

# State (Article12)/asr

- Fundamental rights available against State

Under that concept unlike the other legal rights, which are the creation of the State given to individuals against one another, the fundamental rights are claimed against the State. Therefore, whether a constitution says it or not, it is generally assumed that the fundamental rights given in it are available against the State i.e. against the actions of the State and its officials. Fundamental Rights provided by Articles 15(2),17, 23(1) & 24 are available against private individuals.

# Definition of State (Article 12)

- Article 12 defines the term 'State' as used in different Articles of Part III of the Constitution. It says that unless the context otherwise requires the term 'State' includes the following :-
  - a) The Government and Parliament of India, *i.e.*, Executive and Legislature of the Union.
  - b) The Government and the Legislature of each State, *i.e.*, Executive and Legislature of States.
  - c) All local or **other authorities within the territory of India.**
  - d) All local and **other authorities under the control of the Government of India.**

# Definition of State (Article 12)

- ***Local Authorities.***- 'Local authorities' as defined in Section 3 (31) of the General Clauses Act refers to authorities like ***Municipalities, District Boards, Panchayats, Improvement Trusts and Mining Settlement Boards.***

## ***OTHER AUTHORITIES***

- *In* Article 12 the expression 'other authorities' is used after mentioning a few of them, such as, the Government, Parliament of India, the Government and Legislature of each of the States and all local authorities.

**Once a body is characterized as an 'authority' under Art. 12, several significant incidents invariably follow, viz;**

1. The body becomes subject to the discipline of the Fundamental Rights which means that its actions and decisions can be challenged with reference to the Fundamental Rights.
2. The body also becomes subject to the discipline of Administrative Law.
3. The body becomes subject to the writ jurisdiction of the Supreme Court under Art. 32 and that of the High Courts under Art. 226.

# Body/Organization/Establishment

- Engaged in performing governmental or sovereign functions.
  - Created by Constitution or Statute
  - Agency or instrumentality(Includes a Government Company or a Society registered under Societies Registration Act).
1. If it is supported financially mainly by Govnmt, or
  2. If there is deep and pervasive control of Government or
  3. If functions are of public importance (closely related to governmental functions)

# *University of Madras v. Santa Bai(1954)*

- In *University of Madras v. Santa Bai*, the Madras High Court held that 'other authorities' could only indicate **authorities of a like nature, i.e. ejusdem generis.** So construed, it could **only mean authorities exercising governmental or sovereign functions.** **It cannot include University .**

# Ejusdem generis

- List is=Onion, tomato, potato, brinjal, . If you need to predict what comes next. You can say that next should a vegetable. (common genus running through these items)
- List is=Onion, tomato, table, elephant. . If you need to predict what comes next. You can say that next need not be a vegetable

## *Ujjammabai v. State of U'P(1962)*

- But in *Ujjammabai v. State of U'P*, the Court rejected this restrictive interpretation of the expression 'other authorities' given by the Madras High Court and held that the ejusdem generis rule could not be resorted to in interpreting this expression. In Article 12 the bodies specifically named are the Government of the Union and the States, the Legislature of the Union and the States and local authorities. There is no common genus ( a class of things which have common characteristics) running through these named bodies nor can these bodies so placed in one single category on any rational basis.



# *Electricity Board, Rajasthan v. Mohan Lal (1967)*

- In *Electricity Board, Rajasthan v. Mohan Lal*, the Supreme Court held that the expression 'other authorities' is wide enough to include all authorities created by the Constitution or statute on whom powers are conferred by law. It is not necessary that the statutory authority should be engaged in performing governmental or sovereign function. On this interpretation the expression 'other authorities' will include *Rajasthan Electricity Board*.

# *Electricity Board, Rajasthan v. Mohan Lal (1967)*

- *In effect, the Rajasthan Electricity Board's decision" has overruled the decision of the Madras High Court in Santa Bai's case,* holding a University not to be "the State".  
And finally, the *Patna High Court, following the decision of the Supreme Court, has held that the Patna University is "a State".*

# Sukhdev Singh v. Bhagatram(1975)

- In Sukhdev Singh v. Bhagatram, *the Supreme Court, following the test laid down in Electricity Board Rajasthan's case by 4:1 majority, (Alagiriswamy, J. dissenting) held that Oil and Natural Gas Commission, Life Insurance Corporation and Industrial Finance Corporation, are authorities within the meaning of Article 12 of the Constitution and therefore, they are 'State'.*
- *The effect of these decisions was that the 'authorities' not created by the Constitution or by a statute could not be a 'State' within the meaning of Article 12 of the Constitution.*

# Airport Authority's case(1979)

- *In this case the Court has held that if a body is an agency or instrumentality of government it may be an 'authority' within the meaning of Article 12* whether it is a statutory corporation, a government company or even a registered society. Accordingly, it was held that the *International Airport Authority which had been created by an Act of Parliament was the "State" within the meaning of Article 12. The Central Government had power to appoint the Chairman and other members of the Airport Authority. It has power to terminate the appointment of any member from the Board. The capital needed by it was provided only by the Central Government.*

# Airport Authority's case(1979)

- **But what is the test whether a body is an agency or instrumentality?** The Court laid down the following tests for determining whether a body is an agency or instrumentality of the Government :-
- **(1) financial resources of the State is the chief funding source, i.e., if the entire share capital of the corporation is held by Government, (2) existence of deep and pervasive State control, (3) functional character being governmental in essence, i.e., if the functions of the corporation are of public importance and closely related to governmental functions, (4) if a department of Government is transferred to a corporation, (5) if the corporation, enjoys monopoly status which is State conferred or State protected.**

# *Ajay Hasia v. Khalid Mujib(1981)*

- In *Ajay Hasia v. Khalid Mujib*, it has been held that a **Society registered under the J&K Societies Registration Act, 1898, is an agency or "instrumentality of the State" and hence a 'State' within the meaning of Article 12.** Its composition is determined by the representatives of the Government. The expenses of society are entirely provided by the Central Government. The rules made by the society require prior approval of the State and Central Governments. The society is to comply with all directions of the Government. It is completely controlled by the Government. The Government has power to appoint and remove the members of the society. Thus, the State and the Central Government have full control of the working of the society.

# *Ajay Hasia v. Khalid Mujib(1981)*

- In view of these elements the society is an instrumentality of the State or the Central Government and it is therefore an "authority" within the meaning of Article 12. **The test is not as to how the juristic person is created but why it has been brought into existence.** A corporation may be statutory corporation created by a statute or a government company formed under the Companies Act, 1956, or **a Society registered under the Societies Registration Act, 1860, or any other similar statute. It would be an 'authority' within the meaning of Article 12 if it is an instrumentality or agency of the Government and that would have to be decided on a proper assessment of the case in the light of the relevant factors**(Regional engineering College,Srinagar)

# *Manmohan Singh Jaitla v. Commissioner, Union Territory of Chandigarh(1984)*

- In *Manmohan Singh Jaitla v. Commissioner, Union Territory of Chandigarh*, the Court following *Ajai Hasia's* case held that an *aided school which received a Government grant of 90 per cent was an "authority" within the meaning of Article 12.* Similarly, it has been held that the *Food Corporation of India, the Steel Authority of India, Bihar State Electricity Board, Indian Oil Corporation, are the 'State' within the meaning of 'other authorities'* under Article 12 as they are instrumentalities of the State.



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# *Tekraj Vasandi v. Union of India(1988)*

- In *Tekraj Vasandi v. Union of India*, it has been held that the "Institute of Constitutional and Parliamentary Studies", a society registered under the Societies Registration Act, 1860, is *not a State within the meaning of Article 12*. The Institute of Constitutional and Parliamentary Studies *is neither an agency nor an instrumentality of the State. It is a voluntary organization. The object of the society is not related to government business. In the functioning of the society, the Government does not have deep and pervasive control.*

# *Chandra Mohan Khanna v. NCERT(1992)*

- Following *Tekraj Vasandi v. Union of India* the Court in *Chandra Mohan Khanna v. NCERT*, has held that **National Council of Educational Research and Training, is not a 'State' within the meaning of Article 12 of the Constitution.** It is a society registered under the Societies Registration Act. **The object of the NCERT is to assist and advise the Ministry of Education and Social Welfare in the implementation of the governmental policies and major programmes in the field of education particularly school education. These activities are not wholly related to governmental functions. The governmental control is confined only to proper utilization of the grant. It is an autonomous body. Article 12 should not be stretched so as to bring in every autonomous body which has some nexus with the government within the sweep of the expression, 'State'.** In the modern concept of welfare State, independent institution, corporation and agency are generally subject to State control.

## *G. Bassi Reddy v. International Crops Research Institute (2003)*

- In *G. Bassi Reddy v. International Crops Research Inst*, it has been held that the International Crop Research Institute is **an international organization and has been set up as non profit research and training centre is not a 'State'** within the meaning of Article 12 of the Constitution. Consequently, no writ petition can be allowed by its employees challenging their removal from service as being violative of Articles 14 and 16 of the Constitution. **It is not set up by the Government and gives service to a large number of countries voluntarily. It is not controlled by nor is accountable to the Government.**

# *M.C. Mehta v. Union of India(1987)*

- In *M.C. Mehta v. Union of India*, **the important question which was raised before the Court was whether a private corporation fell within the ambit of Article 12.** Although the question whether a private corporation fell within the ambit of Article 12 was not finally decided by the Court, but it stressed the need to do so in future.

# Unaided minority School

- *Unaided minority schools over which the Government has no administrative control due to their authority under Article 30 (1) of the Constitution are not "State" within the meaning of Article 12 of the Constitution*  
(Satimbla Sharma V. St. Paul Senior Secondary school[2011])

# BCCI

- BCCI is not “State” under Article 12.- Reasons
- The BCCI is not created by a statute.
- No part of the share capital of the BCCI is held by the government.
- Practically no financial assistance is given by the government to meet the whole or entire expenditure of the Board.
- The BCCI’s monopoly in field of cricket is not state-conferred or state-protected.
- There is no deep and pervasive state control. The control if any is only regulatory in nature.

# BCCI(The Board of Control for cricket in India

- BCCI, the world's richest cricket body, operates as a private entity under the TN Societies registration Act.
- The Law commission panel unanimously concluded that given BCCI's monopoly over cricket, for years in the form of tax exemptions and allotment of land must be classified as a public body and brought under the RTI Act



# Is Judiciary included in the word "State"?

- In America it is well-settled that the judiciary is within the prohibition of the 14th Amendment. The judiciary, ***it is said***, though not expressly mentioned in Article 12 it should be included within the expression 'other authorities' since courts are set up by statute and exercise power conferred by law.
- ***Judiciary cannot be a State under Article 12.***

***Note:Only when they deal with their employees or act in other matters purely in administrative capacity, the courts may fall within the definition of the State for attracting writ jurisdiction against their administrative actions only***

# Laws inconsistent with Fundamental Rights (Article 13)

- Article 13 (1) declares that all laws in force in the territory of India immediately before the commencement of this Constitution shall be void to the extent to which they are inconsistent with the provisions of Part III of the Constitution. Clause (2) of this article provides that the State shall not make any law which takes away or abridges the fundamental rights conferred by Part III of the Constitution; and any law made in contravention of fundamental rights shall, to the extent of contravention, be void. Clause (3) of this article gives the term 'law' a very broad connotation which includes any ordinance, order, by-law, rule, regulation, notification, custom or usage having the force of law.

# Article 13 Clause (2)

**Article 13 Clause (2) provides that no law can annul or abridge Fundamental Rights. Therefore, cannot a Parliamentary amendment annul or abridge Fundamental Rights?**

**In Golak Nath v State of Punjab(1971), a eleven judge bench of the Supreme Court held that Parliamentary amendment was law for the purposes of article 13(2), therefore cannot annul or abridge fundamental rights.**

**However ,in Keshavananda Bharti's case, (1973) a thirteen judge bench of the Supreme Court held that Parliamentary amendment was not law for the purposes of article 13(2), therefore can annul or abridge fundamental rights**

# Power of Judicial Review

- *Judicial Review is the interposition of judicial restraint on the legislative as well as the executive organs of the Government. The concept has the origin in the theory of limited Government and in the theory of two laws-an ordinary and supreme (i.e., the Constitution).* From the very assumption that there is a supreme law which constitutes the foundation and source of other legislative authorities in the body polity, it proceeds that *any act of the ordinary law-making bodies which contravenes the provisions of the supreme law* must be void and there must be *some one who is to possess the power or authority to pronounce such legislative acts void.*

# *Marbury v. Madison*

- The doctrine of judicial review was for the first time propounded by the Supreme Court of America. **Originally, the United States Constitution did not contain an express provision for judicial review. The power of judicial review was, however, assumed by the Supreme Court of America in the historic case of Marbury v. Madison.**

# *Marbury v. Madison (1803)*

- The Federalists had lost the election of 1800, but before leaving the office they had succeeded in creating several new judicial posts. Among these were 42 justices of peace, to which the retiring Federalists President John Adams appointed forty-two persons. ***The appointment of commissions were confirmed by the Senate and they were signed and sealed, but Adam's Secretary of State, John Marshall, failed to deliver certain of them.*** When the new President, Thomas Jefferson, assumed office, he instructed his Secretary of State, *James Madison* not to deliver ***seventeen of these commissions including one for William Marbury.*** Marbury, filed a petition in the Supreme Court for the issue of a writ of *mandamus* to Secretary *Madison* ordering him to deliver the commissions

# *Marbury v. Madison*

- Marbury relied on Section 31 of the Judiciary Act of 1789 which provided: "The Supreme Court shall have the power to issue..... writs of *mandamus* in cases warranted by the principles and usages of law ..... to persons holding office, under the authority of the United States". **The Court, speaking through Marshall, who had now become Chief Justice**, held that Section 31 of the Judiciary Act was repugnant to Article III, Section 2 of the Constitution inasmuch as the **Constitution itself limited the Supreme Court's original jurisdiction to cases" affecting ambassadors, other public ministers and consuls, and those to which a State is party"**. Since *Marbury* fell in none of these categories the court had no jurisdiction in his case.

# JR in a more solid footing in India

- In the Indian Constitution *there is an express provision for judicial review*, and in this sense it is on a more solid footing than it is in America.
- But even *in the absence of the provision for judicial review, the courts would have been able to invalidate a law which contravened any constitutional provision, for such power of judicial review follows from the very nature of constitutional law.*



# Pre-Constitution Laws

- According to clause (1) of Article 13 all pre-Constitution or existing laws, *i.e.*, laws which were in force immediately before the commencement of the Constitution shall be void to the extent to which they are inconsistent with fundamental rights from the date of the commencement of the Constitution.
- **Article 13 not retrospective in effect.**- Article 13 (1) is prospective in nature. ***All pre-Constitution laws inconsistent with Fundamental Rights will become void only after the commencement of the Constitution. They are not void ab initio. Such inconsistent law is not wiped out so far as the past Acts are concerned.***

# *Keshava Madhav Menon v. State of Bombay (1951).*

- In this case, a prosecution (proceeding) was started against the petitioner under the Press (Emergency Powers) Act, 1931 in respect of a pamphlet published in 1949. The present Constitution came into force during the pendency of the proceeding in the Court. **The appellant contended that the Act was inconsistent with the fundamental rights conferred by Article 19 (1)(a) of the Constitution hence void, and the proceeding against him could not be continued.** The Supreme Court held that Article 13 (1), could not apply to his case as **the offence was committed before the present Constitution came into force and therefore, the proceedings started against him in 1949 were not affected.**

# Doctrine of Severability

- When *a part of the statute is declared unconstitutional then a question arises whether the whole of the statute is to be declared void or only that part which is unconstitutional should be declared as such.* To resolve this problem, the Supreme Court has devised the doctrine of *severability or separability. This doctrine means that if an offending provision can be separated from that which is constitutional* then only that part which is offending is to be declared as void and not the entire statute.

# *Kihota Hollohan v. Zachithu(1993)*

- In *Kihota Hollohan v. Zachithu*, it has been held that **Section 10 of the Tenth Schedule minus para 7 remains valid and constitutional.** Para 7 which has been declared unconstitutional is severable from the main provisions of the Tenth Schedule. The remaining provisions of the Tenth Schedule **stand independent of Para 7 and are complete in themselves and workable.** **Para 7 of the Tenth Schedule provided that the Speaker's decision regarding the disqualification shall be final and no court could examine its validity.**

# EXCEPTION

- This is, however, subject to one exception. **If the valid portion is so closely mixed up with invalid portion that it cannot be separated without leaving an incomplete or more or less mingled remainder, then the courts will hold the entire Act, void.** The primary test is whether what remains is so inextricably mixed with the part declared invalid that **what remains cannot survive independently.**

# Doctrine of Eclipse

- The doctrine of eclipse is based on the principle that **a law which violates Fundamental Rights is not nullity or void ab initio but becomes only unenforceable, i.e., remains in a moribund condition.** "It is over-shadowed by the fundamental rights and **remains dormant; but it is not dead. Such laws are not wiped out entirely from the statute book. They exist for all past transactions.** and for the enforcement of rights acquired and liabilities incurred before the present Constitution came into force and for **determination of right of persons who have not been given fundamental rights by the Constitution, e.g., non-citizens.**

# REVIVAL

- Can such a law which becomes unenforceable after the Constitution came into force be again revived and made effective by an amendment in the Constitution?
- It was to solve this problem that the Supreme Court formulated the doctrine of eclipse in *Bhikaji v. State of M.P.*

# *Bhikaji v. State of M.P (1955)*

- In that case provision of C.P. and Berar Motor Vehicles (Amendment) Act, 1947 authorized the State Government to monopolise the entire motor transport business in the Province to the exclusion of motor transport operators. **This provision, though valid when enacted, became void on the coming into force of the Constitution in 1950 as they violated Article 19 (1)(g) of the Constitution. However, in 1951, Clause (6) of Article 19 was amended by the Constitution (1st Amendment) Act, so as to authorise the Government to monopolise any business.** The Supreme Court held that 'the effect of the Amendment was to remove the shadow and to make the impugned Act free from all blemish or infirmity'. **As soon as the eclipse is removed the law begins to operate from the date of such removal**



# *Does the doctrine of eclipse apply to a post-constitutional Law*

## State of Gujarat V. Ambica Mills(1974)

- In *State of Gujarat V. Ambica Mills*, the Supreme Court modified its view as expressed in *Deep Chand* case and held that **a post- Constitution law which is inconsistent with fundamental rights is not nullity or non- existent in all cases and for all purposes.** The doctrine of absolute nullity is not a universal rule and there are many exceptions to it. A post- Constitution law which takes away or abridges the right conferred by Article 19 **will be operative as regards to non- citizens because fundamental rights are not available to non-citizens.**

# Doctrine of Waiver

- The question of waiver directly arose in *Bashesher Nath v. Income Tax-Commissioner (1959)*. The Petitioner whose case was referred to the Income-tax Investigation Commissioner under Section 5 (1) of the Act was found to have concealed large amount of income. He, thereupon, agreed at a settlement in 1954 to pay Rs. 3 lakhs in monthly installments by way of arrears of tax and penalty. In 1955, the Supreme Court in *Muthiah v. I. T. Commissioner*, held that Section 5 (1) of the Taxation of Income (Investigation Commission) Act was *ultra vires* of Article 14.

# *Bashesher Nath v. Income Tax- Commissioner (1959).*

- The petitioner then challenged the settlement between him and the Income Tax Investigation Commission. **The respondent contended that even if Section 5 (1) was invalid, the petitioner by entering into an agreement to pay the tax had waived his fundamental right guaranteed under Article 14.**
- The majority expressed the view that the doctrine of waiver as formulated by some American Judges interpreting the American Constitution cannot be applied in interpreting the Indian Constitution.