EXAMINING THE TENSIONS BETWEEN THE DOCTRINE OF STATE ACTION AND INSTRUMENTALITY & AGENCY TESTS UNDERLYING ARTICLE 12

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Introduction

When a private corporation can be held responsible for public rights? This question lies at the fundamentals of constitutional jurisprudence. As the lines between public and private spheres continue to fade, judiciaries are being tasked with the increasing burden of determining what actions a corporation can commit that can be scrutinised constitutionally. To answer this question, one must examine multiple jurisdictions. Our country adopts an approach that develops the instrumentality, or agency test, under Article 12 of the Constitution. This test seeks to identify whether a private body functions effectively as a limb of the government. At the other end of the world, the United States makes use of the doctrine of state action, rooted in the Fourteenth Amendment. This approach examines the act committed by the private body and limits constitutional responsibility to cases where state involvement can be demonstrated. This essay conducts a comprehensive examination of both legal frameworks by studying their underlying philosophies, tracing their evolution and development through numerous precedents, before proceeding to talk about the practical consequences that follow.

I. India and the Instrumentality/Agency Test

Article 12 of the Constitution provides the definitional boundaries for the term "state", which reads:

> *In this part, unless the context otherwise requires, "the State" includes the Government and Parliament of India and the Government and the Legislature of under the control of the Government of India*.[1]

At first glance, the Constitution reveals that the term "*state*" encompasses a broader meaning

[1] The Constitution of India – Part III, Article 12.

than its ordinary usage. However, the inclusion of "*other authorities*" piques curiosity. Dr. B.R. Ambedkar opted for a definition that covers "*every authority which has got either the power to make laws or the power to have discretion vested in it*"; this included the most basic structures of law-making within its scope, from the central government to village panchayats.[2] Earlier jurisprudence, as established in the case of *University of Madras v. Shanta Bai*, articulates a concrete definition of the same: '*other authorities'* under Article 12 are those bodies that exercise similar governmental functions to the explicitly defined '*state*' entities, on application of *ejusdem generis* (of the same kind).[3] Article 12's scope is hence initially represented as being deliberately open-ended, ensuring that fundamental rights protections extend beyond traditional state entities that have been fossilised within the Constitution.[4] This lines up with the thoughts of the population at the time, who preferred a broader interpretation of Article 12 for three reasons: *firstly,* the number of actors against whom fundamental rights could be claimed would increase; *secondly*, a wider scope meant that individuals could pursue writ petitions under Articles 32[5] and 226[6], rather than pursue a long, drawn-out civil suit and deal with the hurdles that accompany it; *thirdly*, establishing an entity as "*state*" under Article 12 would pre-emptively solve a fundamental issue with the maintainability of writ petitions itself – without this, non-state actors could remove themselves from the scope of Articles 12 and 226 by simply claiming their actions belonged purely within the private realm.[7]

However, a definition based on the rule of *ejusdem generis* was later rejected by the Supreme Court in *Ujjam Bhai v. State of Uttar Pradesh*[8], wherein it was held that for the rule to apply, there must be a common genus or similarity running through the bodies in question – an element absent among the legislative and executive authorities listed within Article 12.[9] Subsequently, a more liberal interpretation of Article 12 was adopted in *Rajasthan Electricity Board v. Mohanlal*, where the court applied the sovereign powers test: '*state*' includes those statutory or constitutional bodies that possess the power to make and enforce law, or to issue

[2] Extracted from Dr. B.R. Ambedkar's speech in the Constituent Assembly; see Pradeep Kumar Biswas v. Indian Institute of Chemical Biology & Ors. (2002) 5 SCC 111
[3] University of Madras v. Shanta Bai [AIR 1954 MAD 67]
[4] "*The Oxford Handbook of the Indian Constitution",* edited by Sujit Choudhry, Madhav Khosla, Pratap Bhani Mehta, (Oxford University Press, 2015), 784.
[5] The Constitution of India – Part III, Article 32.
[6] The Constitution of India – Part VI, Article 226.
[7] "*The Oxford Handbook of the Indian Constitution",* edited by Sujit Choudhry, Madhav Khosla, Pratap Bhani Mehta, (Oxford University Press, 2015), 784-785.
[8] Smt. Ujjam Bhai v. State of Uttar Pradesh [1962 AIR 1621]; see also K.S. Ramamurthi Reddiar v. The Chief Commissioner [1963 AIR 1464]
[9] Jain, M.P. "*Indian Constitutional Law*", edited by Dr. Sanjay Jain, 9th Ed., (LexisNexis, 2024), 71.

binding directions, disobedience of which is punishable as an offence.[10] The popular instrumentality test, which is now considered as the precedent, found its conception in the case of *Sukhdev Singh v. Bhagatram Sardar*, wherein the state was defined as an abstract entity, unable to perform its functions without "*instrumentality or agency of natural or juridical persons*."[11] The inverse application of this test was also carried out by the same constitutional bench in *Sabhajith Tewari v. Union of India*: a body which is registered under a statute cannot be considered an instrument of the state if it does not perform state functions or is subject to the pervasive control (read: *guidance*) of the same.[12] Subsequently, the case of *R.D. Shetty v. International Airport Authority of India* marks the first comprehensive account by the Supreme Court to lay down factors by which an entity could be defined as '*state*' by virtue of instrumentality, those being financial assistance by the state and to what magnitude, the extent of control the state enjoys over the entity in management and policy matters, a monopoly status granted to the entity by the state and a resemblance of the entity's functions to public or governmental functions.[13]

Subsequently, this holding laid the foundation for examining whether a body could act as the agent of the government. Subsequently, this definition was enhanced in *Ajay Hasia v. Khalid Mujib Sehravardi*, wherein it was held that for a body to fall under the definition of "other authorities" of the state, it must be financially and functionally under the control of the government.[14] This condition is not limited to bodies created by statute but includes all companies, organisations, and corporations, after considering all relevant factors of the case, as held in *R.D. Shetty*.[15] Ajay Hasia famously laid down six primary conditions for determining whether a corporation is an instrument of the state:

i. Whether the entire share capital of the corporation is held by the state;

ii. Whether the entire or almost entire expenditure of the corporation is funded by the state;

[10] Rajasthan Electricity Board v. Mohan Lal [1967 AIR 1867]
[11] Sukhdev Singh v. Bhagatram Sardar Singh Raghuvanshi [AIR 1975 SC 1331]; see also Ramana Dayaram Shetty v. The International Airport Authority of India & Ors. [1979 AIR 1628]
[12] Sabhatji Tewari v. Union of India [1975 AIR 1329]
[13] Ramana Dayaram Shetty v. The International Airport Authority of India & Ors. [1979 AIR 1628]
[14] Ajay Hasia v. Khalid Mujib Sehravardi [1981 AIR 487]
[15] Ramana Dayaram Shetty v. The International Airport Authority of India & Ors. [1979 AIR 1628]

iii. Whether the corporation enjoys a monopoly status that has been conferred or is being protected by the state;

iv. Whether the state holds deep and pervasive control over the corporation;

v. Whether the functions of the corporation are of public importance and resemble governmental functions; and

vi. Whether a department of the government has been transferred to the corporation.

A satisfactory answer would be found after examining the cumulative findings of these six conditions, or at least a combination of them.[16] Twenty-four years later, the case of *Virendra Kumar Shrivatsava v. U.P. Rajya Karmachari Kalyan Nigam* expanded upon the test further, by now requiring an in-depth examination of whether the state has significant administrative, financial and functional control of the concerned body.[17]

It is important to note that each time a test concerning the definition of state is formulated, the nexus between the government and the body in question is considered, and each subsequent test is an advancement of the same. Even though the Constitution imposes both a positive duty on the State through the directive principles of state policy in Part IV and a negative duty in preserving the sanctity of the fundamental rights in Part III, the judiciary has consistently interpreted Article 12 to mean that in the absence of any explicit definition, fundamental rights could only be enforced against the state and its agents, and not private entities.[18]

II. The United States and the Doctrine of State Action.

An alternate approach with regard to the interpretation of having fundamental rights against private entities is adopted in the United States. The doctrine of state action adopts a far more liberal view than the tests of instrumentality and agency as followed in India.[19] It insists on a strong separation of the private and public realm and relies on fundamental rights to prevent

[16] Ajay Hasia v. Khalid Mujib Sehravardi [1981 AIR 487]
[17] Virendra Kumar Shrivatsava v. U.P. Rajya Karmachari Kalyan Nigam & Anr. [AIR 2005 SC 411]
[18] Shukla, V.N. "*Constitution of India*", 4th Ed., (Eastern Book Company, 1964)
[19] Kay, Richard S. "*The State Action Doctrine, the Public/Private Distinction, and the Independence of Constitutional Law*", Constitutional Commentary, (University of Minnesota Law School, 1993), 330.

excessive coercion of the state and federal law into the private sphere.[20] The doctrine is constructed atop a theory of rights that operates on the belief that each individual has full autonomy and does not need recognition from the state to exist.[21] A popular argument for this doctrine is that it prevents unnecessary litigation for every right infringed by a private party, and in its absence would open floodgates that would surely overwhelm the judiciary. This argument is feverently rejected in the case of Zee Telefilms Ltd. v. Union of India, which holds that the judiciary "*cannot refuse to answer a question only because there may be some repercussions.*"[22]

Reverting back, the American understanding of the state revolves around the Fourteenth Amendment, and was first discussed in the case of *Ex Parte Virgina*, wherein it was defined that the state acts through its legislative, executive and judicial authorities, and whoever by virtue of his position under the State "*violates the constitutional inhibition*" acts for and in the name of the State.[23] This departs from the Indian understanding, where the judiciary is generally excluded from the ambit of the state as long as it is acting judicially, and not exercising administrative functions.[24] In India, judicial orders, even if inherently unjust, cannot be viewed as a violation of fundamental rights.[25] The American interpretation, however, posits the judiciary as a direct arm of the state. A failure of a judge to adhere to due process can amount to a violation of constitutional rights, therefore placing the judiciary under the umbrella of '*state action*.' Subsequently, an understanding of the doctrine of state action based on a principal-agent relationship between the state and its official was utilised in the case of *Iowa-Des Moines National Bank v. Benett*, wherein it was held that if an officer of the government, while acting in their official capacity violates a private right of an individual, it is considered a violation against the Constitution even if the specific violation was committed within the scope of his duties if he disregards the law while doing so.[26] This was further upheld in United States v. Classic, where the ruling judge stated, "*Misuse of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law, is*

[20] Lugar v. Edmondson Oil Co. [1982] 457 U.S. 922
[21] Hutchinson, Allan C. & Petter, Andrew. "*Private Rights/Public Wrongs: The Liberal Lie of the Charte*r" in the University of Toronto law Journal, No. 3, Vol. 38, (University of Toronto, 1988)
[22] Zee Telefilms Ltd. v. Union of India [2005] 4 SCC 649
[23] Ex Parte Virginia [1879] 100 U.S. 339
[24] Jain, M.P. "*Indian Constitutional Law*", edited by Dr. Sanjay Jain, 9th Ed., (LexisNexis, 2024), 76.
[25] Naresh Shridhar Mirajkar v. State of Maharashtra [AIR 1967 SC 1]
[26] Iowa-Des Moines National Banks v. Benett [1931] 284 U.S. 289

action taken 'under colour of' state law."[27]

With regard to whether private entities or actions could fall under the ambit of 'state action', American courts have developed an understanding supplemented and enriched by multiple factors, towards what we understand as the modern doctrine of state action. Jurisprudence in this field started with an examination of whether the private entity in question wields public power or receives certain benefits from the state, leaving out purely private activities free from being hit by constitutional protections. However, *Munn v. Illinois* marked a fundamental shift in this understanding, as it held that state governments could regulate private enterprises if it involved public interest.[28] The landmark case of *Marsh v. Alabama* developed the public function requirement further, wherein the "*public function*" was utilised. The case itself held that the actions of a private company town in forbidding the distribution of religious material are unconstitutional, as the company here was performing a public function, in running a town.[29] An alternate line of reasoning arose post the 1940s, where courts began to examine whether the state encouraged or aided private acts resulting in injury.[30] The most famous example of this can be seen in *Burton v. Wilmington Parking Authority*, where the state's failure to prohibit a private entity from leasing out land in a public space while denying access to black patrons resulted in a constitutional violation.[31] This displays a need to examine the relationship between the state and the private actor itself. Similarly, in the case of *Evans v. Newton*, a private trustee operating a public park that denied entry to black individuals was considered to be state or 'municipal' action that is answerable to the Constitution.[32] The doctrine was enriched further in *Norwood v. Harrison*, where the state of Mississippi distributed free textbooks to educational institutions, including those that practised racial segregation.[33] This resulted in a holding that private actions could become constitutionally accountable by virtue of being "*entangled*"[34] or "*entwined*"[35] with the state –this later developed into the '*nexus doctrine'*.[36] Here, it was held that the state was participating in discriminatory conduct and could not wash its hands of

[27] United States v. Classic (1941) 313 U.S. 299
[28] Munn v. Illinois (1876) 94 U.S. 113
[29] Marsh v. Alabama (1946) 326 U.S. 501
[30] Ramachandran, Gowri. "*Private Institutions, Social Responsibility, and the State Action Doctrine*" in the Texas Law Review, Vol. 96, (Texas Law Review, 2018)
[31] Burton v. Wilmington Parking Authority (1961) 365 U.S. 715
[32] Evans v. Newton (1966) 382 U.S. 296
[33] Norwood v. Harrison (1973) 413 U.S. 455
[34] Shelly v. Kraemer (1948) 334 U.S. 1; see also Burton v. Wilmington Parking Authority (1961) 365 U.S. 715
[35] Brentwood Academy v. Tennessee Secondary School Athletic Association (2003) 531 U.S. 288
[36] Ramachandran, Gowri. "*Private Institutions, Social Responsibility, and the State Action Doctrine*" in the Texas Law Review, Vol. 96, (Texas Law Review, 2018)

constitutional responsibility.[37] These cases demonstrate that when a private entity exercises powers traditionally attributable to the state, its actions, as a result, could naturally be attributed to the State itself.

However, scholars have critiqued the doctrine of state action for only examining this ground in cases where the government "*hides behind private surrogates whom it controls.*"[38] The bottom line is that the reach of the doctrine of state action is connected to certain fundamental provisions of the U.S. Constitution, that being the Equal Protection and Due Process clauses of the Fourteenth Amendment.[39] A violation of these clauses can only be claimed against a private entity if the injuries suffered could be connected to the state.[40] American courts have been quite persistent in protecting the state from being attributed to injuries caused by private entities, as multiple cases show that the Constitution's provisions have been interpreted as not imposing positive duties on the state.[41]

III. Practical Consequences and Concluding Thoughts

A brief examination of both approaches portrays their shared goal: to understand when actions by non-governmental or private bodies can be held constitutionally accountable. Indian jurisprudence and precedents reflect a firm commitment on the part of the judiciary that any entity that effectively operates on behalf of the state cannot be absolved of the scrutiny of Part III of the Constitution. As such, the Indian approach is primarily functional – to strip and examine the private entity's constitution entirely in order to examine who controls its functions, funding, finances and constitution. The result helps establish an incredibly clear nexus between the state and private body, one that is refutable on very few grounds. The emphasis, however, lies on the link between the state and the body, and not necessarily on the nature of the act committed. The American approach, by contrast, is much more transactional in nature. It chooses to give less attention to the position or status of the private body, but rather focuses on whether the specific act committed is attributable to the state. As such, multiple sub-tests have

[37] ibid
[38] Metzger, Gillian. "*Privatization as Delegation*" in the Columbia Law Review, Vol. 106, No. 6, (Columbia Law Review Association, 2003)
[39] Fourteenth Amendment to the United States Constitution
[40] Kay, Richard S. "*The State Action Doctrine, the Public/Private Distinction, and the Independence of Constitutional Law*", Constitutional Commentary, (University of Minnesota Law School, 1993), 330.
[41] Howard, David. M. "*Rethinking State Inaction: An In-Depth Look at the State Action Doctrine in State and Lower Federal Courts*" in the Connecticut Public Interest Law Journal, Vol. 16, (University of Connecticut, 2017)

been employed to definitively answer this question; tests that explore the nexus between the act committed and the involvement of the state in facilitating it.

The most stark difference can be observed by comparing two landmark cases of each jurisdiction – *Ajay Hasia* and *Burton*. In the former, it was held that a private body is included within the ambit of "state" as per Article 12 by employing the six-fold test that examined the functional operations of the body, and subsequently connecting the state to it. The latter, however, criticised the failure of the state itself to prevent constitutional violations by private actors engaged in public or governmental functions, therefore seeking state accountability through the character of the act committed and the involvement of the state within it. This, however, has practical consequences. The Indian approach seems more strict in this regard, as it allows systematic relationships with the state accountable to fundamental rights, making it easier to subject private corporations to the Constitution, whereas the American doctrine of state action seems more flexible, operating on an enhanced understanding of individual autonomy that permits private actors who resemble the state to operate outside the reach of the constitution, unless it is indefinitely proved that the state had some sort of decisive influence in the carrying out the impugned act. In terms of remedies, the Indian approach allows the same based on a simple binary conclusion – either the entity is 'state' or it is not. This may solve issues of efficiency and confusion, but it can be said to be rigid in definition. On the other hand, the American approach and its insistence on fact-specificity permit more interpretive decisions, enabling its courts to examine each case on its merits.

In conclusion, while the Indian and American frameworks share a common concern, one that tries to limit the state in being able to delegate its constitutional responsibilities, each of their respective thresholds is shaped by significantly different legal cultures. These fundamental differences are not merely doctrinal – they reflect deep-rooted divergences in the way each country looks at constitutional accountability. India and its instrumentality/agency tests are carried out with the belief that the state cannot absolve itself of its obligation by pushing them down to private bodies and that constitutional rights must be enforced wherever public power is wielded. The U.S., however, exercises caution in extending constitutional norms into the private sphere. Each country reflects its rich political philosophy in its approach: India's view of the state is rooted in a vision of social justice and state responsibility, as the makers of our Constitution intended, while the American experience prefers a narrower view of the state premised on the primacy of individual liberty and non-interference. As courts in both

jurisdictions continue to develop these tests, the tensions between the public/private divide will only arise more, and both systems must navigate these fault lines cautiously.