IN THE FAST CHANGING ECONOMIES, "PRIVATE AUTHORITIES DISCHARGING PUBLIC FUNCTIONS" – AN ANALYSIS OF "STATE" IN PART III OF THE CONSTITUTION OF INDIA

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Abstract *A State, which exists via the conduit of public authority and opinion, originating from the tradition of the social contract theorists and the authors of the Federalist Papers, i.e. the founding father of the United States of America, can be posited as being burdened with the intrinsic duty of ensuring the upholding of the constitutional guarantee of fundamental rights. In India, those rights are specifically enumerated under Part III of the Constitution of India casting a duty on the State, (positive or negative, as the case maybe) in order to preserve and protect these rights relative to the citizens of the country. An integral aspect of Part III rights in India (in the past primarily) was that they were primarily enforceable against violative actions committed by the State and its agents and not against private individuals, who were primarily exempt from liability. As a result of the same, with the rise in the rate of globalization and, with it, privatization in the modern economic market, several instances of Part III rights violations were reported to the Supreme Court of India, thereby requiring an analysis and definition of "State" under Article 12 of the Constitution.*

A key aspect in determining whether an entity before the court of law comes under the definition of "State" under Article 12 involves an examination of the nature of its functioning as falling within the tests prescribed by the doctrine of public function, and if said test is insufficient to allow for the ascription of statehood, then the question of liability dependent on the same. This paper, thus, seeks to analyze the nature of primary and secondary institutions, the difference between State and religion, (in order to display the importance of the public function doctrine in the fundamentally absurd notion of "State") the rising growth of capitalism and privatization in the 21st century, the position of the public function doctrine in the United States of America, contrast of the same with the Indian position, and finally a set of recommendations regarding the impact of the same on the definitional exposition on state.

1. INTRODUCTION

A hypothetical construction of "State", and its functioning within the realm of behavioural regulation in a construction involving a conspicuous absence of a tendency to gravitate toward a "civil society", would result in quite the absurd creation. Religion has borne a marked influence on the creation of a civil society, especially following the postcedent specificities:

- A centre of control is often sought to be established which, in the former one, can observe a centralization of power around the notion of the divine, but vesting actual executive authority within the religious organization is considered to represent the guiding principles of the divine under question. In the latter, a similar practice is echoed when power is centralized around principles or a grundnorm, and actual executive authority is grounded in individuals charged with the discharge of their functions in a constitutionally valid manner.
- One of the primary goals that are shared by both the institutions under examination happens to be the idea of social regulation. Both religion and the State seek to achieve the same end and that can be stipulated as the framing of a regulatory set of rules and mechanisms that allow for smooth interaction to take place between individuals (under state supervision, directly or indirectly) with the view of enriching the State and, in the process, being expedient to their own enrichment.
- Another similarity rests in the method of enforcement of certain norms. Both institutions employ a form of fear that is instilled within the populace through sanction, in order to create an inescapable motivation to perform a particular task, as mandated.

It is therefore permissible for one to posit that the primary differentiation inferable from a comparative explored between the State and religion happens to be a lack of divinity and the orientation of ethereal fear that is attached towards the same that is fundamentally distinct from material fear that is experienced when considerations of disobeying state regulations are entertained. In such a situation, reverting to the hypothetical mentioned in the opening lines, the construction of an entity, quite similar to religious order *sans* the ethereal fear characteristic of the same, set to the performance of similar functions, would seem superfluous. Yet, in the existent reality, we observe a wholehearted embracing of the ideology of the State, and a constant effort to distance humanity from the idea of religious government. Such a shift is fairly understandable, owing to the disastrous reign of the clergy primarily characterized by famine, poverty, suppression of intellectual pursuits, denial of scientific truth and an explicit effort to ensure the lower socioeconomic strata remain uninformed as to the developments in society and science. The purpose of purporting such a

hypothesis was in order to demonstrate the absurdity of an entity such as the State, when examined in isolation and yet considered in a relative manner one observes that the evolution of the State was an attempt of hope, one that would help alleviate the suffering of the people under the hands of corrupt institutions functioning under the auspices of organized religion, which granted complete recognition to the archaic feudal model of socio-economic organization as it benefited greatly from the same.

A secondary inference that can be drawn from the above hypothetical consideration is the idea that the human beings display a tendency to integrate or layer, and such an assertion is amply supported in historical precedent, wherein the development or the pioneering of neo-age socio-economic institutions is never subject to direct and standalone application. The manner of application is always one wherein elements are integrated into the current dominant narrative in a manner so as to conduct a test of efficacy and if considered passable, then an independent status is evolved for the same. However, the independence so obtained is also not one that is absolute, seeing as to how the antecedent social institution that occupied a dominant status retains a degree of influence within the context of the new institution. Such a position of waning and waxing importance makes the creation of a system of differentiating interests as it inevitably leads to conflict, with specific reference to the areas wherein the interest sets overlaps either in terms of:

- Individual fulfilment;
- Group fulfilment, typically of smaller groups that do not constitute the ruling elite;
- Self-preserving interest of previously dominant social institutions themselves. (Typified by instances where the State seeks to do away with the consideration of religious needs and necessities thereby threatening the existence of said religion.)

It is imperative to consider these inferences in light of positing a definitional analysis of statehood, as the very notion of "State" is subject to a dynamic change in the twenty-first century. The primary reason that can be traced for such a change happens to be economic in nature. The predominant goal of international relations in the modern geo-political scenario happens to be fundamentally economic, a contest of sorts in order to determine the country with an economy robust enough to influence policy decisions around the world in their favour, a basic attempt at satisfying subsumed libido dominandi. Hence, on the backdrop of rapidly modernizing economies, the definition of "State" must be reconsidered, as there exist newer entrants into the field of discharging functions that could be considered the sole province of State functioning in the recent past. A primary aspect of the definition of the "State" would be an internal perspective on the nature and function of the state entity, seeing as to how the above definition is primarily concerned with the standing of the State at an

international level, for the consideration of actors at such forums is to evaluate and determine the validity of the State's existence. In order to achieve such an end, let us consider the definition provided by eminent sociologist, Max Weber, in his essay "Politics as a Vocation", as follows:

> *"Today, however, we have to say that a state is a human community that (successfully) claims the monopoly of the legitimate use of physical force within a given territory. Note that 'territory' is one of the characteristics of the state. Specifically, at the present time, the right to use physical force is ascribed to other institutions or to individuals only to the extent to which the state permits it."*

An examination of the Weberian definition of "State" allows for several interesting conclusions to be drawn and points to be considered. At the outset, it is evident that Weber seeks to craft a definition for the term "State" from an anthropological or a sociological viewpoint, as the definition, of itself, does not adopt a legal argument, but rather makes room for the existence of the same at a later point in the event scale. Weber makes curious use of the terms "human" and "community" in conjunction with one another, in an attempt to strike at the heart of any comprehensive definition of State, its human origins. Such usage also takes into account the role that social evolution plays in the development of a state from the existent human society or community. The usage of the same, is reminiscent of a certain degree of authority that rests with the community that is separate from the "decision-making" unity of the State, seeing as to how the only reason for Weber to concede a community-evolved point of origination would be indicative of a certain degree of control retained my members of the community in order the ensure that the representatives of the state discharge their functions in a manner that is consonant with the founding principles. Secondly, it is possible to observe the crux of the Weberian conception of state, i.e. the *monopoly* over the use of force. Weber believes it be imperative that for an organization whose primary function is to regulate societal interactions to be classified as taxonomically consistent to a *state* it must exercise an absolute control over using force in a manner that would be deemed legitimate in an effort to advance its goals and policies. At this juncture, one can infer that Weber concedes that an important aspect of the State revolves around the use of morally and legally sanctioned force to ensure that its constituent members keep in line with established laws and practices, an admission novel during his time amongst peers on the same issue. Weber considers two more issues within his definition, the first being the role that territory plays and the second being that of power delegation. On the issue of the former, Weber opines that territory is the geographical determinant of the extent of the monopoly that the state exercises over the use of force. The right that the State enjoys in an undisputed manner pertaining to the use of force ceases to exist beyond the boundaries that demarcate one state from another. On the issue of the latter, Weber agrees the right enjoyed by States is transferable and can devolve to other players, private

or otherwise in a manner that is permitted by the State and to that extent alone, any transgression from the same is viewed seriously as trespassing onto state sovereignty as a whole.

2. DIFFERENCES BETWEEN PRIMARY AND SECONDARY INSTITUTIONAL AUTHORITY

Upon examination of the traditional definition that is ascribed to "State", the idea of rapidly modernizing economies in the twenty-first century and the influence of the same on the Weberian notion of the state must be examined, in order to shed light on the fundamental aim of this paper, an attempt to integrate the public function doctrine into the definition of a state. With the work propounded by Adam Smith, the Father of Capitalism and arguably of modern economics, one observes a paradigm shift in the nature of economic activity in of itself, when this was coupled with the Industrial Revolution, permanently altered the manner in which human beings transacted with one another. Metaphysical institutions such as markets were established as institutions meant to regulate the economic behaviour of the masses, but not infringing into the validity of social norms. This refers to an explicit infringement, not an indirect influence that such institutions effectuate onto social norms, in part may even be responsible for the development of a unique set of norms aimed at streamlining behaviour proven to be beneficial on the markets. However, the aim of these newer institutions was accompanied by a restrictive mandate in terms of explicit societal interaction regulation. In order to represent the concept in a more efficacious manner, an example is illustrated as follows:

Institution A (Socio - legal)	*Institution B (Economic)*
Purpose - The establishment of governing rules, principles and regulations in an attempt to enforce certain fundamental norms, to ensure the smooth functioning of society as an entity reliant on the state.	*Purpose - The establishment of a favourable atmosphere for the conducting of economic activity, in a mutually or exclusively beneficial manner, as the case maybe. To ensure proper conduct due contracting parties in an attempt to ensure maximum efficiency of functioning.*
Mandate - To directly govern, through executive, legislative or judicial action the behaviour of its constituent members in matters extending to all spheres. (Social, economic, political)	*Mandate - To indirectly govern, through regulations and internally binding documents the behaviour of individuals both natural and juristic participating in the market in question.*

Institution A (Socio - legal)	*Institution B (Economic)*
Example - Let us consider the issue of qualifying Part III rights of the Indian Constitution, with specific reference the freedoms guaranteed under Article 19, if one were examine the freedom of speech and expression and the reasonable restrictions placed upon the same, by the constitution, being subject to law, order and national security. Now, if this law was to be framed under the authority of institution A, the restrictions would be applicable to all the individuals intended to be included under its ambit, so mentioned in the usually the opening clauses of the Act in question. It can be stated that the law is active at all given times, in a manner wherein individuals being governed by the same do not possess an option to provide their consent, either explicitly or implicitly towards being subjected to its provisions. Of course, seeing as to how in those institutions belonging to the "A" category that function on the principle of representative democracy, or the rule of the masses, the consent to a particular government's policies can be expressed during the time of an election when the field is thrown open to competing ideologies allowing the electorate an eclectic choice of individuals to choose their representative from. However, during the course of the functioning of the government, there is no option to express consent to particular policies and a difference of opinion can be expressed in myriad ways against governmental policies, but the expressing of such a difference does not exempt individuals from the rule of law being extended to them.	*Example - If the similar issue of qualifying Part III rights are considered with specific reference to the freedom of speech and expression, in order to expose the differences between Institution B and Institution A, the regulatory framework drafted by Institution B would in keeping with its limited mandate be applicable only in those instances wherein the constituent members explicitly or implicitly expressed their consent, and undertook the activity in question. Hence, the status of such a law can be best described as passive or inactive in the sense that it is invocatory in nature and assumes authority when consent to be tried under the same is provided for. In instances wherein individuals do not engage in such activities or do not imply their consent towards the same, it can be stated that the law is inapplicable to them. Here, the individuals who interact with the institution and through the same the regulations and rules framed by such an institution retain the direct right (which can manifest in an implicit manner as well) to reject certain rules in favour of others and not participate in certain activities citing similar grounds.*

The aim of the above comparison was to illustrate the growing importance that non-state institutions, which are primarily specific in nature, have evolved over time, and such an evolution is accompanied by a growing importance with the exponential increase in the human population forcing states to devolve greater chunks of their traditional authority in an effort to improve governance. If one were to take into account the phenomenon of privatization, it has provided a perfect route for entrance to private players into sectors and to perform functions that were traditionally reserved for the State. Privatization has essentially ensured that the State allows for the functioning of private

companies and individuals to invest and own operating units in different sectors wherein the government previously controlled the functioning corporations, in essence such a measure is one that is being increasingly adopted by governments in developing countries, brought on in part by intelligent planning and in part by necessity.

3. THE EVER – INCREASING PRESENCE OF PRIVATIZATION IN THE 21STCENTURY

At this juncture it is imperative to consider the query regarding the necessity of such a measure being hailed as one of great import and preached by the premier financial institutions at the global level, namely the IMF and the World Bank, to countries around the world especially as mentioned earlier developing ones, is due to the numerous benefits that accrue from a system that practices privatization as opposed to one that does not, and they are as follows –

- A drawback of government run institutions happens to be neglect as governments possess a vast array of responsibilities that require the exigent allocation of attention towards, thereby allowing for several of such enterprises that run on the use of government machinery fairly sluggish in their performance and lackadaisical in their approach towards the idea of product sales and customer service provisions. Allowing for the entry of private players provides greater impetus to the provision of products that possess a higher intrinsic quality and more efficacious customer servicing as the bottom line for most firms is profit-oriented making it crucial for them to perform remarkably well and couple the same with a high level of innovation. This, in turn, can be stated as an improvement in the overall efficiency that can be ascribed to the economy as a whole.

- It must be observed that another drawback with state-sponsored economic activity is the constant possibility and in many cases tangible interference by the state machinery (and the term state machinery refers to individuals who form the controlling aspects of government) in the functioning of the industry in question. This negates any attempted separation by the government from the daily functioning of the corporations that it substantially funds or owns. An absence of such interference is markedly conspicuous in an economic system that allows for substantial private funding.

- Another aspect of private funding that is beneficial to the economic health of a particular state as opposed government sponsored industry arises when the first two points mentioned above are considered and examined in conjunction. India is a democracy that functions on the principle of majoritarian rule or the sovereignty being vested in the masses as opposed to any other organizational source, and,

additionally, India is a multicultural society that also allows for a multi-party system and with the culmination of mono-party dominance (until a brief renaissance under the Narendra Modi BJP-led government appointed for the term 2014-2019), it would be a grave error to assume that a primary motivating factor for governmental policy making is focused on the polls that are emergent on every incumbent government. Hence, this makes it impossible to arrive at a reasonable conclusion that governments indeed push for developmental agendas that are detrimental to their possibilities of reelection to office. This was particularly brought to light following the numerous scams of the previous UPA, Congress – led government between 2004 and 2014.

- The argument of added pressure can also be made when considering the functioning of companies owned and operated independently by private contractors, which tips the scales in favour of privatization over government funding again. The nature of the manifest added pressure is in the form of shareholder commitments that are imposed on the company as failure to meet said requirements would result in the company being acquired, which would possibly result in a loss of employment for all the existing management. The management being directly related to the functioning and profitability of the corporation would work in order to ensure that such a situation does not come pass and thereby, making the products and services of higher quality and improving the efficiency in the market.

- Lastly, the argument of raised competitiveness in the market can be made when examining the benefits of privatization of any given sector. This refers to the conditions that surround the declaration of certain markets and being open to private players and investment, most governments using the tool of deregulation, and especially when traditionally regulated industries are thrown open, the potential for profit attracts multiple firms and investors thereby immediately increasing the level of competition within the market. In order to stay relevant and profitable within in a highly competitive market, it is exceedingly important for corporations to innovate and minimize costs, as a failure to do the same usually spells an early, inopportune exit from the market. Such pressure and possible elimination does not plague solely governmentally funded industries of substantially funded ones, thereby making room for complacency.

While it must be understood that privatization like most of the other economic concepts or models which seek to structure the economic systems in particular ways has its own share of disadvantages and possibilities of misuse. While the risks are quite pronounced when these privatized sectors are not

regulated properly, the advantages far outweigh the costs especially in developing economies that are usually in dire need of the investment from foreign sources.

The necessity of the above exposition on the nature of State and religion, the differences between the two and the nature of primary and secondary institutions through a mandate and functional comparison, followed with a contrast to the nature of organizations and the modern spread of privatization, coupled with its benefits and possible defects, happens to be the groundwork necessary in order to truly understand the nature of the modern State, the problems of conflicting institutions that all function under the auspices or the regulatory permissions granted by the State. It is particularly important in the light of the same to have considered the nature of primary and secondary institutions as they allow one to paint an accurate image of the manifest hierarchical structure resultant from the same. This, in turn, makes the process of identifying state function in the first instance particularly convoluted and analyzing its impact on the definition of the state becomes the final goal that is to be undertaken in the instant paper.

When the question of public function is considered in order to provide a comprehensive definitional analysis of State, the key aspects that have to be taken into consideration are as follows:

- The definition of public function as a doctrine employed by the Judiciary in order to ascertain the extent of the extant definition of the same.
- Seeing as to how the country wherein the same is primarily practiced, defined and analyzed by the judiciary is the United States of America, upon the completion of the analysis in the first above mentioned point a contrast on the system that is existent in India in order to address state liability. (With specific reference to the doctrine of sovereign, non-sovereign functions and sovereign immunity)

c) Lastly, addressing the role played by the doctrine of public function in the definition of state in the United State of America and extrapolating the same onto an Indian scenario wherein, a hypothetical (in which the doctrine is contrasted with that of India's usage pursuant to the second point mentioned above) is scrutinized in an attempt to arrive at a definition for state within the understanding of Article 12 of the Constitution of India.

4. DEFINITION AND EXTENT OF THE DOCTRINE OF PUBLIC FUNCTION

The doctrine of public function can be understood as an attempt to devolve liability in a manner that accompanies the devolvement of power and

authority from traditional bases, such as governmental organs and substantially funded organizations to private players owing to the freeing of economic space for investors. In order to illustrate said assertion let us consider the hypothetical scenario below:

> *There exists a town 'x', (the size of said town can be approximated by calculating the land owned by the local government in the capacity of an agent of the state government, a number which come up to ten hectares) which has a fixed population and is located at the foothills of the Rockies, United States of America, and it exists primarily in order to facilitate the rather large, obtrusive mining facility that is owned and operated by corporation 'y'. The government of the State in whose territorial jurisdiction the town 'x' comes under issues a notification opening up the purchase of large tracts of land in excess of five hectares to individuals, private corporations and other entities vested with legal persona. Following the issuing of such notification, 'y' acquires all the land owned by the agent 'x' and takes the reins of administration within the territorial limits of 'x'. Such a status quo prevails for five years and then an incident occurs that results in litigation against the governing authority. The incident is as such – "During the course of construction of a road that lead from the town to the entrance of the mine (a road constructed for the purpose of allowing the townspeople an opportunity to have easy access to the stream which ran parallel to the mine entrance, and additionally since most of the townspeople worked at the mine, the families would find it easier to visit in such cases with the presence of a road), an innocent bystander making his way home from the nearby stream was killed in an accident that involved the negligence of the contractors (belonging to 'y') building said road and the family of the deceased filed a suit in the court of law stipulating that the liability of the corporation be raised to the level of a state as posited by the Constitution, pari materia to that of the United States of America. The court in deciding that since the corporation was – a) performing the functions of the state in the region for a few years; and b) the nature of their instant action, i.e. the building of the road for purposes that were community-oriented qualifies as discharging of functions that are essentially public and hence must be liable as the state would provided that they directly discharged said function.*

Such a situation would exemplify the doctrine of public function in the country of the United States of America, primarily under examination, as the doctrine has adopted by the judiciary in an attempt to modernize the state perspective in cases wherein liability must be differentiated and ascribed as being constitutional or non-constitutional (In cases wherein a court is asked to

identify whether a party to a case can be classed as a State actor or not). Prior to exploring the nature of the public function doctrine in the US, let us consider the definition of "State" within the same, and that may be divisible into the positive and the negative definition which seek to define different aspects of the state. While the former attempts at defining the nature of the 'State' in of itself with regards to its structure, the latter's definition is a functional one referring the extent of State authority in an attempt the allow for a delineation that marks the separation of said entity from society to be denoted as state. The positive definition can be posited as follows:

> *"In its most enlarged sense, it signifies a self-sufficient body of persons united together in one community for the defence of their rights, and to do right and justice to foreigners."*
>
> *"In a more limited sense, the word 'state' expresses merely the positive or actual organization of the legislative, or judicial powers; thus the actual government of the state is designated by the name of the state..."*

Upon analyzing the latter aspects of the above mentioned definitions, it is obvious that the in a positive light, "State" is an institution that possesses a wide mandate guaranteed by grundnorm, in the above case referring to the Constitution of 1787, and this wide mandate also allows for the state to formulate a governmental structure that includes the legislative, executive and judicial organs the powers inherent in them and the scope of their interactions and authority. It also refers to the discharge of functions therefore mandated by the constitutional grundnorm, which vary from organ to organ, with the legislature primarily mandated to deliberate and pass legislation, the executive to interpret the same and the judiciary to resolve disputes, interpret the constitution and preserve fundamental rights. On the other hand, the negative definition of the state was laid down the in *Civil Rights Cases*[1], where the Supreme Court in an opinion authored by Joseph P. Bradley, which states that,

> *"...Individual invasion of individual rights is not the subject matter of the [Fourteenth] Amendment. It has a deeper and broader scope. It nullifies and makes void all state legislation, and state action of every kind...it does not authorize congress to create a code of municipal law for the regulation of private rights..."*

The definition clearly demarcates the extent of the State with respect to its function, with the court expressing a clear inability of the State to legislate on matters that are wholly private or personal in nature under the authority of Section V of the Fourteenth Amendment that gives the state the right to enforce said amendment, with specific references to Section I and II of the Amendment that instruct the state to ensure the presence of the due process of law.

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[1] 1883 SCC OnLine US SC 183 : 27 L Ed 835 : 109 US 3 (1883).

The United States Judiciary developed the doctrine of state function in the original instance in *Marsh* v. *State of Alabama*[2], wherein the Court held that a private corporation that owned a town and operated it would be held liable for actions committed by the same as a State would (the same is akin to the hypothetical scenario constructed in the antecedent paragraphs). However, the Supreme Court in later decisions regarding the doctrine of public function usually considered a single function as opposed to a multitude that initially allowed them confer liability in *Marsh* v. *State of Alabama*[3]. The doctrine appears to have no concrete definition and the application of the same is only exposed when cases decided by the court are examined, as an objective standard extrapolated from the doctrine appears to be lacking. The only conceivable manner in which the extent of the doctrine of public function can be examined is to analyze the criteria laid down by the court in order to apply said principle in law. There appears to be two distinct tests or manner of application for the public function doctrine and the first follows from the *Marsh* v. *State of Alabama*[4], and has not been laid down in any single case but can be extrapolated from several similar ones wherein the courts have expressed same views and the nuances of the test are as follows:

- There exists a private party that performs the functions that are traditionally and exclusively reserved for the state.
- The power to perform said function is traditionally associated with the sovereign.
- The nature of the power to perform is such that the state is itself obligated to perform the same.
- The power happens to be an exclusive prerogative of the sovereign.

The aforementioned test appears to be fairly restrictive in its allowance for a function to be classified as public as opposed to private. The primary emphasis appears to be on the sovereign or the State and the association of said function with that of the mandate of the State in order to perform. The keywords being, (ones that have undergone modification on the basis of different fact-situations) "traditional", "associated", "exclusively" and "prerogative". These terms make it abundantly unambiguous that in order for any function be classified as a state/public function, it must first pass the test of exclusivity, wherein the nature of function must be such that only that is traditionally obligated to perform it and when such a right to perform is delegated to a private player then such player must be held up to a constitutional standard.

The conflicting test to the aforementioned one originates with the case of *Evans* v. *Newton*[5], wherein the Supreme Court adopted a different standard for

[2] 1946 SCC OnLine US SC 9 : 90 L Ed 265 : 326 US 501 (1946).
[3] 1946 SCC OnLine US SC 9 : 90 L Ed 265 : 326 US 501 (1946).
[4] 1946 SCC OnLine US SC 9 : 90 L Ed 265 : 326 US 501 (1946).
[5] 1966 SCC OnLine US SC 1 : 15 L Ed 2d 373 : 382 US 296 (1966).

the application of the public function doctrine, one that included three limitations laid down in order to satisfy the court for the application of the doctrine, and they are as follows:

- There exists a tradition of municipal control.
- That tradition has become firmly established with the passage of time.
- The function is open to all classes of the public, and hence the public function doctrine applies.

With reference to the conflict in *Evans* v. *Newton*[6], taking into reference to other previously decided cases, specifically the case of *Jackson* v. *Metropolitan Edison Co.*[7] and that of *Flagg Bros. Inc.* v. *Brooks*[8], the idea behind the "exclusivity" test in the first one happens to refer only to the right that is vested within the State or the sovereign to perform the act in question, as opposed to the facts of the *Evans* v. *Newton*[9], wherein the performance was an ongoing practice until recently before the filing of the suit. Additionally, *Evans* v. *Newton*[10] made it unambiguous that the nature of the "exclusivity" could be attached to the operative aspect of effectuating a vested right. The Court also observed while a right to perform is reserved by private parties, actual performance is limited to the State and its agents. The Court also considered the question of public perception by postulating that it was of great import for a function to be considered as public to have the weltanschauung of the people in contact with said function believe that it was essentially public in nature (the court considered that a particular class of individuals would be affected by the function in either a positive or negative manner). At the culmination of the case (and that of *Jackson* v. *Metropolitan Edison Co.*[11]), the public function doctrine could be restated as any function would allow for invocation of the doctrine if it was actually performed by the State and its agents but the right to perform was vested in the public as a whole (allowing for private players as well), and the performance of the same affected a class of people in a particular manner and if the class perceived the function as being public.

5. ASCERTAINING THE VALIDITY AND APPLICABILITY OF THE PUBLIC FUNCTION DOCTRINE IN INDIA

The doctrine of public function, though not under a specific label has been applicable in India post-1947. However, in order to examine the present status of public function in India the history of the definition of 'State' or 'sovereign'

6 1966 SCC OnLine US SC 1 : 15 L Ed 2d 373 : 382 US 296 (1966).
7 1974 SCC OnLine US SC 224 : 42 L Ed 2d 477 : 419 US 345 (1974).
8 1978 SCC OnLine US SC 80 : 56 L Ed 2d 185 : 436 US 149 (1978).
9 1966 SCC OnLine US SC 1 : 15 L Ed 2d 373 : 382 US 296 (1966).
10 1966 SCC OnLine US SC 1 : 15 L Ed 2d 373 : 382 US 296 (1966).
11 1974 SCC OnLine US SC 224 : 42 L Ed 2d 477 : 419 US 345 (1974).

function must be explored. *Peninsular and Oriental Steam Navigation Co.* v. *Secy. of State for India*[12] was a landmark judgment in pre-independent India where the High Court at Calcutta provided the first negative definition of state function. The case primarily allowed for the affixment of liability, which was vicarious in nature, onto the State for the acts of its agent in the course of business. In a string of cases that followed, the Court laid down several functions as either being sovereign on non-sovereign with questions pertaining to liability of the State under the same, until the landmark judgment *N. Nagendra Rao & Co.* v. *State of A.P.*[13], wherein the Court concluded that even in cases wherein the function was deemed to be sovereign, the state would be liable to compensate the aggrieved for acts of negligence (amongst other tortious actions) by the agents it employs.

The definition of "State" under the Constitution of India is provided under Article 12, with the part reading as follows:

> *"The Government and 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."*

Upon examining the provision, it is fairly evident that the framers of the Constitution intended to have a narrower definition of "State" as they include the concluding phrase as being under the control of the Government of India, a phrase without which the Court could have interpreted several other organizations and bodies whose functions resemble state functions be classified as states. The higher judiciary in India oscillated between two tests of determining the constitutional status of an entity under Article 12, the first being the functional test and the second being the legal/control test. In *Pradeep Kumar Biswas* v. *Indian Institute of Chemical Biology*[14], the Supreme Court ruled in favour of the control test, stating it to be fitting and keeping in consonance with the spirit of the Constitution of India. The functional test is fundamentally a test performed by the court on any organization in question with respect to the functions discharged by said organization and upon comparison with the jurisprudence built up on the subject-area of sovereign and non sovereign functions, arrive at a reasonable inference as to whether the entity can be classified as a State or not (it is when its functions resemble that of the State's or sovereign functions). The control/legal test, on the other hand, as was laid down in the case refers to the organizational structure being in commiseration with that of the State or under the control of the Government of India (the terminology employed by the court was: "functionally, financially or administratively"). Additionally, the Supreme Court has however set to work on developing the jurisprudence on the grounds of liability of non-state actors (private) in cases wherein there exists a discharge

[12] (1865) 1 Bom HCR App 1.
[13] (1994) 6 SCC 205.
[14] (2002) 5 SCC 111.

of public/state functions. This was especially observed in *Indian Medical Assn.* v. *Union of India*[15], *People's Union for Democratic Rights* v. *Union of India*[16], *Unni Krishnan, J.P.* v. *State of A.P.*[17], and finally approaching a fruition in *Zee Telefilms Ltd.* v. *Union of India*[18], wherein the Court upon classifying the BCCI as a non-state entity under the definition of Article 12 imposed liability on the same under the doctrine of public function concluding that the entity performed functions that could closely be associated with the functioning of the State.

6. CONCLUSION

When the systems that allow for the application of the doctrine of public function in the United States is compared with India, several points arise which have touched upon with brevity. At the outset, the idea of public function in India lacks the clarity that is perceivable in the US, which ironically possesses a more discordant form of application as opposed to the relatively unambiguous method that is employed by the Indian Judiciary. It is also observable that in the United States, the Judiciary has unified the idea of public function with that of a State actor in order to ascribe liability, whereas the method adopted by their Indian counterparts is one separation of the two, whilst imposing liabilities for both.

Another area of primary difference is the impact of the same on the definition of statehood. In the case of the United states, owing to a unified approach, the idea of a state actor or a state is one that is in a state of constant flux, dependent on the fact-situations emergent in newer cases that could possibly present an opportunity for the Judiciary to alter the meaning of the same or in other words, a classical proponent of the functional approach. In India, however, the idea of State under Article 12 is far narrower and limited as the control test is preferred and hence, there exists a dual system *per se* wherein one set of bodies that are under the control of the Government of India, which can be classified as extensions of state and other bodies that discharge state/public functions which can be deemed liable under Article 32 or 226 under the principle of direct horizontality.

By way of conclusion, it is the personal inference of this paper that the system that is followed in India is far more efficacious as it eliminates ambiguities in defining a state dependent on varying social facts as opposed to the US system (especially so, as it preserves the notion of liability for wrong actions). This in turns boosts the efficiency of the Judiciary as a whole thereby allowing for a greater realization of the ideals of justice.

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[15] (2011) 7 SCC 179.
[16] (1982) 3 SCC 235.
[17] (1993) 1 SCC 645.
[18] (2005) 4 SCC 649.