

## **JUDICIARY AS STATE WITHIN THE AMBIT OF ARTICLE 12 OF THE CONSTITUTION OF INDIA**

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### **ABSTRACT**

Fundamental rights are only available against the State. Article 12 defines the term “State” as used in different Articles of Part III of the Constitution. The word ‘State’ under Article 12 as to be interpreted as per the changing times and which ensures that Part-III be applied to a larger extent. Judiciary is the prominent organ of the State. The definition of State under Article 12 of the Constitution does not explicitly mention the Judiciary. Hence, a significant amount of controversy surrounds its status vis-a-vis Part III of the Constitution. This paper lists out various arguments based on the nature of the definition in Article 12, by considering Article 13 and by tracing few characteristics of courts which performs the role of the State, shows that judiciary comes within the ambit of Article 12 of the Constitution. The basic argument here would be that since precedent shows that the Judiciary is capable of violating Fundamental Rights, it should be brought within the ambit of Article 12. The courts decision that judicial order are not subject to scrutiny on Part III grounds is violating the constitutional remedy provided under the Constitution. Further, arguments for treating the Judiciary as State is considered, by drawing comparisons with the United States Constitution. Finally, the recommendations of the National Commission to Review the Working of the Constitution are considered. If judiciary is not included within State, then Part III is made nugatory. In the light of these reasons, it is submitted that the mere fact that “judiciary” does not find express mention in Article 12 should not lead one to the contrary conclusion.

### **KEYWORDS:**

Article 12 – State – Judiciary – Violating – Fundamental Rights.

### **INTRODUCTION**

Fundamental rights are only available against the State. So the need to expand the definition of State under Article 12 is necessary. The word ‘State’ under Article 12 as to be interpreted as per the changing times and which ensures that Part-III be applied to a larger extent. Article 12 defines the term “State” as used in different Articles of Part III of the Constitution. It says that unless the context otherwise requires the term “*State*” includes the following:-

- 1. The Government and Parliament of India*
- 2. The Government and the Legislature of each of the States*
- 3. All local or other authorities within the territory of India*

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#### 4. *All local and other authorities under the control of the Government of India.*<sup>1</sup>

Judiciary is the prominent organ of the State. Legislature frames the law and executor organ implements them and enjoys vast power of delegated legislation as well. One of the most important functions of Judiciary is to check invasion of fundamental right by these two organs and their instrumentality. The definition of State under Article 12 of the Constitution does not explicitly mention the Judiciary. Hence, a significant amount of controversy surrounds its status vis-a-vis Part III of the Constitution.

#### **DEFINITION UNDER ARTICLE 12: INCLUSIVE IN NATURE BUT NOT EXHAUSTIVE**

Some take up the stand that since judiciary has not been specifically mentioned in Article 12, it is not State. To begin with we have the definition of 'State' in Article 12. That definition does not say fully what may be included in the word 'State' but, although it says that the word includes certain authorities, it does not consider it necessary to say that courts and Judges are excluded. The nature of the definition in Article 12 is expressly inclusive but not exhaustive.

#### **CONSIDERING ARTICLE 13: STATE INCLUDES JUDICIARY**

The reason is made obvious at once, if we consider Article 13(2). There the word 'State must obviously include 'courts' because otherwise 'courts' will be enabled to make rules which take away or abridge fundamental rights.'<sup>2</sup>

In the Constituent Assembly, concerns regarding the textual ambiguities in Article 12, and in particular, the meaning of the phrase 'other authorities' were raised. It was suggested that leaving judicial bodies out of the purview of Article 12 may lead to the conclusion that "*even a Magistrate... might pass an order, or make a notification abridging the rights that are conferred under sub-clause (a) of clause (1) of Article 13.*"<sup>3</sup>

#### **JUDICIARY PERFORMS THE ROLE OF THE STATE: RULE MAKING POWER AND OTHER NON-JUDICIAL FUNCTIONS**

Although there is no specific mention of judiciary in Article 12, the Supreme Court has the power to make rules (to regulate practice & procedure of courts), appoint its staff and decide its service conditions (as mentioned in Articles 145 and 146 of the Indian Constitution). Hence, it performs the role of a State.

To understand the expanded meaning of the term "other authorities" in Article 12, it is necessary to trace the origin and scope of Article 12 in the Indian Constitution. Present Article 12 was introduced in the Draft Constitution as Article 7. While initiating a debate on this Article in the Draft Constitution in the Constituent Assembly, Dr. Ambedkar described the scope of this Article and the reasons why this Article was placed in the Chapter on fundamental rights as follows :-

*"The object of the fundamental rights is twofold. First, that every citizen must be in a position to claim those rights. Secondly, they must be binding upon every authority - I shall presently explain what the word 'authority' means - upon every authority which has got either the power to make laws or the power to have discretion vested in it. Therefore, 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 by law and which has got certain power to make laws, to make rules, or make bye-laws.*

*If that proposition is accepted - and I do not see anyone who cares for Fundamental Rights can object to such a universal obligation being imposed upon every authority created by law 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', its 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 economise in words."*<sup>4</sup>

Jurists like H.M.Seervai, V.N.Shukla also consider judiciary to be State. Their view is supported by Articles 145 and 146 of the Constitution of India.

Since, Courts like any other organ of States are created by statutes they share characteristics of State. They have to adhere to the standards prescribed by Constitution and the appointments of Judges are done by President. Also, Judges receives emoluments from the Consolidated Fund of India.

From the above, it is seen that the intention of the Constitution framers in incorporating this Article was to treat such authority which has been created by law and which has got certain powers to make laws to make rules and regulations to be included in the term "other authorities" as found presently in Article 12.

Thus the above few characteristic features which brings Judiciary under the cover of State. Court is impliedly covered under "other authorities" the phrase present in Article 12.

## **POSSIBILITY OF VIOLATING THE FUNDAMENTAL RIGHTS BY THE JUDICIARY AND THE NEED TO BRING WITHIN THE AMBIT OF ARTICLE 12**

Judiciary is the organ of the State that decides the contours of the Fundamental Rights. Their determination, of whether an act violates the same, can be right or wrong. If it is right then the Citizen's right is safeguard and what happens if it is wrong? Does this not affect the fundamental rights of the citizen?.

In the changing time, it is not wrong to say that the Judiciary is capable of acting in contravention of Fundamental Rights. So, the argument is that the judiciary should be

brought under the ambit of State. This would clear the way to hold judges in their judicial capacity to be held accountable for violation of the Fundamental Rights.

The FR can be violated only by the State. In the light of this fact, two decided case laws can explain and describe the status of court, thus leading to above inference.

In the decided case of *Naresh v State of Maharashtra*,<sup>5</sup> it has been held that even if a Court is a State (under Article 12) the High Court cannot be issued a writ under Article 32 against its judgment for it is presumed that such a judgment won't violate FR.

Also, in *A R Antulay v R S Nayak*,<sup>6</sup> the Court held that a court can't pass an order contrary to FR. The question there was whether directions issued by the High Court singling out the petitioner's prosecution for speedier trial violated his Article 14 and Article 21 rights. Seemingly departing the trend evidenced above, the Court held:

*"In our opinion, we are not debarred from re-opening this question and giving proper directions and correcting the error in the present appeal, when the said directions on 16th February, 1984, were violative of the limits of jurisdiction and the directions have resulted in deprivation of the fundamental rights of the appellant, guaranteed by Articles 14 and 21 of the Constitution."*

In former case, the court in a way accepts that it is presumably a State and in latter case, Since FR is exclusively about relationship b/w State and Individual<sup>7</sup>, this proves the point that Court is a State.

In fact so far as the guarantee of equal protection in Article 14 is concerned, our Supreme Court, in the early case held that any State action, executive, legislative or judicial, which contravenes Article 14, is void.<sup>8</sup>

Since fundamental rights are only available against the state and the precedent shows that the Judiciary is capable of violating Fundamental Rights, it should be brought within the ambit of Article 12.

### **JUDICIAL ORDERS ARE NOT SUBJECT TO SCRUTINY ON PART III GROUNDS: VIOLATING THE CONSTITUTIONAL REMEDY**

The Constitution bench of the Supreme in *Ashok Rupa Hurra*<sup>9</sup> felt no hesitation in concluding with little reasoning that "superior courts of justice do not also fall within the ambit of State or other authorities under Article 12 of the Constitution." If this is correct, it must follow that the judiciary is incapable of violating Part III rights.

Challenging a judicial decision which has achieved finality, under the writ jurisdiction of superior courts on the basis of violation of fundamental rights is a constitutional remedy. If the fundamental rights of a person are being violated by any decision of the Supreme court then he has the right to file a case under article 32 of the Constitution. If the citizen wins, then the Supreme court is mandated to revert its decision regarding the individual.

Almost consistently, courts have dismissed petitions that attempt to impugn judicial orders under Article 32. Prima facie, this must mean that judicial orders are not subject to scrutiny on Part III grounds. One of the earliest illustrations is the decision of a seven-judge bench of the Supreme Court in *Ujjam Bai v State of Uttar Pradesh*.<sup>10</sup>

A nine-judge bench in *N. S. Mirajkar v State of Maharashtra*<sup>11</sup> followed this decision. A petition under Article 32 challenging a gag order passed by Mr. Justice Tarkunde of the Bombay High Court was held to be not maintainable in that case. This trend is also evidenced by *Triveniben v State of Gujarat*<sup>12</sup>. Dismissing a petition under Article 32, the Court there opined that “it will not be open to this Court in exercise of jurisdiction under Article 32 to go behind or to examine the final verdict reached by a competent court convicting and sentencing the condemned prisoner.” It is unnecessary to duplicate other instances here, but further affirmation of this view may be found in, *Mohd. Aslam v Union of India*<sup>13</sup> and *Khoday Distilleries Ltd. v Registrar General, Supreme Court of India*.<sup>14</sup> All of these were attempts to challenge judicial orders by way of petitions under Article 32.

Constituent Assembly of India armed with the untrammelled Powers and Authority to Supreme Court under Article 32 of the Constitution of India to ensure “*REMEDY*”. Founding father of the Constitution Dr. B. R. Ambedkar concluded the debate inter alia saying that: “... *there can be no right unless the Constitution provides a remedy for it. It is the remedy that makes a right real. If there is no remedy, there is no right of all, and I am therefore not prepared to burden the Constitution with a number of pious declarations which may sound as glittering generalities but for which the Constitution makes no provision by way of a remedy. It is much better to be limited in the scope of our rights and to make them real by enunciating remedies than to have a lot of pious wishes embodied in the Constitution. I am very glad that this House has seen that the remedies that we have provided constitute a fundamental part of this Constitution.*”.

During the course of several years, knowingly or unknowingly, Supreme Court reduced its efficacy enshrined under Article 32 of the Constitution, after wrong interpretation of the “State” under Article 12 of the Constitution, as was lastly appeared in last 3 lines of Para 7 of the Judgment dated 10<sup>th</sup> April 2002<sup>15</sup>, 388-428 SCC (2002) 4 SCC that “*It may be further noted that the superior courts of justice do not fall within the ambit of State or other authorities under Article 12 of the Constitution*”.

Such interpretation of the “State” was held without considering that Supreme Court Judges are appointed by the Constitutional Authority, i.e. President of India and can be removed by the another Constitutional Authority i.e. Parliament of India and such removing Authority i.e. Parliament of India admittedly covered within the ambit of the “State” under Article 12 of the Constitution of India. Such wrong interpretation was held to justify application of the principle of finality of the Order of the Supreme Court (Nine Judge Bench)<sup>16</sup>, which was decided without considering that it may change the ambit and may effect efficacy of the Article 32 of the Constitution and may allow Supreme Court Judges to pass orders “either without jurisdiction or in violation of the principles of natural justice or due to

unfair procedure giving scope for bias which resulted in abuse of the process of the court or miscarriage of justice to an aggrieved person,”

In fact through such interpretation of the “State” Supreme Court changed the meaning, scope, ambit of Article 12 and reduced efficacy of Article 32 of the Constitution, beyond the Constitutional provisions that Supreme Court or Judges of the Supreme Court cannot be beyond the ambit of the “State” under Article 12 of the Constitution.

It is ample clear that even after Supreme Court or Judges of the Supreme Court would be hold within the ambit of the “State” under Article 12 of the Constitution, the Powers or Authority of the Supreme Court under Article 13 or 32 of the Constitution, being part of basic structure of the Constitution cannot be effected.

### **PART III IS MADE NUGATORY IF JUDICIARY IS NOT INCLUDED WITHIN STATE**

Finally, it appears that many provisions in Part III are, at least in part, directed at judicial bodies. A good example is the power of the Supreme Court under Article 32 to issue the writ of *certiorari*. Since that power can only be exercised against judicial or quasi-judicial bodies, the view that judicial orders fall outside the purview of Part III renders it nugatory<sup>17</sup>. Another set of similar examples may be found in the rights guaranteed by Article 20 of the Constitution. Consider for instance, the right not to be “*convicted of any offence except for violation of a law in force at the time of the commission.*” Since conviction cannot but be by a judicial authority, it is clear that the addressee of the right under Article 20(1) is the judiciary.

### **JUDICIARY AS STATE IN UNITED STATES**

The decision of the U.S. Supreme Court in *Commonwealth of Virginia v. Rives*<sup>18</sup> is often cited to show that a judicial decision is included within the scope of State action for the purposes of the 14<sup>th</sup> Amendment to the Constitution. It has been held in *Brinkerhoff-Fairs Trust & Savings Co. v. Hill*<sup>19</sup> that a decision that deprives a person of his/her existing remedy without offering him/her an opportunity to be heard would be violative of the “Dude Process” clause. From the substantive point of view, it has been held that a common law inconsistent with a fundamental right, if enforced, would result in the Supreme Court issuing a certiorari to the authority. Hence judicial officers cannot discriminate in their judicial capacity, wither in enforcing common law or even private agreement. Through the agency of the courts, the State should not be guilty of discrimination; this does not necessarily entail that decisions would remain uniform or free from error. As was held in *Fay v. People of the State of New York*<sup>20</sup>, a conviction could be quashed if the aggrieved party can prove that the method of their trial denied them the equal protection of the laws.

What is noteworthy as regards the American position is the clarity regarding both substantive and procedural aspects of the 14<sup>th</sup> Amendment. The examples used herein clearly show that it is not “fanciful speculation” as Seervai puts it, to think that judicial officers

acting in their judicial capacity can prejudice the fundamental rights of a citizen. Hence, an explicit recognition of the Judiciary as State under Article 12 seems in order.

## **NCRWC RECOMMENDATIONS**

The National Commission to Review the Working of the Constitution (NCRWC) has put forward the recommendation that an Explanation should be added to Article 12 wherein it would be mentioned that the expression “other authorities” shall include any person in relation to such of its functions which are of a public nature”. Since the *raison d’etre* for the establishment of Courts was to decide and interpret the law- a function that clearly relates to the public sphere- the Judiciary and its officers would fall within the scope of “other authorities” as defined in Article 12.<sup>21</sup>

## **CONCLUSION**

In the light of these reasons, it is submitted that the mere fact that “judiciary” does not find express mention in Article 12 should not lead one to the contrary conclusion.

A perusal of cases from *Prem Chand Garg*<sup>22</sup> to *Rupa Ashok Hurra*<sup>23</sup> show that the trend is mostly tilted in favour of rectifying mistakes that it had made, under a writ petition under Article 32, even if it is after issuing a categorical statement to the effect that judicial decisions which have achieved finality are not open to question. Hence, it can be inferred that since it has been recognized that judicial orders may contravene fundamental rights, the Judiciary too comes implicitly within the meaning of State under Article 12. It is also widely accepted that certain fundamental rights have been held to be applicable in the case of Judiciary as well.

It is therefore eminently desirable to bring the Judiciary, itself a creature of the Constitution, under the purview of Part III, so that the highest of constitutional ideals are realized.

## **REFERENCES**

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<sup>1</sup> Dr. J. N. Pandey, *The Constitutional Law of India*, 49<sup>th</sup> Ed., Central Law Agency, at p.59.

<sup>2</sup> *Premchand Garg v. Excise Commissioner, U.P., Allahabad*, 1963 AIR 996.

<sup>3</sup> Constituent Assembly Debates, Vol. VII, p. 609 (1950).

<sup>4</sup> Constituent Assembly Debates, Vol. VII, p. 610 (1950).

<sup>5</sup> 2 1966 (3) SCR 744.

<sup>6</sup> AIR 1988 SC 1531.

<sup>7</sup> *P D Shamdasani v. Central Bank of India*, 1952 AIR 59.

<sup>8</sup> *In Budhan v State of Bihar*, AIR 1995 SC 191.

<sup>9</sup> (2002) 4 SCC 388.

<sup>10</sup> 1962 AIR 1621.

<sup>11</sup> *Supra note 5*.

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<sup>12</sup> 1989 AIR 1335.

<sup>13</sup> 1996 AIR 1611.

<sup>14</sup> 1996 SCC (3) 114.

<sup>15</sup> *Supra note 9.*

<sup>16</sup> *Naresh Shridhar Mirajkar And Ors vs State Of Maharashtra And Anr*, 1967 AIR, 1 1966 SCR (3) 744.

<sup>17</sup> H. M. Seervai, *Constitutional Law of India: A Critical Commentary*, 4th Ed., p. 394.

<sup>18</sup> 100 U.S. 313, 318(1880).

<sup>19</sup> 281 U.S. 673 (1930).

<sup>20</sup> 332 U.S. 261 (1947).

<sup>21</sup> Kalyani Ramnath, *Guarding the guards: The Judiciary As State Within The Meaning of Article 12 of The Constitution*, available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1693464](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1693464), sited on 11-05-2015.

<sup>22</sup> *Supra note 2.*

<sup>23</sup> *Supra note 9.*

