

## CHAPTER - 3

### THE SCOPE OF DEFINITION OF THE STATE

The main concern of Political Science is the State, the greatest of all human associations. The word has often been erroneously employed as a synonym for “nation”, “country”, “society” and “the government.” There is so great a diversity of the uses of the word “State” that it creates confusion. There are diverse notions about the word “State” in Political Science. The word has often been used indiscriminately to express a general tendency or an idea. While in common usage we speak of the ‘State’ of a man’s health, of his mind or of his economic conditions. In political science also it has been used in different shades. It has commonly been employed to express the idea of the collective action of community as distinguished from individual action . The term has also been erroneously employed as a synonym of the word ‘government’.

In Political science by the word “State” we mean a “politically organised people of a definite territory.” If we closely analyse, we shall find that the United State of America or India possesses all the four essential elements of the “State” i.e population, territory, government, and sovereignty. But the constituent units of these countries possess population, government but not sovereignty. Therefore, they cannot be called States.

#### **I. Definitions by Political Thinkers**

It is very much important to know about the ideas given by the Political thinkers about the word State. The term “State” has been defined by a number of political thinkers who tried their best to let us know what they meant by the term “State”. A few popular definitions are given below:

Aristotle defined the State as :

“a union of families and villages having for its end a perfect and self-sufficing life by which we mean a happy and honourable life”.<sup>1</sup>

Cicero defined the States as:

“a numerous society united by a common sense of right and a mutual participation in advantages.”<sup>2</sup>

In 1576 Bodin defined the State as:

“an association of families and their common possessions, governed by supreme power and by reason.”<sup>3</sup>

The English writer Holland defines the “State” as :

“a numerous assemblage of human beings generally occupying a certain territory amongst whom the will of the majority or class made to prevail against any of their number who oppose it.”<sup>4</sup>

Burgess defines the State as:

“a particular portion of mankind viewed as an organised unit”<sup>5</sup>

According to Bluntschli,:

“The State is politically organised people of a definite territory.”<sup>6</sup>

Phillimore goes to the extent of saying that a State for all purposes of international laws is :

“a people prominently occupying a fixed territory, bound

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1. Aristotle : “*Politics*”, Jowell’s Translation.

2. Cicero: “*De Republica*”, Bk I. at 25

3. Bodin : “*Six liner de la repubhque*”, Bk. I. Ch. I

4. Holland : “*Elements of Jurisprudence*” (6th ed.), at 40

5. Burgess : “*Political Science and Constitutional Law*”, Vol I, at 24.

6. Bluntschli : “*Allegemcine Staatslchve*”, Vol. I, at 24

together by common laws , habits and customs into one body politic, exercising through the medium of an organised government, independent sovereignty and through the medium of an organised government, independent sovereignty and control over all persons and things within its boundaries, capable of making war and peace and of entering into all international relations with the communities of the globe.”<sup>7</sup>

According to Woodrow Wilson, :

“The State is people organised for law within a definite territory.”

Professor Laski defined State as :

“a territorial society divided into government and subjects claiming within its allotted physical area, a supremacy over all other institutions.”

Hall, viewing the State primarily as :

“a concept of international law says, “the marks of an independent state are that the community constituting it, is permanently established for a political end, that it possesses a defined territory and that it is independent of external control.”<sup>8</sup>

Professor Gilchrist defines the State as :

“The State is a concept of Political Science and a moral reality which exists where a number of people living on a definite territory, are unified under a Government which in internal matters is the organ for expressing their sovereignty and in external matters is independent of other Governments”.<sup>9</sup>

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7. Phillimore: “*International Law*”, 3rd ed. at 81.

8. Hall: “*International Law*”, 3rd ed. at 18.

9. Prof. Gilchrist : “*Principles of political science*”. at 17, 1957.

Modern Conception of the State, Views of Gabriel Almond and Robert Dahl :

Gabriel Almond used the term “Political System” instead of the State. According to him Political System is the system of interactions to be found in all independent societies which perform the functions of integration and adaptation <sup>10</sup> (both internally and vis-a-vis other societies) by means of the employment, or threat of employment of more or less legitimate physical compulsion”. “The political System”, he explains “is the legitimate, order maintaining or transforming system in the society”.<sup>11</sup>

Pennock and Smith define the State as a political system comprising all the people in a defined territory and possessing an organisation (government) with the power and authority to enforce its will upon its members, by resort, if necessary, to physical sanctions, and not subject in the like manner to the power and authority of another polity. <sup>12</sup>

Robert A. Dahl defines the State as:

“the political system made up of the residents of the territorial area is a state”.<sup>13</sup>

Aristotle’s definition of the State is incomplete. There are four essential elements of the modern state. But Aristotle regarded the state as “ a union of families and villages, which aims at doing good to human being and making human life happy”. It does not include the two essential elements, i.e territory and sovereignty. Indirectly, it gives hint to the political organisation and deals with population in detail. It is clear that his definition is incomplete and fails to give an idea of the modern State. Therefore, Cicero’s definition fails to include the three essential elements of the State, i.e government, territory and sovereignty. Bodin’s definition also fails to include the two essential elements

10. Gabriel, A. Almond and James S. Coleman : “*The Politics of Developing Areas*”, at7.

11. *Ibid.*, at 7

12. J. Donald Pennock and David G. Smith : “*Political Science*”, at 126.

13. Robert A. Dahl : “*Modern Political Analysis*”, at 12.

of the state i.e territory and sovereignty. It refers to the government and population only. Holland's definition refers to the territory and population but it does not include the other two essential elements of the modern State, i.e the government and sovereignty. The definition given by Burgess deals in detail with population and the political organisation and does not make any reference to territory and sovereignty. Therefore, this definition also remains incomplete and fails to give us the idea of the modern state. Likewise the definition given by Bluntschli is also incomplete and unsatisfactory as it does not refer to sovereignty. It deals only with territory and politically organised people.

The definition given by Phillimore seems to be complete and it is satisfactory to a very great extent. His definition deals with all the four essential constituents of the modern state i.e., population, territory, government and sovereignty. Woodrow Wilson's definition deals with population and territory and gives indirect hints to peaceful political organisation but does not make any reference to sovereignty. Therefore, it also remains incomplete. Laski's definition deals with almost all the four essential elements of the state, i.e population, territory, government and sovereignty. But it refers to the internal sovereignty and does not make any mention of external sovereignty. Therefore it is also not complete. Hall's definition deals with territory, population and sovereignty and indirectly refers in brief to all the four constituent elements of the modern state, i.e territory, population, government and sovereignty. In his definition Maclaver makes reference to sovereignty. Among all the definitions of the State given above, the definition of Professor Gilchrist and Dr. Garner seem to be complete and satisfactory as they deal in detail with all the four constituent elements of the modern state. They deal with population, territory, government and sovereignty.

The definitions given by Phillimore and Oppenheim also serve the purpose but the definitions given by Professor Gilchrist and Dr. Garner seem to be better.

The modern State is constituted of the following four constituent elements :

- (1) Population or the number of people.

- (2) Fixed territory or a definite place of residence
- (3) Government or an organisation for uniting the people.
- (4) Sovereignty or supremacy in internal matters and independence of external control.

Of these four constituent elements of the modern state, the first two are physical elements, the third is political and the fourth is spiritual.

There is no denying the fact that the state is a human institution and is the highest of all human associations. Obviously, there can be no state without human beings. A population of some kind is necessary for the existence of the State. No state can exist in an uninhabited land nor can a definite piece of land without human habitations be called a state. The State, being a human institution, can never exist without human beings. Nor can living beings other than human constitute the State.

Indeed, there cannot be a lower or upper limit for the number of citizens of a state, nor can a dozen of people or so living in definite place form a state. Their number should neither be too small to be self-sufficient nor too large to be well-governed. What should be the desirable number of the people and what should be the suitable size of population for an ideal state are the problems with which a number of political thinkers attempted to deal. For example, Plato, the famous Greek Philosopher fixed the number at 5,050 citizens, whereas his disciple - Aristotle - was not willing to be bound by any set figure. He was clearly of the opinion that there ought to be a limit and he laid down the general principle that "the number should be neither too small nor too large; it should be large enough to be self-sufficient and small enough to be well-governed."<sup>14</sup> He believed that ten persons would be too small a figure but a hundred thousand would be too large a figure to be well-governed. Both were the extremes. He stuck a via media between too small a figure and too large a number. While giving his opinion in this regard Aristotle had in his view the city-states of Greece which according to him, were self-sufficient

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14. Aristotle : "*Politics*". Bk. VII 4 (Jowett's ed., at. 267), "*Laws*" V. 737.

and well-governed. These city-states of Greece had a very small size of population and direct democracy was popular in these city-states. The voters or the citizens used to go to the Assembly Hall and pass the laws. In a populous city state direct democracy could not function. This is the reason why Aristotle had not recommended too large a number of people to be well - governed.

Many centuries after Aristotle, Rousseau the French Philosopher who belonged to eighteenth century when the populous states existed wrote his famous book "Social contract", published in 1762, that ten thousand should be the ideal figure of population for an ideal state. According to modern scholars, it is well-nigh impossible to fix a definite figure of population of a modern state. These days there are many states, the figures of which can be counted in crores.

On the other hand, there are small states like San Marino. The population of San Marino was twentythree thousand only in 1985. It does not go beyond five figures. This it is quite clear that the states of today vary greatly in respect of population.

The modern state gives preference to the big size of population because bigger the size of population, greater will be its manpower. They can fight for a big longer period of time during the war period.

The second essential constituent of the State is territory which is an important and essential constituent of the State as many other. The word territory "covers the surface of the land within well -defined boundaries, the sub-soil, lakes and rivers and also air space above the land. Jellinck believes that none of the definitions of the state given prior to nineteenth century mentioned territory as an essential element. He remarks that lever in 1817 was the first writer to define the state as a society of citizens "having a determinate territory".<sup>15</sup>

All the modern thinkers and writers are of the opinion that territory

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15. Jellinck : "*Richt des Modernen States*", (1905) , Bk III Ch. III, at 19

forms an essential element of the State. Bluntschi believes that “as the state has its personal basis in the people, so it has its material basis in the land. The people do not become state until they have acquired a territory.”<sup>16</sup> Owing to this reason, the State is different from other human Institutions.

The third essential constituent of the State is the government. Like other essential constituent of the State the government is also indispensable element of the State because no state can exist in the absence of the government. For the existence of a State, Government is indispensable.

Government is the political organisation through which the collective will of the people is formulated, expressed and executed. As a matter of fact, the state operates through the governmental machinery. It is the agency through which society is politically organised, common policies are determined and by which common affairs are regulated and common interests are promoted.

The 4th essential constituent of the State is sovereignty which is regarded as the life and soul of the State. There can be no state in absence of sovereignty. The term sovereignty has been derived from the Latin word “*Superanus*” which means supreme, sovereignty, therefore is the supreme element of statehood. It is the power which differentiates the state from all other social organisation. Other existing social organisations can claim a number of people with separate territory and a governmental organisation that the state is the only human institution that has all the essential elements including sovereignty.

Sovereignty means supremacy of the State. The State rules supreme in the internal and external matters. The sovereignty of the state is expressed through the government which rules supreme in internal and external matters. Since the State is supreme in internal and external sovereignty. Sovereignty means the authority of some other country ruling supreme in the country.

The terms State and Governments have indiscriminately and erroneously used for each other. They have often been inter-changeably employed as if there is no difference between the two. The Stuart in England never

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16. Bluntschli : “*Theory of the State*”, at 231.

differentiated the State from the government. They did so in order to justify their absolute authority. King Louis XIV used to say, "I am the State". Some political thinkers have also gone to the extent of using these two terms interchangeably. Hobbes employed the terms the State and the government as if they meant the same thing. It was John Locke who first of all attempted to differentiate the State from the government in nineteenth century.

Political thinkers like Harold J. K Laski and G.D.H Cole also find little or no difference between the two. According to Cole, the State "is nothing more or less than the political machinery of government in a community".<sup>17</sup> Laski also observes, "for the state is for the purposes of practical administration, the government". This identification of the State and government misses an important fact. "While the government is a body of some citizens, the State consists of all the citizens, however, inactive and inarticulate their will may be in the governance of the country."<sup>18</sup> In this connection Professor W.w. Willoughby Organisation of the State - the machinery through which its purpose are formulated and executed"<sup>19</sup>

The term society and State have often been inter-changeably used. For example, Aristotle saw no difference between the State and society. That is why the Greek City-states were said to be co-existent with society. These two terms-society and State are usually employed as synonyms but they differ from each other in several respects. Society is a social organisation whereas the State is a political organisation. "By society", says Laski, "I mean a group of human beings living together for the satisfaction of their mutual wants".<sup>20</sup> Society deals with the social order whereas the State deals with the political order. In this connection Maclver has very aptly remarked. "To identify the social with the political is to be guilty of the grossest of all confusions which completely bars any understanding of either society or State".<sup>21</sup> "Social relations

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17. G.D.H. Cole : "*Self Government and Industry*", revised ed. Londo 1919, at 119.

18. C.C. Field : "*Guild Socialism - A critical Examination*", at 106.

19. W.W. Willoughby : "*The Nature of the State*", at 8.

20. Laski : "*The State in Theory and Practice*", (1967), at 20.

21. Maclver: "*The Modern State*".

an threads of life” and social institutions “form the loom on which the threads are woven into a cloth or garment”. Leacock has pointed out that the term “Society” suggests “not only the political relations by which men are bound together but the whole range of human relations and collective activities G.D.H. Cole has defined Society as “the complex organised association and institutions within the community”.<sup>22</sup> Maclver believes that, “Society exists for a number of purpose”, some great and some small but all in their aggregate deep as well as broad, “The State is not a social organisation”. Maclver has pointed out that “the ends for which the state stands are not all the ends which humanity seeks and quite obviously the ways in which the state pursues its objects are only some of the ways in which within society, men strive for the objects of their desires”.<sup>23</sup> Thus, it is quite clear that society and States are different organisations. They are different in their modes and structure.

Ancient political thinkers like Aristotle and Plato, did not see any distinction between the State and society. The reason is that when they dealt with the term “State” they had the idea of city-states in mind. But now the city-states do not exist. Like Plato and Aristotle, Hegel, Hitler and Mussolini also saw no difference between the State and society. They considered the State all powerful with its sovereignty over its population living in a fixed territory. But gone are the days of Hegel, Hitler and Mussolini. Maclver, an eminent American political thinker, fails to accept the opinion of Hegel, Hitler and Mussolini. He says “In this first place we must distinguish the State from Society. To identify the social with the political is to be guilty of the grossest of all confusions which completely bars any understanding of either society or the State”.<sup>24</sup>

Though the State is regarded as the highest of all human associations, yet there is a marked distinction between the State and other associations. An associations is defined by Maclver, an eminent political thinker of America,

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22. G.D.H. Cole : “*Social Theory*”, III ed. London, 1923, at 29.

23. Maclver : “*The Modern State*”.

24. Maclver : “*Modern State*”, at 5-6.

as “A group of persons or members who are associated and organised into unity of will or a common end”.<sup>25</sup> Cole defines it like this, any group of person pursuing a common purpose or system or aggregation of purposes by a course or cooperative action extended beyond a single act and for the purpose agreeing together upon certain methods of procedure and laying down in, however rudimentary a form, rules for common action”.<sup>26</sup> State is also a group of human beings. Like other groups it also exists to satisfy human needs through the concerted action of the government. Despite this close affinity between the State and other associations, there are marked differences between the State and other associations.

## II. The State in Part III of the Constitution of India

The guarantee of Fundamental Rights is sought to be made as complete and certain as possible by a very comprehensive definition of the term “State” in Art 12 for the purposes of Part III of the Constitution. Article 12 says :-

In this part, unless the context otherwise requires “ the state” includes

- i) The Government and Parliament of India and
- ii) The Government and the Legislature of each of the States and
- iii) All local authorities or
- iv) Other authorities within the territory of India or under the control of the Government of India.

Article 12 gives an extended meaning to the words ‘ the state’ wherever they occur in Part III of the constitution. Unless the context otherwise requires, “the state” will include not only the Executive and Legislative<sup>27</sup> organs of the Union and the States, but also local bodies <sup>28</sup>(such as municipal authorities) as well as ‘ other authorities’<sup>29</sup>, which include the ‘ instrumentalities’ or agencies’

25. *Ibid.*, at 6

26. Cole : “*Social Theory*”, at 37.

27. *Kochunni K.K v. state of Madras*, AIR 1959 SC 725.

28. *Railway Boards v. observer Publications*, A.I.R. 1972 S.C. 1792.

29. *Basheshar Nath v. I.T. Commr.*, AIR 1959 SC 149 (158).

of the State, or bodies or institutions which discharge public functions of the governmental character.<sup>30</sup>

### (i) The Scope of Article 12

The term 'State' has been very widely defined with a view to securing the guarantee of fundamental rights in respect of all possible institutions. The scope of this wide definition has been further expanded by judicial interpretation of the term 'other authorities' occurring in Art. 12. This expansive interpretation promotes the expansion of administrative law as more bodies are covered under its scope. It helps in the expansion of judicial review as many more bodies become subject to the writ jurisdiction, and it also makes bodies amenable to the restrictions of fundamental rights.

This definition is only for the purpose of the provisions contained in Part III<sup>31</sup> Hence, even though a body of persons may not constitute 'the state' within the instant definition, a writ under Article 226 may lie against it on non-constitutional grounds or on the ground of contravention of some provision of the Constitution outside Part III e.g., where such body has a public duty to perform or where its acts are supported by the State or Public Officials.<sup>32</sup>

Under Article 12 the word 'includes' indicates that the definition of 'the State' is not confined to a Government Department and the legislature but extends to any administrative<sup>33</sup> action (whether statutory or non-statutory), judicial or quasi-judicial, which can be brought within the fold of the 'State action',<sup>34</sup> which violates a fundamental right.<sup>35</sup> Therefore, the scope of the word 'the state' has been widened through interpreting each and every words

30. *Ramana Dayaram Shetty v. I.A.A.I.*, AIR 1979 SC 1628 (1638); *State of Punjab v. Raja Ram*, AIR 1981 SC 1694.

31. *Rama Rao Gazula Dasaratha v. State of A.P.*, AIR 1961 SC 564 (570).

32. *Kartik Chandra Nandi v. W.B.S.I. corpn.*, AIR 1967 Cal, 231 (234).

33. *Gulam Abbas v. State of U.P.*, AIR 1981 SC 2198.

34. *Ramana Dayaram Shetty v. I.A.A.I.*, AIR 1979 SC 1628 (1638); *State of Punjab v. Raja Ram*, AIR 1981 SC 1694.

35. *Som Prakash Rekhi v. Union of India*, AIR 1981 SC 212.

used in Article 12. The Supreme court has shown the vital role for widening the scope of this Article 50 that the Fundamental Rights of the citizen can be better protected against the arbitrary practices of the Government Departments, legislature as well as administrative actions.

### **(ii) Local Authorities**

The expression Local Authorities includes a 'Panchayat';<sup>36</sup> a Port Trust<sup>37</sup> or other bodies coming within the definition of 'local authority' in s. 3 (31) of the General Clauses Act, 1897.<sup>38</sup>

A local authority is a representative body. Merely because the Housing Board, constituted under S. 3 of Haryana Housing Board Act, 1971, is authority under Art. 12, it cannot be treated as a local authority;<sup>39</sup> so also are Calcutta State Transport Corporation<sup>40</sup> and U.P Forest Corporation.<sup>41</sup>

### **(iii) Other Authorities**

The expression "authoritt" has a definite connotation. It has different dimensions and, thus, must receive a liberal interpretation. To arrive at a conclusion, as to which "other authorities" could come within the purview of Article 12, we may notice the meaning of the word "authority".

36. *Ajit Singh v. State of Pubjab*, AIR 1967 SC 856 (866); *Bhagat Ram v. State of Punjab*, AIR 1967 SC 927.

37. *Madras Pinjrapole Management v. Labour Court*, AIR 1961 Mad, 234 (239).

38. *Madras Pinjrapole Management v. labour Court*, AIR 1961 Mad, 234 (239);

*Dinesh (Dr.) Kumar v. M.N.M College* AIR 1986 SC 1877 ( a Municipal Corpn. and educational institution run by it )

39. *Housing Board of Haryana v. Haryana Housing Board Employees Union*, AIR 1996 SC 434.

40. *Calcutta State Transport Corporation v. Commissioner of Income Tax, W.B.* (1996) 8 SSC 758.

41. *Commissioner of Income Tax, Lucknow v. U.P Forest Corportation*, AIR 1998 SC 1125.

In Concise Oxford English Dictionary<sup>42</sup> the word ‘authority has been defined as under :

“1, the power or right to give orders and enforce obedience. 2, a person or organization exerting control in a particular political or administrative sphere. 3, the power to influence others based on recognized knowledge or expertise.”

Broadly, there are three different concepts which exist for determining the question which fall within the expression ‘other authorities’:

- (i) The Corporations and the Societies created by the State for carrying on its trading activities in terms of Article 298 of the Constitution wherefor the capital infrastructure, initial investment and financial aid etc. are provided by the State and it also exercises regulation and control thereover.
- (ii) Bodies created for research and other developmental works which is otherwise a governmental function but may or may not be a part of the sovereign function.
- (iii) A private body is allowed to discharge public duty or positive obligation of public nature and furthermore is allowed to perform regulatory and controlling functions and activities which were otherwise the job of the government.

The rule of *ejusdem generis* cannot be applied to interpret this expression in as much as there is no common feature running through the named bodies.<sup>43</sup>

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42. Concise Oxford English Dictionary, 10th Edition.

43. *Rajasthan State Electricity Bd. v. Mohan Lal*, AIR 1967 SC 1857 (1861-63); *Railway Board v. Observer Publications Pvt. Ltd.*, AIR 1972 SC 1792;

The expression 'other authorities' refers to -

- i) Instrumentalities<sup>44</sup> or agencies,<sup>45</sup> of the Government and Government Departments.<sup>46</sup> But every instrumentality of the Government is not necessarily a 'Government Department',<sup>47</sup> The instrumentalities or agencies, even though performing some of the functions of the State, cannot be equated with a government department, if they have an independent status distinct from the State e.g. government companies and public undertakings though for the purpose of enforcing fundamental rights, they could be held to be State.<sup>48</sup>
- ii) Every type of public authority, exercising statutory powers,<sup>49</sup> whether such powers are governmental or quasi-governmental<sup>50</sup> or non-governmental<sup>51</sup> and whether such authority is under the control of the Government or not,<sup>52</sup> and even though it may be engaged in carrying on some activities in the nature of trade or commerce<sup>53</sup> e.g.,

44. *Ramana Deyaram Shetty v. I.A.A.I.*, AIR 1979 SC 1628 (1638); *State of Punjab v. Raja Ram*, AIR 1981 SC 1694.
45. *Ramana Dayaram Shetty v. I.A.A.I.*, AIR 1979 SC 1628 (1638,); *State of Punjab v. Raja Ram*, AIR 1981 SC 1694; *Som Prakash Rekhi v. Union of India*, AIR 1981 SC 212; *Tejender Singh v. B.P.C.*, AIR 1987 SC 51; *Dwarkadas Marfatia and Sons v. Board of Trustee of the Port of Bombay*, AIR 1989 SC 1642.
46. *Bidi Supply Co. v. Union of India*, AIR 1956 SC 479.
47. *State of Punjab v. Raja Ram*, AIR 1981 SC 1694, *Not a Govt. Department, Steel Authority of India Ltd. v. Shri Ambica Mills Ltd*, AIR 1998 SC 418, following *SL. Agarwal (Dr.) v. G.M. Hindustan Steel Ltd.*, AIR 1970 SC 1150 and *Western Coalfields Ltd. Special Area Development Authority*, AIR 1982 SC 697.
48. *Mohd. Hadi Raza v. State of Bihar*, (1998) 5 SCC 91.
49. *Rajasthan State Electricity Bd. v. Mohan Lal*, AIR 1967 SC 1857 (1861-63); *Railway Board v. Observer Publications Pvt. Ltd.*, AIR 1972 SC 1792; *Bidi Supply Co. v. Union of India*, AIR 1956 SC 479; *Sukhdev Singh v. Bhagatram Sardar Raghuvanshi*, AIR 1975 SC 1331 (1342).
50. *Rajasthan State Electricity Bd. v. Mohan Lal*, AIR 1967 SC 1857 (1861-63); *Railway Board v. Observer Publications Pvt. Ltd.*, AIR 1972 SC 1792.
51. *Rajasthan State Electricity Bd. v. Mohan Lal*, AIR 1967 SC 1857 (1861-63); *Railway Board v. Observer Publications Pvt. Ltd.*, AIR 1972 SC 1792.
52. *Ramamurthy Reddiar, K.S. v. Chief Commr. Pondicherry*, AIR 1963 SC 1464.
53. *Rajasthan State Electricity Bd. v. Mohan Lal*, AIR 1967 SC 1857 (1861-63); *Railway Board v. Observer Publications Pvt Ltd.*, AIR 1972 SC 1792.

A Board,<sup>54</sup> a University,<sup>55</sup> the Chief Justice of High Court,<sup>56</sup> having the power to issue rules, bye laws or regulations having the force of law<sup>57</sup> or the power to make statutory appointments<sup>58</sup> i.e The High court on the administrative side,<sup>59</sup> a public corporation<sup>60</sup>.

- (iii) An authority set up under a statute<sup>61</sup> for the purpose of administering a law enacted by the Legislature, including those vested with the duty to make decisions in order to implement them.<sup>62</sup> U.P State Cooperative Land Development Bank Ltd. is an authority<sup>63</sup>.

A non-statutory body, exercising no statutory powers<sup>64</sup> is not 'State', e.g.,

- (i) A company.<sup>65</sup>
- (ii) Private bodies, having no statutory power,<sup>66</sup> not being supported by a State act.<sup>67</sup>

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54. *Rajasthan State Electricity Bd. v. Mohan Lal*, AIR 1967 SC 1857 (1861-63); *Railway Board v. Observer Publications Pvt. Ltd.*, AIR 1972 SC 1792.
55. *Umesh v. Singh*, AIR 1967 Pat. 3 (9) F.B.
56. *Paramatma Sharan v. Chief Justice Rajasthan High Court*, AIR 1964 Raj 13.
57. *Rajasthan State Electricity Bd. v. Mohan Lal*, AIR 1967 SC 1857 (1861-63); *Railway Board v. Observer Publications Pvt. Ltd.*, AIR 1972 SC 1792.
58. *Paramatma Sharan v. Chief Justice Rajasthan High Court*, AIR 1964 Raj. 13.
59. *State of Bihar v. Bal Mukund Sah*, (2000) 4 SCC 640.
60. *D.T.C. v. Mazdoor Congress, D.T.C.*, AIR 1991 SC 101.
61. *Sukhdev Singh v. Bhagatram Sardar Singh Raghuvanshi*, AIR 1975 SC 1331 (1342); *Sabhajit Tewary v. Union of India*, AIR 1975 SC 1329; *Premji Bhai Parmar v. D.D.A.*, AIR 1980 SC 738.
62. *Ujjam Bai v. State of U.P.*, AIR 1962 SC 1621; *Masthan Sahib v. Chief Commr. Pondicherry*, AIR 1963 SC 533; *Ramamurthy Reddiar K.S. v. Chief Commr. Pondichery*, AIR 1963 SC 1464.
63. *U.P State Cooperative Land Development Bank Ltd. v. Chandra Bhan Dubey*, AIR 1999 SC 753.
64. *Devdas v. K.E. College*, AIR 1964 Raj. 6 (11).
65. *S.K. Mukherjee v. Chemicals Allied Products*, AIR 1962 Cal. 10 (12); *M.C. Mehta v. U.O.I.*, AIR 1987 SC 1086.
66. *Naresh Shridhar Mirajkar v. State of Maharashtra*, AIR 1967 SC 1 (11); *Parbhani T.C.S. v. R.T.*, AIR 1960 (3) SCR 177; *Tekraj Vasandi v. Union of India*, AIR 1988 SC 469.
67. *Kochunni K.K. v. State of Madras*, AIR 1959 SC 725 (730).

- (iii) A society, registered under the Societies Registration Act, <sup>68</sup> unless it can be held that the Society was an instrumentality or agency of the State <sup>69</sup> or exercised statutory power to make rules, bye-laws or regulations having statutory force. <sup>70</sup>
- (iv) An autonomous body which is controlled by the Government only as to the proper utilisation of its financial grant. <sup>71</sup>.

Even a private body or a corporation <sup>72</sup> or an aided private school <sup>73</sup> may, however, be included within the definition of 'State' if it acts as an 'agency' of the Government. <sup>74</sup>.

In determining whether a corporation or a Government company <sup>75</sup> or a

68. *Tiwari J. (Smt) v. Jwala Devi (Smt)*, AIR 1981 SC 122; *Dhanoa S.S. v. Municipal Corpn.*, AIR 1981 SC 1395; *Sheela Barse v. Children's Aid Society*, AIR 1987 SC 656.
69. *Som Prakash Rekhi v. Union of India*, AIR 1981 SC 212; *Sabhajit Tewary v. Union of India*, AIR 1975 SC 1329; *Minhas B.S. v. Indian Statistical Inst.* AIR 1984 SC 363; *Ramchand Iyer, P.K. v. Union of India*, AIR 1984 SC 541; *Sheela Barse v. Secy., Children's Aid Society*, AIR 1987 SC 656.
70. *Ramana Dayaram Shetty v. I.A.A.I.* AIR 1979 SC 1628 (1638); *State of Punjab v. Raja Ram*, AIR 1981 SC 1694.
71. *Chander Mohan Khanna v. N.C.E.R.T.*, AIR 1992 SC 76.
72. *Central Inland water Corpn. v. Brojo Nath Ganguly*, AIR 1986, SC 1571; *Bhandari O.P. v. I.T.D.C.*, AIR 1987 SC 111; *Ajay Hasia v. Khalid Mujib Sehravardi*, AIR 1981 SC 487 (496); *LIC v. Escorts*, AIR 1986 SC 1370; *Gujarat State Financial Coprn.v. Lotus Hotels Pvt. Ltd.*, AIR 1983 SC 848; *Kalra A.L. V. P & E Corpn.*, AIR 1984 SC 1361; *Food Corpn. of India Worker's Union v. Food corporation of India*, AIR 1996 SC 2412.
73. *Monmohan Singh v. Commr. U.T. Chandigarh*, AIR 1985 SC 364 ; *Workmen Food Corpn. v. Food Corpn.of India*, AIR 1985 SC 670.
74. *Sukhdev Singh v. Bhagatram Sardar Singh*, AIR 1975 SC 1331 (1335, 1359-60) ; *A.I. Sainik Schools Employees v., Sainik Schools Society*, AIR 1989 SC 88; *Star Enterprises v. C.I.D.C. Maharashtra Ltd.* (1990) 3 SCC 280; *Mahabir Auto Stores v. Indian Oil*, AIR 1990 SC 1031.
75. *Central Inland Water Corpn. v. Brojo Nath Ganguly*, AIR 1986 SC 1571, 24, 69; *Bhandari O.P v. I.T.D.C.*, AIR 1987 SC 111.

private body is an instrumentality or agency of the state, the following tests would be applicable:<sup>76</sup>.

- (i) Whether the entire share capital is held by the Government.
- (ii) Whether the corporation enjoys monopoly status conferred by the State.
- (iii) Whether the functions of the corporation are governmental functions or functions closely related thereto.
- (iv) If a department of the Government has been transferred to the corporation.
- (v) The volume of financial assistance received from the State.<sup>77</sup>
- (vi) The quantum of State control.<sup>78</sup>
- (vii) Whether any statutory duties are imposed upon the corporation.<sup>79</sup>.
- (viii) The character of the corporation may change with respect to its different functions.<sup>80</sup>

A private educational institution does not become an instrumentality of the State because of the mere fact that it has received recognition or affiliation from the State.<sup>81</sup>

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76. *Central Inland Water Corpn. v. Brojo Nath Ganguly*, AIR 1986 SC 1571; *Bhandari O.P. v. I.T.D.C.*, AIR 1987 SC 111; *Ajay Hasia v. Khalid Mujib Sehravardi*, AIR 1981 SC 487 (496); *LIC v. Escorts*, AIR 1986 SC 1370; *Gujarat State Financial Corpn. v. Lotus Hotels Pvt. Ltd.*, AIR 1983 SC 848; *Kalra A.L. v. P & E Corpn*, AIR 1984 SC 1361.

77. *Manmohan Singh v. Commr. U.T. Chandigarh*, AIR 1985 SC 364 *workmen Food Corpn. v. Food Corpn. of India*, AIR 1985 SC 670 *Ganapathi National Middle School v. M. Durai Kannan*, AIR 1996 SC 2803.

78. *Manmohan Singh v. Commr. U.T. Chandigarh*, AIR 1985 SC 364; *Workmen Food Corpn. v. Food Corpn. of India* AIR 1985 SC 670.

79. *Ajay Hasia v. Kalid Mujib Sehravardi*, AIR 1981 SC 487 (496); *LIC v. Escorts*, AIR 1986 SC 1370; *Gujarat State Financial Corpn. v. Lotus Hotels Pvt. Ltd.*, AIR 1983 SC 848; *Kalra A.L. v. P & E. Corpn.* AIR 1984 SC 1361.

80. *Mehta M.C. v. Union of India*, AIR 1987 SC 1086; *L.I.C. v. Escorts*, AIR 1986 SC 1370.

81. *Unnikrishnan J.P. v. State of A.P.*, AIR 1993 SC 2178.

Haryana State Electricity Board awarded a contract to a contractor who was found to be only a name lender, there being no genuine contract with him. he employed Safai Karamcharis whose services he terminated after they had worked for more than 240 days. The High Court lifted the veil and held that the Safai Karmacharis were employees of the said Electricity Board, an agency of the Govt. and hence they were entitled to be reinstated.<sup>82</sup> *The District Rural Development Agencies*<sup>83</sup> and *U.P State Cooperative Land Development Bank Ltd.*<sup>84</sup> held to be instrumentalities of the State.

In *Zee Tele Films Ltd. v. Union of India*<sup>85</sup>. The question for consideration in this petition is whether the Board falls within the definition of ‘the State’ as contemplated under Article 12 of the Constitution.

It was the argument of the Board that it did not come under the term “other authorities”, hence was not a State for the purpose of Article 12. While the petitioner contended to the contrary on the ground that the various activities of the Board were in the nature of public duties. A literal reading of the definition of State under Article 12 would not bring the Board under the Term “other authorities “ for the purpose of Article 12. However, the process of judicial interpretation has expanded the scope of the term “other authorities” in its various judgments. It is on this basis that the petitioners contended that the Board would come under the expanded meaning of the term “other authorities” in Article 12 because of its activities which was that of a public body discharging public function.

Therefore, to understand the expanded meaning of the term “other authorities” in Article 12, it is necessary to trace the origin and scop of Article 12 in the Indian Constitution. Present Article 12 was introduced in the Draft Constitution as Article 7. The Court quoted with approval the observation of

82. *Secretary, H.S.E.B. v. Suresh*, AIR 1999 SC 1160.

83. *Rajendra v. State of Rajasthan*, AIR 1999 SC 923.

84. *U.P State Cooperative Land Development Bank Ltd. v. Chandra Bhan Dubey*, AIR 1999 SC 753.

85. AIR 2005 SC 2677.

Dr. Ambedkar in the Constituent Assembly. 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.

..... 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 economise in words.”<sup>86</sup>

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86. *Constituent Assembly Debates*, Vol. VII 1948 at 610, Quoted in *Zee Tele Films Ltd. v. Union of India*, AIR 2005 SC 2677 at 2685.

Till about the year 1967 the courts in India had taken the view that even statutory bodies like Universities, Selection Committee for admission to Government Colleges were not “other authorities” for the purpose of Article 12<sup>87</sup>. In the year 1967 the case of *Rajasthan State Electricity Board V. Mohan Lal & Ors.*<sup>88</sup>, the Court held that the expression “other authorities” is wide enough to include within it every authority created by a Statute on which powers are conferred to carry out governmental or quasi-governmental functions and functioning within the territory of India or under the control of the Government of India. Even while holding so Shah, J. in a separate but concurring judgement observed that every constitutional or statutory authority on whom powers are conferred by law was not “other authority” within the meaning of Article 12. He also observed further that it is only those authorities which are invested with sovereign powers, that is power to make rules or regulations and to administer or enforce them to the detriment of citizens and others that fall within the definition of ‘State’ in Article 12: if constitutional or statutory bodies invested with power but not sharing the sovereign power of the State are not “State” within the meaning of the Article.

Almost a decade later another Constitution Bench of this Court somewhat expanded this concept of “other authority” in the case of *Sukhdev Singh & Ors, V. Bhagatram Sardar Singh Raghuvanshi & Anr.*<sup>89</sup> In this case the Court held, the bodies like Oil and Natural Gas Commission, Industrial Finance Corporation and Life Insurance Corporation which were created by statutes because of the nature of their activities do come within the term ‘other authorities’ in Article 12. Even though in reality they were really constituted for commercial purposes while so holding Mathew J. gave the following reasons for necessitating to expand the definition of the term “other authorities”

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87. See *The University of Madras V. Shantha Bai & Anr.* (AIR 1954 Madras 67) : *B.W.Devadas V. The Selection Committee for Admission of Students to the Karnataka Engineering College and Ors.* AIR 1964 Mysore 6.

88. AIR 1967 SC 1857.

89. AIR 1975 SC 1331.

in the following words:

“The concept of State has undergone drastic changes in recent years. .... It can only act through the instrumentality or agency or natural or juridical persons. There is nothing strange in the notion of the state acting through a Corporation and making it an agency or instrumentality of the State. With the advent of a welfare State the frame work of civil service administration became increasingly insufficient for handling the new tasks which were often of a specialised and highly technical character. .... The Public Corporation, therefore, became a third arm of the Government. The employees of public Corporation are not civil servants. In so far as public Corporations fulfil public tasks on behalf of Government they are public authorities and as such subject to control by Government. The public Corporation being a creation of the State is subject to the constitutional limitation as the State itself.<sup>90</sup>

In *Sabhajit Tewary v. U.O.I & Ors.*<sup>91</sup> the judgment was delivered by the very same Constitution Bench which delivered the judgment in *Sukhdev Singh* case. In this judgment the court noticing its judgment in *Sukhdev Singh & Ors.*<sup>92</sup>, rejected the contention of the petitioner therein that Council for Scientific and Industrial Research the respondent body in the said writ petition which was only registered under the Societies Registration Act would come under the term “other authorities” in Article 12.

This distinction to be noticed between the two judgments referred to hereinabove namely *Sukhdev Singh & Ors.*, and *Sabhajit Tewary*<sup>93</sup>, is that, in

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90. *Sukhdev Sing v. Bhagatram*, AIR 1975 SC 1331, Quoted in *Zee Tele Films Ltd., v Union of India*, AIR 2005 SC 2677 at 2686.

91. AIR 1975 SC 1329.

92. AIR 1975 SC 1331.

93. AIR 1975 SC 1329.

the former the Court held that bodies which were creatures of the statutes having important State functions and where State had pervasive control of activities of those bodies would be State for the purpose of Article 12. While in *Sabhajit Tewary's* case the Court held, a body which was registered under a statute and not performing important State functions and not functioning under the pervasive control of the Government would not be a State for the purpose of Article 12.

Subsequent to the above judgments of the Constitution Bench a three-Judges Bench of this Court in the case of *Ramana Dayaram Shetty v. The International Airport Authority of India & Ors.*<sup>94</sup> placing reliance on the judgment of this Court in *Sukhdev Singh*<sup>95</sup> held that the International Airport Authority which was an authority created by the International Airport Authority Act, 1971 was an instrumentality of the State, hence, came within the term “other authorities” in Article 12. While doing so this Court held :

To-day the Government, in a welfare State, is the regulator and dispenser of special services and provider of a large number on benefits. The valuables dispensed by Government take many forms, but they all share one characteristic. They are steadily taking the place of traditional forms of which. These valuables which derive from relationships to Government are of many kinds :leases, licenses, contracts and so forth. With the increasing magnitude and range of governmental functions as we move closer to a welfare State, more and more of our wealth consists of these new forms. Some of these forms of wealth may be in the nature of legal rights but the large majority of them are in the nature of privileges. But on that account, it cannot be said that they do not enjoy any legal protection nor can they be regarded as that they do not enjoy any legal protection nor can they be

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94. AIR 1979 SC 1628.

95. AIR 1975 SC 1331.

regard as gratuity furnished by the State so that the State may withhold, grant or revoke it at its pleasure<sup>96</sup>.

The law has not been slow to recognize the importance of this new kind of wealth and the need to protect individual interest in it and with that end in view, it has developed new forms of protection. Some interest in Government larges, formerly regarded as privileges, have been recognized as rights while others have been given legal protection not only by forging procedural safeguards but also by confining or structuring and checking Government discretion in the matter of grant of such larges. The discretion of the government has been held to be not unlimited in that the Government cannot give or withhold largess in its arbitrary discretion or its sweet will.

It is in the above context that the Bench in *Ramana Dayaram Shetty's*<sup>97</sup> case laid down the parameters or the guidelines for identifying a body as coming within the definition of "other authorities" in Article 12, they are as follows:

- 1) One thing is clear that if the entire share capital of the corporation is held by Government it would go a long way towards indicating that the corporation is an instrumentality of Government<sup>98</sup>.
- (2) Where the financial assistance of the State is so much as to meet.. almost entire expenditure of the corporation. It would afford some indication of the corporation being impregnated with governmental character<sup>99</sup>.
- 3) It may also be a relevant factor whether the corporation enjoys monopoly status which is State-conferred or State-protected<sup>100</sup>.

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96. *Ramana Dayaram Shetty v. The International Airport Authority of India & Ors.*, AIR 1979 SC 1628, quoted in *Zee Tele Films Ltd. v. Union of India*, AIR 2005 SC 2677 at 2687.

97. AIR 1979 SC 1628.

98. *Ramana Dayaram Shetty v. The International Airport Authority of India & Ors.*, AIR 1979 SC 1628, quoted in *Zee Tele Films Ltd. v. Union of India*, AIR 2005 SC 2677 at 2688.

99. *Ibid.*

100. *Ibid.*

- (4) Existence of deep and pervasive State control may afford an indication that the corporation is a state agency or instrumentality<sup>101</sup>.
- (5) If the functions of the corporation are of public importance and closely related to governmental functions, it would be a relevant factor classifying the corporation as an instrumentality or agency of Government<sup>102</sup>.
- (6) Specifically, if a department of Government is transferred to a corporation, it would be a strong factor supportive of this inference of the corporation being an instrumentality or agency of Government<sup>103</sup>.

The above tests propounded for determining as to when Corporation can be said to be an instrumentality or agency of the Government was subsequently accepted by a Constitution Bench of this Court in the case of *Ajay Hasia & Ors. v. Khalid Mujib Sehravardi & Ors*<sup>104</sup>. But in the said case of *Ajay Hasia*<sup>105</sup> the court went one step further and held that a society registered under the Societies Registration Act could also be an instrument of State for the purpose of the term “other authorities” in Article 12. This part of the judgment of the Constitution Bench *Ajay Hasia*<sup>106</sup> was in direct conflict or was seen as being in direct conflict with the earlier Constitution Bench of this court in *Subhajit Tewary's*<sup>107</sup> case which had held that a body registered under a statute and which was not performing important State function or which was not under the pervasive control of the State cannot be considered as an instrumentality of the State for the purpose of Article 12.

The above conflict in the judgments of *Sabhajit Tewary*<sup>108</sup> and *Ajay Hasia*<sup>109</sup> of two co-ordinate Benches was noticed by this Court in the case of

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101. *Ibid.*

102. *Ibid.*

103. *Ibid.*

104. AIR 1981 SC 487.

105. *Ibid.*

106. *Ibid.*

107. AIR 1975 SC 1329.

108. *Ibid.*

109. AIR 1981 SC 487

*Pradeep Kumar Biswas* and hence the said case of *Pradeep Kumar Biswas*<sup>110</sup> came to be referred to a larger Bench of seven Judges and the said Bench, speaker through Ruma Pal, J. held that the judgment in *Sabhajit Tewary*<sup>111</sup> was delivered on the facts of that case, hence could not be considered as having laid down any principle in Law. The said larger Bench while accepting the ratio laid down in *Ajay Hasia's*<sup>112</sup> case though cautiously had to say the following in regard to the said judgment of this Court in *Ajay Hasia*:

“perhaps this rather overenthusiastic application of the broad limits set by *Ajay Hasia* may have persuaded this Court to curb the tendency in *Chander Mohan Khanna v. National Council of Educational Reserch and Training*<sup>113</sup>. The court referred to the tests formulated in *Sukhdev Singh*<sup>114</sup>, *Ramana*<sup>115</sup>, *Ajay Hasia*<sup>116</sup> and *Som Prakash Rekhi*<sup>117</sup> but striking a note of caution said that “these are merely indicative indicia and are by no means conclusive or clinching in any case”. In that case, the question arose whether the National Council of Educational Reserch (NCERT) was a “State” as defined under Article 12 of the Constitution. NCERT is a society registered under the Societies Registration Act. After considering the provisions of its memorandum of association as well as the rules of NCERT, this Court came to the conclusion that NCERT was largely an autonomous body and the activities of NCERT were not wholly related to governmental functions and that the governmental control was confined only to the proper utilisation of the grant and since

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110. (2002) 5 SCC 111.

111. AIR 1975 SC 1329.

112. AIR 1981 SC 487.

113. AIR 1992 SC 76

114. AIR 1975 SC 1331

115. AIR 1997 SC 1628

116. AIR 1981 SC 487

117. AIR 1981 SC 212

its funding was not entirely from government resource, the case did not satisfy the requirements of the State under Article 12 of the Constitution. The Court relied principally on the decision in *Tekraj Vasandi v. Union of India*<sup>118</sup>. However, as far as the decision in *Sabhajit Tewary v. Union of India*<sup>119</sup> was concerned. It was noted that the “decision has been distinguished and watered down in the subsequent decisions”<sup>120</sup>

Thereafter the larger Bench of this Court in *Pradeep Kumar Biswas*<sup>121</sup> after discussing the various case laws laid down the following parameters for gauging whether a particular body could be termed as State for the purpose of Article 12:

The picture that ultimately emerges is that the tests formulated in *Ajay Hasia* are not a rigid set of principles so that if a body falls within any one of them it must, ex hypothesi, be considered to be a State within the meaning of Article 12. 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 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.<sup>122</sup>

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118. AIR 1988 SC 469.

119. AIR 1975 SC 1329.

120. *Ajay Hasia v. Khalid Mujib*, AIR 1981 SC 487, quoted in *Zee Tele Films Ltd. v. Union of India*, AIR 2005 SC 2677 at 2688.

121. (2002) 5 SCC 111.

122. *Pradeep Kumar Biswas v. Indian Institute of Chemical Biology*, (2002) 5 SCC 111, quoted in *Zee Tele Films Ltd. v. Union of India*, AIR 2005 SC 2677 at 2689.

Above is the *ratio decidendi* laid down by a seven Judges Bench of this Court which is binding on this Bench. The facts of the touchstone of the parameters laid down in *Pradeep Kumar Biswas* <sup>s</sup><sup>123</sup> case. Before doing so it would be worthwhile once again to recapitulate what are the guidelines laid down in *Pradeep Kumar Biswas* <sup>s</sup><sup>124</sup> case for a body to be a state under Article 12. They are:

- 1) Principles laid down in *Ajay Hasia*<sup>125</sup> are not a rigid set of principles so that if a body falls within any one of them it must ex hypothesi, be considered to be a State within the meaning of Article 12.
- 2) The question in each case will have to be considered on the bases of facts available as to whether in the light of the cumulative facts as established, the body is financially, functionally, administratively dominated, by or under the control of the Government.
- 3) Such control must be particular to the body in question and must be pervasive.
- 4) Mere regulatory control whether under statute or otherwise would not serve to make a body a State.

The facts established in this case shows the following:

- 1) Board is not created by a statute.
- 2) No part of the share capital of the Board is held by the Government
- 3) Practically no financial assistance is given by the Government to meet the whole or entire expenditure of the Board.
- 4) The Board does enjoy a monopoly status in the field of Cricket but such Status is not State conferred or State protected.
- 5) There is no existence of a deep and pervasive State control. The control if

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123. (2002) 5 SCC 111.

124. *Ibid.*

125. AIR 1981 SC 487.

any is only regulatory in nature as applicable to other similar bodies. This control is not specifically exercised under any special statute applicable to the Board. All functions of the Board are not public functions nor are they closely related to governmental functions.

- 6) The Board is not created by transfer of a Government owned corporation. It is an autonomous body.

In Article 12, the 'State' has not been defined, it is merely an inclusive definition. It includes all other authorities within the territory of India or under the control of the Government of India. It does not say that such other authorities must be under the control of the Government of India. The word or is disjunctive and not conjunctive.

What is necessary is to notice the functions of the Body concerned. A 'State' has different meaning in different context. In a traditional sense. It can be a body politic but in modern international practice a State is an organization which receives the general recognition accorded to it by the existing group of other States. Union of India recognizes the Board as its representative. The expression "other authorities in Article 12 of the Constitution of India is State within the territory of India as contradistinguished from a State within the control of the Government of India. The concept of State under Article 12 is in relation to the fundamental rights guaranteed by part III of the Constitution and Directive Principles of the State Policy contained in part IV thereof. The contents of these two parts manifest that Article 12 is not confined to its ordinary or constitutional sense of an independent or sovereign meaning so as to include within its fold whatever comes within the purview thereof so as to instill the public confidence in it.

Article 12 must receive a purposive interpretation as by reason of Part III of the Constitution a Charter of Liberties against oppression and arbitrariness of all kinds of repositories of power have been conferred the object being to limit and control power wherever it is found. A body exercising significant functions of public importance would be an authority in respect of these functions. In those respects it would be same as is executive government

established under the Constitution and the establishments of organizations funded or controlled by the Government. A traffic constable remains an authority even if his salary is paid from the parking charges in as much as he still would have the right to control the traffic and anybody violating the traffic rules may be prosecuted at his instance.

Criticism of too broad a view taken of the scope of the State under Article 12 in *Ramana case*<sup>126</sup> invited some criticism which was noticed in *Som Prakash Rekhi case*<sup>127</sup>. It was pointed out that the observations in *Ramana case*<sup>128</sup> spill over beyond the requirements of the case and must be dismissed as obiter; that International Airport Authority is a corporation created by a statute and there was no occasion to go beyond the narrow needs of the situation and expand the theme of the State in Article 12 vis-a-vis government companies, registered society, and what not; and that there was contradiction between *Sukhdev Singh case*<sup>129</sup> and *Ramana case*<sup>130</sup>.

#### (iv) Authorities under the control of the Government of India

These words extend the application of the fundamental rights to areas outside the territory of India, which may be under the control of the Government of India for the time being, e.g. mandatory and trust territories which might be placed by international organisations under the control of the Government of India. This article explains that India would not discriminate, so far as the fundamental rights of individuals are concerned, between its own nationals and the people of other countries, which might come under the administration

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126. *Ramana Dayaram Shetty v. International Airport Authority of India*, AIR 1979 SC 1628.

127. *Som Prakash Rekhi v. Union of India*, AIR 1981 SC 212.

128. *Ramana Dayaram Shetty v. International Airport Authority of India*, AIR 1979 SC 1628.

129. *Sukhdev Singh v. Bhagatram*, AIR 1975 SC 1331.

130. *Ramana Dayaram Shetty v. International Airport Authority of India*, AIR 1979 SC 1628.

of India under some international arrangement, agreement or the like.<sup>131</sup>

The Supreme Court<sup>132</sup> has, however, given to the above words a meaning different from that given in the Constituent Assembly. According to the Supreme Court the words under the control of the Government of India control the word authorities and not the word territory, so that the expression would read thus:

“all local or other authorities within the territory of India or all local or other authorities under the control of the Government of India”.

The result of this interpretation is that in respect of an authority situated outside India, an additional test has to be satisfied before it can be brought within Art. 12 namely, whether it is under the control of the Government of India'. According to this interpretation, Art. 12 will apply to two categories of 'authorities' :

- (a) Authorities situate within the territory of India; these need not be under the control of India in order to be deemed 'State' under Art. 12.
- (b) Authorities situate outside the territory of India (e.g., territories administered by India under the Foreign Jurisdiction Act, 1947); these will come within the purview of Art. 12 only if they are under the control of India.

Proceeding from the view, it has been held<sup>133</sup> that since a judicial or quasi-judicial authority cannot be said to be under the control of the Government, in respect of its function, the superior Courts in India will have no power of judicial review over the decisions of a judicial or quasi-judicial authority if it is situated in a territory outside India, even though such territory is under the control of the Government of India.

131. Dr. Ambedkar, *constituent Assembly Debates*, Vol VI at. 607.

132. *Ramamurthy v. Chief Commr.*, AIR. 1963 S.C. 1464 (1467-8); *Masthan Sahib v. Chief Commr.*, AIR. 1963 S.C. 533 (537)

133. *Masthan Sahib v. Chief Commr.*, AIR. 1963 S.C. 533 (537).

It is conceded by the Supreme Court in both the cases<sup>134</sup> that where the control of the Government of India extends over a territory which is outside India, the superior courts in India can exercise their constitutional jurisdiction over the acts of the administrative authorities situated in such territory by 'passing suitable orders' against the Government of India. Does it make any difference if such administrative authority is endowed with quasi-judicial authority by the law? So far as quasi-judicial bodies located in India are concerned, there is no doubt that their decisions may, in proper circumstances, be quashed by certiorari. In such cases, it is the decision which is struck down and the Supreme Court does not compel the inferior tribunal to exercise its functions in any particular manner. Where the quasi-judicial authority violates the decision of the Court, the Supreme Court cannot directly enforce its decision against such authority and will be obliged to take the aid of the Government of India; but then the Government of India shall be competent to see that the quasi-judicial body complies with the orders of the Supreme Court in the same manner as it can do in the case of a purely administrative body. In so doing, the Government would not be compelling the quasi-judicial tribunal to decide a question in a particular manner, but only enforcing the decision of the highest Court of India against the inferior tribunal.

It is submitted that much anomaly will be created if the word 'control' is interpreted in the sense of 'functional'<sup>135</sup> as distinguished from 'administrative' control.

'Under the control of the Government of India' means An authority which is located outside India may still come under the definition of 'State under Art 12 if it is under the control of the Government of India.

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134. *Ramamurthy v. Chief Commr.*, AIR. 1963 S.C. 1464 (1467-8); *Masthan Sahib v. Chief Commr.*, AIR. 1963 S.C. 533 (537).

135. *Ramamurthy v. Chief Commr.*, AIR. 1963 S.C. 1464 (1467-8).

### (v) Fundamental Rights - a guarantee against State action

The rights which are guaranteed by Arts. 19,<sup>136</sup> 21 and 3<sup>137</sup> are guaranteed against State action as distinguished from violation of such rights by private individuals. In case of violation of such rights by private individuals, the person aggrieved must seek his remedies under the general law.

But where the claim of a private person is supported by a State act, executive or legislative,<sup>138</sup> the person aggrieved may challenge the constitutionality of the State act which supports the private claim.<sup>139</sup>

While a right created by statute may be taken away by another statute, a fundamental right guaranteed by the Constitution cannot be taken away by a statute.<sup>140</sup>

### (vi) Judiciary

While the inclusive definition of 'State' in Art. 12 includes the Judiciary,<sup>141</sup> in some earlier cases, it was observed that (i) a judicial order could not possibly violate fundamental right;<sup>142</sup> and (ii) no remedy under Art. 32 was available on the ground that a judicial order violated a fundamental right.<sup>143</sup>

### (vii) Industry

The State while discharging a public welfare function is not an "industry" under the Industrial Disputes Act.<sup>144</sup>

136. *Samdasani P.D. v. Central Bank*, AIR 1952SC 59.

137. *Vidya Verma v. Shivnarain (Dr.)*, 1956 (2) SCR 108.

138. *Kochunni K.K. v. State of Madras* (1), AIR 1959 SC 725 (730).

139. *Ibid.*

140. *Pannatal Binj Raj v. Union of India*, AIR 1956 SC 397.

141. *Budhan Choudhury v. State of Bihar*, AIR 1955 SC 191.

142. *Amirabbas Abbasi Sehabzada Saiyed Muhammed v. State of M.B.*, AIR 1960 SC 768; *Parbhani Transport Co-operative Society v. R.T.A.*, AIR 1960 SC 801 ; *Naresh Shridhar Mirajkar v. State of Maharashtra*, AIR 1967 SC 1.

143. *Ujjam Bia v. State of U.P* AIR 1962 SC 1621; *Antulay A.R. v. Nayak R.S.* AIR 1988 SC 1531.

144. *Executive Engineer (State of Karnataka) v. K. Somasety*, (1997) 5 SCC 434.

There has however, been a change of judicial climate since the minority opinion of Hidayatullah, J., in Naresh's case<sup>145</sup>. The propositions so far asserted in these subsequent cases are -

- (a) A judicial decision or order which violates a fundamental right is void,<sup>146</sup> even though it will be binding on the parties so long as it is not set aside in appropriate proceedings.<sup>147</sup>
- (b) Though the remedy under Art. 32 is not available where the offending Court is the Supreme Court itself, the court in the exercise of its inherent jurisdiction (para 105)<sup>148</sup> would review and set aside a previous direction given by the court which offended against a fundamental right, e.g. the natural justice, an ingredient of Art. 14 or 21 (paras 60-61, 77, 80-82).<sup>149</sup>

The literatures available on the definition of the State are not sufficient. The subject has been discussed in the constitutional law commentaries and articles published in the law journals. Over and above one has to depend mainly on the judicial decisions.

Seervai has pointed out that "our constitution should exist on the exercise of power by the State; but the essential problem of liberty and equality was freedom from arbitrary restrictions. The constitution should be so interpreted that the governing power, wherever located, must be subjected to fundamental constitutional limitations". He raises a question "when can a corporation be looked upon as an agency of the State for subjecting it to constitutional limitation? No easy answer is possible".<sup>150</sup>

In the *Airport*<sup>151</sup> Case the doctrine of agency and State instrumentality

145. *Budhan Choudhury v. State of Bihar*, AIR 1955 SC 191.

146. *Ujjam Bia v. State of U.P* AIR 1962 SC 1621; *Antulay A.R. v. Nayak R.S.*, AIR 1988 SC 1531; *Nawabkhan Abbas Khan v. State of Gujarat*, AIR 1974 SC 1471.

147. *Antulay A.R. v. Nayak R.S.* AIR 1988 SC 1531.

148. *Antulay A.R. v. Nayak R.S.*, AIR 1988 SC 1531.

149. *Ibid.*

150. *Seervai, H.M., Constitutional law of India* (1991).

151. AIR 1979 SC 1628.

was adopted by Bhagwati J. The problem to be solved in that case was thus stated by Bhagwati J.:

This appeal by special leave raises interesting questions of law in the area of public law. What are the constitutional obligations on the State when it takes action in exercise of its statutory or executive power? Is the State entitled to deal with its property in any manner it likes or award a contract to any person it chooses without any constitutional limitations upon it? What are the parameters of the statutory or executive power in the matter of awarding a contract or dealing with its property? These questions fall in the sphere of both Administrative Law and Constitutional law and they assume special significance in a modern welfare state which is committed to egalitarian values and dedicated to the rule of law. But these questions cannot be decided in the abstract. They can be determined only against the background of facts and hence we shall proceed to state the facts giving rise to the appeal.

In *Hasia's*<sup>152</sup>Case the question for determination arose out of writ petitions filed under Article 32 challenging the validity of admissions to the Regional Engineering College, Srinagar ("the College") which was one of 15 Engineering Colleges in India sponsored by the Govt. of India. The college was run by a Society ("The society") registered under the Jammu and Kashmir Registration of Societies Act 1893. The question was whether the society was "the State" under Article 12, for only if it was the State could the admissions to the college be challenged as violating Article 14, Bhagwati J. delivering the unanimous judgements of a constitution Bench scrutinized the Memorandum of Association and the Rules of the Society and held that the Society was an instrumentality or agency of the State and Central Governments and the Society was an authority under Article 12.

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152. AIR 1981 SC 487

Bhagwati J. formulated that relevant tests for determining whether a corporation was an agency or instrumentality of govt. as follows:<sup>153</sup>

- (a) One thing is clear that if the entire share capital of the corporation is held by Govt., it would go a long way towards indicating that the corporation is an instrumentality or agency of Govt;
- (b) Where the financial assistance of the State is so much as to meet almost (the) entire expenditure of the corporation, it would afford some indication of the corporation being impregnated with government character,
- (c) It may also be a relevant factor ..... whether the corporation enjoys monopoly status which is the (sic) State conferred or state protected;
- (d) Existence of 'deep and pervasive State control may afford an indication that the Corporation is a State agency or instrumentality;
- (e) if the functions of the Corporation are of public importance and closely related to government functions, it would be a relevant factor in classifying the corporation as an instrumentality or agency of Government.

The fundamental rights may be violated by the State as much directly as indirectly. While in the former case its officials or agencies violate them, in the latter it may let them be violated by others either through its inaction or active connivance. The latter violation may be as injurious as the former. In such cases State cannot escape its responsibility or liability towards the protection of fundamental rights on the plea that they are the actions of private individuals and not of the State.<sup>154</sup>

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153. *Ibid.*

154. Shukla, V.N. *The Constitution of India* (2001)

The 'judiciary', though an organ of the State like the executive and legislature, is not specifically mentioned in Article 12. Does it mean that the 'judiciary' is not meant to be included in the concept of 'the state'? The answer depends on the distinction between the judicial and non-judicial functions of the courts. In the exercise of non-judicial functions the courts fall within the definition of 'the State'.

Article 12, while defining the word 'State' used in the Constitution, points to fact that the word 'State' includes the Government and Parliament of India, the Government and legislature of each of the State and all local and other authorities within the territory of India or under the Control of the Government of India. With regard to scope of this article. Dr. Ambedkar said that it encompasses within its ambit "every authority which has been created by law and which has got certain powers to make laws, to make rules and to make by laws"<sup>155</sup>

Any attempt of the State to abridge a fundamental right, directly or indirectly is unconstitutional, unless permitted by some provision of the Constitution itself. Even in the granting of privilege, the State cannot impose conditions which require the 'relinquishment of constitutional rights'. On the same principle, the right to continue the exercise of a privilege granted by the Government cannot be made to depend upon the grantee's submission to a condition, prescribed by the Government, which is hostile to the Constitution.<sup>156</sup>

Where a body exercises power, conferred by a statute, it is obvious that it is exercising governmental power in its ordinary sense. There is the authority of the State behind its acts (assuming them to be *intra vires*). This is why even a Board of Trustees constituted by a Statute has been, in the U.S.A. taken to be an agency of the State.

An instance of judicial creativity is to be found in the expanding connotation being given to the term 'authority' in Article 12.<sup>157</sup> After the famous

155. Sengupta, P.K., *India : Constitutional Dynamics in a Changing Polity* (1991).

156. Basu, D.D., *Commentary on the Constitution of India* (1973)

157. Jain, MP. *Indian Constitutional Law* (1987)

cases of International Airport Authority<sup>158</sup> and Ajay Hasia<sup>159</sup>, it has now become well-established that a body is an 'authority' under Article 12 if it can be characterised as an 'instrumentality' of the Government. To be so, the concerned body has to fulfil two basic tests, viz. : funding and control. Does the Government foot a substantial part of the bill for the operations of the body in questions? Does the Government exercise effective and pervasive control over the body concerned? It does not matter what is the structure of the body in question : it may be statutory or non-statutory : it may be set up by or under an Act of the Legislature or even administratively; it may be a registered society, a co-operative society, or a Government company. It does not also matter whether the body in question has been set up initially by the Government or private enterprise. It does not matter what functions does the body discharge : governmental, semi-governmental, non-governmental, educational, commercial, banking, social service. So long as a body is characterised as an 'instrumentality' of the Government, it falls within the purview of Article 12 as an 'authority'.

Once a body is characterised as an 'authority', three important incidents invariably follow : (1) It becomes subject to the discipline of fundamental rights (2) It becomes subject to the discipline of Administrative law; (3) It falls within writ jurisdiction of the Supreme Court under Article 32 and of the High Courts under Article 226. Thus, as the range of Article 12 expands, so does the ambit of judicial review.

When granting a remedy against State action for infraction of fundamental rights, the Supreme Court is being guided by the definition of the 'State' in Article 12 of the Constitution.<sup>160</sup>

From the definition of the State in Article 12 it is clear that executive action can be complained of where it infringes fundamental rights.

158. AIR 1979 SC 1628.

159. AIR 1981 SC 487.

160. G.C.V. Subba Rao, *Indian Constitutional Law* (1998)

It must be remembered that the Fundamental Rights are constitutional guarantees given to the people of India and are not merely paper hopes or fleeting promises and so long as they find a place in the Constitution, they should not be allowed to be emasculated in their application by narrow and constricted judicial interpretation. The court should be anxious to enlarge the scope and width of the Fundamental Rights by bringing within their sweep every authority which is an instrumentality or agency of the government or through the corporate personality of which an instrumentality or agency of the government or through the corporate personality of which the government is acting, so as to subject the government in all its myriad activities, whether through natural persons or through corporate entities, to the basic obligation of the fundamental Rights.<sup>161</sup>

Expansion of the Definition of the 'State' to include the Judiciary for greater judicial accountability. The judiciary which imparts justice is not accountable to the people of India. Some exercise has to be done to consider the question of naming "judiciary" as part of state under Article 12 of the Constitution.<sup>162</sup>

There is no reason why the expression 'other authorities' in Article 12 should be confined only to statutory or constitutional bodies.<sup>163</sup> Political parties, for example, even though they are not statutory organisations, and are in form private clubs, are to be with in this category. So also are labour unions on which statutes confer the right of collective bargaining. It is hoped that in the years to come the courts will go a step forward and interpret the expression 'other authorities' in Article 12 should be confined only to statutory or constitutional bodies. Political parties, for example, even though they are not

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161. C.K. Takwani, "*other authorities*" within the meaning of Article 12 of the Constitution, (1986) 4 SCC (J).

162. G.B Reddy, *Fifty years of Indian Constitution - A Constitutional imperative to Review its working*, IBR 2000.

163. Y.R. Haragopal Reddy, *Article 12 of the Constitution and the new Horizons of fundamental rights*, IBR 1984.

statutory organisations, and are in form private clubs, are to be within this category. So also are labour unions on which statutes confer the right of collective bargaining. It is hoped that in the years to come the courts will go a step forward and interpret the expression 'other authorities' in Article 12 in such a way that it will include within its fold bodies private in character but dealing with public rights to make them accountable to part III of the Constitution as is being done in the United States of America. The Courts can fully utilise the new trend set by *Airports Authority*<sup>164</sup> to expand the constituency of fundamental rights to a greater extent so as to prohibit arbitrariness and discrimination and to extent so as to prohibit arbitrariness and discrimination and to extend the blessings of liberty and equality proclaimed in the preamble to the constitution and transformed into the body of the Constitution in terms of Fundamental rights and directive principles to one and all.

Fundamental Rights are enforceable against the State and writ jurisdiction of the superior courts is also available mainly against the State. The definition of the word "State" has been given in Article 12 and usually the threshold objection to the maintainability of a writ petition is that the respondent is not State within the meaning of Article 12.<sup>165</sup>

The Supreme Court by an imaginative and innovative interpretation has given an expansive meaning to the term "other authority" and has held that it included corporations, government companies and even registered societies which functioned as mere surrogates of the government, even though in law they might have a separate and independent existence. The logic applied has been that the directive principles visualised a welfare state with increased and manifold functions and the State could perform these additional functions either departmentally or by creating independent entities and the government could not be allowed to cheat the people of their fundamental rights by merely transferring its functions to other bodies. These other bodies were merely agencies or instrumentalities of the government and as such they were subject

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164. AIR 1979 SC 1628.

165. S.P Sathé, *Constitutional Law - I (Fundamental Rights)*, ASIL (1992).

to the fundamental rights to the same extent and in the same manner as the government.<sup>166</sup>

In the recent past a number of decisions have come up at the Supreme Court as well as at the High Courts level which shall be thoroughly surveyed and analysed in the present research work. There are some of the articles which appeared in the law Journals and the reports dealing with the various aspects of the matter. The subject has been dealt with in the Constitutional law commentaries by the authors. However, there is a research gap in evolving the clear picture so as to make a constitutional lawyer to understand about the clear test of instrumentality and the enforcement of Fundamental Rights. There is need of research in this area. The present work will make an attempt to fill up this gap.

In the present study it may be noted that the expression “other authorities” under Article 12 of the Indian Constitution is not free from ambiguity. And because of this ambiguous nature of expression the investigation is needed to find out the clear picture of the said term. This investigation leads to the finding of new facts by searching and analysing the existing facts which may be collected from various books, first rate law journals, opinions of the academicians and judicial decisions delivered by the Supreme Court and High Courts.

A good number of decisions have come up since the last quarter of the 20th Century. The issue of interpretation of the expression “other authorities” specifically started from its interpretation by the Supreme Court in *Sukhdev Singh's*<sup>167</sup> case. This interpretation was further developed and institutionalized in *Ajay Hasia's*<sup>168</sup> case by evolving the test for determining the agency or instrumentality of the State. The issue however, has been subjected to further scrutiny by the Apex Court as to the evolution of the parameters of the agency

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166. Udai Raj Rai, *Reach of Fundamental Rights*, Vol. 36 JILI (1994) at 292.

167. AIR 1975 SC 1331.

168. AIR 1981 SC 487.

or instrumentality test. A significant question arose in the *MC Mehta*<sup>169</sup> case as to the inclusion of the private corporation into the expression other authorities within the definition of the State under Article 12. This question although not finally decided by the Supreme Court and left for future occasion to be determined, gave ample scope for academicians to infer a positive assertion. Another significant question in this respect is whether it is necessary to include any authority within the expression “other authorities” so as to make it amenable to the limitation of the Fundamental Rights. This was subject to further elaboration by the Supreme Court in *Unni Krishnan’s*<sup>170</sup> Case. Further in the matter of public interest litigation the Supreme Court has extensively interpreted the definition of the State for the enforcement of Fundamental Rights.

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169. AIR 1987 SC 1086.

170. AIR 1993 SC 2178.