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State as a Shadow: A Critical Analysis in Disparities in The Judgements Related to Article 12 after Pradeep Biswas

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ABSTRACT

This is about the perspectives, in relation to the judgements pronounced by the Supreme Court, post 2002 in the context of Art. 12 of the Consti and how the journey of defining the extent and limit of the "State" has affected the field for private players and making it easier for them to evade responsibility. The narrow approach adopted for defining the "State" in Pradeep Kumar Biswas case and the later followed contradicting judgements by High Courts affecting the field of for example, education & higher education in India. The impact of public-private partnership in education sector, the marketing of education as a commodity, State hiding in the shadows and being lethargic in holding private players accountable for violating fundamental rights has been also considered and observed.

Keywords: Art. 12, State, Pradeep Kumar Biswas, Govt. Education.

I. INTRODUCTION

"The essence of law lies in the spirit, not in its letter, for the letter is significant only as being the external manifestation of the intention that underlies it" – Salmond

Article 12² defines "State" for the purposes of Part III of the Constitution. As a general rule, a writ lies against the "State" as defined in Article 12 of the Constitution. "State" comprises of

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

With regard to (i) to (iii) there does not appear to be much trouble and the law is almost well

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² The said Article reads as under: In this part, unless the context otherwise requires, "the State" includes the Government and the Parliament of India and the Government and the Legislature of each of the States and all local or other authorities within the territory of India or under the control of the Government of India.

solid. However, the ambit and extent of the expression “other authorities” under Article 12 is vast, and the recent development in law shows that the said phrase has been interpreted more and more liberally to welcome within its bend more authorities than before to give protection to the aggrieved persons against the actions taken by those authorities.

As in the journey that is taken before 2002, art. 12 has taken big leaps FROM **Smt. Ujjam Bai v. State of Uttar Pradesh**³, wherein the Court stated that Art. 12 winds up the list of authorities falling within the definition by referring to “other authorities” within the territory of India which cannot, obviously be read as ejusdem generis with either the Government and the Legislatures or local authorities TO the case of **Rajasthan State Electricity Board v. Mohan Lal**⁴ wherein Hon’ble Supreme Court highlighted that the High Courts fell into an error in applying the principle of ejusdem generis⁵ when interpreting the expression “other authorities” in Article 12 of the Constitution, as they overlooked the basic principle of interpretation that, to invoke the application of ejusdem generis rule, there must be a distinct genus or category running through the bodies already named. The Court went further ahead to state that *it is not at all material that some of the powers conferred may be for the purpose of carrying on commercial activities. It was at the earliest established that it is immaterial to consider the profit motive to make an ‘other authority’ liable under the ambit of Art. 12.*

Under article 12, the term “instrumentality or agency” has not been defined though it depends upon incessant judicial interpretation by the courts. There are certain tests which need to be satisfied before being recognised as the instrument of the state. Moreover, the term ‘includes’ indicates that the definition is not exhaustive in nature. It is possible that the instrumentalities or agencies may not be a part of a government department, but when there is a violation of fundamental rights, they shall be construed as a state under the definition e.g., government companies and public undertakings⁶. Therefore there is no characterisation of the nature of the “authority” in this residuary clause and accordingly it must embrace every kind of authority set up under a statute for the purpose of administering laws enacted by the Parliament or by the State

II. CHANGES: THE ERA OF GLOBALISATION AFFECTING ART. 12, POST 2002

The question arises what happened that made the judiciary fall into faults? Answer lies in the

³ Smt. Ujjam Bai v. State of Uttar Pradesh AIR 1962 SC 1621.

⁴ Rajasthan State Electricity Board v. Mohan Lal AIR 1967 SC 1857.

⁵ the principle of Ejusdem Generis is where general words follow an enumeration of persons or things by particular and specific words. Not only these general words are construed but also held as applying only to persons or things of the same general kind as those specifically enumerated.

⁶ Mohd. HadiRaza v. State of Bihar, (1998) 5 SCC 91.

era of globalization that we live in. The concept of State has undergone drastic changes. Today State cannot be conceived anymore simply as a coercive machinery wielding the thunderbolt of authority⁷ rather after this it becomes necessary to grip the character of mystic power that the State wields. After passage of a decade, there was a silent political and economic demand that the theory of instrumentality needs new contents that serves the requirements of neo liberal global economic system which gave way for dodging obligations & duties towards the righteous citizens. The trend of evading responsibility was majorly brought into light by the decision of **Pradeep Kumar Biswas v. Indian Institute of Chemical Biology**⁸, The majority view expressed by **A.N. Ray, C.J.** that was emphasized here, “a public authority is a body which has public *or* statutory duties to perform and which performs those duties and carries out its transactions for the benefit of the public and not for private profit. Such an authority is not precluded from making a profit for the public benefit.”⁹ But still the judgement was read down to mean only – 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 Govt. Such control must be particular to the body in question and must be pervasive.⁹ Instead of using the garb of *public duties* the Court came up with narrow bases approach theory of FFA (functionally, financially and administratively) and the after effects of this could be felt on the later cases. There are serious doubts about the application and efficacy of the fundamental rights. The prime doubt is based on a fundamental premise that with the increasing role of private enterprise and the decreasing role of the State, the fundamental rights would be violated more by the private enterprises than by the State¹⁰.

Taking the cases of **Zee Telefilms Ltd. V. Union of India**¹¹, The Court recapitulated the guidelines laid down in *Pradeep Kumar Biswas* case for a body to be a State under Art. 12 and held that BCCI cannot be held to be a State for the purpose of Art. 12 herein, challenging the termination of the contract as arbitrary and thus, violative of Art. 14 of the Constitution. Also, contradiction between a. **Janet Jeyapaul v. SRM University**¹² and b. **Yogesh Rajput v. State of Rajasthan**¹³, in case a. it is notified as a “Deemed University” by the Central Government under Section 3 of the UGC Act and being a “Deemed University”, all the provisions of the UGC Act are made applicable to Respondent 1 and similarly in case b. section 3 of the UGC

7 Sukhdev Singh and Ors. V. Bhagatram Sardar Singh Raghuvanshi and Ors 1975 1 SCC 421.

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

9 Halsbury's Laws of England 3rd Edn., Vol. 30 para 1317 at p. 682. ⁹

Id. at 6.

10 MAHENDRA PAL SINGH, V.N. SHUKLA'S CONSTITUTION OF INDIA (Eastern Book Company 2020).

11 Zee Telefilms Ltd. v. Union of India (2005) 4 SCC 649.

12 Janet Jeyapaul v. SRM University (2015) 16 SCC 530

13 Yogesh Rajput v. State of Rajasthan 2012 SCC OnLine Raj 1748

Act made BITS declare as ‘deemed to be university’. But the decision stand completely opposite to each other in this regard where both discharge public functions of imparting education among the masses, in case a. it was considered to be under the ambit of State under Art. 12 but not a State under Art. 12 in case b. **In Kailashi Devi v. Branch Manager**,¹⁴ private financial institutions, carrying of business or commercial activity, may be *performing public duties*, but cannot be considered to be covered under the definition of “State” under Article 12 of the Constitution of India.

To the juristically conditioned mind that we possess, the revelations appear to be paradoxical. Yet, this has become more or less, in the present state of our nation, an existential question¹⁵ because it is clear that the State is contracting in its responsibility and leaving ample of space for private institutions to play the economic forces by market capitalization. As the question in *Janet Jeyapaul & Yogesh Rajput case* is of education. India which is experiencing an unprecedented crisis at all levels in the form of increased and unregulated commercialisation. There has been a shift in the opinions on education due to this, merely as a product, determined and guided by the market, and the market alone which can be seen due to contracting definition of Art. 12 in the latter period of 2002. In the case of the edu-industry, the consumers are voiceless children, and their parents an apprehensive lot who want to buy everything possible to make their children's future safe.

III. GOVERNMENT’S ARGUMENTS IN SUPPORT OF PRIVATE EDUCATION

The government does not have enough money to meet the increasing demand for higher education. This kind of active participation is creating different problems. It involves several compromises on core academic values, including distortions in the invaluable objective, becoming endlessly ridiculed with money and competition¹⁶. This problem become even more strenuous in case of higher education where a big chunk of middle class cannot even achieve quality education due to exorbitantly high fees and maintainability. In the case where we have received as a society chaotic judgement relating to the ambit for Art. 12 even more disturbing development pertains to the fact that the state is also gradually abdicating its responsibility towards higher education under the guise of private participation, public-private participation and private initiatives.¹⁷

14 *Kailashi Devi v. Branch Manager* 2020 SCC OnLine All 1415

15 Chanchal Kumar Singh, *APOCRYPHAL ‘STATE’: Fragments on Theoretical Foundations, Constitution, Law and Their Mythical Unification*, II Shimla Law Review, 41, 59 (2019).

16 Jandhyala B G Tilak, *Private Higher Education in India*, 49 Eco. and Pol. Weekly 32, 36-37 (2014), <https://www.jstor.org/stable/24480821>.

17 *Id.* at 16.

The new trend of public-private partnership in case of education has now become much more rampant.¹⁸ A more recent example comes in the form of the Model School scheme, launched by the Government of India, in November 2008, which had articulated clearly that of the 6,000 schools sanctioned, 2,500 would be built under PPP. Therefore, this becomes a major problem when the model of privatisation is offered for providing education at mass level because nobody can disagree that state schools, colleges and universities are struggling with major issues of inclusion and learning. The commercialisation of education can only exacerbate the challenge, taking it to a level from where recovery would be even more difficult, or, perhaps, irreversible.¹⁹ Partnerships with the private sector are not always in public interest. At times, these may act as an indirect mechanism to serve private business interest. While entering into such partnerships, the government must ensure that the right to education is respected, protected and fulfilled.¹⁹

A body performing a 'public function' aiming to achieve communal benefit for the public or a section of the public and is accepted by the public or that section of the public as having authority to do so must invariably be held liable because safeguarding education against the forces of commercialisation and preserving education as a public good are legal responsibilities of the government. It is also a moral responsibility²⁰. It cannot be highlighted enough the positive chain of events that education creates:

1. it helps in participating in social or economic affairs of the society,
2. creates employment opportunities,
3. strength and capacity to sustain and grow holistically.

Right to education is also a fundamental right upheld in the case of **Unnikrishnan JP vs State of Andhra Pradesh & Others**²¹ The effect of holding that right to education is implicit in the right to life is that the state cannot deprive the citizen of his right to education except in accordance with the procedure prescribed by law. Right to education occurs in as many as three Articles in Part IV viz., Articles 41, 45 and 46 shows the importance attached to it by the founding fathers. Even some of the Articles in Part III viz, Articles 29 and 30 speak of education.

IV. SOLUTION

In light of the grave situation highlighted above the judgement of **Kaushal Kishore v. State of**

18 Jyotsana Jha, *Education private limited India*, 42 India Int. Centre 39, 44 (2015), <https://www.jstor.org/stable/2631657>.¹⁹ *Id.* at 18

19 Kishore Singh, *Right to Education*, 42 India Int. Centre 119, 125 (2015), <https://www.jstor.org/stable/26316578>.
20 *Id.* at 20

21 Unnikrishnan JP vs State of Andhra Pradesh & Others 1993 AIR 2178

U.P²² where the Court held that “A fundamental right under Article 19/21 can be enforced even against persons other than the State or its instrumentalities” is a ray of hope which requires interference by the State where acts of a private actor may threaten the life or liberty of another individual. Failure to carry out the duties enjoined upon the State under statutory law to protect the rights of a citizen, could have the effect of depriving a citizen of his right to life and personal liberty.²³ Therefore, a constitutional remedy as such which stands apart making even private actors liable for violating the fundamental right to education under Art. 21 of the Consti. could be turning stone for making the education system strong, vibrant, accessible to all with no place for a profit-seeking private higher education in a democratic society that transform itself into a knowledge society. ²⁴ There is, no characterisation of the nature of the “authority” in this residuary clause and accordingly it must embrace every kind of authority set up under a statute for the purpose of administering laws enacted by the Parliament or by the State plus those bestowed with the duty to make decisions in order to implement those laws which the state has been obligated with. As there is nothing strange in the notion of the State acting through a corporation and making it an agency or instrumentality of the State.²⁵ All that is expected is some kind of responsibility, a duty or an obligation on the part of private players entering the arena of performing public functions. Even an entity though private in nature but performing public functions should be at par placed with public law remedy so that citizens are protected from arbitrary and unregulated actions.

22 Kaushal Kishore v. State of U.P 2023 SCC OnLine SC 6

23 *Id.* at 23.

24 *supra* note 16

25 *supra* note 5