but is equally applicable to a company or a society.” The society was under the control of the government as all its major decisions related to its functioning were in absolute compliance with the directions of the government. Hence behind the “corporate veil” of the society there existed deep pervasive control of the government making the corporation a state. Further, it laid down the six-pronged test for determining whether a body was an instrumentality of the state or not: 1. If a majority of the whole of the Company’s share capital is held by the Government. 2. If the body was created by the transfer of a Government Corporation. 3. Extensive financial assistance. 4. Existence of deep and pervasive governmental control. 5. Monopoly status conferred or protected by the State. 6. Discharging of important public functions. The court however included all the points raised in the *RD Shetty* case in its six-pronged test but reduced the

¹⁰ Sanjuncta, ‘The administrative aspect of *Ramana Dayaram Shetty v. The International Airport Authority of India & Ors.*’ (*LegalServiceIndia*) <<http://www.legalservicesindia.com/article/1109/The-administrative-aspect-of-Ramana-Dayaram-Shetty-v.-The-International-Airport-Authority-of-India-&-ors..html>> accessed 09 december 2021

¹¹ *Ajay Hasia Etc v Khalid Mujib Sehravardi & Ors* AIR 1981 SC 487

significance of the functional test by devoting only one test to it. The court emphasized more on governmental control as a determinant for qualifying a body as a state and reduced the significance of the functional approach.¹²

In the case of Pradeep Kumar Biswas vs the Indian Institute of Chemical Biology¹³, the case involved reconsideration of a judgment delivered by the supreme court in the case of Sabhajit Tewary v Union of India where the court held CSIR (a body under the Department of Commerce) was not a state under article 12. Here in the case, A seven-judge bench by a majority of 5:2 held that the Council of Scientific and Industrial Research can be regarded as an instrumentality or agent of the state within the meaning of Article 12 of the Constitution and overruled the decision held in Sabhajit Tewary case. Justice Ruma Pal made a distinction between the statutory approach and the legal approach and erased the functional approach in her decision. She listed down the six factors discussed in the Ajay Hasia case and concluded that if a body is financially, functionally, and administratively controlled by the government then it is a state for article 12. But if the control is mere regulatory under a statute or otherwise it cannot be considered a state. Thus in this case the entire focus was accorded to state control and the public function approach disappeared completely.

The dissenting opinion delivered by Justices Lahoti and Raju held that Article 13(1) states that all laws inconsistent with Part III, at the time of the commencement of the Constitution, are void to the extent of such inconsistency. Article 13(2) prohibits the State from passing laws contravening Part III. Article 13(3) defines a “law” as “any Ordinance, order, bye-law, rule, regulation, notification, custom or usages having in the territory of India the force of law¹⁴”, hence they argued that the whole point of understanding the ambit of “state” – as Article 13 demonstrated – was to render protection to the citizens from certain kinds of laws, Article 12’s “other authority” must be such that is competent or has the power to make these kinds of laws. Therefore they held that the body in question is not a state under article 12.

¹² Gautam Bhatia, ‘What is the “State”?’- I: Article 12 and Constitutional Obligations (*Indian Constitutional Law and Philosophy*, 26 April 2014) <<https://indconlawphil.wordpress.com/2014/04/26/what-is-the-state-i-article-12-and-constitutional-obligations/>> accessed 13 december 2021

¹³ *Pradeep Kumar Biswas v Indian Institute of Chemical Biology & Ors* (2002) 5 SCC 111

¹⁴ Constitution of India 1950

However, in the case of *Zee telefilms v Union of India*¹⁵, the question again arose whether BCCI(board of control for cricket in India) was state or not? The Board was not constituted from capital derived from shares held by the government. It was also not established by any law and had practically no financial assistance from the government. The government wielded no control by virtue of any ownership and the little control, if any, was only regulatory in nature as applicable to other similar bodies for preventing any unreasonable practice. The functions that the board performed were not all public functions in an absolute sense nor were they closely related to governmental functions. The Board was also not established by the transfer of a Government-owned Corporation and was an autonomous body. The Board was not financially, functionally, or administratively dominated by or under the control of the Government to bring it within the expression 'State' in Article 12¹⁶. Although even the Board did enjoy a hegemony status in the field of cricket it was not by virtue of it being conferred such status by the government. The court held that the board was not performing any authorized function by the government and it concluded that if a private body enters into operations related to any function which is not prohibited by law then it would not be correct to hold that such operation of the entity in question would make it an agent or instrumentality of the State even if that function affects the public at large.

The court however decided that although the functions performed by such bodies cannot be termed as a public function nor the bodies be included within the ambit of state and hence are not amenable to article 32(writ jurisdiction of the supreme court) but they cannot go scot-free as violators of rights as an appropriate remedy can always be sought under article 226 (writ jurisdiction of high court) whose application is wider and can be invoked in case of violation of even non-fundamental rights. In the recent case in 2015, *Dr. Janet jayepal v SRM University* where the petitioner had filed a writ petition against unfair termination from services, the question again arose was whether SRM University which is a deemed university under section 3 of the UGC act be termed as a state? The apex court held that SRM was engaged in imparting education to students at large and since was a deemed university was obliged to follow all

¹⁵ *Zee Telefilms Ltd v Union Of India* AIR 2005 SC 2677

¹⁶ *Ibid*

directions issued by the University Grants Commission and hence performed the function of public importance as so although cannot be called a state yet is amenable to writ jurisdiction of high courts under Article 226 of the constitution.

ANALYSIS

From the above-detailed discussion, we see how the question of interpreting the ambit of “other authorities” that started from the Shantabai case in 1954 took several turns exemplifying the judiciary’s commitment to upholding the sanctity of fundamental rights preventing the government from escaping the constitutional obligation by forming separate entities. We see how the court developed the legal or structural approach and the functional approach to determine the ambit of other authorities and then went to merge the two as agency or instrumentality test and further laying down six-pronged test to identify agents or instruments of state to fall within the purview of “other authorities”.

One noteworthy development that is evident if we glance at the entire trajectory is that the courts prioritized government control or the structural approach over the functional approach to the extent that Justice Ruma Pal in Pradeep Biswas case completely set aside the public function as one of the determinants of state under article 12. In my personal opinion, the structural approach is more promising in determining the ambit than the functional approach as several questions are hard to determine concerning functional tests: what is meant by a function of “public importance”? what if tomorrow the government privatizes for instance all its business ventures to private bodies would we still hold such privatized bodies liable? Can a financially independent body performing a function affecting the public at large be made liable for its violation like the government? Can a private body’s obligations be equated with that of a democratically elected government?. These questions are hard to answer are what constituents “a function of public importance” can neither be easily defined nor decided as importance is subjective and dynamic changing its meaning with time. For instance, BSNL services were a function of public importance a few decades before but today only a minuscule of digital traffic is controlled by it.

But this ambiguity of the functional approach cannot drive us towards absolute elimination of the same as to say for example a few decades from now the government decides to completely privatize the water supply system to a private entity and the entity further decides to withhold water supply to a particular region. What disastrous consequences would be if the judiciary bases its determination on only a structural approach and allows the entity to carry its withholding in absolute violation of fundamental rights of article 21(right to life) article 14 (right to equality)? Thus to prevent such situations from arising we need to determine the ambit of “other authorities” valuing both the approaches equally examining the extent to which government hold and authority exists on case to case basis, and accordingly deciding the limits of the responsibility of private entities arising out of the nature of the functions performed by them, would reasonably be the most defensible approach and sensibly the most pragmatic approach for determining the ambit of “state” under article 12 of the constitution.

IS JUDICIARY A STATE UNDER ARTICLE 12?

When India gained independence the drafters of the Indian constitution took every step to incorporate Montesquieu’s philosophy of separation of powers wherein he advocated clear demarcation of functions and powers among the three organs of governance – the executive, legislative, and judiciary with an appropriate mechanism of checks and balances. The task of respecting and prospering the cause of fundamental rights was dictated to the executive and the legislative. The Indian judiciary was assigned the uphill task of upholding the right of constitutional remedies. For the task, the judiciary was provided the weapon of “judicial review” in its arsenal which it has used to canalize the domain of the other two organs of the state.¹⁷ But the question that arises is to what extent can the judiciary manifest its magic wand of judicial review? And what accountability is assigned to it to not override the constitutional precincts of its powers and obligation? What if the judiciary while exercising its functions itself infringes upon citizens’ rights ?. The answers to all these questions lie in uncovering the debate whether the shadow of “state” under article 12 engulfs the judiciary in it or not.

¹⁷ Dr Uday Shankar abd Saurabh Bindal, ‘Policy Initiatives and the Role of Indian Judiciary’ (*SCC Online*, 19 May 2016) < <https://www.scconline.com/blog/post/2016/05/19/policy-initiatives-and-the-role-of-indian-judiciary-initiatives-and-the-role-of-indian-judiciary/> > accessed 12 December 2021

Article 12 neither explicitly included nor excluded judiciary within the ambit of “state” and thereby a significant amount of controversy surrounds its status vis-à-vis part III of the constitution. Allowing the judiciary under the ambit of article 12 would be provocative inviting innumerable unnecessary litigation as always there is an unsatisfied party in every case. On the contrary not allowing a case can lead to miscarriage of effective justice. Hence in this part of the article, we shall try to trace how the judiciary has tried to resolve the debate around its inclusion in article 12 relying on different interpretations and approaches through a series of jurisprudential developments.

The first major development took place in the case of *Naresh Mirajakar v state of Maharashtra* the court gave a landmark decision that changed the course of the debate. The case involved a defamation suit wherein the defense witness urged the trial court to restrict the publication of the evidence advanced as it may prove to be detrimental to his business. The trial court issued oral orders restraining the journalists from publication. The journalist approached the Bombay high court under article 226 of the constitution contending that his rights guaranteed under Articles 19(i)(a) and 19(i)(g) of the Constitution were violated, the court rejecting the petition holding that a judicial order was not amenable to writ jurisdiction. The journalist then approached the supreme court under article 32 contending the same argument, the majority decision relying upon the case of *Ujjam bai vs the state of Uttar Pradesh* said that an erroneous decision of a judicial or quasi-judicial body in admitted jurisdiction does not violate fundamental rights. The suppression of the evidence in question was necessary for ‘effective administration of justice and for ensuring a fair trial. The court dismissed the petition by stating that the impugned order was temporary and was sustained only for the duration of the trial. However, the dissenting opinion delivered by Justice Hidaytullah was remarkable as it held that judicial decisions were also subject to upholding the fundamental rights and that a judicial decision was amenable to writ jurisdiction under articles 32 and 226 of the constitution¹⁸. He contended that although article 12 did not mention the judiciary it however also did not explicitly exclude it, the reason for the same can be found in article 13(3) which

¹⁸ Kalyani Ramnath, ‘Guarding the Guards: The Judiciary as State within the meaning of Article 12 of the Constitution’ (2006) 18/2 Student Bar Review <<https://www.jstor.org/stable/44306656>> accessed 12 December 2021

defines “law” as “any Ordinance, order, bye-law, rule, regulation, notification, custom or usages having in the territory of India the force of law.”¹⁹ thus includes an order within the meaning of “law”, hence keeping the judiciary outside the purview would mean that it can violate any fundamental right bypassing any order.

Next, the issue was again raised in the case of *A.R.Antulay vs. R.S.Nayak*²⁰ wherein the supreme court was faced with the question of whether a judicial error could be corrected by writ petition or not. MR Antulay was prosecuted on the charges of corruption and was being tried by a special judge but the apex transferred the case and hence a plea was filed to challenge the Apex Court's decision to suo motu transfer a case to the High Court (with the request to the presiding Chief Justice to assign the cases to a sitting Judge of the High Court, evidently to speed up the trial of the appellant). The majority decision held that since the offenses could be tried by a special judge only the order of transfer was unauthorized by law. The court sought to correct the error by relying on the maxim “*actus Curiae neminem gravabit*” (an act of court shall prejudice no man), and also observed that since the order of the court was prejudicial to the appellant the court relying on “*ex debito justitiae*”, (shall do justice to him). The court agreed that there was an infringement of constitutional safeguards granted to citizens and injustice was done. The court held a trial must be in accordance with the procedure established by law and therefore remedied the wrong done to the appellant in the case.

The question of whether an aggrieved party is entitled to any review after the final judgment was answered in the case of *Rupa Hurra v Ashok Hurra*²¹ wherein the court held that: An order passed by the supreme court is not amenable under article 32 of the constitution but devised a new mechanism for relief even after the review petition is rejected called the “curative petition” under which an aggrieved party can approach the court in case of gross violation of the process of law in any case. Again in the case of the Supreme Court Bar

¹⁹ Constitution of India 1950

²⁰ *AR Antulay v RS Nayak & Anr* 1988 AIR 1531

²¹ *Ashok Hurra v Rupa Ashok Hurrarupa Bipin Zaveri* AIR 1999 SC 2870

association v Union of India²²a writ petition was filed in the court against the court's decision in the Vinay Chandra Mishra case ²³where the Court had found the advocate guilty of committing criminal contempt of court and suspended him from practicing for three years. It was contended that only the disciplinary committees tasked to ensure the professional code of conduct among the advocates of the Bar Councils set up under the Advocates Act, 1961 had jurisdiction to inquire into, suspend or debar an advocate. Hence it was argued that the decision delivered by the court was extrajudicial and hence violative of "procedure established by law" thus infringing upon the fundamental right listed under article 21 of the constitution. It was held by the court that it is its duty to make statutory bodies and other organs of the State perform their functions, but that it could not take over the functions of these bodies. So the power to do complete justice mentioned under Article 142 is a corrective power, but usurping the jurisdiction of the Bar Council would be violative of due process and hence the court decided in the favour of the appellants overturning its judgment.

ANALYSIS

The supreme court by bringing a plethora of bodies under "other authorities" and thus within the ambit of state has served the constitution very well. However, bringing the judiciary under the ambit of the state is a much more contentious issue and the apex court has time and again oscillated away from agreeing on its inclusion. The court in cases like Naresh Mirajkar, AR Antulay, Supreme Court Bar Association, has agreed to judicial errors and rectified them upholding the effective administration of justice and rule of law. It has time and again devised newer mechanisms and reasoned under the veil of legal maxims to undo judicial wrongs. One of the reasons for such attitude might be the apprehensions that its inclusion under the meaning of "state" in article 12 may hamper its independence, the other reason for extending the purview of article 12 to judicial decisions might be the judiciary's reluctance to voluntarily subject itself to scrutiny, evaluation and criticism. In my personal view, the judiciary is accorded with the task of the guardian of the constitution, the fundamental rights being a

²² *Supreme Court Bar Association v Union Of India & Anr* [1998] INSC 225

²³ *Re: Vinay Chandra Mishra v Unknown* AIR 1995 SC 2348

crucial part of the constitution cannot be left open for violation by judicial orders. Now the duty lies on the apex court to include judiciary within the ambit of “state” and demarcate for itself ‘constitutional boundaries’ which could not be transgressed in any condition similar to the other organs of governance for the true meaning of democracy to flourish and for the highest realization of constitutional ideals.

CONCLUSION

It is generally accepted that a modern democratic state should be established on Montesquieu’s philosophy of separation of powers. The judiciary along with the executive and the legislative is one of the three essential but equal pillars of a modern democratic setup. All three powers must work towards achieving a welfare state and must hold each other accountable for their actions developing a mechanism of effective checks and balances. In a democratic institution that is subject to the rule of law, none of the three powers of state action are for their interest but in the interests of the general populace as a whole trying to uphold the high ideals of constitutional morality. India as a nation has risen from the aspiration and dreams of people who had been subjected to all possible ways of subjugation and hence always wanted to architect a nation, a land where individual rights are preserved and promoted, where dignity is accorded to each, where there persists no discrimination or ill-feeling of superior or inferior beings, where each is treated alike and none is preferred with privileges over the other.

The drafters of the constitution have delivered down to us the responsibility of preserving the ethos of these aspirations by upholding the heritage of the morality that they cumulatively treasured in the constitution. The righteous interpretation of the ambit of “state” is not just a constitutional question but is in itself linked to preserving this heritage of constitutional morality in a way that broader the interpretation of the ambit broader is the enforcement of fundamental rights. All the seven rights accorded to us in part III of the constitution depends upon the interpretation of the word “state” in article 12. No entity, no government body, no corporation nothing that existed, exists, or will exist is more important than upholding the

constitutional morality which in turn is achieved by rightful interpretation of “state” and protecting the fundamental rights.

The inclusion of the judiciary under the ambit of “state” is also necessary as the judiciary is a governing institution and an organ of the State. In this era of judicial activism which extends to the judiciary sometimes dictating legislations and overreaching its functions and also using its wide-ranging capability to review matters, the Judiciary wields immense political power. The goal of the architects of the constitution was to enable the social revolution which they believed could only be achieved by absolute devotion to constitutional morality by honoring individual liberty and dignity for achieving a land of dreams and a truly independent nation.