CHAPTER-6

CONCLUSION AND SUGGESTIONS

6.1 Conclusion

The concept of ‘State’ has undergone a change due to LPG. There are various theories supporting this fact. In India with New Economic Policy of 1991 liberalization and privatization is established as an economic policy and now it has come to the extent of questioning the judicial sovereignty of India as in the case of White Industries between India and Australia through an enabling clause in the bilateral treaty Arbitral Tribunal in Singapore passed an order against the Indian government on account of the loss suffered due to delay in delivering the judgment by the Supreme Court. Thus in the era of LPG there are private actors who even challenges the sovereignty of a nation. In addition, the economic policies and as a concomitant social democracy is also at the hands of powerful international bodies like IMF, WB etc. It is thus mandatory to consult these bodies before the government venture to release economic policies. Let alone economic policy even politics is also driven by private actors within a democracy. Thus today is the world of private actors who has rampant influence on all aspects of life and the power of the State to that extent is whittled down. The enforcement of fundamental rights is a matter of concern in this era of LPG.

In India Article 12 defines the concept of ‘State’ for the purpose of enforcement of fundamental rights. The State action doctrine in India is derived from this Article. The Article provides that the state includes the Government and Parliament of India and the Government and legislatures of each of the states. Besides it also includes ‘local authority’ and ‘other authorities’ within the territory of India and ‘under the control of Government of India’. The judicial controversy is mainly attached to the term ‘other authority’ and scope of Article 12 is also surrounded around this expression. The futuristic approach of the Constitution makers is evident from the phraseology adopted in the Article and the flexibility it permits. The Article has been expanded considerably over time keeping in view the changing situations. Thus the Court formulated various tests to develop the concept of ‘other authorities’. Though the approach towards State Action doctrine was very narrow at the beginning
as evident in the case of *University of Madras v. Shanta Bai*, further the Court further devised new tests in the light of the changing socio economic situations.

In US the concept of State Action was interpreted by taking into account strict private and state action distinction as interpreted by the judiciary in *Civil Rights case*. But during the course of time most of the public utility functions have been delegated to private actors. When the private actors practiced racial discrimination in giving access to the utility services it became a threat to the noble ideal of equality enshrined in the Bill of Rights. The main hurdle in bringing private racial discriminations under the ambit of the Constitution was the strict private public divide or distinction existing at that time which was based on the concept that bill of rights except thirteenth amendment which prohibits slavery, can be enforced only against the ‘State.’ But judiciary over a period of time devised number of tests to bring private authorities also under State Action concept by establishing link between private actor/action and the state. The scope was expanded further to the extent of finding state action with the judicial enforcement of private restrictive covenants in the case of *Shelly v. Kraemar*. Through this approach the US judiciary could successfully combat the challenges posed by racial discrimination by private actors.

As far as legal status of private actors under the Indian Constitution under Article 12 is concerned it can be said that not much effort had been taken by the judiciary so far to bring them under the purview of ‘other authorities’ and it is evident from the cases like *M.C. Mehta v. Union of India, Zee Telefilms* etc. In spite of the changing economic, social and political circumstances due to the emergence of LPG, when a private actor is involved in violation of fundamental rights Courts follow the same tests to determine state action through interpreting ‘other authorities’ in Article 12. The concept of state action is thus ineffective against private actors in India while adopting the tests to determine what bodies are ‘other authorities’ under Article 12. The judiciary is withholding itself from declaring private actor as a state actor even when they violate fundamental rights.

In the above background the following findings have been made.
6.2 Findings of the Research

i. Emergence of Global Capitalism

Washington Consensus followed by the establishment of WTO has immensely affected the traditional role of the state. Since 1991, there are wide scale liberalization policies adopted by the State through deregulation, establishment of SEZ, EEZ, tax exemptions favouring private corporations, FDI, Public Private Partnership etc. Even social sectors like education, health, providing drinking water etc. has been privatized. What can be seen today through liberalization is an era of ‘global capitalism’ which is capitalism in a new form. This new era of global capitalism is supported by multinational companies and powerful international bodies like IMF, World Bank etc. The basic ideology behind the functioning of these bodies is New Right theory which is popularly called as neo-liberalism. Neo-liberalism gives little importance to social democratic principles like planning, affirmative action etc. As a result there is a wide gap between haves and have not’s, also after the New Economic Policy of 1991 also aggravated regional disparities between the States.

ii. Globalization as a threat to the traditional role of state

The vertical approach towards protecting fundamental rights is not enough to protect the fundamental rights in the era of neo-liberalism wherein there are multiple economic and political power centres. The political and legal conditions behind fixing ‘State’ as the sole repository of power is not present in this era when fundamental rights are at the mercy of private non-state actors. In the era of globalization, when power is given to private actors enforcement of Constitutional Rights is in a stage of dilemma because the private power houses are not bound by the Constitutional principles. Thus there is a negation of Fundamental Rights and Constitutional principles. State is now not the largest service provider, the services provided through the state have fallen now into the hands of private corporations. The shift of political authority to powerful economic actors due to the emergence of economic liberalization, globalization and privatization globalization- is a challenge to the traditional State-centred focus of constitutional law and democratic set up of the nation.
iii. Absence of a pro-active role to protect Fundamental Rights by Judiciary

The concept of ‘State’ has great significance. State as seen through the eyes of Constitution is a ‘Welfare State.’ In the cases occurred till the emergence of globalization the Court has interpreted the term ‘state’ in progressive manner in order to uphold the fundamental rights. It is evident from the way in which the Court has analysed the economic situations present in each cases. The cases are also decided in the background of the political and economic developments taken place during those times and the same is reflected in the decisions as well. For instance the decision *Sukhdev Singh* was decided taking into account the ‘Welfare State’ functions and International Airport Authority reflects the recognition of new forms of government wealth in the form of largess which was in the backdrop of ‘License Raj’ Government. This attitude of the judiciary is a testimony to the fact that judiciary was playing its part as a ‘social engineer’ in the changing ‘politico-legal’ scenario. But the situations have further changed due to the foray of neo-liberalism developments in India. The judiciary is not taking further steps in order to dispense with the constitutional responsibility as the protector and guarantor of the fundamental rights of the people even in a situation when other governmental organs are also distancing away from the constitutional obligations.

iv. Need to forge a purposive interpretation on Article 12

The concept of ‘State’ is at the centre stage of enforcement of Fundamental rights. There are various flexibility phrases in the Article like ‘unless the context otherwise requires’ the term State ‘includes’ ‘other authorities under the control of India’ which can be used to include private authorities under Article 12. But none of the phrases are effectively utilized to devise a purposive interpretation of Article except the expression ‘other authorities. The judiciary has been expanding the concept ‘other authority’ for the purpose of wider enforcement of fundamental rights by establishing nexus between the governmental function and the functions or activity performed by the ‘other authority’ was put to judicial scrutiny right from the inception of the Constitution.

v. Negative fallout of *Pradeep Kumar Biswas* decision

The expression ‘State’ encompasses a number of bodies having a nexus with the government. There are various tests applied by the Court to put an authority or body
under the expression ‘other authority’ in Article 12. Various cases present the attitude of the judiciary and the journey had been through cases giving a narrow view devising ejusdem generis test then a wide approach through ‘sovereign power’ test and a much broader test of ‘instrumentality and agency,’ then six fold test combining government control and public functions test, and finally, a much narrower approach through Pradeep Kumar Biswas case which has crystallised all the six test into one test called “deep and pervasive” control test. With this test the Concept of State Action came to standstill and now it is difficult to include private actors/bodies under the ambit of Article 12.

vi. Ineffectiveness of Instrumentality Test

The test of Instrumentality or agency is the main principle applied by the judiciary in finding out State Action in a challenged action. It is the judicial interpretation of ‘other authorities’ that resulted in bringing out the concept of ‘instrumentality or agency’ under which if an authority is judicially recognised as instrumentality or agency of the state, it will directly fall under the purview of State as defined under Article 12. The criteria’s to decide whether a body is an instrumentality or agency evolved through a number of judicial decisions starting from the decision of Mohanlal came out in the year 1957. Applying this test Government Companies, Societies under Societies Registration Act etc. were held as ‘State’ under Article 12. Though Mathew J. deserves applause in evolving the doctrine for the first time, the doctrine was dubious from its inception as to its scope and applicability until Bhagwati J. articulated and applied the six fold test to determine instrumentality or agency under Article 12 through the expression ‘other authority.’ In the course of time we can also see cases where in the instrumentality test could not be of much help in protecting the fundamental rights of the individual as against private actors.

What can be seen is that instrumentality or Agency test was used in relation to bodies performing Public Functions but later under Bhagwati J’s enunciation of the six fold test Public Functions Test became one of the criteria to find out State Action. The scope of Public Functions Test was considerably whittled down with the decisions of Supreme Court in Pradeep Kumar Biswas and Zee Telefilms. In Pradeep Kumar Biswas six point tests were crystallised into one test called “deep and
 pervasive state control” test as the name denotes it is marked as the death of functional test. Whittling down the scope of Public Functions as in the case of will affect the scope of Article 12 because there cannot be a single test for all the cases under Article 12. As observed by the Minority bench in Zee Telefilms the traditional tests of a body controlled financially, functionally and administratively by the Government as is laid down in Pradeep Kumar Biswas can be given application only when the body is created by the State itself for different purposes but incorporated under the Companies Act or the Societies Registration Act. Those tests may not be applicable in a case where the body like the Board (BCCI) was established as a purely private body long time back.

vii. Absence of a theoretical background to implement horizontal application of Fundamental Rights

The concept of horizontality of fundamental rights through which fundamental rights is enforced against private actors in countries like Germany, Canada etc. is not devised by the Courts in India. The result is poor theoretical foundation for application of fundamental rights against private actors. In interpreting Article 12 of the Constitution there is a need to put a proper theory in practice; theory should advance public interest in the light of socio economic changes happening due to liberalisation, globalization, privatisation etc. Interpretation as applied in Pradeep Kumar Biswas will lead to absurd results.

The Courts can devise the concept of direct horizontality to apply fundamental rights against private action. At present what can be seen is that even in the cases of enforcement of fundamental rights like Article 17, 23, 24 etc. which can be enforced even against private parties no theoretical foundation had been laid out so as to give a justification in applying these rights against private actors. Regarding the applicability of State Action as against private actors it can be seen that whenever state action was applied it was done under the pretext of safeguarding Article 21 and in most of the cases state was pleaded as a party to the petitions along with the state actor. For instance in Vishaka and in Asiad Workers case though the Court has accepted the duty of the state to protect the women from sexual harassment of women at the workplace it never accepted the doctrine of ‘State Action.’ In USA State Inaction is one of the broad areas wherein Court inherently applies State Action doctrine. In most of the
cases wherein Supreme Court has enforced fundamental rights against private actors through the principle of Indirect Horizontality also no theoretical framework was laid out.

viii. Co-operative Society as Violators of Fundamental Rights

With the decision in *Sukhdev Singh* a registered society may be treated as ‘state’ but there is a great difficulty in bringing co-operative societies under the ambit of 12 by invoking Article 32 and 226. Though earlier there was a view that power to make bye-laws give co-operative societies the colour of state but afterwards in a number of decisions Court ruled out the possibility of bringing co-operative societies as state despite the fact that the body receives aid from the government and discharges public functions. The main reason is that a co-operative society does not have a statutory character. Thus it is the form and not the purpose for creation which matters. But this kind of an interpretation should not come in the way of safeguarding the fundamental rights of the people. It can also be seen that there are many occasions where the bye-laws have encroached into the basic fundamental rights of the individual. In *Zoroastrian Co-operative society* bye laws of the society acted as restrictive clauses which ran contrary to the equality clause and Court upheld the validity of the clause in the bye law which prohibited inter-religious transactions. Even there are tests devised by the Court only to determine whether co-operative society is a state or not in a given situation.¹ These tests are abstract and give emphasis to the form rather than purpose behind its creation or nature of functions performed by the co-operative societies.

ix. Rampant Violations of Labour Laws

The concept of labour welfare underwent a sea change after LPG. Contracting out, Hire and Fire rule and such kinds of gross conditions exist in employment. There is no job security and the trade unionism is completely washed off. There is feminisation of labour because of their lack of bargaining power and more than 91% of the labour belongs to the unorganised sector without any legal protections. The fundamental rights of the workers are also affected due to disinvestment and since disinvestment is the result of political decision making, it is immune from judicial

scrutiny. It can also be found that even multinational companies with huge turnover also employs employees on contact basis which underlies hire and fire rule. Thus social security in job is enjoyed by a very few percentage of the Indian population. This situation calls for a transformation.

x. Adherence to a technical approach by the Indian Judiciary

In US, most of the times State Action was found purely against private actors by applying multiple tests mainly by public functions test and government nexus test. Instead of applying strait jacket formula for all fact situations US Court’s has followed a fact to fact approach and it resulted in multiple tests to find out state action in private actions. One of the glaring features of US State Action concept is finding of State Action in cases of State Inaction and the inclusion of judicial actions as State Action. But after analyzing the position in US what can be concluded is that apart from principle of subjectivity of the respective judge, or to put it more precisely the mind-set of the judge including the political orientation, US State Action is largely guided by a fact finding analysis based on a case to case basis and then formulation of the test applicable to the case under consideration. This kind of a reasoning based on deductive thinking is lacking in Indian judiciary rather the Indian judiciary follows a ‘patently technical’ and ‘functional’ test and the overall effect of both tests in a given set of facts to consider a body as ‘State’ through interpreting ‘other authorities’ under Article 12.

6.3 Testing of Hypotheses

Hypothesis 1

1. Globalization, privatisation and liberalisation have revolutionized and diluted the concept of ‘State’ and this shifting role of State in the wake of LPG has its impact upon the relationship between State and the individual freedoms guaranteed under the Constitution.

The answer to the above hypothesis is in the affirmative. It is found that LPG has left deep imprints on the traditional role of State and it is happening worldwide. This is mainly due to the influence of political theories like ‘New Right Theory’ which is underlying Globalization, and forces free market economy controlled by international bodies like IMF, World Bank and WTO. These developments are mainly
catered to protect the interest of the developed nations in the world primarily USA. India which is a ‘socialistic democracy’ has fallen into the path of free market economy driven by LPG with the New Economy Policy of 1991 following the collapse of 1991 erstwhile USSR. With this large scale economic reforms took place and the state is now transforming into a Neo-liberal State from Welfare State. The new policy advanced deregulation, de-licensing, disinvestment, privatisation in service sector etc. Fundaments rights are in a dilemma state since the private bodies are not bound by the Constitutional values and rights enshrined in the Constitution.

Therefore, the hypothesis is proved as correct

Hypothesis 2

2. The state action concept is dynamic in nature and its contents and dimensions vary.

The answer to this hypothesis is in the affirmative. The concept of State Action is derived from Article 12. The Article is expanded to a larger extent beyond the literal meaning by interpreting the term ‘other authorities.’ The judiciary has formulated various principles from time to time to find government nexus with the challenged act in question. Those tests are government financial or administrative control test according to which governmental financial control in the form of meeting expenditures or holding substantial shares of the body or managerial control over the policies of the authority acts as a test to determine state action. The other tests are government monopoly test, public functions test and transferring of department of government to the body which will be sufficient criteria to determine state action. Further these tests were crystallised into one test in the decision of Pradeep Kumar Biswas according to which if a body is financially, functionally or administratively under the control of government, then that body is other authority under Article 12. Thus it can be stated that the state action concept in India is a dynamic concept which is capable of further expansion.

Therefore the hypothesis is proved as correct.

Hypothesis 3

3. US concept of state action is applicable against purely private bodies despite the rigidity of the Constitutional text guaranteeing life and liberty because of
the fact finding and rights based analysis adopted by the judiciary in interpreting State action doctrine.

The answer to this hypothesis is in the affirmative. It is through the Fourteenth Amendment to US Bill of Rights that the Doctrine of State Action emerged. The Amendment is addressed to the “State” in clear terms and there was no possibility of reading into the lines of the Amendment a private authority as bound by the Constitution. Despite this in its effort to combat the racial discriminatory practices prevailed in US which was a constant threat to the constitutional values of liberty and equality, US Supreme Court has adopted a fact finding analysis to State Action and through that approach an array of bodies having dissimilar features are held to be bound by the Concept of State Action. The main tests employed in US are public functions test and government nexus test. The cumulative effect of the tests is not necessary to apply the doctrine; rather the presence of one or the other test implicating performance of public functions by the body or fulfilment of government nexus with the challenged activity or actor or is sufficient to denote state action.

In the light of these reasons the hypothesis is proved as correct.

Hypothesis 4

4. In the absence of a legal theoretical framework to support constitutional values in the wake of LPG to extend the applicability of state action towards private actors the constitutional values and rights will be at peril.

The answer to this hypothesis is in the affirmative. In the era of LPG when most of the governmental functions are performed by private actors the expansion of the scope of fundamental rights through a wider application of Article 12 is an effective way of fulfilling the purpose of Constitution in all its purpose and contents. The Indian judiciary have not developed a theoretical towards this effect; rather the judiciary is sticking on to the tests put forth by it during the early years of Constitutional development. The situations prevailing in those times were entirely different, the Indian economy was a mixed economy striving to achieve the goals of ‘socialism’ now the state is a neo-liberal state moving forward for more and more liberalisation and privatisation. It is an accepted notion that the ‘Constitution of every country is a living document’ and it cannot be interpreted in isolation without taking into account the social, economic and political transformations happening during a
particular point of time. This idea is to be taken seriously when it comes to the application of fundamental rights. If this is not done the fundamental rights will lose its significance.

**On the basis of above reasoning, the hypothesis is proved as correct**

**6.4 Suggestions**

1. **Assimilation of the Political Metamorphosis of the Concept of State**

   While interpreting the term ‘State’ under Article 12 the political metamorphosis of the concept of ‘State’ in the political sense -from a welfare to neoliberal state must be given due importance. This will establish a strong theoretical base for including private actors under the realm of Article 12. It will also do justice and rationality to the expression ‘State.’ It is also the need of the hour. In this era of LPG constitutionalism is best understood as an artefact in the struggle between hegemonic i.e. constitutional values of social economic, political justice etc. and counter hegemonic forces i.e. the principles of free market economy enforced through the machinery of State. Due to this fact the expression ‘State’ under Article 12 of the Constitution is not to be treated as an isolated phenomenon disjunctive of fundamental rights.

2. **A purposive and Liberal interpretation of Article 12**

   The expression other authority is qualified by two phrases ‘within the territory of India’ and ‘under the control of Government of India.’ The phrase ‘within the territory of India’ is a term capable of a creative interpretation in the light of LPG. ‘Other authorities’ can be read in conjunction with ‘within the territory of India’ thereby creating a separate category, including private actors under the ambit of Article 12. It can be seen that in none of the decisions this expression was put into limelight but that does not mean that it should be rendered futile such an approach will strike at the heart of the makers of the Constitution because when a Constitution is made makers always attach a purpose to the provisions and wordings used. It is the solemn duty of the judiciary to attach a meaning to it considering the social transformation of the contemporary world. Interpretations can only give life blood to the otherwise lifeless words of the Constitution.
A purposive and liberal interpretation should be adopted by the judiciary in this regard keeping in mind the broader view of protection of fundamental rights which the constitution makers had in their mind while incorporating Part III to the Constitution. In this regard even regulatory control would be considered as suffice in case of big business enterprises when they violate the fundamental rights of the individual. It should also be noted that it is good to adhere to the precedents like Ajay Hasia, Pradeep Kumar etc. which stood the test of times but that should not be at the cost of the rights and freedoms of the people.

3. ‘Instrumentality of State’- a Misnomer

The term ‘other authority’ and ‘instrumentality or agency’ should not be treated as synonymous. Instead of identifying private actors as instrumentality or agency of State they must be interpreted as bodies directly falling under the expression ‘other authorities under the control of government of India’ since a private entity has business motives more it cannot be an instrumentality or agency of state in every case.

4. Regulatory control would be held as suffice

Behind the creation of every private entity there is regulatory control from the part of the government, the non-obedience of which will lead to incongruous results. Again it can be seen that according to the Supreme Court merely regulatory control is not a criteria to determine whether an authority is an instrumentality or agency of the state as per the verdict in Pradeep Kumar Biswas. If regulatory control would have been enough then the whole test by the judiciary would become futile that could have been the reason behind ruling out the possibility of BCCI as a state under Article 12. This is not a welcome trend because no criteria can be applied in a stringent way without allowing exceptions under it. In the context of LPG exceptional cases of the past have become the general rule and judiciary may keep abreast with the motive of protecting fundamental rights. So regulatory control of government on the private actor plus some additional ground would be held as suffice to bring into operation Article 12.
5. **Inclusion of Private Actions under Article 15 (2)**

The term ‘shop’ under Article 15 (2) can be further interpreted so as to include private economic market transactions also. If we analyze the meaning of the term it can be seen that is a synecdoche for the idea of the impersonal, abstract market of the modern liberal capitalist economy. If this kind of an interpretation is followed even co-operative bodies, associations, private educational institutions etc. can also be brought under the purview of Article 12.

6. **Co-operative Societies as State**

The Court should think beyond the technicalities and should not allow any formalistic interpretation to fall in the way of protecting fundamental rights, in the case of co-operative societies when the bye-laws violate the fundamental rights the society should be held as a state unequivocally. Though co-operative societies does not have a statutory character they have the power to make law in the form of bye-laws which affect the lives of many, besides making bye-law can be held as an exercise of sovereign power and also it is ‘law’ as defined under Article 13 (3) of the Constitution. Bye-laws also fall under the ‘dual test’ laid down by the judiciary in *Rajasthan Electricity Board* i.e. power to make laws and to put reasonable restrictions on it. Whenever restrictions are imposed through bye-laws it should be tested against the anvil of constitutional rights and obligations. In this regard it is pertinent to note the decision of the US Supreme Court in *Shelly v. Kraemar* wherein a purely private restrictive covenant was held to be in violation of Fourteenth Amendment. So it is the impact of the bye-law on the fundamental right rather than the form in which society is created which has to be taken into account.

7. **Horizontal Application of Fundamental Rights**

Judiciary must give effect to the horizontal application of fundamental rights against private bodies in the light of the changes happening due to privatisation. The theory of Horizontal application of fundamental rights should be adopted and developed by the Courts in cases involving private actors and violation of fundamental rights by them and also in cases of State Inaction. Even in case of violation of fundamental rights mentioned under Article 15(2), 19, 23, 24 which can be applied even against private actors there must be a declaration to that effect by the
judiciary that private actors are ‘State’ falling under the expression other authorities by applying ‘horizontal application’ theory of fundamental rights.

8. **Devising New Tests to Interpret Article 12**

   Apart from the six fold test as laid down in *Ajay Hasia* the Court needs to devise new tests like ‘state encouragement’ test and ‘virtual monopoly’ test wherein if state encourages the private actor to perform a public function that should be a criteria to make the body considered as a State actor. If that is done bodies like BCCI, Indian Olympic Association, private corporations etc. will categorically fall under Article 12. Joint action test can also be adopted as a major test. As per this test if the state actor and the private actor jointly engage in any activity by giving encouragement, aid, or coerce the alleged act then to the extent of such act, it should fall under the doctrine of state action. This test can be successfully applied to determine the legal status of public corporations which undergo disinvestment or of corporations that are in partnership with the government since its functions are carried out to fulfil the purposes of the state. We can see a state authorization in delegating public functions to the private players. One cannot delegate the authority which it does not possess and governing power whenever delegated must be subjected to constitutional limitations. There is government encouragement through policies, executive actions etc towards the private sector; state authorization is thus very much evident. Thus the actions and actors who violate fundamental rights of the people can be brought under the ambit of Article 12.

9. **Implementation of the Recommendations of NCRWC**

   As recommended by National Commission on the Review of the Working of the Constitution amendment to Article 12 of the Constitution must be carried out in order to include private non-state entities like BCCI which discharge important quasi-governmental or important public functions, which have repercussions on the life and welfare of the community under the definition of ‘State’. Judiciary must be given the status of ‘State’ under Article 12 of the Constitution in necessary and proper cases to avoid blatant violations of fundamental rights and to make it accountable to the denial of fundamental rights when situation demands. This will be helpful to prevent the Court from enforcing restrictive covenants like in the case of *Zoroastrian Co-operative Society*. 
10. Public Functions Test to be Given more Impetus

Public Functions test is to be treated at a different pedestal like in US and like in the Sukhdev Singh and R D Shetty. Accordingly if one let 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. Public functions doctrine should also intends to mean 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. 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. To be a public function, the function need not be the exclusive domain of the state. Public function can be put into effect when an authority intervenes or participates in social or economic affairs in the public interest. Identifying public function with sovereign function is also a wrong approach; because the nature of the functions cannot be remain static for a long time.

11. Supplemental Government Activity Test

In cases involving private educational institutions, running of hospitals etc. a theory of Supplemental Government Activity Test can be adopted according to which if the corporation discharges public functions that should be taken as the sole criteria to invoke Article 12. It is the primary responsibility of the government to run these organizations and the function involved is a public function. So, mere delegation of this function will not abdicate the public nature of the functions performed by the private player. So the supplementary functions performed by the private player for instance service conditions in schools, colleges etc. should also be treated as supplementary government activity.

12. Revisit into the ‘Deep and Pervasive control’ Test

The decision of the Court in Pradeep Kumar Biswas must be given a relook because the decision has considerably whittled down the scope of Article12. It is difficult to find an authority administratively, financially and functionally under the control of the government in the era of liberalization and privatization, it was possible during the time of ascendancy of the state as the biggest service corporation. After Pradeep Kumar Biswas the Court can determine the legal status of an entity by
emphasising the fact why it should not be treated as a state rather than looking on the possibilities of declaring it as a state and it is also evident from the cases came after Pradeep Kumar Biswas for e.g. Zee Telefilms. This will have a direct impact upon the scope of fundamental rights to a greater extent. So the decisions must be given reconsideration.

13. Fundamental Rights as ‘baseline’ to safeguard Rights Constitutionalism

Neo-liberalism envisages the concept of Legal Pluralism wherein multiple private actors evade constitutional principles by creating their own rule books. They are not bound by the constitution because they are private actors. In the era of LPG importance of constitutional values and rights should not be forgotten. Fundamental Rights are the basic rights of the individual and it should permeate in the private actions as well. Doctrine of State Action creates a ‘constitutional baseline’ and mandates that there shall be adherence to the constitutional principles. This should be also a baseline for legislature, executive and the judiciary.

The American Constitution is based on the notion that people of United States do not serve the government rather the governments serve the people and thus the government may not invade the fundamental rights of the people and the governmental action is subject to the people’s fundamental rights. It is on this fundamental principle that the foundations of the state action doctrine emerged and subjected governmental action to judicial review. Even in US what can be seen is that though the State Action concept was confined only to governmental action it was subsequently applied to discriminatory acts of private actors as well. Even Indian Constitution is also based on the same premise that ‘people are sovereign’ and so fundamental right should permeate in private actions as well.

14. Minimum State Intervention Theory or Balancing of Rights Theory

Even if a private body is declared as State there should be a principle of ‘minimum state theory’ which means private actor should not be held as State for all purposes but it should be restricted to cases when the alleged act constitutes a violation of the fundamental right of the individual or when it is found that the principles of justice, reasonableness and fairness are not followed by the private actor/body. Complete control will affect the private nature and will interfere with the
constitutional rights of the private entity. So a balancing of rights must be sorted out between both fundamental rights of the individual and the rights of the private player.

15. Effective Implementation of DPSP

Since ‘State’ in Part IV also connotes State as in Part III wherever possible the Court must try to interlink fundamental rights with Directive Principles of State Policy and thereby should impose an obligation up on private bodies to oblige the fundamental rights. This will also promote socio economic equality and promote constitutional mandate of ‘Welfare State’ as visualised by the constitution framers through DPSP. Such an approach is the need of the hour because due to LPG the Socialism lost its significance as an essential feature of the Constitution ad it is not a favourable trend for more than half of the population in India. Even one of the objectives of NCWRC was also the bridging of the gap between Fundamental Rights and Directive Principles of State Policy.

16. Affirmative Action in Private Sector

Private players are not bound by the affirmative action policies of the government. Even if some private entities are following reservation policies, to a larger extent effective implementation is not done. Free market economy is against planning and principles of social justice like affirmative action. But in a country like India inclusive growth and development of the economy is not possible without affirmative action or else it will lead to marginalisation of the poor and the weak and the domination of the capitalist class. Besides, Indian constitution establishes a Social Democracy. Due to privatization and liberalization when government lost its significance as the largest service provider, the same liability shifted to the private entities. Thus ‘reservations’ can be brought in even in the private sector thereby making ‘socialism’ a more realistic concept under the Constitution.

17. Revisiting the ‘Public Policy’ of the Realm

The policy regime of the government is beyond judicial scrutiny. Most of the liberalization and privatization policies are implemented through executive actions though it affects the fundamental rights and other constitutional norms. It is evident through the decision in BALCO and Jaya Pal Singh which implemented disinvestment and privatization respectively affecting the fundamental rights of the
citizens. The judiciary has the power to review a policy decision in extraordinary situations when the policy or decision of the government is arbitrary or irrational. While deciding on arbitrariness and irrationality the judiciary must bear in mind its duty to protect the fundamental rights of the people and should not turn a blind-eye towards the constitutional mandate entrusted with them.