CHAPTER-5
STATE ACTION AND PRIVATE ACTORS

5.1 Introduction

In the era of globalization when the power is given to private bodies within the state the enforcement of Constitutional Rights is a matter of concern. Political theories underlying globalization rested on the contention that reduction of law to state law is unsustainable and therefore it posited multitude sources of law by non-state actors and private actors. In a sharp contrast to this classical model of constitutional rights saw the state as the only power Centre. With the emergence of liberalization, globalization and privatization the massive public/private divide is diminishing. All most all traditional functions of the State are now performed by private actors accorded through disinvestment, contracting out, public private participation, privatization etc. This often leads to denial of fundamental rights to a large number of people.

If we analyze Part III of the Constitution we can see that fundamental rights can be claimed even against private actors. For e.g., Article 15, 17, 23 24, besides there are provisions which are ambivalent as to its enforceability like Article 19 wherein it can be enforced through judicial activism. This highlights the futuristic view of our constitution makers and the importance they have given to fundamental rights. But despite this there is less activism shown by judiciary in declaring private actors as ‘State’ under Article 12.

The US economy was a free market economy right from the inception thus privatization is a common phenomenon even from the earlier times.\(^1\) In United States, more than half of all government spending on goods and services is publicly financed but privately produced.\(^2\) Distinctions between the public and private sectors are being blurred as the organizations for accomplishing public purposes are more and more frequently a deliberate blend of public and private characteristics.\(^3\) But in US except the Amendment prohibiting slavery none other Amendment is applicable against

\(^1\)JOEL HANDLER, DOWN FROM BUREAUCRACY: THE AMBIGUITY OF PRIVATIZATION AND EMPOWERMENT 78 (1996).
private actors. In this scenario also fundamental rights were held applicable against the private actors through the application of State Action doctrine. In this context this chapter analyses applicability of fundamental rights against private actors taking into account various private bodies like BCCI, Indian Olympic Association, private corporations and the position in US is also drawn out wherever possible. This chapter also critically analyses the approach of Indian Courts in horizontal application of fundamental rights and gives an account of position in countries like Ireland, Germany, South Africa and Canada regarding enforcement of fundamental rights against private actors.

5.2 The Public/Private Divide in India

In India also it is a widely accepted rule that fundamental rights are enforceable against the State barring a few exceptions. Unlike in US there had not been much debate over Public/Private divide because there our Constitutional provisions are clear regarding against whom fundamental rights are enforceable. It was in *P.D. Shamsadani v. Union Bank of India* the question as to the enforceability of fundamental rights against private actor came for the first time. The Court drew a line between private and state action and held that fundamental rights are not enforceable against private actor.

The same situation follows even today with few exceptions as to the enforceability of right to life and personal liberty guaranteed under Article 21. In those cases involving violations of rights enforceable against private actor also Court did not made a declaration to that effect. It shows the unwillingness of the Court to consider private actors either as guarantor of fundamental rights or as violators of fundamental rights. In *Binny v. Sadasivan* Court held that “it is difficult to draw a line between public functions and private functions when it is being discharged by a purely private authority. A body is performing a public function when it seeks to achieve some collective benefit for the public or a section of public and is accepted by the public or that section of the as having authority to do so.” But looking at a different perspective by giving emphasis on the role of state in the protection of

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4 For example the Fourteenth Amendment commands that “No state shall …deprive any person of life, liberty or property, without due process of law; nor deny…equal protection of the law.”

5 AIR 1952 SC 59.

6 2005 (6) SCJ 156.
fundamental rights an argument can be raised that, fundamental rights needs to be protected by the state no matter who is the violator private or public authority.

5.3 Private Actors/Bodies

5.3.1 Sports Authorities

With globalization Sports is now a global phenomenon affected by the emergence of a world media system, especially television and corporate capitalism. In the contemporary world sports has become a business for the corporate world and the consumers are the global audiences. Besides, globalization of sports has shifted the focus of legal regulation increasingly onto certain international and national sports federations which controls and governs international sport. They have their own rulebooks and constitutions, often catered to their own convenience. They take decisions that can have profound effects on the careers of players and that have important economic consequence. They are autonomous organizations and are independent of national governments.\(^7\)

a. BCCI

Cricket as a sport attracts the attention of a vast majority of population in India. It has deep implications for the notions of Indian-ness and national identity.\(^8\) It is International Cricket Conference (ICC) and Board of Control of Cricket in India (BCCI) are the bodies which regulates game of cricket by setting out rules, regulations etc. ICC regulates International Cricket whereas BCCI regulates cricket in India at all the levels.\(^9\)

Internationally and nationally the wide popularity for the game have exemplified due to the success of Indian Premier League (IPL) introduced by BCCI in 2008.\(^10\) Internationally, IPL is marked as the rise of the non-Western nations primarily

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\(^8\) Boria Majumdar, *Soaps, serials and the CPI (M)*, *Cricket beat them all: Cricket and Television in the Cotemporary India*, 11 SPORT IN SOCIETY 570-582 (2008).

\(^9\) At the grass-root level, national level, international level and it also regulates private cricket i.e. Indian Premiere League as per BCCI Regulations 2.1. Initially it was functioning as an unregistered association and in 1940 it got registered under the Societies Registration Act of 1860. Later with the enactment of Tamil Nadu Registration Act, 1975 BCCI came to be registered under it.

\(^10\) CHRIS RUMFORD AND STEPHEN WAGG., *CRICKET AND GLOBALIZATION* (2010) (The success is marked by the fact that in a short span of three years the first franchise based Twenty 20 cricket has grown into one of the world sports’ foremost properties.); Shakya Mitra, *India’s Foray into World’s Sports Business* 13 SPORT IN SOCIETY 1314-1333 (2010).
India. This changing scenario has also shifted the control and regulation of cricket from ICC to BCCI.\textsuperscript{11} Even then BCCI runs cricket as a private venture least accountable towards the public, players and with no transparency. Now BCCI is an unruly horse wielding enormous power economically as well as politically and enjoys monopoly status in every sense. Simultaneously BCCI could be compared to Black Hole which would eventually bring cricket to nothingness due to the prevailing corruption and irregularities within.\textsuperscript{12}

i. **India’s Globalized Cricket Regime – the Indian Premier League**

IPL was the brainchild of Lalit Modi, unveiled in the year 2008 in lines with the European Premier League. It was the first franchisee based Twenty 20 cricket competition. It was created at a time when cricket started losing its popularity after World Cup 2007 when India could not even make it upto the final ten teams. Lalit Modi, the protagonist of IPL foresaw that IPL would be a great success taking into account the emerging Indian economy and the multibillion population of India. With IPL cricket became a media enterprise-corporatized and catered to fit the needs of sponsors, media corporations and other stakeholders rather than the fans who are also sold as consumers in the commoditization process of cricket.\textsuperscript{13}

The major breakthrough in cricket in India was the opening up of market and liberalization policies of Narasimha Rao government in 1991.\textsuperscript{14} It eventually had put an end to the monopoly of state run Doordarshan in broadcasting the game. This deregulation and subsequent entry of ESPN, Zee sports etc. made cricket a global media event having high television rating point.\textsuperscript{15} In fact it is called as a “Perfect Television Sport.”\textsuperscript{16} IPL is a mix masala of all the things which people of emerging


\textsuperscript{13}SHAKYA MITRA, *supra* note 10, at 1314-1333.


\textsuperscript{15}The commercial success of the game could be gauged from the fact that in 2008, the IPL captured 9.5% of the Indian television market compared to soap operas and reality shows that made up 5% of the market reflecting the affection of South Asians for the game. David Rowe and Callum Gilmour, *Global Sport: Where Wembley meets Bollywood Boulevard*, 23 CONTINUUM: J. OF MEDIA & CULT. STUD. 178 (2009).

India keep close to their heart *viz:* Bollywood, corporate culture and finally cricket – the *de facto* national game of India.\(^{17}\)

The cricket-Bollywood nexus is a neo-liberal mechanism to market entertainment products and celebrities which produces increased profits by captivating televised audiences through the appeal of cricket and Bollywood.\(^{18}\) The game became a vehicle through which increasingly global but also national commercial brands are launched and maintained particularly Bollywood stars as brand ambassadors.\(^{19}\) This new Hegemonic Sports Culture\(^{20}\) dominated by cricket in India is intrinsically related to the forces of capitalism. Capital societies heavily depend on cultural products, including sports as they are directly linked to the performance of economy by providing new avenues for growth, dynamism, profit and control. By converting sporting events (not only cricket) into a spectacle major corporations compete for profits, growth and control over the market.\(^{21}\)

Deregulation without any mechanism for enforcement in the globalized free market era has in fact lead to the weakening of state and incidental to it is the social acceptance of corruption.\(^{22}\) Cricket and IPL is no exception to it. Indian cricket has a long tradition in match fixing and betting, with IPL even BCCI officials came to be involved in corruption, thereby tainting the old reputation of cricket as “gentlemen’s game.”\(^{23}\) Government is giving tax exemption to BCCI, writing-off its debts, also


\(^{18}\)Azmat Rasul & Jennifer M. Proffitt, *Bollywood and the Indian Premier League: The Political Economy of Bollywood's New Blockbuster*, 21 ASIAN J. COMMUN. 373-388 (2012) (India, being an emerging economic power with a large middle class, has assumed a unique position among cricket playing nations in large part due to the millions of spectators willing to spend money not only on attending matches but also on tourism, shopping, and other consumerist practices following the neoliberal economic policies of the Indian government.); Amit Gupta, *supra* note 11.

\(^{19}\)Azmat & Jennifer, *id.* at 19, at 380 (Even *Lagaan*, which marked a new awakening in the Indian cinema since it had combined nationalism with cricket and was widely acclaimed for its professionalism besides promoting cricket in rural areas.); M. K. RAGHAVENDRA, *supra* note 14; Florian Stadtler, *Cultural Connections: Lagaan and its audience Responses*, 26 THIRD WORLD QUARTERLY 517-524 (2005).


leases and stadiums are given at a cheaper rate for the game but at the same time subsidies to the poor are savaged and this is a clear negation of the social justice principles embodied under the Indian Constitution.  

The game of cricket is now part of the entire polity and the politicians also have to share the burden for downfall of cricket. It does not matter which party they belongs to it is all about money making, as rightly noted by Susan Strange “economic globalization signals supremacy or triumph of the market over the nation-state and of economics over politics.” Economic globalization coupled with political globalization has made BCCI enormous power wielding machinery both nationally and internationally, enjoying an economy scale that could be equal to a small nation. Justice Mudgal and Lodha Committee Report also put into limelight the corruption within BCCI and IPL. The existing situation demands transparency in administration and integrity on the part of officials and furthermore a legislation to regulate its affairs.

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24 P. Sainath, How to feed your billionaires, THE HINDU, April 17, 2010; Karan Thaper, IPL has made cricket just business: MS Gill, CNN-IBN, available at http://ibnlive.in.com/news/ipl-has-made-cricket-just-business-ms-gill/112266-5-24.html (May 22, 2013); (Government is giving a blind eye to the organised black market dealing in betting on India and the betting in cricket is often organised by the mafia that abets and aids the fidayeen funds.); Aditya Sondhi, The Legal Status of BCCI, Unwarranted Ad-Hocism, Constitutional Hurdles and the Pressing Need for Cricket Legislation. 22 MANUPATRA 1-13 (2010).
26 Sainath, id. note 24, a t18.
28 (Political Globalization is interpreted as “the shifting reach of political power, authority and forms of rule,” it is characterized with increasing influence of international organizations, non-state actors, national pressure groups into the international arena) David Held & A. McGrew, The End of the Old Order, 24 R. INT’L. STUD. 219-243 (1998).
30 Mudgal and Lodha Committee was appointed by the Supreme to investigate the match fixing and corruption in IPL, also found cricketers and IPL officials liable. http://www.theHINDU.com/multimedia/archive/01750/JUSTICEMUDGAL_IPL_1750744.pdf (Sep. 28, 2013).
31 (But when discussions on making BCCI under the purview of the National Sports Authority Bill, 2011 came up there had been strong oppositions from the ministers holding positions in the BCCI and they vehemently opposed government regulation in the activities of BCCI) A. G. Noorani, Wail of Zamindars, FRONTLINE, http://www.frontline.in/static/html/fl2820/stories/201110/07/282004600.htm (Sep. 28, 2013).
Equally important is ensuring ‘fairness’ and ‘good faith’ in the activities of BCCI by subjecting it to the process of judicial review under Article 32 and 226 of the Indian Constitution and also to make it an instrumentality of the State under Article 12. Courts’ supervisory jurisdiction helps to ensure that private bodies like BCCI do not abuse their power and do not act arbitrarily, capriciously, unreasonably or unfairly. Litigation and the possibility of litigation can play a useful regulatory role. And this requires introspection into the judicial stand on BCCI as ‘State’ under Article 12.

ii. Legal Status of BCCI

The question regarding legal status of BCCI under Article 12 came before various cases viz; Mohinder Amarnath & Ors. v. BCCI and others, Ajay Jadeja v. Union of India & others, and Rahul Mehra & Anr. v. Union of India before the Delhi High Court. The other decisions are by the Supreme Court: BCCI v. Netaji Cricket Club and Ors., Zee Telefilms ltd & anr. v. Union of India & Ors. and A.C. Muthiah v. BCCI & anr.

In Mohinder Amarnath BCCI was held not to be an instrumentality of State taking into account the contractual nature of the rights and duties. In Ajay Jadeja the Court dealt with the question regarding the nature of the duty performed by BCCI and nature of the rights infringed. Court held that the writ under Article 226 is maintainable by taking into account the public nature of activities performed by BCCI. The Court referred the judgment in Air India Statutory Corporation wherein the Supreme Court has emphasized on the public nature of the functions performed by

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32 Ajay Jadeja v. Union of India (2002); DLT 14, 2002 (61) DRJ 639.
33 CW.NO.632/89 (In this case the validity of the disciplinary action on Amarnath was called in question).
34 Id (The case dealt with the validity of a disciplinary action imposed on cricketer Ajay Jadeja).
35 (2005) 4 Comp.L.J.268 Del, 114 (2004) DLT 323 (In this case public interest litigation was filed claiming various rights against BCCI and Delhi District Cricket Association. The petitioner’s contended that these bodies function as government recognized monopolies and perform State functions of promoting cricket in the country. Thus they cannot be permitted to function as purely private organizations without any accountability or obligations to the people).
36 (2005) 4 SCC 741 per Santosh Hegde J. and S.B. Sinha J.
37 (2005) 4 SCC 649 (Santhosh Hegde J. and Sinha J. who were the authors of Netaji case split over the status of BCCI and majority in the words of Santhosh Hegde J. held BCCI as not a “State” under Article 12).
38 (2011) 6 SCC 617.
39 Id at para 50.
40 AIR.1997 SC 645.
a private body as necessary criteria for falling under Article 226. The Court also recognized that even if a matter arises from a contract purely in private law field a writ will lay if the contract gives rise to a public duty or if the act involves violation of fundamental rights.

But decision in *Ajay Jadeja* was held as not a precedent in *Rahul Mehra* and it was affirmatively held that writ against BCCI is maintainable. The decision was made by virtue of the monopoly nature of BCCI in regulating and controlling the game of cricket and the nature of the duties and functions performed by it. According to the Court the words "any person or authority" used in Article 226 may cover any other person or body performing public duty.

In *Netaji* Supreme Court upheld the monopoly status of BCCI and further held that having regard to the enormity of power exercised by the Board, it is bound to follow the doctrine of ‘fairness’ and ‘good faith’ in all its activities and further held that having regard to the fact that it has to fulfil the hopes and aspirations of millions, it has a duty to act reasonably and it cannot act arbitrarily, whimsically or capriciously. As the Board controls the profession of cricket, its actions are required to be judged and viewed by higher standards.

In *Zee Telefilms* Apex Court elaborately discussed about the position of BCCI as an instrumentality of State under Article 12 and held that since BCCI is not financially, functionally and administratively controlled by government cumulative land so it cannot be held as a State and thus writ petition under Article 12 is not maintainable. For holding so, the Court relied on the test laid down in *Pradeep Kumar Biswas v. Indian Institute of Chemical Biology*. Later in *Muthiah* Supreme Court reaffirmed the decision in *Zee Telefilms* and it was held categorically that BCCI is a private autonomous body and its actions have to be judged only like any other similar authority exercising public functions. The Court also rejected the claim that every entity regulating the fundamental rights under Article 19 (1) (g) is a ‘State’ within the

**Notes:**

41 *Id* at para 21.
42 *Id* at para. 22.
43 (Since petition filed by Ajay Jadeja was withdrawn by him as he agreed to have the matter settled by an Arbiter, court ordered the decision to be treated not as a precedent in another case of whatsoever nature) *Supra* note 33, para. 4.
44 *Id* at para 20.
45 *Supra* note 36, at para. 80 and 81.
46 (2002) 5 SCC 111 at 40 (In this case the question was whether CSIR is a State or not under Article 12).
meaning of Article 12. It was held that the functions of the Board do not amount to public functions. In view of this decision observations made by Sinha in Netaji stands no longer as a good law.

Regarding BCCI, starting from Mohinder Amarnath the public functions performed by BCCI was put into limelight. In Ajay Jadeja Delhi High Court held that the function like selecting team is a public function and the same has been reiterated by Supreme Court in Rahul Mehra. Later in Netaji also Apex Court reaffirmed this view and imposed upon BCCI the duty to act fairly and reasonably in the manner of conducting elections.

In Zee Telefilms there had been a detailed discussion on the public functions performed by BCCI and it was observed by the Minority Bench that a body discharging public functions and exercising monopoly power would be an authority under Article 12. BCCI exercises functions like controlling and regulating the game of cricket. It has final say in the matters of selection and disqualification of players, umpires and others connected with the game touching their right to freedom of speech and occupation. It makes law on the subject which is essentially a state function in terms of Entry 33 of the Seventh Schedule to the Constitution it thus acquires status of monopoly.

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47 (Court denied the claim of the petitioners that the functions of the Board amount to public functions, as the State/Union has not chosen the Board to carry out the duties and as it is not legally authorized by it carry out those functions under any law or agreement and that instead it has voluntarily chosen to perform those functions under its own guidelines which makes it an autonomous body) Supra note 37, at para 28.
48 Id at para. 34.
49 (‘When the Government stands by and lets a body like BCCI assume the prerogative of being a sole representative of India for cricket by permitting BCCI to choose the team for India for appearance in events like the World Cup, then it necessarily imbues BCCI with the public functions at least in or far as the selection of the team to represent India and India's representation in International Cricket for a and regulation of Cricket in India is concerned.” ) Supra note 36, Para 15.
50 (“The game of cricket involves the right of the telecaster and that of the viewers. The right to telesporting event will therefore also include the right to educate and inform the present and the prospective sportsmen interested in the particular game and also to inform and entertain the lovers of the game) Secretary, Ministry of Information & Broadcasting, Government of India & Ors v. Cricket Association of Bengal & Ors. (1995) 2 SCC 161 at para. 75.
51 CONSTITUTION OF INDIA Entry 33 of the Seventh Schedule: (“Theatres and dramatic performances; cinemas subject to the provisions of entry 60 of List I; sports, entertainments and amusements.”). Supra note 37, para. 173.
52 (It (BCCI) has, thus, enormous power and wields great influence over the entire field of cricket. In sum, the control of the Board over the sport of competitive cricket is deep and pervasive, nay complete. Its monopoly status is undisputed) Supra note 36, para. 227 and 229.
Subsequently in *BCCI v. Cricket Association of Bihar & Ors.* the Supreme Court indulged in the question whether BCCI is a State or not and it was categorically held by the Court that it is not a ‘state’ though a writ can be filed under Article 226 of the Constitution. Among other things it was the opinion of the Court that “Any organization or entity that has such pervasive control over the game and its affairs and such powers as can make dreams end up in smoke or come true cannot be said to be undertaking any private activity. The functions of the Board are clearly public functions, which, till such time the State intervenes to take over the same, remain in the nature of public functions, no matter discharged by a society registered under the Registration of Societies Act.” It is to be noted that though Supreme Court held it as an authority performing public functions adducing the earlier decisions and the US Supreme Court decisions, no reasoning was given pertaining to the legal status of BCCI as a State within the meaning of Article 12.

### iii. BCCI under Right to Information Act, 2005

Right to Information Act, 2005 (RTI Act, 2005) defines ‘public authority’ for the purpose of filing RTI petitions. In spite of the observation by the Supreme Court on the nature of functions performed by BCCI as having a public nature, BCCI is not held as a public authority under the RTI Act, 2005. In *Anil Chintaman Khare v.*

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53 C.A. No 4326 of 2014 (Sep. 29, 2015) [http://supremecourtofindia.nic.in/FileServer/2015-01-221421928541.pdf](http://supremecourtofindia.nic.in/FileServer/2015-01-221421928541.pdf). (In this case the appellants sought mandamus directing BCCI to recall its order constituting a probe panel comprising two retired Judges of Madras High Court to enquire into the allegations of betting and spot fixing in the IPL made against Gurunath Meiyappan and others. It also sought for the removal of respondent No.2 from the post of President of BCCI and cancellation of the franchise favouring Chennai Super Kings and Rajasthan Royals for the IPL matches to be conducted in future. Appellants also challenged the validity of Regulation 6.2.4 of the BCCI Regulations for Players, Team Officials, Managers, and Umpires & Administrators).

54 *Id* at para.20 to 30.

55 *Id* at para. 30 (The Court continued by saying that “if the Government not only allows an autonomous private body to discharge functions which could it in law takeover or regulate but even lends its assistance to such a non-government body to undertake such functions which by their very nature are public functions, it cannot be said that the functions are not public functions or that the entity discharging the same is not answerable on the standards generally applicable to judicial review of State action. BCCI may not be State under Article 12 of the Constitution but is certainly amenable to writ jurisdiction under Article 226 of the Constitution of India.”).

56 RIGHT TO INFORMATION ACT, 2005 § 2 (b) (“Public authority” means any authority or body or institution of self-government established or constituted,— (a) by or under the Constitution; (b) by any other law made by Parliament; (c) by any other law made by State Legislature; (d) by notification issued or order made by the appropriate Government, and includes any— (i) body owned, controlled or substantially financed; (ii) Nongovernment Organization substantially financed, directly or indirectly by funds provided by the appropriate Government.”).
Central Information Commissioner (CIC) by following the decision of Supreme Court in *Zee Telefilms* held that it cannot be a ‘public authority’ under Section 2 of RTI Act. On December 14, 2011 in its written statement to CIC the Union Ministry of Youth Affairs and Sports maintained that the BCCI is on par with other national sports federations and had been availing various tax exemptions, customs duties and other governmental benefits. Describing this as indirect funding the government asked the CIC to treat the body as an entity financed substantially by the government and therefore qualifying as a “public authority” under RTI Act.58

In 2012 on a writ petition filed by an RTI activist on the status of BCCI and on that CIC served a notice on BCCI. But the Madras High Court has stayed the order taken by CIC by referring the earlier verdicts of CIC which stated that BCCI is not a public authority.59 Later in *BCCI & anr. v. Prasar Bharati & anr.*, 60 the Supreme Court has recognized the public functions performed by BCCI and it is hopefully been considered as a green signal for considering BCCI as a public authority under the RTI Act, 2005. The decision will also have repercussions on many issues pertaining to the BCCI: its selection process for the national team, which may at least be subject to the scrutiny regarding allegations of nepotism, bias and lack of transparency that seem to follow each round of selection.61

There was proposal at the ministerial level to enact National Sports Development Bill, 2013 62 to govern all sports federations including BCCI. At the initial stage only BCCI refused to submit the necessary documents as a National Sports Federation or Apex Body for the game of cricket in India. It also refused to

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58 (The other governmental benefits include all civic and security services were provided by the Central or State governments concerned for organizing BCCI sporting events, providing land at concessional rates, much below the prevailing market prices, for the construction of cricket stadia etc.) [http://www.FRONTLINE.in/cover-story/dubious-status-of-bcci/article4799701.ece](http://www.FRONTLINE.in/cover-story/dubious-status-of-bcci/article4799701.ece) (Sep. 29, 2015).


62 The Bill aims at achieving good governance through greater participation of sportsmen in decision making process and also it incorporate six parameters including the International Olympic Charter, anti-doping laws, age fraud detection, and basic universal principles of good governance, good international legislative practices and sexual harassment.
comply with the age and term guidelines for the office bearers. The BCCI’s main contention was that since it does not take any financial assistance from the ministry, it is not binding on them to follow the guidelines. Later BCCI agreed to fall under the Bill provided the government agrees with certain conditions put forth by BCCI regarding *inter alia* protecting personal/confidential information relating to athletes. The Sports Ministry has also made a clause in the Draft Bill which states that only those federations who come under the RTI Act ambit will have the right to use ‘India’ as the teams name.63 Also in this year BCCI has constituted its Anti-corruption unit as a measure to combat corruption.64 But how far these legislative and non-legislative steps will tackle the issues of match-fixing and other scandals will be proved in the coming days.

b. Indian Olympic Association

Indian Olympic Association (IOC) is a society registered under the Societies Registration Act, 1975 and it is an apex body for all sports bodies and federations in India. It represents the national face of the International Olympic Association (IOA). It has the power to affiliate or recognize other sports federations, which in turn can select and sponsor sportsmen to represent the country in games and events. It also backs and encourages spread of sports ethics and fights against unethical practices in sports. In *Indian Olympic Association v. Union of India*65 it was submitted that IOA and all NSF’s are State as they perform key public functions. Rahul Mehra, an intervener in the instant petition had urged the Court to declare all NSF’S and IOA as state under Article 12 for the purpose of filing writ under Article 226 of the Constitution taking into account the performance of key public functions by them which are akin to state functions and thus ought to be accountable, responsible and transparent in their functioning.66

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63 As per the provisions of the Bill only two clauses will be applicable on the BCCI-one pertaining to RTI and other is on Ethics, chapter 9 and 4 respectively.
64 BCCI, *Anti-Corruption Code for Participants*, (July 29, 2015), [www.bcci.tv>about>anti-corruption](http://www.bcci.tv/about/anti-corruption) (last visited on 01/10/2015).
66 *Id* at para 27.
In the instant case it was submitted that the National Sports Code, issued by the respondent Union Government is beyond its executive power. Arguments were put forth for upholding the autonomous character of the Association. But rejecting the contentions Union government argued that the restrictions are put on the association in order to ensure transparency. The Solicitor General also drew attention to the financial assistance provided by the Union to the association, tax exemptions even for those who donate money to the association and such other benefits.

Most importantly Supreme Court relied on the “aspect theory” and urged that one legislative entry may seemingly cover all facets of the subject matter but in reality one or more aspects may properly fall within the domain of another legislative authority, under another field and thus it was urged that international sports by its very nature was incapable of being encompassed within the field of “sports” falling in the State List. Attempts were made to link Article 245, Entry 10, Entry 13

67 Since Parliament does not possess legislative power to enact a law in that regard and that its provisions are violates IOA rights guaranteed under Article 14, 19 (1) (C) and 21 of the Constitution of India.
68 Id. at para 24.
69 Id. at para. 25.
70 CONSTITUTION OF INDIA art. 245 (1) (“Subject to the provisions of this Constitution, Parliament may make laws for the whole or any part of the territory of India, and the Legislature of a State may make laws for the whole or any part of the State.”) (2) No law made by Parliament shall be deemed to be invalid on the ground that it would have extra-territorial operation.”).
71 CONSTITUTION OF INDIA art. 246 (1) (“Notwithstanding anything in clauses (2) and (3), Parliament has exclusive power to make laws with respect to any of the matters enumerated in List I in the Seventh Schedule (in this Constitution referred to as the “Union List”).
(2) Notwithstanding anything in clause (3) Parliament, and, subject to clause (1), the Legislature of any State also, have power to make laws with respect to any of the matters enumerated in List III in the Concurrent List “(in this Constitution referred to as the “Concurrent List”)
(3) Subject to clauses (1) and (2), the Legislature of any State has exclusive power to make laws for such State or any part thereof with respect to any of the matters enumerated in List II in the State List (in this Constitution referred to as the “State List”)
(4) Parliament has power to make laws with respect to any matter for any part of the territory of India not included [in a State] notwithstanding that such matter is a matter enumerated in the State List.”).
72 In this regard reliance was placed on the observation made by the court in the case of Mr. Narinder Batra v. Union of India. W. P. (C) 7868/2005 decided on March 2, 2009 available at http://indiankanoon.org/doc/183659563/ (last visited on October 02, 2015) (“There can be no argument that international sporting events have been considered as an essential part of the diplomatic relations of the nation. Nuances of the hostility in political relations, issues of defence, security concerns of players, objection on account of policies of discrimination, apartheid and perceived human rights violations have guided nations in decisions to or not to participate in different countries….no state government would have the competence or jurisdiction to undertake such exercise. This is clearly the province of the Union Government.”).
73 CONSTITUTION OF INDIA Entry 13 List I (“Participation in international conferences, associations and other bodies and implementing of decisions made thereat.”).
97\textsuperscript{74} and other entries in List I and III.\textsuperscript{75} Fairly, the crux of the Code revolves around the regulation of NSF’s, which are \textit{sui generis} entities recognised by the Central Government, their terms of affiliation and in a broader sense, sporting activity nationally and internationally. Accordingly the Court was of the opinion that the Code falls under Entry 97, List I.

In the instant case it was observed that “the drafters did not foresee a question such as the one this Court is faced with today - a world in which private bodies such as the IOA, in their engagement with internationally recognized but again private, sports bodies such as the International Olympic Committee, would acquire such a monopoly over entire fields of public activity. Indeed, it is plausible to claim that the drafters did not imagine a state of events where an Indian private entity would regulate activities within its field of activity with a strong public character and as pervasively as Government regulation. Indeed that the IOA and other sports associations have acquired a quasi- norm creating character, such that they regulate activities between a host of private entities in the field of sports is undeniable. Plausibly, the associations’ connection with their international counterparts, and realization of decisions reached by the latter locally, are of grave importance, and are coloured by the same shield of public activity.”\textsuperscript{76}

\textbf{i. Indian Olympic Association and Right to Information Act, 2005}

The question whether IOA can be held as a ‘public authority’ under RTI Act, 2005, was decided by the Court in the case of \textit{Indian Olympic Association v. Veeresh Malik}.\textsuperscript{77} The Court held that IOA is a ‘public authority’ under the Act on the ground

\textsuperscript{74} (The Court also found the regulation of sporting activity as one governed by Entry 97 of List I. In this regard Court referred observation made in the case of Zee Telefilms “keeping in view that the Union of India is required to promote sports throughout India, it, as of necessity is required to coordinate between the activities of different states and furthermore having regard to the international arena, it is only the Union of India which can exercise such a power in terms of Entry 10, List I of the Seventh Schedule of the Constitution of India and it may also held to have requisite legislative competence in terms of Entry 97, List I of the said List.”) \textit{Supra} note 65, at para. 51-53.

\textsuperscript{75} \textit{Id} at para 26, 27, 28 (According to “I am anxious as any other Member here that the Central Legislature should have ample powers to give effect to treaties and agreements reached with other countries. But in order to do so it must be related to one or other subject in the concurrent or federal legislative lists.”).

\textsuperscript{76} \textit{Id} at para. 43 (By stating this it was concluded that Entry 13 should be read to include such activities which are private in form but public in substance, so as to give effect to the import of Entry 13).

\textsuperscript{77} (2010) ILR 4 Delhi 1 (In the instant case two cases of the similar nature were disposed by the Delhi High Court. The first case was regarding the legal status of IOC and the other was on the legal status of Sanskruti School a private institution whose membership consists of Central Civil Service Officers).
that IOA is ‘substantially financed’ by the Central and state government.\textsuperscript{78} Though what is substantial financing was not defined under the Act, Court held there cannot be a straitjacket formula for finding it.\textsuperscript{79} It was held that the Games Committee of Commonwealth Games\textsuperscript{80} is duty bound to use its public funds judiciously and be open for scrutiny at all times.\textsuperscript{81}

Judging on the basis of the dictum in \textit{Zee Telefilms}, Court held that “the IOA is the national representative of the country in the IOC and it has the right to give its nod for inclusion of an affiliating body that in turn select and coach sportsmen. It is an Olympic self-regulatory in respect of all national and international level sports. The funding by the government forms part of its balance sheet and the IOA depends on such amounts to aid and assist in travel, transportation of sportsmen etc. Without such funding of the government, the IOA perhaps will not be able to work effectively. Taking into account all these factors it was held that IOA is a ‘public authority’ under the RTI Act.\textsuperscript{82}

\textsuperscript{78}\textit{Id} at para 32 & 33 (The Ministry of Youth Affairs and Sports spends for the expenditures of the players. Various inter-disciplinary games like Olympic Games, Asian games, Commonwealth games are funded by the government. For the successful holding of the games government spends huge amount of money in crores).

\textsuperscript{79}\textit{Id} at para. 60 (“It was held that “the percentage of funding is not “majority” financing, or that the body is an impermanent one, are not material. Equally, that the institution or organization is not controlled, and is autonomous is irrelevant; indeed, the concept of non-government organization means that it is independent of any manner of government control in its establishment, or management. That the organization does not perform – or pre-dominantly perform – “public” duties too, may not be material, as long as the object for funding is achieving a felt need of a section of the public, or to secure larger societal goals. “To the extent of such funding, indeed, the organization may be a tool, or vehicle for the executive government’s policy fulfilment plan.”).)

\textsuperscript{80}\textit{Id} at para. 67 (“The Games Committee is a society, set up as part of the commitment given to the Commonwealth Games and the International Olympic Committee. It has an autonomous management structure, and is not dependent on the Central or NCT Government for any of its decision making processes. It owns the games, which means its conduct, and all the rights associated with it. As far as Central and NCT Government involvement is concerned, they are committed to investing and improving physical infrastructure.”).

\textsuperscript{81} (“It was stated that the Games Committee is an asset less organization and the loan which sanctioned by its unsecured and that it cannot be equated with the functioning of Banks/Statutory Financial entities, which would not agree to provide funds without proper safeguards including guarantors.) \textit{Id} at para. 33. (Further it was stated that “in this case, the Games Committee owns the conduct of the games; it is responsible, and reaps the benefit of the substantial amounts received, by way of licensing fee, sponsorship fee collected, etc. The Central Government does not share these revenues; rather they flow back to the Commonwealth Games and the International Olympic Committee. The Central Government has also agreed to allow the use of the stadium, and other infrastructure, without any user charges….In these circumstances, the court concludes that the financing or funding of the Games Committee, concededly a non-governmental organization, is substantial; it is therefore, a public authority, within the meaning of Section 2 (h) of the Act.”) \textit{Id} at para. 68.

\textsuperscript{82}\textit{Id} at para 65.
Sports Bodies in USA

In cases involving sports bodies in USA Court has applied the ‘Entanglement Test.’ In Brentwood Academy v. Tennessee Secondary School Athletic Association Court held that sport-association can be sued as a state actor because its actions and history have been "entangled" with state action. The Court acknowledged that the analysis of whether state action existed was a "necessarily fact-bound inquiry" and noted that state action may be found only where there is “such a close nexus between the State and the challenged action that seemingly private behavior may be fairly treated as that of the State itself.” Following the judgment, in Communities for Equity V. Michigan High School Athletic Association US Supreme Court held that Michigan High School Athletic Association is a ‘state actor’ and thus is subject to the Equal Protection Clause of the Fourteenth Amendment.

5.3.2 Private Banks as ‘other authorities’ under Article 12

Liberalisation and privatisation in banking sector also poses the question as to whether India should give priority to constitutional obligation or privatisation policy which is fundamental to the economy. Though nationalised banks were held to be ‘other authority’ under Article 12, none of the private commercial banks are considered to be other authority except in U.P. State Co-operative Land Development Bank v. Chandra Ban Dubey where the decision was mainly on the basis of the government involvement in the functioning of the bank.

83531 US 288 (The question was whether the actions of an interscholastic sport-association that regulated sports among Tennessee schools could be regarded as a state actor for First Amendment and Due Process purposes. The Court stated that TSSAA’s “nominally private character…is overborne by the pervasive entwinement of public institutions and public officials in its composition and workings.”); Petronella Robin, A Comment on the Supreme Courts’ Machiavellian Approach to Government Action and the Implications of its Recent Decision in Brentwood Academy v. Tennessee Secondary School Athletic Association, 31 STETSON L. REV. 1057-1094 (2000).
84Id. (“According to the Court private action amounts to state action when it results from the State’s exercise of ‘coercive power,’ when the state provides significant encouragement either covert or overt or when private actor operates as a willful participant in joint activity with the State or its agents. A private entity can also be treated as a state actor when it is controlled by the agency of state, when public functions are delegated to it by the State, when it is entwined with governmental policies or when Government is entwined in its management or control.”).
85377 F3d 504 (A class action suit was brought by a School Athletic Association alleging gender discrimination due to which the plaintiffs were excluded from participating in interscholastic athletic programmes. This case posed a question regarding the application of the state action doctrine of the Fourteenth Amendment to a state high school athletic association that sets rules for athletic programs throughout the State of Michigan.).
86Id.
871999 (1) SCC 741: AIR 1999 SC 753 (“In case of UP State Co-operative Land Development Bank the participation and control of the State is all pervasive. State officers head the institution. It is..."
In *Federal Bank v. Sagar Thomas*,\(^88\) the High Court held that writ petition is maintainable against the bank by virtue of the discharge of public duty or positive obligation of government nature, also on the ground of performance of public duty in the light of the control of the RBI over the banking industries. But Supreme Court reversed the decision on appeal. As per the Supreme Court a writ may be issued to private bodies or persons when there is a statute which is to be complied with by all concerned including private companies.\(^89\)

It was held that in the normal functioning of the private banking company there is no participation or interference of the State or its authorities. The statutes have been framed regulating the financial and commercial activities for maintaining the healthy economic atmosphere in the country. Any activity, business or commercial, may be banking, manufacturing units or related to any other kind of business generating resources, employment, production and resulting in circulation of money do not have impact on the economy of the country in general. Such activities cannot be classified as one falling in the category of discharging duties or functions of a public nature. Thus the case does not fall in the fifth category of cases enumerated in *Ajay Hasia*.”\(^90\)

In *Firdous Ahmed Tanki v. Jammu & Kashmir Bank*\(^91\) Court revised the judgment and held that bank is not a state by applying the principle in *Pradeep Kumar*
It was held so because “every government makes efforts to bring in more and more industry, trade with a view to uplift the economic conditions of the citizens. The state only lays down a policy for creating atmosphere to improve financial status of its subjects but by encouraging activity of any company or organization for improving economic conditions of citizens, the government or state only provides an opportunity to its citizens for improving their economic conditions. This in no manner can be termed as a governmental activity or an activity close to it.”

It was contended on behalf of the respondents that the state is maintaining its shareholding at more than 51% can be seen to be protecting the character of the Bank being a government company. The reduction in holding of shares was done not by disinvesting or withdrawing or selling the shares but by the mere fact that the subsequent subscription was made by the Government when the Bank invited and flouted a public issue in the late 1990’s. Thus substantial financial control over the bank still exists with the Government. The principal authority responsible for managing the business of the Bank is Chairman, who is the nominee of the Government. The Chairman and its two government directors of the Bank cannot be removed except by the Government as per the Articles of Association. Thus the government has de facto control over the Bank.

But in spite of this, Court held that the Bank does not perform any public duty or public function while dealing with its employees or carrying out its normal commercial activities as a banking company so as to make it amenable to writ jurisdiction under Article 226 read with Article 103 of the Constitution of J&K.

According to the Court a public duty must be statutory or otherwise and where it is otherwise the body or the person must be shown to owe that duty or obligation to the public involving the public law element. Similarly for ascertaining the discharge of public function it must be established that the body or the person was seeking to

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92In Jagdish Chander Gupta v. J&K Bank & ors 1986 J&K 1 Court held that Bank is an instrumentality of the state. But subsequently Court revised the judgment and held that bank is not a state.

93Id.

94CONSTITUTION OF JAMMU & KASHMIR art. 103(“Power to issue certain writs- The High Court shall have power to issue to any person or authority, including in appropriate cases any Government within the State, directions, orders or writs, including writs in the nature of habeas corpus, mandamus, prohibition, quo warranto and Certiorari, or any of them, for any purpose other than those mentioned in clause (2-A) of article 32 of the Constitution of India.”).
achieve some collective benefit for the public or a section of it and the authority to do so must be accepted by the public.\textsuperscript{95}

In \textit{ICICI Bank Ltd. v. Lakshminarayanan}\textsuperscript{96} respondent was an employee of the Bank of Madura Ltd later merged with ICICI Bank Ltd. The issue was regarding the denial of pension to a retired employee by the appellant Bank under the voluntary retired scheme. The question raised was whether a writ is maintainable against a private bank in order to apply the principle of non-discrimination between 'retired employees' and 'voluntarily retired employees' made in its Pension Regulation. Supreme Court by applying the tests laid down in \textit{Pradeep Kumar, Ajay Hasia} etc. held that the appellant bank is not carrying out any statutory or public duty and thus no writ petition is maintainable against it.\textsuperscript{97} Further it was held that merely because the bank has made provisions to grant 'pension' on VRS, the same cannot be a ground to hold that the bank is performing a public duty or public function.

The facts of this case is similar to \textit{D.S. Nakara v. Union of India}\textsuperscript{98} wherein the Supreme Court has struck down the classification made between pensioners retiring before a particular date and retiring after that particular date holding it as arbitrary and violates the doctrine of classification under Article 14. But the Court in this case denied applying the rationale of the case since a private bank does not come under the category of 'State' under Article 12. The Court had also referred to \textit{A.K. Ansari v. Bharat Overseas Bank}\textsuperscript{99} wherein Court held that “right of pension is a matter of livelihood and denial of such livelihood offends the Constitution and such a situation is monstrous in respect of retirees who lead a frugal life and this Court followed the pensioners benefits in favour of a retired employee of the Bank of Baroda.

\subsection*{5.3.3 Private Corporations}

There is no difficulty while exercising the power as against the Government, statutory authorities, Corporations and such other authorities coming within the definition of “State” under Article 12 of the Constitution of India. But when it comes

\textsuperscript{95} In this connection Court referred to Anandi Swami v. R Rudant; VST Industries ltd v. VST Workers Union & anr.(2001) 1 SCC 298; G.M. Kishan Sahkari Chini Mills ltd v. Satrughan Nishad & Ors. (2003) 8 SCC 639

\textsuperscript{96}2008 (3) LLN 320.

\textsuperscript{97}Id. at para 10-13.

\textsuperscript{98}1983 (2) SCR 165.

\textsuperscript{99}(2001) 3 LLJ 1367 Mad.
to issuing a writ against private companies, establishments and individuals, the
ground for exercising the power are restricted and narrowed down having regard to
the extraordinary nature of the power and the availability of alternative remedies.

Some of the grounds which would weigh against the exercise of the power are
(i) availability of effective alternative remedy (2) absence of any public duty; (3)
laches and unreasonable delay in approaching the Court; (4) Need to deal with and
adjudicate upon complicated facts which would require detailed evidence oral or
documentary etc. These are the factors which would dissuade the Courts from
exercising the jurisdiction. But even if these dissuading factors exist, yet the Court
can issue a writ, if the situation and interest of justice and public interest warrant
interference and the monstrosity of the situation is such that refusal to exercise such
power would result in grave injustice.\(^{100}\)

In *M.C. Mehta v. Union of India*\(^{101}\) the question was whether a private
corporation would fall under the definition of ‘State’ under Article 12. It was
pointed out on behalf of the applicant that as Shriram is registered under the
Industries (Development and Regulation). Act, 1951, its activities are subject to
extensive and detailed control and supervision by the Government and thus it
would fall under Article 12.\(^{102}\) According to the American State Action doctrine, if
supported, controlled or regulated by the State may get so entwined with
governmental activity as to be termed State action and it would then be subject to
the same constitutional restraints on the exercise of power as the State.

On the other hand, counsel for Shriram contended that control or
regulation of a private corporation's functions by the State under general
statutory law such as the Industries (Development and Regulation) Act 1951 is
only in exercise of police power of regulation by the state. Such regulation does not
convert the activity of the private corporation into that of the State. It was also
pointed out that the State action doctrine to the Indian situation means control and
function test which have been evolved in order to determine whether a particular

\(^{100}\) As observed in Jiby P. Chacko v. Principal, Medicity School of Nursing &anr.2002 (2) ALD 827 at
para. 35.

\(^{101}\) AIR 1987 SC 965.

\(^{102}\) “Under the Act a license is necessary for the establishment of a new industrial undertaking or
expansion of capacity or manufacture of a new article by an existing industrial undertaking carrying
on any of the Scheduled Industries included in the First Schedule of the Act.”
authority is an instrumentality or agency of the State and hence 'other authority' within the meaning of Article 12. Therefore, to so expand Art 12 as to bring within its ambit even private corporations would be against the fundamental rights.

The Supreme Court held that though Government does not interfere in the internal management policies of the Company the functional control is of special significance. Along with this Shriram also receives sizable assistance in the form of loans and overdrafts running into several cores of rupees from the Government through various agencies. Moreover, Shriram is engaged in an activity which has the potential to invade the right to life of large sections of people. Despite establishing the contentions of the petitioners finally the Hon'ble Court said that they do not propose to decide whether a private corporation like Shriram would fall within the scope and ambit of Article 12, because of insufficient time to consider and reflect on this question in depth. The Court felt that this is not a question on which they must make any definite pronouncement at that particular stage since it needs detailed consideration.

In VST Industries Ltd. v. VST Industries Workers' Union & anr., the Supreme Court after considering Anandi Mukta, examined whether a writ would lie against an industry which was engaged in manufacture and sale of cigarettes and it was held that the appellant is engaged in the manufacture and sale of cigarettes since manufacture and sale of cigarettes will not involve any public function.

In Dalco Engineering Pvt. Ltd v. Satish Prabhakar Padhey & Ors. the question was whether, having regard to the definition of the word ‘establishment’

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103 “The learned counsel also pointed out that those rights which are specifically intended by the Constitution makers to be available against private parties are so provided in the under Art 17, Art 23 and Art 24.”
104 The Supreme Court held that Shriram required to obtain a license under the Factories Act and is subject to the directions and orders of the authorities under the Act. It is also required to obtain a license for its manufacturing activities from the Municipal authorities under the Delhi Municipal Act, 1957. It is subject to extensive environment regulation under the Water (Prevention and Control of Pollution) Act, 1974 and as the factory is situated in an air pollution control area, it is also subject to the regulation of the Air (Prevention and Control of Pollution) Act, 1981.
105 (2001) 1 SCC 298 (In this case the appellant company was manufacturer in cigarettes the shares of it were held by the public and the shares were traded through stock exchanges. The respondents were the workers of the canteen in the factory premises and they were running canteen for a long period of time on contract basis. Through the writ petition they sought that they has to be treated at par with employees of the company for grant of monitory and other consequential benefits).
106 (2010) 5 SCC 349 (In this case the appellant was employed in a private limited company incorporated under the provisions of Companies Act, 1956. He became hearing impaired while on service to the respondent and he was not allowed to continue on service. The Disability Commissioner
of Section 2(k) of the Companies Act, 1956, the requirement relating to non-
discrimination of employees acquiring a disability during the course of service, embodi
ded in Section 47, is to be complied with only by authorities falling within the
definition of State (as defined in Article 12 of the Constitution), or even by private
employers. The Supreme Court dismissed the petition.

The learned counsel for employee submitted that the terms used in a socio-
economic statute like Disabilities Act, 1995 providing for full participation and
equality, for people with disabilities and to remove any discrimination against them vis-à-vis non-
disabled persons, should be interpreted liberally. He submitted that keeping the said objects in view, the term ‘establishment’ in Section 2(k) of the
Companies Act, 1956 should be extended to all corporations incorporated under the
Companies Act 1956, irrespective of whether they are in the public sector or private sector. But the Apex Court turned a blind eye to these arguments and by applying the principle laid down in Sukhdev Singh's case and held that the respondent private company is not an ‘establishment,’ within the meaning of that expression in Section 2(k) of the Act, and therefore Section 47 of the Disabilities Act will not apply to the private company.

In Binny Ltd. & anr. v. Sadasivan & Ors., Supreme Court held that it is only when a private person or body performs a public function and discharges a

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107 Companies Act, 1956 § 2 (“Definitions.-In this Act, unless the context otherwise requires, (k) 'Establishment' means a corporation established by or under a Central, Provincial or State Act, or an authority or a body owned or controlled or aided by the Government or a local authority or a Government company as defined in section 617 of the Companies Act 1956 (1 of 1956) and includes Departments of a Government.”).
108 Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995 § 47 (“Non-discrimination in Government employment -- (1) No establishment shall dispense with, or reduce in rank, an employee who acquires a disability during his service: Provided that, if an employee, after acquiring disability is not suitable for the post he was holding, could be shifted to some other post with the same pay scale and service benefits.”).
109 (1975) 1 SCC 421 (It was observed that a company incorporated under the Companies Act, 1956 is not created by the Companies Act but comes into existence in accordance with the provisions of the Act. There is thus a well-marked distinction between a body created by a statute and a body which, after coming into existence, is governed in accordance with the provisions of a statute) para 10.
110 Id (“Here the term 'establishment' was equivalent to the expression 'State' under Article 12 of the Constitution. If private company was held as an 'establishment' it was automatically becoming 'other authority' under Article 12.”).
111 (2005) 6 SCC 657 In this case the appellant company had employed the respondents at various posts and subsequently in order to avoid overtime wages the company insisted them to be designated as
public duty that Article 226 of the Constitution can be invoked and that although it is not easy to define what a public function or public duty is, it can reasonably be said that such functions are similar to or closely related to those performable by the State in its sovereign capacity. The Supreme Court has further observed that a body performs a public function when it seeks to achieve some collective benefit for the public or a section of public and is expected by the public or that section of the public as having authority to do so.

In *MRF Employees Union v. The Management of MRF* Madras High Court held that a writ cannot be issued against a private party if there is any alternative remedy and at the same time it cannot be denied in case of violation of statutory provisions. It can be issued at the discretion of the Court only under extraordinary circumstances if the monstrosity of the situation requires or to protect violation of fundamental rights under Part III of the Constitution of India or if there is gross violation of the mandates of law. A perusal of the judgment shows the inclination of the High Court in enforcing fundamental rights against private management of MRF. Court held that large scale termination of employees following their attempts to form trade union violates Article 14 as well as Article 19 of the Constitution and also it violates the statutory rights of the workers to have a labour union for the welfare of the workers and to effectively exercise their bargaining power.

Managerial staff and the respondent acceded to it. Later company suffered loss due to the damage caused to the machinery, finished good and plant when water entered the premises unexpectedly and decided to suspend the operations of the mill. As a result an order for termination was given to the respondents invoking clause 8 of the agreement which gave company power to terminate employees by giving one months notice or salary in lieu thereof. The respondents filed a writ petition for a declaration to the effect that the agreement, read with the termination order was void and illegal and violates of Sec. 23 of the Indian Contract Act, and also to declare that the agreement violates of Article 21 of the Indian Constitution.

*Id* at para 51

*Id* at para 71, 73.Per K.P. Sivasubramaniam.
In *Jaya Pal Singh v. Union of India*\(^{115}\) the question was whether Videsh Sanchar Nigam (VSNL) Ltd. is amenable to the writ jurisdiction under Article 226 by satisfying the criteria under Article 12. The negative fall-out of *Pradeep Kumar Biswas* is clearly reflected in this decision. It was submitted from the side of employees that VSNL performs public functions. An important point raised for consideration was that “when the government, in the exercise of its executive power by way of a policy decision creates an entity or divests its functions, which may have a bearing upon the fundamental rights, in favour of a private body or transfer of public entity to a private body, in such an eventuality, the functions earlier discharged by the Government cannot be termed as purely a private function.”

It was submitted that the functions are sovereign functions on the ground that determining sovereign nature of a function depends on the nature of the power and manner of its exercise and airwaves and frequency are public property.\(^{116}\) Other important submissions were to the effect that while deciding on the definition of ‘other authority’ importance has to be given to the mixed economy of the State and private enterprises and that VSNL being in partnership with Union of India is duty bound to uphold the rule of law.\(^{117}\)

But despite these genuine grounds for holding VSNL as ‘other authority’ the Court followed the approach in *Pradeep Kumar Biswas* Court held that VSNL/TCL is not performing any public functions. Court held that the public function performed by a private educational institution and by VSNL/TCL cannot be treated at the same pedestal as the former is a sovereign function. Regarding termination of services Court held that promise by the government not to retrench the employees would not create any public duty which is bound to be performed by the government, as far as wrongful termination of services is concerned Court held that affected parties have to

\(^{115}\) 2013 (4) SCJ 26 (In this case the government of India established a department Overseas Communications Services and later converted it into a Public Sector Corporation known as VSNL. It handled international telecommunication services of the country and in the year 2002 the government handed over VSNL to TATA Communications Ltd. In this scenario ten writ petitions were filed by the former employees of VSNL before the Delhi High Court and two at the Bombay High Court. Writ petition have been also filed against wrongful termination of services by VSNL in breach of the assurances given by Union government as per the share holding agreement. The main issue was the maintainability of the petitions.).

\(^{116}\) *Id.* at 34. To substantiate this view the decision in Secretary, Ministry of Information and Broadcasting v. Cricket Association of Bengal (1995) 2 SCC 122 was referred to, wherein it was held that right to impart and receive information is a species of freedom of speech and expression under Article 19 (1) (g).

\(^{117}\) *Id.* at p. 35.
approach any other forum. But there be any fixed criteria as to what are the sovereign functions of the government especially when most of the functions of the government are delegated to private players.

**Private Corporations in USA**

In US corporations or associations private in character but dealing with public rights have already been held subject to constitutional standards by applying various tests. Public Functions test implies that “when one devotes his property to a use in which the public has an interest, he in effect grants to the public an interest in that use, and must submit to be controlled by the public for the common good to the extent of the interest he has thus created.” According to this doctrine “when private individuals or groups are endowed by the state with powers or functions governmental in nature, they become agencies or instrumentalities of the State.” Later in 1974 Court held that in order to attract the doctrine of State Action, the functions carried out by the Corporation must be ‘public function closely related to the governmental functions.’

In U.S. Public functions doctrine became stronger with the decision in *Marsh v. Alabama*,118 wherein the question arose was whether a private township could prevent a person from distributing religious literature i.e.; applicability of the first and fourteenth amendments to the conduct of the corporation that owned the town. The majority opinion delivered by Black J. was premised on the notion that the more an owner opens up his property for use by the public in general for his advantage, the more do his rights become circumscribed by the statutory and Constitutional rights of those who use it. Interestingly, the Court opined that even in cases where the State had merely acquiesced to an entity performing an important public function, the entity would be subject to Constitutional standards.

**5.3.4 Private Cooperatives**

State legislatures have enacted laws in the nature of Cooperative Societies Act, 1961 where under there is provision for registration of private cooperatives. The objective of the cooperatives may range from marketing to banking and covers every objective for which cooperative venture is useful and fruitful. They are also given the power to frame bye-laws with the prior approval of the government, for the regulation

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of their internal management. A high ranking government official known as Registrar of Cooperative Societies has wide ranging jurisdiction to supervise and assist the working of the cooperatives, and is possessed of powers of interference. Questions have been raised regarding applicability of fundamental rights against cooperatives in a number of cases.

A cooperative society is in general not an ‘authority’ except in relation to the performance of statutory duty directly imposed on it. In Dukhooram v. Cooperative Agricultural Association it was argued that since the Cooperative Societies Act, 1961 authorised a cooperative society to make bye-laws on specifically stated matters, it was indicative of the fact that society was ‘State’. Subsequently it was overruled and the matter came to be settled in Ram Swarup v. Madhya Pradesh State Cooperative Marketing Federation and also in Vaish Degree College, Shamli & Ors. v. Lakshmi Narain & Ors., wherein Court held that a body not created by a statute, did not become statutory merely because certain statutory provisions applied to it. A writ of mandamus can be issued only for the enforcement of some duty or obligation which was imposed by a statute. The question of status of the cooperative society, its bye-laws and its amenability to the writ jurisdiction of the High Court was thoroughly examined by a full bench of the Andhra Pradesh High Court in the case of Sri Konaseema Cooperative Central Bank ltd v. N. Seetharam Raju and the following principles were put forth by the Court;

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120 AIR 1961 MP 289 (In this case the petitioners’ suspension was quashed because under the applicable bye-laws suspension could be imposed only as a substantive punishment and not during the pendency of an enquiry).
121 AIR 1976 MP152
122 1976 (2) SCC 58
123 The decision in Vaish Degree College was followed in Deepak Kumar Biswas v. Director of Public Instructions AIR 1987 SC 1422 wherein a dismissed lecturer of a private college asked for reinstatement in service. The Court refused to grant the relief although it was found that the dismissal was wrongful.
124 Id. In Deepak Kumar Biswas, the respondent institution was a Degree College managed by a registered co-operative society. A suit was filed against the college by the dismissed principal for reinstatement. It was contended that the Executive Committee of the college which was registered under the Co-operative Societies Act and affiliated to the Agra University (and subsequently to Meerut University) was a statutory body. The importance of this contention lies in the fact that in such a case, reinstatement could border if the dismissal is in violation of statutory obligation. But this Court refused to accept the contention. It was observed that the management of the college was not a statutory body since not created by or under a statute. It was emphasized that an institution which adopts, certain statutory provisions will not become a statutory body and the dismissed employee cannot enforce a contract of personal service against anon-statutory body.
125 AIR 1990 AP 171 FB.
1. The bye laws of the cooperative society do not have the force of law, and therefore no writ can be issued for the enforcement.

2. In those cases were a particular cooperative society has the features on the basis of which it can be called an instrumentality of the state, a writ can be issued for the enforcement of the bye-laws not because it has the status of law, but because it would be violative of Article 14 of the Constitution if the society is left free to observe or not to observe its bye-laws in different cases, according to its sweet will.

3. Where a statutory obligation or duty is imposed on a society, the same can be enforced against it by the issue of a writ even though the society is not ‘the state’ under Article 12 of the Constitution.

4. Even where a society is found to fulfil the indicia which go to make it a State instrumentality, every aspect of its activity is not subject to the control of the writ jurisdiction of the High Court, which is an aspect of the public law. Even a society which is ‘the State’ may have private law rights and obligations.

In A.M. Ahmed & Co. v. Union of India\textsuperscript{126} Madras High Court held that National Agricultural Cooperative Federation of India ltd is a State. But the Court did not accept the contention that the term ‘State’ had a wider meaning for the purpose of Article 12 and 14 of the Constitution and had a narrower import for Article 19(6) of the Constitution, the argument being that otherwise the expression ‘a corporation owned or controlled by the state’ in Article 19(6) would be superfluous. In K.V. Pandurangarao v. Karnataka Dairy Development Corporation\textsuperscript{127} the Karnataka High Court recognised the governmental nature and monopoly status of the Corporation and applied responsibility of the State under Article 48 to the Constitution.\textsuperscript{128}

In General Manager, Kisan Sahkari Chini Mills v. Satrughan Nishad & Ors.\textsuperscript{129} the question was whether Kisan Sahkari Mills registered under UP Co-operative

\textsuperscript{126} AIR 1982 Mad. 247.
\textsuperscript{127} 1994 (1) KLJ 149.
\textsuperscript{128} CONSTITUTION OF INDIA art. 48 ("The State shall regard the raising of the level of nutrition and the standard of living of its people and the improvement of public health as among its primary duties and, in particular, the State shall endeavour to bring about prohibition of the consumption except for medicinal purposes of intoxicating drinks and of drugs which are injurious to health.").
\textsuperscript{129} (2003) 8 SCC 639.
Societies Act, 1965 is a ‘State.’ Court applied the test of Pradeep Kumar Biswas and held that it is not a 'State', since it does not involve any public function. In M Thanikkacahalam v. Madhuranganthagam Agricultural Co-operative Society Supreme Court held that no writ will lie against a Cooperative Society since it is not an instrumentality of State within the meaning of Article 12 of the Constitution of India and the correctness of the same decision was challenged in K Marappan v. Deputy Registrar of Co-operative. The Court applying the tests in Ajay Hasia, and Pradeep Kumar Biswas it was held that the respondent society carrying on banking business cannot be termed as an instrumentality of the State within the meaning of Article 12 of the Constitution. The bye-laws made by a co-operative society registered under the Tamil Nadu Co-operative Societies Act, 1983 do not have the force of law. Hence, where a society cannot be characterized as a State, the service conditions of its employees governed by its bye-laws cannot be enforced through a writ petition.

In Zoroastrian Cooperative Housing Society v. District Registrar Supreme Court held that ‘public policy’ with regard to a cooperative society has to be judged in the light of four corners of the Act and thus it upheld the ‘freedom of Contract’ and accordingly the freedom to contract cannot be curbed or curtailed relying on fundamental rights. Therefore as per the Court even though it may seem retrograde in Secular India, the enactment did not bar cooperative societies from discriminating on the ground of religion only. As far as applicability of Article 12 to co-operative society is concerned it was held that the appellant society Article 12 is not applicable as it does not satisfy the tests laid down in Ajay Hasia, thus it is not possible to argue that a person has a fundamental rights to become a member of a voluntary association or of a co-operative society governed by its own bye-laws. The society must be bound to stay within the four corners of Part III relating to fundamental rights as it is

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130 2000 (4) CTC 556.
131 2006 (4) CTC 689.
132 (2005) 5 SCC 632 (In this case, the members of the Parsi community established a co-operative housing society by a local Act. A bye-law of the co-operative society confined its membership to the Parsi community. A question arose whether a subsequent non-Parsi purchaser could be excluded from membership because of the bye-law. The High Court held that the restriction is unfair. But the Supreme Court held that the bye-law is not contrary to 'public policy' mentioned in Section 4 of the Local Act under which the co-operative society is formed).
133 Id at para 18 & 27 (It was also held that constitutional goals could be achieved only by legislative intervention and not by the Courts interpretation of the public policy).
134 Id at 659.
135 Id at para 26.
the fundamental law of the land. Shifting the responsibility to prevent discrimination to the legislature in this kind of an exceptional situation is not expected from the judiciary which is the protector and guarantor of fundamental rights of the people in India.

Further in *S.S. Rana v. Registrar, Co-operative Societies* \(^{136}\) it was observed by the Supreme Court that, for arriving at the conclusion that the State has a deep and pervasive control over the society several other relevant questions are required to be considered namely (i) How was the society created? (ii) whether it enjoys any monopoly character? (iii) Do the functions of the society partake to statutory functions or public-functions and (iv) can it be characterized as public authority?\(^{137}\)

In *Fazila Husain v. Union of India*\(^{138}\) the question was whether the Rowing Federation of India which is subject to National Sports Development Code is a 'State' as it receives grant from the Central Government. The Apex Court held that the form of the body is not decisive rather the real status of the body with respect to the control of government would have to be looked into. The various tests have to be applied and considered cumulatively. And finally it was held that merely because authority receives grant from government by itself will not bring it within the term 'other authorities' so as to enable the Court to issue writ under Article 12.\(^{139}\)

In *Thalappalam Ser. Co-operative Bank ltd & Ors. v. State of Kerala & Ors.*,\(^{140}\) it was held that though co-operative societies are not covered by Article 12, it still can be a 'public authority’ for the purpose of RTI Act, 2005. Thus, now it is partly acknowledged that co-operative societies perform public functions. In cases of violation of fundamental rights co-operative societies should be treated as other authority.’

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\(^{137}\) *Id* at para. 8.
\(^{139}\) *Id* at para. 8 (The form in which the body is constituted, namely, whether it is a society or a cooperative society or a company, is not decisive. The real status of the body with respect to the control of Government would have to be looked into. The various tests, as indicated above, would have to be applied and considered cumulatively. There can be no hard-and-fast formula and in different facts/situations, different factors may be found to be overwhelming and indicating that the body is an authority under Article 12 of the Constitution).
\(^{140}\) 2013 (7) SCJ 862.
5.3.5 Private Educational Institutions

For the purpose of Article 12 private educational institutions can be classified into aided unaided, government educational institutions. As far as government maintained institutions are concerned they fall under the purview of Article 12.

There are catena's of decisions regarding whether a private educational institution can be held as a State or not. In *Vaish Degree College v. Lakshmi Narain*\(^\text{141}\) and in *Arya Vidya Sabha v. K.K. Srivastava*\(^\text{142}\) the Supreme Court held that a private college even if it is registered under the Societies Registration Act or affiliated to a University it would not be a statutory body. As to when a body can be registered as a statutory one has been explained by saying that if an institution owes its existence to a statute it would be a statutory body. In *Nookavarapu Kanaka Durga Devi v. Kakatiya Medical College*\(^\text{143}\) also the Court held that the private medical college will not come under the definition of state merely because it received some helpful cooperation from the government.\(^\text{144}\)

i. Government Aided Private Educational Institutions

Further in *Anandi Mukta Sadguru Trust v. V.R. Rudani & Ors.*,\(^\text{145}\) it was pointed out that public money paid as government money plays a major role in the control, maintenance and working of educational institutions and the service conditions of the academic staff are not purely of a private character. Thus a college receiving aid for its managing committee would be amenable to writ jurisdiction to obtain compliance of any statutory duty imposed upon it. It was

\(^{141}\) (The Court upheld the removal of the Principal of the college which was in violation of the University Act and Statute which required that he can be removed only with the prior approval of the Vice-Chancellor. This was one of the early applications of Article 12 to a private educational institution. The Supreme Court emphasised that the College did not become statutory authority merely because some statutes apply to it).

\(^{142}\) *AIR* 1976 SC 1073.

\(^{143}\) *AIR* 1972 AP 83 (In this case the petitioner had been refused admission because she could not produce certificate to the satisfaction of the admission committee of the college that she had been 15 years resident of Telengana region. The petitioner contended that the rule violates Article 14 of the Constitution. The college contended that the since the college was not a ‘state’ under Article 12 right to equality could not be claimed against it).

\(^{144}\) *AIR* 1989 SC 1607 (It was argued on behalf of the respondent that the college received aid from the government; two ministers and the District Magistrate were members of the Committee of the college; the Government District Hospital was allowed to be attached to the College and the college imparted medical education which was a public function and because of these reasons college has to be treated as a ‘State’ under Article 12).

\(^{145}\) In this case the amenability of a trust managing an affiliated college receiving aid to writ jurisdiction came up for examination.
also upheld that the constitutional position that a writ under Article 226 can be moved against a private college even though it did not qualify to call to be a state under Article 12 of the Constitution. In *All India Sainik Schools Employees Association v. Sainik Schools Society*\(^{146}\) Supreme Court upheld the contention that Sainik Schools Society was ‘State’ and therefore it could not be in violation of Articles 14, 16 and 39 of the Constitution. The Court noted that the entire funding was by the Central and State governments and the overall control also vested in the governmental authority.\(^{147}\)

In *Maricherla Chitti Babu v. Bharatiya Vidya Bhavan*\(^{148}\) Supreme Court held that a writ of mandamus under Article 226 cannot be applied to enforce a contract of employment between a teacher and a private school, which does not receive any aid from the government. It was contended on behalf of the petitioner that the school comes under Article 12 since it is affiliated to CBSE and it performs public function.\(^{149}\)

Similarly in *Tika Ram v. Mundikota Shikshan Prasarak Mandal*\(^{150}\) writ petition filed by head master of a private school was held maintainable against the order of Director of Education. In *Francis John v. Director of Education*\(^{151}\) also a similar view was expressed by the Supreme Court and as observed by Venkataramaiah C. J. "any private school which receives aid from the government under the grant in aid code cannot escape from the breach of the code and particularly where the Director of Education who is an instrumentality of the State is participating in the decision making process"

\(^{146}\) 1989 AIR 88, 1988 SCR Supl. (3) 398 (The petitioner association claimed parity in service conditions with the teachers and employees of Kendriya Vidyalayas and other similar Central government employees).

\(^{147}\) *Id.* at p. 138-139 (With regard to the nature of the governmental function performed, it was pointed out that the defence of the country is one of the state responsibilities and the main object of the society was to run schools and prepare students for National Defence Academy).

\(^{148}\) 1991 (3) ALT 385.

\(^{149}\) In this case the service of the petitioner who was a permanent employee was terminated when Sri RamkrishnaVidyalaya where he was working merged with BharatiyaVidya Bhavan on the reason that his services are no longer required.

\(^{150}\) AIR 1984 SC 1621.

\(^{151}\) AIR 1990 SC 423.
But the position underwent considerable change in the wake of the decision of the Court in *Ajay Hasia*.\(^\text{152}\) In *Mamohansingh Jaitla v. Commissioner, Union Territory of Chandigarh*\(^\text{153}\) Supreme Court held an aided institution as a state as per the decision of the Supreme Court in *Ajay Hasia* and held that no action could be taken except by following a procedure based on natural justice and proposed action.\(^\text{154}\) The decisions of the Deputy Commissioner, against whose decision an appeal could be preferred to the Commissioner were held to be ‘other authority’ and subject to judicial review.\(^\text{155}\)

Similarly in *Francis John*\(^\text{156}\) it was held that even though the petitioner was a Headmaster in a private school a writ petition would lie against the Director of Education because his services had been terminated by the College Principal only after the approval of this step by the Director of Education who is a public official.

Further in *Ravneet Kaur v. Christian Medical College, Ludhiana & anr.*,\(^\text{157}\) overriding the decision of the P&H High Court it was held that Daya Nand Medical College and Hospital, which is a minority educational institution privately, owned and managed receiving aid out of state funds is not an instrumentality of State under Article 12. It was also held that Regulation II of the Medical Council Act which lays down criteria for selection of students will not lay any statutory public duty on the respondent Medical College.

**ii. Government Recognized Private Educational Institutions**

*Sater Paul v. Sobhana English Medium High School*\(^\text{158}\) the Court held that a writ petition under Article 226 is maintainable against private recognized unaided college. In the same case Court referred to *Sri Krishnamacharyalu & ors v.*

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\(^{152}\) The change is evident in the decision of the Court in *Master Vibhu Kapoor v. Council of Indian School Certificate Examination*. AIR 1985 Del. 145, wherein Council of Indian School Examinations was held to be a state when it arbitrarily withheld the result of a student.

\(^{153}\) AIR 1985 SC 364 (In this case services of the petitioner as Head Master of a private school was terminated overriding the Punjab Aided Schools (Security of Services) Act, 1969 which provided that no employee shall be dismissed or removed or reduced in rank except after an inquiry to be held in the manner prescribed therein. It was done by invoking the provisions in the service agreement).

\(^{154}\) As per the facts of the case ninety five percent of the expenses of the institution were met by government grant and it was governed by Punjab Aided Schools (Security of Service) Act, 1969 by which the appointment had to be approved by the Department of Public Instruction.

\(^{155}\) 2008(2) SCT 543.

\(^{156}\) 1990 AIR 423; 1989 SCR Supl. (2) 252.

\(^{157}\) AIR 1998 P H 1.

\(^{158}\) 2003 (3) KLT 1019 (The question was whether a writ petition is maintainable against the manager of a recognized unaided private institution).
Venkateswara College of Engineering &Ors.,\textsuperscript{159} wherein the hon’ble Supreme Court held that “there is an interest created by the government in an institution to impart education, which is a fundamental right of the citizens. When an element of public interest is created and the institution is catering to that element, the teacher the arm of the institution is also entitled to avail the remedy provided under Article 226 of the Constitution.”

iii. Un-aided Private Educational Institutions

In \textit{Raja Soni v. Air Officer}\textsuperscript{160} the petition against a private school registered under the Societies Registration Act, 1960 was resisted by the respondent management on the ground that the school was being run by a private management and it is not receiving any grant from the government nor there any government control in the management of the school. Therefore it was contended that the school cannot be a ‘state’ or 'other authority' under Article 12 of the Constitution. But negating the said contention the Supreme Court observed; “the recognized private schools in Delhi whether aided or otherwise are governed by the provisions of the Delhi Education Act and Rules. The respondent management is under a statutory obligation to uniformly apply the provisions of the Act and the Rules to the teachers employed in the School. The authority cannot defy the statute on the pretext that it is neither a State or nor an ‘authority’ under Article 12 of the Constitution of India.”

The above decisions apart, it was in \textit{J.P. Unnikrishnan v. State of Andhra Pradesh}\textsuperscript{161} that for the first time Supreme Court encountered the question whether private educational institution can be held as ‘State’ under Article 12. It was held that the concept of 'State Action' cannot be extended to private educational so as to subject them to the discipline of Part III.\textsuperscript{162} A valid point was raised by the respondents which needs to be noted in the subsequent decisions is the fact that the educational institutions perform an important public function coupled with the

\textsuperscript{159}(1997) 3 SCC 571 (In this case a writ petition by the Lab assistants of a private un-aided college for parity in pay scales to that of government employees was held to be maintainable by the Supreme Court).

\textsuperscript{160} AIR 1969 SC 667

\textsuperscript{161}(1992) 3 SCC 666.

\textsuperscript{162}id. at para. 51.
fact that their activity is closely inter-twined with governmental activity, characterizes their action as ‘State Action.’

In Unnikrishnan Supreme Court held that Article 14 applies even to private institutions also and it compels them to admit students only on the basis of merit. According to the Court no private educational institution can survive without recognition and affiliation which are granted by authorities of the State. The State authority cannot allow its power and privilege to be used unfairly. Hence the said authority is under an obligation to insist upon appropriate conditions to ensure not only requisite teaching standards but also fair play in regard to admission of students in unaided private educational institutions. The Court held that merit will have to be the sole criterion subject to reservations under Article 15.

On the contrary, in Jiby P. Chacko v. Principal, Medicity School of Nursing & anr. Andhra Pradesh High Court held that Nursing Schools fulfil Supplemental Government Activity Test since they perform public functions and thus they are bound by fundamental rights including Article 14 and 19 of the Constitution. But in spite of this it was not held to be a ‘State’ under Article 12 because of the absence of pervasive control and financial participation.

Thus we can see that there are factors which make private educational institutions amenable to writ jurisdiction like receiving of aid, granting recognition. But in most of the cases it was done without reference to the concept of State Action.

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163 Id. at 600.
164 Id. at 610.
165 Id (The fees charged from the students cannot be higher than what is charged in government colleges of similar courses. The government and other authorities will have to provide for such conditions, if not already provided for and shall ensure compliance with them. Therefore the rules which apply to the state activity also apply to the activities of private educational institutions).
166 2002 (2) ALD 827.
167 Id at para 18 (But it was held that since the recognizing affiliating authority is the State, it is under an obligation to impose such conditions as part of its duty enjoined upon it by Article 14 of the Constitution of India...In our opinion, no Government, authority or University is justified or is entitled to grant recognition/affiliation without imposing such conditions. Doing so would amount to abdicating its obligations enjoined upon it by Part-III ...To reiterate, what applies to the main activity applies equally to supplemental activity. The State cannot claim immunity from the obligations arising from Articles 14 and 15. If so, it cannot confer such immunity upon its affiliates).
iv. Minority Aided and Un-aided Educational Institutions

In *Un-aided Private Schools of Rajasthan v. Union of India & Anr.* 168 The Court upheld the applicability of Right of Children to Free and Compulsory Education Act, 2009 to un-aided non-minority schools under Article 21 A of the Constitution. In a well thought out judgment Court discussed at length the responsibility of non-state actors to enforce fundamental rights. 169 The judge even criticised the decision in *T.M.A. Pai Foundation* 170 and *Inamdar* 171 as casting negative obligations on the private educational institutions since the decision have categorically held any action of the State to regulate or control admissions in the unaided professional educational institutions, so as to compel them to give up a share of the available seats to the candidates chosen by the State, as if it was filling the seats available to be filled up at its discretion in such private institutions, would amount to nationalization of seats. 172

Further in *Pramati Educational & Cultural Trust & Ors. v. Union of India & Ors.* 173 the court looked into the question whether Article 15 (5) is valid with respect to private un-aided institutions or whether it alters the basic structure of the Constitution of India. 174 The writ also questioned the constitutional validity of the Act to the extent it imposes obligations upon aided but minority run educational institutions. Court upheld the applicability of the Act in so far as private unaided and aided institutions are concerned. But regarding the applicability to minority aided and unaided institutions court ruled in the negative and held that it is *ultra vires* the Constitution. 175

It is pertinent here to note that learned counsel for the Union submitted that private educational institutions cannot have any grievance regarding giving admissions to weaker and disadvantaged students as per the Act because they are

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168(2012) 6 SCC 102 (In this case the validity of Section 12 (1) (c) was challenged which made it mandatory to admit 25 % of the students from weaker and disadvantaged group in the neighbourhood to unaided private schools).
169Id. at para. 89-100.
172Id at para. 100.
173In this case the Court looked into the validity of the order passed in Un-aided Private Schools of Rajasthan v. Union of India & anr. (2012) 6 SCC 1.
174(He submitted that Article 21A, if construed to mean that the State could by law pass on its obligation under Article 21A to provide free and compulsory education to all children up to the age of fourteen years to private unaided schools, Article 21A of the Constitution would abrogate the right of private educational schools under Article 19(1) (g) of the Constitution as interpreted by this Court in T.M.A. Pai Foundation case).
175Id. at para 46 and 47.
performing functions akin to the state. By applying functional test he observed that educational institutions are part of Article 12 of the Constitution.\textsuperscript{176}

\textbf{5.3. 6 Private Hospitals}

In \textit{Sanjeev Gulati v. Sri Ganga Ram Hospital}\textsuperscript{177} it was held by the Delhi High Court that services of a medical practitioner in a private institution providing free medical services to a section of public does not involve any public duty or an element of public policy since it is a matter under contract of employment. Petitioners relied on the public functions aspect of the hospital but it was denied by the Court.

\textbf{5.4 Concept of Horizontality of Fundamental Rights}

Among the most fundamental issues in Constitutional law is the applicability of the rights against private actors.\textsuperscript{178} In recent years the horizontal position has been adopted in varying degrees in Ireland, Canada, Germany, South Africa and the European Union. The horizontal position ejects the public private division in constitutional law and the justification for this is that in the modern context the constitutional rights and values may be threatened by extremely powerful private actors and institutions as well as the governmental ones and the vertical application of rights privileges the autonomy and privacy of such citizen theatres over that of their victims.\textsuperscript{179}

There is also ‘direct horizontal’ and ‘indirect horizontal effect.’ Under ‘direct horizontal effect’ fundamental rights will be directly enforceable against private actors through express Constitutional provisions. ‘Indirect Horizontal effect’ is an intermediate or hybrid position according to which although constitutional rights apply directly only to the government, they are nonetheless permitted to have some degree of indirect application to private actors. South Africa and Ireland are the best example for ‘direct horizontal effect’ whereas Canada and Germany are examples for ‘indirect horizontal effect’ of fundamental Rights.

The US Constitution envisages a strict vertical application of fundamental rights. It is because of the degree of commitment to social democratic norms which is

\textsuperscript{176} Id. at para. 37.
\textsuperscript{177} As decided on Dec 8, 2005, available at \url{http://delhihighcourt.nic.in/} (last visited on Oct 12, 2015).
a compelling factor to adopt horizontality in the application of fundamental rights. US have weak social democratic commitments because of the *laissez faire* tradition but it was inducted into it through the establishment of Welfare institutions in the New Deal Era and in order to tackle the situation the judiciary has evolved the doctrine of state action to face the challenge posed by social democratic norms against liberal autonomy\(^{180}\) or private actors against the constitutional safeguards.

In US the pure vertical application of Bill of Rights is also because of the approach towards the doctrine of state action by J. Rehnquist. Rehnquist Model strictly limited the application of the state action theories to ensure that the Courts will use 14\(^{th}\) amendment to control governmental action only, thereby leaving the political branches to regulate the private activities and relationships as the constitution intended, thus upholding the principles of separation of powers. As a result of these, the comparatives almost universally view United States as the paradigm of the polar vertical application of constitutional rights.\(^{181}\)

### 5.5 Horizontal Application of Fundamental Rights in India

Though there are instances wherein Court declined to apply fundamental rights against private actors there are some exceptional cases wherein Court has enforced fundamental rights against private actors. There are also instances when a writ was filed by private actors under Article 32, Court declared the matter as a fit case to be decided under Article 226, due to the reason that violation of fundamental right not a condition precedent for invoking Article 226 of the Constitution, thus restricting the scope OF Article 32. But the phraseology of Article does not cast any express prohibition on private actors from invoking the article for the protection of their fundamental rights.

Article 32 clause 1 envisages only the right to move the Supreme Court for the enforcement of the right. It can be interpreted to mean that the framers had in their mind the rights which can be violated by the private individuals in which case a writ under Article 32 could be moved by the private individual. Clause 2 of the Article


\(^{181}\) The exclusive focus on the 14\(^{th}\) Amendments state action requirement as the source for determining the scope of constitutional rights has obscured the more basic and fundamental proposition which derived not from the 14\(^{th}\) Amendment at all but is a straight forward implementation of the Supremacy Clause.
envisages that Supreme Court has power to issue directions, writ or orders for the enforcement of ‘any of the rights’ conferred under Part III. If this provisions are read in conjunction with Article 12, it can be concluded that horizontal application is not unwarranted by the makers of the constitution deliberately or otherwise. The cases narrated below help to understand the pattern adopted by the Indian judiciary in applying rights horizontally.

(a) **Right to Property against Private Actor:** *P.D. Shamdasani v. Central Bank of India* 182 was one of the earlier cases wherein Supreme Court ruled out the applicability of fundamental rights under Article 19 (1)(f) and 31 against private individuals. 183 The reasoning on behalf of the petitioner that as there is no express legislative power pertaining to the ‘deprivation of property’ under Schedule VII of the Constitution and so it must be regarded that the provision conferred a right against private action. However this contention was dismissed as it was held that the State had the legislative power either under Entry no. 1 of List II or Entry no. 1 of List III of Schedule VII.

The reasoning behind ruling out applicability of Article 19 against the Bank was mainly on the basis of two grounds firstly, on freedoms under Article 19 it was contended that restrictions could be placed exclusively by the state in the succeeding clauses of the same Article i.e. Article 19 (2) envisaged infringement only against state action. Secondly, it was held that the omission of the word state in Article 31 (1) does not imply that it is enforceable against private persons. For substantiating this view Court read Article 31 (1) along with Article 21 which has resulted in concluding that rights can be curbed only by way of an authorized governmental action involving ‘procedure established by law’ and ‘express authority of law.’ 184

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182 **AIR 1952 SC 59** (In this case the petitioner was aggrieved by the Banks’ sale of his shares to recover a debt due to him. He petitioned the Court by a writ action to enforce his fundamental right to acquire, hold and dispose of his property under Article 31 (1) against the Central Bank of India, and then a private bank incorporated under the Companies Act, 1882).

183 (Prior to Shamsadani, in *Shrimati Vidya Verma v. Shiv Narain Verma* **AIR 1956 SC 108**, the Supreme Court refused to find an Article 21 violation in the case of one individual being detained by another. Quoting Patanjali Shastri J.’s opinion in *A.K. Gopalan*, the Court held in that “as a rule, constitutional safeguards are against the State and the protection against violation of rights by individuals must be sought in the ordinary law.”).

184 **CONSTITUTION OF INDIA** art. 21 (“No person shall be deprived of his life or personal liberty except according to procedure established by law.”).
(b) Right to form Association and Right to Life: In Bharat Kumar M. Palicha v. State of Kerala & Ors., a writ was filed against the Communist Party of India against calling for and holding of a ‘Bundh’ by a political party as it violates Article 19 and 21 of the Constitution. It was argued by the respondents that the petition is not maintainable for non-joinder since the government is not pleaded as a party to the petition. Though this objection was taken into account, the Court like in the case of M.C. Mehta declined give any opinion regarding enforcement of fundamental right against private citizen or a political organization. As per the Court it is suffice if the fundamental rights of the citizen are infringed in one way or the other. At a later stage Court also held that in the absence of any regulatory action on the part of the State Court has the ample jurisdiction to give a declaratory relief to the petitioners since the petition is based on violation of fundamental rights.

(c) Right against Sexual Harassment: Vishaka v. State of Rajasthan was a case involving sexual harassment of women at workplace and there are three pointers in the case which indicated that sexual harassment in workplace amounted to constitutional wrong. Firstly, as per the positive obligation on various organs of the state to protect woman under Article 14 and 15, under right to life under Article 21 and her right to practice any profession under Article 19 (1) (g) and this sense of responsibility from the part of state is clear when the state was included as a party in the writ petition, Secondly, as per the Fundamental Duty under Article 51-A. Thirdly, under the obligations of the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW).

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185AIR 1997 Ker. 291.
186Id at para 8 A (But what was argued was that a challenge on the basis of violation of the fundamental rights under Articles 19 and 21 of the Constitution could be raised only against State action and not to prevent a political organisation or a private citizen from allegedly interfering with that right. Necessarily we will consider that argument at the appropriate stage. But at the moment what is called for is only to notice that the rights put forward by the petitioners in these Original Petitions to earn on their profession or business or to attend to their offices is certainly part of the fundamental rights guaranteed to them by the Constitution. How far such rights air infringed and even if they are infringed by the action of the political parties and their calls for bundhs how far the same could he redressed in this proceeding under Article 226 of the Constitution are aspects that will have to be considered at the appropriate stage).
187Id at para. 18.
188AIR 1997 SC 3011 (The petitioners complained about the brutal gang-rape of a social worker at the work premises).
189CONSTITUTION OF INDIA art. 51 A (It provides that it “shall be the duty of every citizen of India to abide by the Constitution and respect its ideals and institutions”).
This case has brought into effect the idea that though Article 14 and 15 or for that matter any article which casts obligation on the state need not be disabled from having any horizontal effect on private action.\textsuperscript{190} Here, writ was filed on the ground that failure of the state to establish a legal framework to tackle sexual harassment resulted in the violation of constitutional obligations. By putting forth state as the opposite party, Court was absolved from the procedural difficulties in initiating a writ against the private party and thereby supplied justification in enforcing the writ against the individual offender. Subsequently in Medha Kotwal Lele v. Union of India\textsuperscript{191} in spite of keeping silence on the violation of fundamental right by private actors in the judgment, Court has given the direction to follow the mandate of the Court in Visakha wherein in both cases the issue pertained to both public and private discrimination. In Bodhisatwa Gowtham v. Subhra Chakraborthy\textsuperscript{192} Court held that "fundamental rights can be enforced even against private bodies and individuals" under Article 32 but without elucidating any reasoning for the same.

(d) Right against Child Labour: In PUDR v. Union of India\textsuperscript{193} government contractors in Asiad Games project engaged in pernicious forms of labour practices which violated right to live with dignity and equality of the labourers and the constitutional prohibitions against forced and child labour. Petitioners alleged violations of all these rights by private contractors in their employment contracts as well as by the state which had failed to enforce labour statutes. Though Bhagwati J. did not distinguish between phrasing of different rights violated in this case, proposed a significant horizontal aspect to Articles 23 and 24 but found that Article 14 had a much narrower scope.

Bhagwati J. also took the Courts’ view in Maneka Gandhi v. Union of India\textsuperscript{194} towards an expansive view of the scope and reach of fundamental rights. He found it inconceivable and unreasonable that the ‘constitution makers’ would have sought to exclude forms of labour were minimum wages were paid. By ignoring the fundamental distinctions between feudal modes of extraction of labour and services

\textsuperscript{190}Sudhir Krishnaswamy, \textit{Horizontal Application of Fundamental Rights and State Action in India} in HUMAN RIGHTS, JUSTICE AND CONSTITUTIONAL EMPOWERMENT, 53-55 (C. Raj Kumar and K. Chokalingam 2\textsuperscript{nd} ed. 2010)
\textsuperscript{191}(2013). 1 SCC 311.
\textsuperscript{192}AIR 1996 SC 1992.
\textsuperscript{193}(1982). 3 SCC 235.
\textsuperscript{194}1978 AIR 597.
and the unequal bargaining positions in an unregulated market economy, Bhagwati concluded that the expression ‘forced labour’ would apply irrespective of the payment and non-payment of remuneration. He also identified rights which can be applied horizontally. He pointed out that whenever any fundamental right is enforceable against private individuals it is the constitutional obligation of the state to take the necessary steps for the purpose of interdicting such violation and ensuring the observance of the fundamental right by the private individual who is transgressing the same.

He continued by saying that the horizontal application of Article 24 prohibition may give rise to two corresponding duties: the constitutional duty on the contractors not to employ any child below the age of 14 years and a corresponding obligation on the state to ensure that this obligation is obeyed by the contractors. He also emphasised on the constitutional duties with respect to payment of minimum wages and equal remuneration by linking it with Article 14. Thus he did not extend the reach of traditional writ remedies to private actors.

Further, regarding the procedural form of the case he exalted public interest litigation and he vehemently denied that the purpose of the writ petition is to find fault with any particular authority for not observing the labour laws in relation to workmen employed in the projects which are being executed by it, but to ensure that in future the labour laws are implemented and the rights of the workers under the labour laws are not violated.” While fixing the liability the Court had applied principal agent relationship and made the principal employer i.e. state liable for statutory violations. The application of fundamental rights to dispute between private citizens in this fashion relies more on the doctrine of state action than the idea of a horizontally applicable right as per the decision.

The contractors were directed to pay the workers minimum wages and the Delhi Development authority was asked to take action against contractors who failed to do so. DDA was also recommended to insert a clause in their contracts to ensure that their contractors complied with all labour laws. The Court appointed three

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195 Supra note 188, at p. 462.
196 Id at p. 466.
197 CONSTITUTION OF INDIA art.24 (“Prohibition of employment of children in factories, etc. No child below the age of fourteen years shall be employed to work in any factory or mine or engaged in any other hazardous employment.”).
independent ombudsman to make periodical inspections to ensure that the labour laws are implemented and wages and benefits accrued to the workmen. Thus in this case though the concept of direct horizontal application was not specifically applied by the Court, the Indian Supreme Court has given Supreme Court some horizontal effect by imposing a wider range of constitutional duties on state actors and by accommodating private and state actors as respondents to a writ petition.

In *M.C. Mehta v. State of Tamil Nadu*\(^{198}\) the petitioners claimed that child labour violated the constitutional prohibition under Article 24 of the Constitution\(^{199}\) and Directive Principles under Article 45.\(^{200}\) The respondents were State of Tamil Nadu and private parties who employed the children. Though Justice Hasaria effectively directed a ten-point action plan against child labour, he did not distinguish between obligations under Article 24 which can be applied even against private actors and obligations of the state under Article 45. Without referring that the Court has turned the action into public law action by giving emphasis to the positive obligation on the state where fundamental rights are violated by non-state actors and to liberal rules of standing and secondly by adopting liberal procedure to allow public interest petitioners to name both state and private actors as respondent.

**(e) Right to Education:** *Indian Medical Association v. Union of India*\(^{201}\) related to the applicability of reservations in private non-minority unaided medical college. The petitioners challenged *inter alia* Article 15(5) of the Constitution which was inserted into the Constitution by the 93\(^{rd}\) Amendment Act, 2005.\(^{202}\) Court overruled the objection by holding that “it (the Art) clearly situates itself within the broad egalitarian objectives of the Constitution. In this sense what it does is that it enlarges as opposed to truncating an essential and indeed a primordial feature of the equality code.”\(^{203}\)

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198 (1991) 1 SCC 283.
199 Supra note 192.
200 CONSTITUTION OF INDIA art. 45 (“The State shall endeavour to provide early childhood care and education for all children until they complete the age of six years.”).
201 (2011) 7 SCC 179.
202 CONSTITUTION OF INDIA art. 15 (5) Nothing in this article or in sub-clause (g) of clause (1) of article 19 shall prevent the State from making any special provision, by law, for the advancement of any socially and educationally backward classes of citizens or for the Scheduled Castes or the Scheduled Tribes in so far as such special provisions relate to their admission to educational institutions including private educational institutions, whether aided or unaided by the State, other than the minority educational institutions referred to in clause (1) of article 30.”).
203 Supra note 196, at para 109.
The Court also referred to the Constitutional Assembly Debates to hold that the word “shops” under Article 15 (2) is of a wide import so as to include in its ambit any arms-length provision of goods or services on the market.\(^{204}\) Court has also vehemently criticized private educational institutions which under the veil of charity are denying social justice principles under the Constitution.\(^{205}\) By analysing this judgement we can see that the Court has made the private actor liable for breach of Constitutional provisions. At same time Court analysed the exact meaning of the word ‘access’ in 15 (2),\(^{206}\) posing the question whether access is limited to situations where private parties refuse to transact on the basis of a constitutionally prohibited maker or does it extend to all kinds of economic interactions between the parties, including hiring firing decisions?\(^{207}\) An answer to this will clear out most of the evils of liberalisation and privatisation.

In Society for Unaided Schools v. State of Rajasthan\(^{208}\) the main question was whether Right to Education (Free and Compulsory) Act, 2009 (RTE Act, 2009) violated Article 19(1) (g) of the Constitution. A peculiar feature of this judgment is that two interveners for the respondent had embarked on the concept of horizontal application of fundamental right.\(^{209}\) The Court gave importance to the rule that

\[^{204}\text{Id. at para 112 and 113.}\]

\[^{205}\text{Id at para 148, 149 (further it was mentioned that “the power of the State to allow such participation of the private sector could only have existed if the State had the power to devise policies based on circumstances to promote general welfare of the country, and the larger public interest. The same cannot be taken to mean that a constitutional amendment has occurred, in a manner that fundamental alteration has occurred in the basic structure itself, whereby the State is now denuded of its obligations to pursue social justice and egalitarian ideals, inscribed as an essential part of our constitutional identity, in those areas which the State feels that even resources in the private sector would need to be used to achieve those goals. The argument that the policies of liberalization, privatization and globalization (LPG) have now cut off that power of the State are both specious, and fallacious. Such policies are only instances of the broader powers of the State to craft policies that it deems to serve broader public interests. One cannot, and ought not to deem that the ideologies of LPG have now stained the entire Constitutional fabric itself, thereby altering its very identity.”).}\]

\[^{206}\text{CONSTITUTION OF INDIA art. 15 (2) (“No citizen shall, on grounds only of religion, race, caste, sex, place of birth or any of them, be subject to any disability, liability, restriction or condition with regard to—}
(a) access to shops, public restaurants, hotels and places of public entertainment; or (b) the use of wells, tanks, bathing ghats, roads and places of public resort maintained wholly or partly out of State funds or dedicated to the use of the general public.”).}\]

\[^{207}\text{Horizontality under the Indian Constitution: A Schema, Available at https://indconlawphil.wordpress.com/2015/05/24/horizontality-under-the-indian-constitution-a-schema/ (last visited on 02/10/2015)}\]

\[^{208}\text{2012} 6 \text{ SCC} 1.}\]

\[^{209}\text{Id at para 38 (It was contended that Articles 21A and 15(3) provide the State with Constitutional instruments to realize the object of the fundamental right to free and compulsory education even through non-state actors such as private schools. On the other hand, learned senior counsel for the petitioners submitted that since no constitutional obligation is cast on the private educational institutions under Article 21A, the State cannot through a legislation transfer its}\]
enjoyment of those socio-economic rights, the beneficiaries should not make an inroad into the rights guaranteed to other citizens.\textsuperscript{210} According to him socio-economic rights can be realized only against the State and the statutes enacted to protect those rights are subject to the rights guaranteed to non-state actors under Article 19 (1)(g), 30 (1), 15 (1), 16 (1) etc.

Regarding obligation of non-state actors in the realization of children’s right’s it was recognized by referring to various international documents that “on-state actors exercising the state functions like establishing and running private educational institutions are also expected to respect and protect the rights of the child, but they are, not expected to surrender their constitutionally guaranteed rights.”\textsuperscript{211} According to the Court the principles enshrined in Articles 46\textsuperscript{212} and 47\textsuperscript{213} are not pious declarations but for guidance and governance of the State policy in view of Article 37 and it is the duty of the State to apply them in various fact situations.\textsuperscript{214}

Finally Court held that no distinction or difference can be drawn between unaided minority and non-minority schools with regard to appropriation of quota by the State or its reservation policy under Section 12(1) (c) of the RTE Act, 2009.\textsuperscript{215}

\textsuperscript{210}Id at para. 49-54 (The counsel for the appellant referred to a number of decisions by African Supreme Court wherein it declined to apply socio-economic rights of private individuals against the state. He also referred to the rulings of India and other countries to impress upon the fact that even in the jurisdictions where socio-economic rights have been given the status of constitutional rights, those rights are available only against State and not against private state actors, like the private schools, private hospitals etc., unless they get aid, grant or other concession from the State) para 57.
\textsuperscript{211}Id at para. 94-95 (“The obligation to protect implies the horizontal right which casts an obligation on the State to that it is not violated by non-state actors. For non-state actors to respect children’s rights cast a negative duty of non-violation to protect children’s rights and a positive duty on them to prevent the violation of children’s rights by others, and also to fulfil children’s rights and take measures for progressive improvement but no positive obligation to make available those rights.”).
\textsuperscript{212}CONSTITUTION OF INDIA art. 46 (The State shall promote with special care the educational and economic interests of the weaker sections of the people, and, in particular, of the Scheduled Castes and the Scheduled Tribes, and shall protect them from social injustice and all forms of exploitation).
\textsuperscript{213}CONSTITUTION OF INDIA art. 47 (“The State shall regard the raising of the level of nutrition and the standard of living of its people and the improvement of public health as among its primary duties and, in particular, the State shall endeavour to bring about prohibition of the consumption except for medicinal purposes of intoxicating drinks and of drugs which are injurious to health.”).
\textsuperscript{214}“By holding so Supreme Court mentioned various cases wherein Court uphold the socio-economic principles under Directive Principles of State Policy like Consumer Education & Research Centre an & Ors. v. Union of India & others [1995] 3 SCC 84; Paschim Banga Khet Majdoor Samity & Ors. v. State of West Bengal & anr. (1996) 4 SCC 37; Social Jurist, A Lawyers Group v. Govt. of NCT of Delhi & Ors. (140) 2007 DLT 698).
\textsuperscript{215}Right to Information Act § 12 (“Extent of school’s responsibility for free and compulsory education: (1) For the purposes of this Act, a school,- (a) specified in sub-clause (i) of clause (n) of
Such an appropriation of seats cannot be held to be a regulatory measure in the interest of the minority within the meaning of Article 30(1) or a reasonable restriction under Article 19(6) of the Constitution. Thus Article 21A and RTE Act, 2009 does not cast an obligation on minority and unaided non-minority educational institutions not receiving any aid or grant from respective government or local authorities.

In *Pramati Educational & Cultural Trust v. Union of India*\(^{216}\) the question was whether by inserting clause (5) in Article 15 of the Constitution by the Constitution (Ninety-third Amendment) Act, 2009, Parliament has altered the basic structure or framework of the Constitution and secondly, whether the word ‘State’ in Article 21A can only mean the ‘State’ which can make the law.

Responding to this questions it was submitted by the petitioner’s that the constitutional obligation under Article 21A of the Constitution is on the State to provide free and compulsory education to all children of the age of 6 to 14 years and not on private unaided educational institutions. Article 21A, however, states that the State shall by law determine the “manner” in which it will discharge its constitutional obligation under Article 21A. Thus, as per the Court a new power was vested in the State to enable the State to discharge this constitutional obligation by making a law. However, Article 21A has to be harmoniously construed with Article 19(1) (g) and Article 30(1) of the Constitution.\(^{217}\) So Article 21A of the Constitution and the 2009Act does not violate Article 19(1) (g) of the Constitution.

While discussing the validity of clause (5) of Article 15 of the Constitution, it was held that if the 2009 Act is made applicable to minority schools, aided or unaided, the right of the minorities under Article 30(1) of the Constitution will be abrogated. Therefore, the 2009Act insofar it is made applicable to minority schools referred in clause (1) of Article 30 of the Constitution is *ultra vires* the Constitution.

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section 2 shall provide free and compulsory elementary education to all children admitted therein; (b) specified in sub-clause (ii) of clause (n) of section 2 shall provide free and compulsory elementary education to such proportion of children admitted therein as its annual recurring aid or grants so received bears to its annual recurring expenses, subject to a minimum of twenty-five per cent.; (c) specified in sub-clauses (iii) and (iv) of clause (n) of section 2 shall admit in class I, to the extent of at least twenty-five per cent. of the strength of that class, children belonging to weaker section and disadvantaged group in the neighborhood and provide free and compulsory elementary education till its completion: Provided further that where a school specified in clause (n) of section 2 imparts pre-school education, the provisions of clauses (a) to (c) shall apply for admission to such pre-school education.”).

\(^{216}\) (2012) 6 SCC 1.

\(^{217}\) *Id* at para. 40.
(f) Constitutionality of Exclusive Covenants: There are two cases in this regard, Zoroastrian Co-operative Society\textsuperscript{218} and Charu Khurana & Ors. v. Union of India & Ors.\textsuperscript{219} In the former case the Supreme Court sustained the constitutional validity of a racially restrictive covenant under the bye-law of a co-operative society run by Zoroastrians and thereby upheld their fundamental right to form associations. The Society was not considered to be a State under Article 12 since it does not satisfy the criteria mentioned under Ajay Hasia. The Court further held that the fundamental rights under Part III are enforceable against State action or by other authorities who may come within the purview of Article 12 of the Constitution, thereby, it is not possible to argue that a person has a fundamental right to become a member of a voluntary association or of a co-operative society governed by its own law.\textsuperscript{220}

In the Charu Khurana there was a violation of equality clause under the Constitution and a writ was filed under Article 32. Though there was a clear violation of fundamental rights in the case the Court denied positing the Make-up artist association either as a ‘State’ under Article 12 or as amenable to Article 226. The Court followed the path as chosen in Vishaka and reiterated that “violation of gender equality “right to Life and Personal Liberty” and “Right to Practice Profession’ attract remedy under Article 32 for the enforcement of these fundamental rights against women.”\textsuperscript{221}

5.6 Horizontal Application of Constitutional Rights in other countries

Unlike India, there are countries which have adopted Horizontal application of fundamental rights mainly, indirect horizontality as a means of applying fundamental rights against private actors. It has been observed by the Courts in these countries that government as well as corporation’s can threaten the human rights. Corporations or people exercising ‘private power’ are actually exercising power conferred on them by law regulating and controlling market behaviour. Thus government is somehow...
implicated in private decisions. Horizontal application of fundamental rights finds a means to implicate government in private decisions or exercise of private power when it violated the fundamental rights of the individual.

(a) Ireland

Ireland is a perfect example for horizontal application of fundamental rights. In Ireland direct horizontality is achieved through the concept of Constitutional torts. If a person has suffered damage by virtue of a breach of constitutional rights that person is entitled to seek as a matter of right redress against the person or persons who infringed that right. This right is expressly guaranteed under the Constitution which says that the State guarantees in its laws to respect and as far as practicable by its laws to defend and vindicate the personal rights of the individual. Through judicial interpretation the Court has enforced this right against state actors, private actors and the judiciary. Constitutional rights which are given horizontal effects include freedom of association, freedom from sex discrimination, right to earn a livelihood and the right to due process.

(b) South Africa

Horizontal effect of fundamental rights is also given in the Constitution of South Africa, 1996. In South Africa the decision in Du Plessis presented a middle way between indirect horizontality and direct horizontality. According to the Court invocation of any law by one private individual in a suit against another initiate the application of constitutional rights to that law. This is because all law whether regulating relations between the individual and the state or relations among individuals, whether statute or common law is directly subject to the Constitution. Constitutional rights do not impose duties on private actors, who are free to order

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223Meskell v. Coras Iompair Eireann (1973) IR 121 Per Walsh J.
224To this effect in one of the cases it was held that a trade union violated the freedom of association of the individual by enforcing a closed shop agreement on existing employees).
225Murtagh Props. Ltd v. Cleary (1972) IR 330 (In this case Court ordered an injunction against a trade union for violating constitutional rights of equality to a woman by objecting employment of women).
226Lovett v. Gogan (1995) 1 LRM 12 (In this case injunction was granted against a defendants unlicensed transport company which was found to be interfering with the plaintiffs transport company’s right to livelihood).
227Glover v. B.L.N. Ltd. (1973) 1 I.R. 388 (In this case damages was awarded to a plaintiff whose right to fair procedures which was implied in the contract of employment permitting to dismiss for a just cause).
228Du Plessis v. De Clerk 1996 (3) SA 850 (CC).
their relationships as they will but does apply to all law including that regulating relationships.229

(c) Canada

In Canada the challenge against private action on the basis of constitutional/charter rights was first put forth before the Supreme Court of Canada in *Dolphin Delivery case.*230 In the instant case an injunction was sought by a private company under the strength of a common law inducing breach of contract to restrain the secondary picketing of its premises by a trade union. Picketing was a protected right under the Charters’ guarantee of freedom of speech and expression. But that was held not to be applicable in common law litigation. The Court decided its opinion on two grounds under Supremacy clause231 and application clause232 in the Charter. But at the same time Court did not completely ruled out the relevance of Charter obligation to a private litigation. It was opined that though the Charter rights impose obligations on the government, charter values influence the entire legal system.233

Subsequently, in *Hill v. Church of Scientology of Toronto*234 Court further elaborated the difference between Charter rights and values.235 It was held that it is up to the party challenging the common law to bear the burden of proving not only that the common law is inconsistent with charter values but also that its provisions cannot be justified. Thus the Supreme Court has recognized the concept of ‘indirect horizontality.’ But it is a difficult task to enforce charter values in a private litigation.

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229*Id.* (It was held that although the Constitution’s Bill of Rights neither had “general direct horizontal application” nor applied in private litigation based on the common law, it nevertheless may and should have an influence on the development of the common law governing relations between individuals).


231*CONSTITUTION OF CANADA ACT, 1982 § 52 (1) (“The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution, is to the extent of inconsistency, of no force or effect.”)).

232*CONSTITUTION OF CANADA ACT, 1982 § 32 (1) (“The Charter applies (a) to the Parliament and government of Canada in respect of all matters within the authority of the Parliament and (b) to the legislature and government of each province in respect of all matters within the authority of legislatures of each province.”)).

233*Supra* note 225, at 605 (According to the Court the answer to the question whether the judiciary ought to apply and develop the principles of the common law in a manner consistent with the fundamental values enshrined in the Constitution must be answered in the affirmative. The Charter is far from irrelevant to the private litigants whose disputes fall to be decided at common law. But this is different from the proposition that one party owes a constitutional duty to another, which proposition underlines the purported assertion of Charter causes action or charter defences between individuals).

234(1995) 2 SCR 1130 (In this case Morris, a lawyer working with the Church held a press conference and wearing the barrister gown he made false imputations against Hill a judge relating to a judgment delivered by him. The main question was the validity of common law of defamation in the light of Canadian Charter of Rights and Freedoms).

235*Id.*
The challenge was succeeded in *Ryan v. Ryan* [[M (A) v. Ryan (1997) 1 SCR 157.](#) wherein the Court held that the common law rules of psychiatrist-patient privilege must be modified in the light of Charter values.

**(d) Germany**

In Germany also just as in Canada Constitutional rights have indirect horizontal effect but they do not directly control or govern private law disputes between individuals. But there are differences in the position of law in both countries. For instance all private laws in Germany are directly subject to the Constitutional rights contained in Basic Law. There was also some initial confusion in Germany as to the vertical and horizontal effect because of the language of the Constitution which is declaratory at some part and universal in some other part.

Through a series of decisions the Federal Constitutional Court (FCC) has developed the doctrine of applicability of third party effect of constitutional rights, came to be known as ‘Drittwirkung’ and it still remains the same. According to the doctrine, although Constitutional rights bind only governmental organs they apply to all private law and so have indirect effect on private actors whose legal relationships are regulated by that law. This was also affirmed in the *Luth v. Luth* [[239](#) wherein the FCC held that the primary purpose of basic law is protection from public officials in private law. But the Basic Law establishes ‘an objective order of values’ [240](#) that must be looked as a fundamental constitutional decision affecting all spheres of law and in that

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237 The Basic Law states that everyone has the right to the free development of his or her personality” and that everyone has the right to life and to (physical integrity). The Basic Law declares that “men and women shall have equal rights.” (Article 2) Freedom of faith and of conscience and freedom of creed, religious or ideological shall be inviolable. (Art.3). Everyone has the right freely to express and disseminate his or her opinion in speech, writing and pictures. (Art.4)” And art and science research and teaching shall be free. (Art. 5).


239 The instant case related to the free speech rights of a public official against whom an injunction was passed by the civil court for preventing him from attempting to boycott a film made by the director who had earlier made anti-Semitic film under the Nazi regime. He claimed that the injunction violated his right to free speech which is a constitutional right.

240 *BASIC LAW FOR THE FEDERAL REPUBLIC OF GERMANY* art. 5 (“Freedom of expression, arts and sciences] (1) Every person shall have the right freely to express and disseminate his opinions in speech, writing and pictures, and to inform himself without hindrance from generally accessible sources. Freedom of the press and freedom of reporting by means of broadcasts and films shall be guaranteed. There shall be no censorship. (2) These rights shall find their limits in the provisions of general laws, in provisions for the protection of young persons, and in the right to personal honour. (3) Arts and sciences, research and teaching shall be free. The freedom of teaching shall not release any person from allegiance to the constitution.”).
case the private law such as that invoked by the plaintiff should be interpreted in the spirit of the Basic Law and a responsibility was imposed on the judges at the lower echelons to correctly understand the constitutional principle in the area of law under review.\textsuperscript{241} The Court by applying the doctrine held that the constitutional value of freedom of conscience contained in Article 4 of the Basic Law\textsuperscript{242} exerts a substantial influence on the interpretation and application of the relevant private employment law, which requires terminations to be ‘socially justified.’ \textsuperscript{243}

\textit{Luth} employs both direct and indirect means of subjecting private laws to constitutional rights. Since the institutions are bound by the Basic Law, the civil courts have a duty to take constitutional values into account while interpreting and applying private law when adjudicating disputes between the parties. This is same approaches in Canada wherein Constitutional values bind the Common law.\textsuperscript{244} In Germany a private law not in conformity with the Basic Law is invalid since it is the directly applicable higher law norm. Thus the application of constitutional law is directed against the law in question and indirect when it is applied in constitutional interpretations.

\textbf{(e) United Kingdom}

In the United Kingdom Human Rights Act, 1998 (HRA) was enacted to incorporate the European Convention on Human Rights into domestic law. After the passing of the Act any Act of Parliament can be called into question if it violates any of the rights mentioned in the Convention. The Courts do not have the power to invalidate or misapply the statute instead the remedy is that the Court will adopt a ‘fast track’ parliamentary procedure to amend or repeal it. It emerges from the text of the Act that it does not have direct horizontal effect since the provision in the Act is

\textsuperscript{241} Supra note 222, at 79.
\textsuperscript{242} \textsc{BASIC LAW FOR THE FEDERAL REPUBLIC OF GERMANY} art. 4 (“Freedom of faith and conscience (1) Freedom of faith and of conscience, and freedom to profess a religious or philosophical creed, shall be inviolable (2) The undisturbed practice of religion shall be guaranteed. (3) No person shall be compelled against his conscience to render military service involving the use of arms. Details shall be regulated by a federal law.”).
\textsuperscript{243} Id. at 407 (The relevant public law was Unfair Dismissal Protection Act, 1969 which renders termination with notice legally effective only if it is ‘socially justified,’ i.e. based on reasons relating to the employees person, conduct, or compelling business requirements that rule out the possibility of continuing to employ the person).
\textsuperscript{244} Id.
addressed only to ‘public authorities’ and not private individuals.\(^{245}\) The applicability of ‘indirect horizontality’ is also at doubt because HRA does not make any reference to Convention rights which applies to private litigation or to the common law. In particular the duty placed on the courts by Section 3(1) to employ Convention rights as an interpretative guide applies only to legislation and not to common law rights.\(^{246}\) On the other hand, the argument in favour of indirect horizontal effect is that the Courts are expressly included in the list of ‘public authorities’ obligated to act in accordance with Convention Rights under Section 6 (1) together with Ministerial statements supporting this position in course of parliamentary debate on the Act.

5.7 Horizontal Application of Fundamental Rights: Reasons and Justifications

The Horizontality of Fundamental Rights can be understood through the lens of Political Liberalism and Social Democracy.\(^{247}\) The political theory of liberalism see public organized into political association as a threat to liberty whereas social democracy came as a response to exercise of social power by market in exercising their control over opportunity of employment and property. In the above countries where horizontal effect of fundamental rights are widely acknowledged and at the same time it can be seen that their Constitutions are embodiment of social welfare and social democratic principles.\(^{248}\) There can also be drawn a connection between state action and social democracy also on the basis of two premises first, that a social democratic state is an activist state and second premise is based on the notion that ‘if liberty supplemented by equality is the guiding political norm of the liberal state, solidarity or fraternity is the guiding norm of the social democratic state.\(^{249}\) Horizontal application of fundamental rights requires each private actor to take those into account in its private actions.\(^{250}\)

\(^{245}\) U.K. Human Rights Act, 1998 § 6 (1) (“It is unlawful for a public authority to act in a way which is incompatible with a Convention Right.”).

\(^{246}\) U.K. Human Rights Act, 1996 § 3 (1) So far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention Rights).

\(^{247}\) Mark Tushnet, supra note 222, at 88-90.

\(^{248}\) Id. For instance, in Canada social democratic institutions are stronger. In Germany Basic Law incorporate Sozialstaat principle in describing federal republic as a ‘democratic and social federal state.’ South African Constitution contains an extensive enumeration of constitutionally guaranteed social welfare rights.

\(^{249}\) Id. at 90 (Solidarity means that each member of the society has the duty to take the interest of others’ into account).

\(^{250}\) Id.
Another important feature of political liberalism is ‘pluralism’ since the political institutions allow reasonably free thought and liberal discussion, over time; citizens will come to affirm different world view religious, moral codes and ways of life, which can be referred as ‘comprehensive doctrines.’ The basic question then is how is it possible for there to exist over time a just and stable society of free and equal citizens, who remain profoundly divided by reasonable religious, philosophical and moral doctrines?\(^{251}\) It is made possible through ‘political conception of justice’ which is based on political institutions of a constitutional regime and the public traditions of their interpretation, as well as historic texts and documents that are common knowledge, but arguments used to defend and justify them must belong to the domain of public reason.\(^{252}\)

In the above context coercive power is legitimately exercisable only when it is exercised in accordance with a constitution the essentials of which all citizens may reasonably expected to endorse in the light of principles and ideals acceptable to them as reasonable and rational.\(^{253}\) Thus the basis of political liberalism is the refusal to impose the majority’s idea of the good upon all of society, and allow everyone to pursue their own conceptions of the good, as opposed to a state where the State chooses one vision of the good and enforce it through law.\(^{254}\) The idea of justice in Pluralism is opposite to the ideas of justice in a social democracy.

When the above idea is imported to the idea of legal pluralism it poses a challenge to the concept of rights constitutionalism with state as the centre of enforcement of fundamental rights. According to legal pluralist ideology state is no longer determinative of the existence of or character of law rather it is the private non-state actors which determines it and rights constitutionalism does not deliver what it promises as an instrument of social engineering, casting significant doubts on its effectiveness to restrain private power.\(^{255}\) The horizontal application of fundamental rights thus permeates fundamental rights to the actions of non-state actors and comes to the rescue of social democratic ideals in a welfare society.

\(^{251}\) JOHN RAWLS, POLITICAL LIBERALISM 4 (1993).
\(^{252}\) Id at 11, 39.
\(^{253}\) Id at 217.
\(^{254}\) Id.
\(^{255}\) GAVIN W. ANDERSON, CONSTITUTIONAL RIGHTS AFTER GLOBALIZATION 10 (2005).
The rationale for horizontal application of fundamental rights also rests on the basic principle that fundamental rights are principles rather than rules.\textsuperscript{256} When the application of rules involves deductive argument, application of principles is based on balancing of competing interests i.e. for e.g. right to freedom and reasonable restrictions. This also leaves much scope of judicial review to control reasonableness of legislative action. It can also be seen that horizontal application of fundamental rights is a common feature with modern constitutions including that of the European Union (EU) whereas vertical approach has now became an exception.\textsuperscript{257}

5.8 Recommendations of National Commission to Review of the Working of the Constitution (NCRWC)

NCRWC\textsuperscript{258} has also expressed its willingness over including private, non-state bodies as ‘state, ‘if they discharge important quasi-governmental or important public functions which have repercussions on the life and welfare of the community. This recommendation was made on the strength of ‘State’ as conceptualised by Mathew J. in his concurring opinion in \textit{Sukhdev}. To him institutions which are engaged in matters of high public interest or performing public functions are by virtue of the nature of the functions performed, government agencies.\textsuperscript{259} Also the Commission has looked into the UK Human Rights Act, 1998 wherein the definition of ‘public authority’ includes any person certain of whose functions are functions of public nature.”\textsuperscript{260}

\textsuperscript{256}Goncalco de Almedo Rebeiro, \textit{Direct and Indirect Effect of Fundamental Rights} 9, 1-38
\textsuperscript{257}\textit{Id.}
\textsuperscript{259}\textit{Id.} at 1335.
\textsuperscript{260}UK Human Rights Act, 1998 § 6 (3) (“In this section ‘public authority’ includes – (a) a court or tribunal and (b) any person certain of whose functions are functions of a public nature. But does not include either House of Parliament or a person exercising functions in connection with proceedings in the Parliament.”).
5.9 Conclusion

Broadly classified there are three kinds of bodies which fell within the expression 'other authorities'. There are corporations and societies created by the State for carrying out its trading and non-trailing activities in terms of Article 298 of the Constitution,\textsuperscript{261} bodies created for research and other developmental works which may or may not be part of the sovereign functions, private bodies which are allowed to discharge public duty which are otherwise functions of the government. Since there are different categories of bodies there cannot be a same test for judging the nature of different bodies for the purpose of ascertaining as to whether any of them fulfils the requirements of law.\textsuperscript{262}

Earlier there had been instances like Netaji case and Central Inland Water Transport Corporation v. Brojonath Ganguly\textsuperscript{263} wherein Court translated public law norm of anti-arbitrariness contained in Article 14 into private law norm of public policy as required under Section 23 of the Contract Act.\textsuperscript{264} Similarly in Bodhisattwa Gautam v. Subra Chakraborty\textsuperscript{265} awarding compensation to a rape victim for the violation of her right to live with dignity under Article 21, independent of any constructive causal link with the State authorities.\textsuperscript{266} There are similar instances in environmental pollution cases as well.\textsuperscript{267} But judicial activism regarding horizontal application of fundamental rights is not developed yet and is not found as a welcome trend by Indian judiciary.\textsuperscript{268}

\textsuperscript{261}CONSTITUTION OF INDIA art. 298. (“Power to carry on trade, etc. The executive power of the Union and of each State shall extend to the carrying on of any trade or business and to the acquisition, holding and disposal of property and the making of contracts for any purpose: Provided that (a) the said executive power of the Union shall, in so far as such trade or business or such purpose is not one with respect to which Parliament may make laws, be subject in each State to legislation by the State; and (b) the said executive power of each State shall, in so far as such trade or business or such purpose is not one with respect to which the State Legislature may make laws, be subject to legislation by Parliament.”).

\textsuperscript{262}Supra note 46, at para 70 & 71.

\textsuperscript{263}(1986) 3 SCC 156 (In this case the question was whether Central Inland Water Corporation a government company owned by the Central Government and the State Governments of Assam and West Bengal is a ‘State’ under Article 12).

\textsuperscript{264}UDAI RAJ UDRAI, FUNDAMENTAL RIGHTS AND THEIR ENFORCEMENT 714 (2011).

\textsuperscript{265}(1996) 1 SCC 490 at 499.


\textsuperscript{268}Hina Doon, The Doctrine of State Action - Politics of Lawmaking: A Comparison of US & Indian Constitutional Law, 5 NALSAR STU. LAW REV. 1-16 (2009); (to Anderson, two developments in
After analysing judicial decisions it can be seen that according to the Court it is only when a private actor satisfies ‘deep and pervasive control test’ or ‘agency or instrumentality test’ that the fundamental Rights can be enforced under Article 32 vis-à-vis Article 12. In this era of globalization this strict vertical approach of Fundamental Rights is no longer proper because now economic and political power are increasingly given to private actors too rather judiciary has to protect and uphold the fundamental rights under the Constitution. But our judiciary is constrained in a set of narrow doctrines evolved from time to time. In the present scenario an innovative and liberal approach in tune with the spirit and fundamental values of the constitution is the need of the hour.\footnote{Sanu Rani Paul, \textit{Need for Horizontal Application of Fundamental Rights in the Era of Globalization}, 2 C.U.L.J. 81-96 (2012); Ashish Chugh, \textit{supra} note 261.}