CHAPTER 1
INTRODUCTION

The conflict between man and the State is as old as human history. It is primarily because of the dynamic nature of the human society where old values, ideas and forces constantly yield place to the new ones. With the emergence of State, the undying dilemma faced by Statesmen and Constitutionalists was to draw limitations of activities of State and the individual i.e.; to strike a balance between individual liberties and social control. A common solution that is adopted by modern democratic States for this purpose is the incorporation of a list of fundamental rights in their constitutions and guaranteeing their inviolability from the executive and legislative organs. It is been said that the constitutions of free democratic nations are the most powerful devices created by the political societies for preserving and promoting the supreme values which makes the good of attaining dignified human personhood for all, a possible reality. But ultimately it is the role of the state in a given society which determines the limitations in the exercise of individual right and the governmental power.

The concept of ‘State’ has undergone a paradigm shift due to globalization and so is the relationship between the individual rights and the governmental power. The traditional model of constitutional rights, positing State at the centre of economic, social, political power no longer exist in the current era where the globalized political power is given to both nation-states and non-state actors like multi-national corporations, private bodies and associations. It can be seen that due to globalization and the political and economic theories underlying liberalisation, there is a shift in the role of State from a ‘service provider’ to a ‘service regulator.’ The State is delegating most of its functions to private actors. There are now actors with public power that are not accountable towards constitutional rights and this has put constitutional rights in a crisis situation. But the powers and functions which are delegated by the state are not subjected to constitutional restrictions as in the case when they are exercised by the state. Thus the sphere of ‘fundamental rights enjoyed by the individual’ is undergoing a paradigm shift in the era of Liberalization, Privatization and Globalization (LPG).

Our Constitution makers founded our constitution on the principles of equality, liberty and fraternity and declared it to be Sovereign, Socialist, Secular,
Democratic, Republic. The judiciary is the protector and the guarantor of Fundamental Rights in India and the fundamental rights can be enforced by invoking the writ jurisdiction under Article 32 and 226 of the Constitution. As a basic condition precedent to invoke the remedy the violator should be a ‘state’ as defined in Article 12. At the time of the framing of the Indian Constitution, the existing scenario of a ‘free market economy’ driven by globalization was least predictable. But still our Constitution contains provisions which make it as a ‘living constitution’ which can stand the test of all times. The judiciary as the protector of the basic rights of the people is entrusted with this function of expanding the meaning of constitutional provisions through judicial interpretation. But what can be seen is that there are no judicial interpretations in widening the scope of ‘State’ as defined in Article 12 so as to include private authorities within the ambit of Article 12.

In the above context the research work examines the impact of globalization on the constitutional dogmas and fundamental rights of the people. It revisits the judicial interpretation on the definition of ‘State’ as given under Article 12 for the purpose of giving a new dimension to it, i.e. enhancing its meaning and scope in the light of contemporary global transformations particularly when the conduct of private actors has been found in violation of Fundamental Rights. A modest attempt has also been made to analyse the scope of the doctrine of state action in the United States (US) through which the Courts in US have brought private actions under the ambit of their Constitution.

1.1 Role of State in the era of LPG

The concept of globalization has a very long history and it is a multifaceted phenomenon having social, cultural, economic, legal and political dimensions. Liberalization and privatization has its base on the economic dimension of globalization. Economic dimension of globalization refers to the widening and deepening of the international flows of trade, capital, technology and information within a single integrated global market. It was ushered in at the global level with the

\[1\] (Liberalization and privatization are the economic rules set by globalization to amplify the goal of achieving a free market economy) KARL MOORE & DAVID CHARLES LEWIS, THE ORIGINS OF GLOBALIZATION 1 (2009).

\[2\] JAMES PETRAS, GLOBALIZATION UNMASKED 11 (2001).
inception of Washington Consensus\(^3\) which can even be called as ‘neo-liberal consensus.’ ‘Neo-liberalism’\(^4\) or ‘New Right movement’ is the underlying idea behind the free market economies and it stresses on the virtues of free market and the vices of big government and considers planning, social justice as unnecessary.\(^5\) The present market approach perceives that the government or the State is less efficient than markets in providing services to the individual. It considers that in a changing-globalizing international and transnational environment the State is not only an agent of its own transformation, but also a major source of development of globalization itself.\(^6\)

Liberalization consist of the policies by the government taken with the aim of liberalizing the economy for facilitating freer global trade relations for instance deregulation, de-licensing, tax reductions, allowing FDI and free capital flows etc. Privatization, in a narrow sense, implies the induction of private ownership in publicly owned enterprises, but in a broader sense, it connotes, besides private ownership the induction of private management in the ownership and operation of public sector enterprises.\(^7\) Privatization is implemented through policies favouring disinvestment, Public Private Participation (PPP), Contracting Out, joint venture, creation of Special Economic Zones (SEZ) etc.

Through the policies favoring liberalization and privatization there took place considerable diffusion of state power. There is a ‘rolling back of state’ from welfare functions and the role of the state is confined to decision making authority or as

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\(^3\)(Washington Consensus came out at the first instance as a paper presented by Williamson, the Chief Economist of the World Bank, at a Conference on Latin American growth which was stagnating during 1989. His focus was on areas like privatization, trade liberalization, public sector expenditure to be restricted to priority sectors, deregulation etc.) Stanley Fischer, *The Washington Consensus*, PETERSON INSTITUTE FOR INTERNATIONAL ECONOMICS 12, 13 (2012) (Sep. 28, 2015), [http://www.piie.com/publications/chapters/pre view/6628/02iie6628.pdf](http://www.piie.com/publications/chapters/pre view/6628/02iie6628.pdf).


regulator of the economy.\textsuperscript{8} There is considerable reduction in the powers enjoyed by the state due to the diminution of state sovereignty.\textsuperscript{9} And more importantly this has resulted in attrition of constitutional values and principles. The enforcement of constitutional rights has drifted from the hands of State to private actors on whom the State does not have any control since the policies guiding them are larger part of the global policies surrounding globalization which is taken at the international level. As rightly said by Anderson economic globalization is one of the main factors behind the paradigmatic crisis to constitutional rights, and it is mainly due to the change in the role of the State because of the neo-liberal tendencies and practices underlining the principles of globalization, liberalization and privatization.\textsuperscript{10}

1.2 Indian Scenario

Indian constitution establishes a socialistic pattern of society. Socialism in India was the brainchild of Jawaharlal Nehru and the socialism which he tried to materialize through the constitution was a blend of Marxian and Gandhian Socialism which paves the way for a Mixed Economy.\textsuperscript{11} According to Nehru “political freedom, independence, were no doubt essential, but they were steps only in the right direction; without social freedom and a socialistic structure of society and the State, neither the country nor the individual could develop much.”\textsuperscript{12} During those times State was conceived as an institution which stands for the welfare of the people. But this concept of State has undergone a drastic change ever since the emergence of globalization.\textsuperscript{13}

\textsuperscript{8}World Development Report (1999/2000): Entering the 21\textsuperscript{st} Century, WORLD BANK, (2000) available at  http://hdl.handle.net/10986/5982 (last visited on 14/10/2015) (According to the Report, the Government plays a vital role in the development, but there is no simple set of rules that tell them what to do. Every country has therefore, to determine the areas and extent of market and state intervention depending upon its own stage of economic development, socio-political system and other historical facts).
\textsuperscript{9} JOHN BEYNON, DAVID DUNKERLEY EDTD., GLOBALIZATION: THE READER 244 (2000).
\textsuperscript{10} GAVIN W. ANDERSON, CONSTITUTIONAL RIGHTS AFTER GLOBALIZATION 5 (2005).
\textsuperscript{11} (Marxism was rooted deeply in Nehru’s mind but it appeared to him full of dogmas’ and he was against any kind of dogma and that is one of the reason why even while accepting Marxism he didn’t blindly followed Marxist views as that of in Russia) M. N. DAS, THE POLITICAL PHILOSOPHY OF JAWAHARLAL NEHRU 125-167 (1961).
\textsuperscript{12} JAWAHARLAL NEHRU, TOWARDS FREEDOM 144 (1941); JEFFRY A. FRIEDEN, GLOBAL CAPITALISM: ITS FALL AND RISE IN THE TWENTIETH CENTURY 312-316 (2006).
In India the seeds of globalization were sown in the early 1980’s but the real thrust was provided through the New Economic Policy (1991) (NEP) of P.V. Narasimha Rao Government. The Policy situated on a perspective which was fundamentally different from the model of economic development as envisaged by the framers of the Indian Constitution. The framers envisioned that basic industries should be owned or controlled by the State and the private sector must accept the national plan and fit to it and this was in consonance with the mixed economy vision which was deeply rooted to the Indian Constitution. But the NEP initiated in 1991 was adopted by the subsequent governments and the concept of ‘mixed economy’ which was envisaged at the time of Independence has been revolutionised and diluted. The concept of socialism is now in a disintegrated State.

The emerging trend of globalization tends to bring to India a neo-liberal culture and that is quite evident from the economic measures adopted by the government. The government is removing the bottlenecks which will hinder foreign investment and affect foreign investor confidence and foreign capital flows. A notable impact of globalization is the steady erosion in the rights of the labour including right to form association, right to social security etc. Disinvestment in public sector and privatization results in undermining the rights of workers since they are not bound by constitutional obligations. Public law of the country is unequipped to deal with these tribulations. The problem associated with displacement due to the creation of Special Economic Zone (SEZ) also deserves attention here. Privatization

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15 This was one of the key components in the Election Manifesto of the Indian National Congress during the first General Elections of 1952.
16 (It includes raising diesel prices, capping subsidiary on LPG cylinders, allowing Foreign Direct Investment (FDI) in multi-brand retail, recent proposal for amendments to the Insurance Bill etc.). (It is apt to quote the words of the noted economist Nitin Desai—“What we have now is infrastructure fantasies like Delhi – Mumbai Industrial Corridor (DMIC) which conjuring up with China in a jiffy. There is no clue as to how these grandiose projects are being implemented or what benefit they would bring to people.”) Venkitesh Ramakrishnan, Long Away from Avadi, FRONTLINE, Oct. 5, 2012 at 29.
18 As decided in the case of BALCO Employee’s Union (Regd.) v. Union of India & Ors. AIR 2002 SC 350 there can be no judicial of the economic policy of the government.
19 Sandeep Agarwal v. Union of India W.P. No. 278 of 2009 throws light on the necessity for reinstatement of the fundamental right to property due to the large scale displacements caused by the
of educational sector is furthermore a testimony to the shifting of welfare responsibility to private actors. 20

1.3 Protection of Fundamental Rights in the Era of LPG

In the era of LPG, most of the public functions are at the disposal of private parties and in our constitution most of the fundamental rights are enforceable against State except Articles 15 (2) 21, 17 22, 23 23, 25(2) (b) 24, 28(3) 25 and 29(2). 26 As far as the protections of fundamental rights under other articles are concerned the violator should be a State as defined under Article 12. It defines State as “in this part, unless the context otherwise requires, “the State” includes the Government and Parliament of India and the Government and the Legislature of each of the States and all local or

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21 CONSTITUTION OF INDIA art. 15(2) Prohibition of discrimination on grounds of religion, race, caste, sex or place of birth.(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.

22 CONSTITUTION OF INDIA art.17 (“Abolition of Untouchability.-"Untouchability” is abolished and its practice in any form is forbidden. The enforcement of any disability rising out of “Untouchability” shall be an offence punishable in accordance with law.”).

23 CONSTITUTION OF INDIA art. 23 (1) (“Traffic in human beings and begar and other similar forms of forced labour are prohibited and any contravention of this provision shall be an offence punishable in accordance with law (2) Nothing in this article shall prevent the State from imposing compulsory service for public purposes, and in imposing such service the State shall not make any discrimination on grounds only of religion, race, caste or class or any of them.”).

24 CONSTITUTION OF INDIA art. 25(1) (“Subject to public order, morality and health and to the other provisions of this Part, all persons are equally entitled to freedom of conscience and the right freely to profess, practice and propagate religion.(2) Nothing in this article shall affect the operation of any existing law or prevent the State from making any law-(a) regulating or restricting any economic, financial, political or other secular activity which may be associated with religious practice; (b) providing for social welfare and reform or the throwing open of Hindu religious institutions of a public character to all classes and sections of Hindus.”).

25 CONSTITUTION OF INDIA art. 28(3) (“No person attending any educational institution recognized by the State or receiving aid out of State funds shall be required to take part in any religious instruction that may be imparted in such institution or to attend any religious worship that may be conducted in such institution or in any premises attached thereto unless such person or, if such person is a minor, his guardian has given his consent thereto.”).

26 CONSTITUTION OF INDIA art. 29(1) (“Any section of the citizens residing in the territory of India or any part thereof having a distinct language, script or culture of its own shall have the right to conserve the same.(2) No citizen shall be denied admission into any educational institution maintained by the State or receiving aid out of State funds on grounds only of religion, race, caste, language or any of them.”).
other authorities within the territory of India or under the control of the Government of India.”

The changing scenario of LPG has posed serious doubts about the application and efficacy of the fundamental rights and the doubt is mainly based on the ground that with the increasing role of private enterprise and the decreasing role of the State fundamental rights would be violated more by the private enterprises than by the State. It is only through the expansion of the concept of State under Article 12 that fundamental rights can be enforced against private actors. So there is a need to enhance the reach of fundamental rights to private actors for a better social order in the society.

The literal meaning of Article 12 make it applicable only against public authorities but the article contains flexibility phrases which can be interpreted to include even private authorities under its ambit. A closer look at the article also reveals that the words have been added in such a manner as to help the law-givers to interpret the term with the changing needs of the society and that is the spirit of the framers of the constitution framers to make our Constitution a ‘living document’ which will stand the test of the time. For instance ‘unless the context otherwise requires’, state ‘includes’, ‘other authorities’ etc. The most important question regarding Article 12 is the construal of the term ‘other authorities’ so as to determine the authorities against which the fundamental rights can be claimed. It is important to introspect into the judicial enunciation of ‘other authorities’ by the judiciary in order to understand the scope of Article 12 and feasibility of further expansion of Article 12.

27 VII CONSTITUTIONAL ASSEMBLY DEBATES 608-10 (1949) (Dr. Ambedkar described the object of fundamental rights as two fold firstly, to enable every citizen to claim those rights secondly, and to make it binding upon every authority. To him ‘authority’ means --- every authority which has got either the power to make law or the power to have discretion vested on it.”); (In enacting fundamental rights under Part III the founding fathers showed that they had the will, and were ready to adopt the means, to confer legally enforceable fundamental rights. First, against whom fundamental rights are to be enforceable? Broadly speaking, against the ‘the State’, not as ordinarily understood but as widely defined by Article 12) H. M. SEERVAI, CONSTITUTIONAL LAW OF INDIA 349 (2014).


29 (As Holmes put it “a word in the constitution is not a crystal clear, transparent and unchanging; in the more important interpretative parts, the constitutional words are the skins of living thoughts which change with the times and as society changes.” “The idea of a ‘living constitution’ is a justification for adaption of the basic document to fit in new social exigencies. The words remain the same-they are both timeless and ambiguous-but their content changes”) ARTHUR SELWYN MILLER, SOCIAL CHANGE AND FUNDAMENTAL LAW: AMERICA’S EVOLVING CONSTITUTION 349 (1979).
1.4 Judicial Interpretation of ‘other authority’

It was Madras High Court which interpreted the item ‘other authority’ for the first time by applying the test of *ejusdem generis*. By applying this test it was held that only such authorities could be included within the term ‘other authorities’ as possessed governmental power. This narrow interpretation of the term ‘other authorities’ was overruled in the case of *Rajasthan Electricity Board v. Mohanlal* wherein it was held that every constitutional or statutory authority on whom powers are conferred by law is ‘other authority’ within the meaning of Article 12 and it is not necessary that the statutory authority should be engaged in performing governmental or sovereign function. This was a wider interpretation of ‘other authority’ under Article 12 as compared to the earlier decision.

The most remarkable view on Article 12 has been the one delivered by Mathew J. in his concurring opinion in *Sukhdev Singh v. Bhagatram*. Emphasising on the nature and role of State functions in a ‘Welfare State,’ Mathew J. stressed on the fact that the State should be viewed mainly as a service corporation and that because of its growing functions it can only act through the instrumentality or agency of natural or judicial persons. Therefore there is nothing strange in the notion of the

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*Ejusdem Generis* means that where certain entities which are specifically enumerated have a common characteristic and this enumeration is followed by some general phrase leaving room to include some more, the additional cases to be covered in this residuary category should also possess the common characteristic of possessing power of a governmental nature.

31 The University of Madras v. Shanta Bai AIR 1954 Mad 67 (The question for consideration was whether the rule of the University restricting admission on the basis of sex is valid or not. The Court drew the distinction between government aided and maintained institutions and held that University of Madras is an autonomous institution receiving aid not only from the government but also from private sources like collection of fees from the students and in such a case it cannot be held as a ‘State’ under Article 12).

32 *Rajasthan Electricity Board v. Mohanlal* 1967 SCR (3) 378, 378 (In this case the question was whether Rajasthan Electricity Board created by a statute was ‘other authority’ or not. The Apex Court overruled Shanta Bai and declared incorrect its basic thesis on the ground that for the interpretation of ‘other authority’ in Article12 *ejusdem generis* rule would be inapplicable because there was no common genus present in the authorities specifically enumerated in the Article).

33 But the uncertainty over the criteria to be adopted in holding an authority as State is also reflected in the opinion of the judges. According to Shahi J. ‘authority’ means a body invested with sovereign power to make rules and regulations and to administer or enforce them to the detriment of the citizens and others fall within the definition of State in Article 12, that the power must be peremptory and coercive. He did not concur to the wide proposition laid down by Bhargava J. that every statutory body on which powers were conferred by law as ‘State.’

34 It is pertinent to note that in this judgment authorities performing commercial functions like Rajasthan Electricity Board were held as ‘State’ as under Article 19 (g) and 298 the state is specifically empowered to carry on any business or trade.

35 *AIR 1975 SC 1331* (In this case the employees of the three statutory corporations-ONGC, IFC, LIC had complained that their service had been terminated in contravention of the Regulations governing their service conditions and also in violation of their fundamental rights under Article 14 and 16 of the Constitution).
State acting through a Corporation and making it an instrumentality or agency of the State. The decision in *Sukhdev Singh* upholding LIC, IFC and ONGC as instrumentality of State was a laudatory decision upholding the welfare principles enshrined in the Constitution.

The instrumentality or agency test formulated in *Sukhdev* was given further shape in *RD Shetty* wherein the question was whether International Airport Authority is a ‘State’ or not under Article 12. In this case the Court has recognized the importance of new forms of wealth like leases, licenses, and contracts etc. and it applied the principles of reasonableness, non-discrimination even in the decisions of government which are purely discretionary in nature.

The scope of Article 12 was further widened in *Som Prakash Rekhi v. Union of India* wherein Supreme Court held that Bharat Petroleum Corporation, a government company would fall under the definition of Article 12. Finally in *Ajay*...
Hasia v. Khalid Mujib\(^{42}\) the Court has further widened the scope of ‘other authorities’ by extending its applicability to non-statutory bodies too.\(^{43}\) Bhagwati J. specified the following six considerations to be taken into account in order to determine whether an ‘authority’ is an instrumentality or agency of State.

i. In case of an entity which required investment, was the entire share capital subscribed by the government?

ii. In the case of an entity which provided a service and required funds to be sent; was the entire expenditure met by the government?

iii. Did the government confer on it any special facility or privilege?

iv. Did the government exercise a pervasive control over its working?

v. Did it perform a function of public importance?

vi. Was the function being entrusted to the entity being previously performed by some government department?\(^{44}\)

In Pradeep Kumar Biswas v. Indian Institute of Chemical Biology\(^{45}\) the seven judge bench held that the ultimate test in determining whether an entity would be an instrumentality of the State would be whether functionally, financially and

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\(^{42}\)AIR 1981 SC 487 (The case dealt with the challenge as to whether a college established and administered by a Society registered under the Jammu & Kashmir Registration of Societies Act 1898 was a State or not under Article 32 of the Indian Constitution).

\(^{43}\)The criterion made in R.D. Shetty was made applicable to the society and Court held that the concept of instrumentality or agency is not limited only to a corporation created by a statute but is equally applicable to a company or society. It was made clear that the genesis of the corporation was immaterial. In the instant case in fact the government had full control over the working of the society and the society was merely a projection.

\(^{44}\)In Sukhdev Singh the Court attempted to extend the meaning of the State but however could not come to a logical conclusion as to how and when an authority can be called as other authority under Article 12. According to the Court “These tests are not conclusive or clinching, but they are merely indicative indicia which have to be used with care and caution, because while stressing the necessity of a wide meaning to be placed on the expression “other authorities”, it must be realized that it should not be stretched so far as to bring in every autonomous body which has some nexus with the Government within the sweep of the expression. A wide enlargement of the meaning must be tempered by a wise limitation.”

\(^{45}\)(2002) 5 SCC 111 (The question was whether CSIR is a State or not under Article 12. Reiterating Sabhajit Tewary the Court answered the question in negative. In the words of Court “normally, a precedent like Sabhajit Tewary which was stood for a length of time should not be reversed, however erroneous the reasoning if it has stood unquestioned, without its reasoning being “distinguished” out of all recognition by subsequent decisions and if the principles enunciated in the earlier decision can stand consistently and be reconciled with subsequent decisions of this Court, some equally authoritative. In our view Sabhajit Tewary fulfils both conditions.”). Para. 21
administratively the body is under the deep and pervasive control of the State and that mere regulatory control by the Government will not suffice to fulﬁl the requirements of Article 12.46 It was held that the tests formulated in Ajay Hasia are not a rigid set of principles so that if a body falls within any one of them it must, ex hypothesis, be considered to be a State within the meaning of Article 12.47 Further in the case of Zee Teleﬁlms v. Union of India48 the Apex Court while reafﬁrming the test laid down in Pradeep Kumar Biswas made it clear that a private registered society could not be treated as State merely because it had State patronage.49 It appeared to the Court that there is no need to further expand the scope of “other authorities” in Article 12 since the situation prevailing at the time of Sukhdev Singh is not in existence for the time being since the State is today distancing itself from commercial activities and concentrating on governance rather than on business.50

Thus with Pradeep Kumar Biswas the focus of the instrumentality or agency test shifted from the six fold test in Ajay Hasia to the “deep and pervasive control” test. With the reformulation of agency and instrumentality test in Pradeep Kumar Biswas there is no scope for extension of the reach of fundamental rights via Article 12 of the Constitution. Though it overruled the narrow interpretation in Sabhajit Tewary there appears to be a dim prospect of government patronized authorities being recognized as State after Pradeep Kumar Biswas as well as Zee Teleﬁlms.51

46The majority also reconsidered Sabhajit Tewary because of its inconsistency with Ajay Hasia and observed that Ajay Hasia itself was wrongly decided to the extent it allowed incorporated companies and registered societies to be included in the category of agency or instrumentality of State.
47It must be noted here that due to the strength of the Bench, the ratio in this case would be binding on all other Constitutional Benches, comprising of ﬁve judges unless the same were to be overruled by a larger bench as per Article 141 of the Constitution of India.
48AIR 2005 SC 2677 (In this case the Court was called upon to determine whether the Board of Cricket Control of India, the principle body regulating the sport of cricket in India, would fall within the deﬁnition of Article 12).
49(It was held that the pre-requisite for invoking the enforcement of a fundamental right under article 32 is that the violator of that right should be a State ﬁrst. Importantly, the minority distinguished the test laid down in Pradeep Kumar Biswas by observing that the “deep and pervasive State control test” applies only in cases when a body has been created by the State but for different purposes under the Indian Companies Act, 1956 or the Societies Registration Act, 1860).
50In this regard Court cited BALCO Employee’s Union (Regd.) v. Union of India AIR 2002 SC to substantiate its view on the matter. It is pertinent to note the view expressed by SANTHOSH KUMAR J. in Zee Teleﬁlms, “…..in a democracy there is a dividing line between a State enterprise and a non-State enterprise, which is distinct and the judiciary should not be an instrument to erase the said dividing line unless, of course, the circumstances of the day require it to do so.”
51(It is pertinent to note that there is a difference between government sponsored and government patronized authorities. According to Pradeep Kumar Biswas, mere government patronization is not enough to hold an authority as ‘State’ under Article 12. There must be deep and pervasive governmental control over the ﬁnancial, administrative and functional activities of the authority. If all
From the above judicial expositions it is crystal clear that judiciary is distancing itself from including non-state actors from the purview of Article 12. In India, the state action doctrine which is derived from Article 12 is couched in the widest extent possible but still the judiciary is hesitating to declare private authorities as ‘State.’ The judicial controversy in this regard is mostly surrounded over the interpretation of ‘other authority’ and the tests to be applied by the Court to bring an authority/body under the expression ‘other authority’ by applying ‘instrumentality or agency’ test. With the decision in Pradeep Kumar Biswas and Zee Telefilms it has become further more difficult to bring a private actor as an ‘instrumentality or agency’ of the State.

As discussed earlier there has taken place a shift in the role of the State, the traditional State functions are now delegated to non-state actors. In such a scenario, the judiciary has the judiciary may have to keep pace with the changes in order to protect the rights of the individual rather than confining itself to the doctrinal limitations. There are instances where the Indian judiciary has expanded Article 12 so as to include private entities under Article 12. But a much more creative interpretation and progressive approach have to be adopted in the light of LPG, bereft of which the fundamental rights of the people will be curtailed by the powerful private actors.

In M.C. Mehta v. Union of India the Supreme Court of India had the occasion to deliberate on the question whether a private entity discharging important public functions would come under the definition of ‘other authorities.’ Despite giving favorable indications on including private corporations as State Bhagwati J., however, left the question unanswered. Responding to the argument that the

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52 (Further Regarding application of Article 14 and 15 against private educational institutions in J.P. Unni Krishnan v. State of Andhra Pradesh 1993 (1) SCC 645 it was held that private educational institutions do not become an instrumentality of the State by virtue of mere recognition and/or affiliation and the concept of ‘State Action’ cannot be extended to these colleges) para. 30.
54 AIR 1987 SC 1086 (The question that arose in MC Mehta was whether victims of a gas leak from a private chemical and fertilizer plant could sue for compensation under Article 32 of the Constitution).
55 It must be noted that the matter was left undecided by the Court in spite of the fact that the activity of producing chemicals and fertilizers is deemed by the State to be an industry of vital public interest, whose public import necessitates that the activity should be ultimately carried out by the State itself. In
inclusion of private entities within the definition of Article 12 would strike a death blow to the policy of private enterprise, Bhagwati J., opined that “it is through creative interpretation and bold innovation that the human rights jurisprudence has been developed in our country to a remarkable extent and this forward march of the human rights movement cannot be allowed to be halted by unfounded apprehensions expressed by status-quoits.”

The case remains important as the Court observed that the American doctrine of State Action might be applicable in India, and that, all the functions of a body judged as ‘State’ need not be public functions to invoke Article 12. The present study also analyses the scope of State Action doctrine of US in order to examine to what extent the same can be devised in India.

1.5 State Action Doctrine in USA

The concept of State Action evolved in US nearly a century after the adoption of US Constitution with the introduction of Fourteenth Amendment Act to the Constitution. It provides that “no state shall deny to any person within its jurisdiction the equal protection of the laws.”

The earliest interpretation to the concept of state action in the fourteenth amendment was given in Ex Parte Virginia wherein the majority laid down that the action inhibited by the first section of the Fourteenth Amendment is only such action as may fairly be said to be that of the States, and that...
the Amendment erects no shield against merely private conduct, however discriminatory or wrongful. In the *Civil Rights Cases* the Supreme Court laid down the bright-line rule of State Action wherein it was held that the federal government does not possess the power to regulate the policies and practices of private entities under Fourteenth Amendment Act.

In the instant case Justice Bradley demarcated “private wrongs” from violations of constitutional rights, asserting that “civil rights” such as are guaranteed by the Constitution against state aggression, cannot be impaired by the wrongful acts of individuals. But this dividing line between state action and private action was narrowed down through various cases involving privatization debates in USA. In US privatization was a common phenomenon after 1930’s and safeguarding the life and liberty of the individual from the clutches of the private actor was a necessity rather than an obligation.

To enforce Bill of Rights against purely private bodies the Court has devised various theories on a fact to fact basis. The main tests are public functions test and government nexus test. There are various ways to find out private actor’s or actions’ nexus with the government. Performance of public functions or the performance of the traditional functions which was exclusively within the dominion of the State would be a strong case for finding state action in the functions performed by the private actor. Those criteria for finding state nexus includes government

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60Ex Parte Virginia 100 US 310 (This has been interpreted to mean that (a) discriminatory law would be clearly violation of Constitutional protections (b) executive agents carrying out legislative command would also fall foul of the Constitutional protection (c) when the judiciary, either fails to afford due process or when the judges lay down common-law; its action can be violation of the Constitutional protection).

61109 U.S. 3 (1883) (In Civil Rights Cases US Supreme Court had grouped together United States v. Stanley, United States v. Ryan, United States v. Nichols, United States v. Singleton, Robinson v. Memphis & Charleston Ry. Co., these cases were all founded on violation equality clause of First and Second Sections of the Civil Rights Act of Congress 1875).

62109 U.S. 13 (“Until some state law has been passed, or some State action through its officers or agents has been taken... no legislation of the United States under Fourteenth Amendment nor any proceedings under such legislation can be called into activity for the prohibitions of the amendment are against State laws and acts done under the state authority.”).

63(The positive tone of Bradley’s language was weakened later in the opinion when Bradley discussed the applicability of thirteenth amendment) Thomas P. Lewis, *supra* note 58, at 1084-1085.

64Marsh v. Alabama 326 U.S. 501 (1946) (The case involved a company town which was privately owned by The Gulf Shipbuilding Corporation comprising both residential and commercial districts. The owners of the town had no formal ties with any state agency or authority. Agents of the Corporation had sent out a Jehovah Witness to leave the area or stop distributing pamphlets containing religious literature).

65Jackson v. Metropolitan Edison Co. 419 U.S. 345 (1974) (In this case a woman had her electrical service terminated without a final hearing to determine the status of her account with the company).
encouragement, or coercion, 66 government entwinement 67 with the private actor, government regulation or licensing of the activity in question etc. 68 In the much celebrated case of Shelley v. Kraemer, 69 the question that came up for consideration was whether judicial enforcement of private restrictive covenants of the nature that prevented members of certain races from acquiring certain property violates the Constitution. Taken to its logical conclusion, the ratio in the Shelley implied that Constitutional protections are available against private action when the Court ratifies any unconstitutional private action; the same would amount to State Action violation of Constitutional protections. 70

Unlike in US, in India the concept is not widely used against private bodies except in rare cases like violation of fundamental rights, environmental pollution cases etc. It must also be noted that in India the doctrine of state action has a wider application than in the American Constitution because of the difference in the text of the Constitution. 71 But even then the Supreme Court and High Court are reluctant to expand the scope of Article 12 to include private actors within the ambit of ‘State.’

66 Lombard v. Louisiana 373 US 267 (1963) (The Supreme Court reversed the conviction of trespass convictions of sit-in-demonstrators because the city officials prior to the demonstration, had condemned sit-ins and the city was prepared to enforce law. These statements were taken to be official encouragement of store owners to use the state trespass law in a discriminatory manner).
67 382 US 296 (1966) (This case involved the exclusion of members of racial minorities from a park in Macon, Georgia. The park had been established in 1911 by testamentary trust in the will of Senator Bacon which required that the park be used only for white persons. The original trustee and operator of the park was the city and after the decision of the Court in Brown v. Board of Education it resigned and requested for the appointment of a private person to take the possession park but subject to racial discrimination. The validity of the testament was challenged in this case).
68 Flagg Bros. Inc. v. Brooks 436 U.S. 149 (1978) (In this case Respondent Shirley Brooks was evicted from her home, and her possessions were moved to a warehouse owned by Petitioner Flagg Brothers, Inc. after a dispute over fees unpaid by Respondent, Petitioner threatened to sell Respondent’s possessions. Respondent then filed suit for damages, for an injunction against selling her possessions and a declaration that such a sale violates the Due Process and Equal Protection Clauses of the Fourteenth Amendment and the Court upheld her claim).
69 334 U.S. 1 (1648) (In this case a white property owner attempted to sell his property to s member of a racial minority. The land was subject to a covenant which forbade sales to racial minorities. Those persons with an interest in the racially restrictive covenant sued to restrain the current owner from violating the covenant by selling to a Black).
70 Overruling the decision in Corrigan v. Buckley, 271 US 323 (1926) wherein it was held that the Constitution applied only against Governmental actions, the US Supreme Court observed that “in granting judicial enforcement of the restrictive agreements…the States have denied the petitioners equal protection of laws.”
71 It is mainly because of three reasons Firstly; Part III starts with the definition of the word ‘State’ which is an inclusive one. The terms like ‘unless the context otherwise requires’ and the term ‘other authorities’ leaves ample scope for further expansion of the definition through liberal, purposive interpretation. Secondly, Most of the Fundamental Rights included in Part III of the Constitution are addressed to the ‘State’. Thirdly, Article 36 enacts that the definition of the expression the ‘State’ in Article 12 shall apply throughout Part IV which deals with Directive Principles of State Policy.
On this background the following research problems have been drawn out;

1.6. Statement of Research Problems

Due to the emergence of LPG, the role of the State has completely undergone a change. There is a downsizing in the welfare functions done by the State. The economic theories underlying economic globalization i.e. new right theory itself negates economic planning and social justice and egalitarianism. It seeks to establish a free market economy where market forces prevail over the nation-state. Thus the changing role of the State is a necessary concomitant of economic liberalization, privatization and a larger part of the economic plan of international bodies like International Monitory Fund (IMF), World Bank (WB) and World Trade Organisation (WTO). In this situation fundamental rights are facing a challenge from private actors who are not bound by Constitutional values and principles.

State is at the centre-stage of enforcement of Fundamental Rights. Under Indian Constitution Article 12 defines the term ‘State’ for the enforcement of Fundamental Rights. The term is couched in the widest extent possible. For invoking the writ procedure under Article 32 the precondition to be satisfied is that the body in question must be a ‘State’ answering the descriptions laid down by the judiciary. In this regard ‘State’ as defined under Article 12 was put to judicial scrutiny right from the inception of the Constitution and the judiciary has formulated various tests to find out whether an authority is an ‘other authority’ or not. Strict adherence to these tests is a hindrance in the way of expanding the scope of the concept of ‘State’ to include public actors under the definition and for the realisation of fundamental rights in the wake of LPG.

Privatization of Welfare functions was a common phenomenon in US even prior to the emergence of Globalization. It is through the judicial interpretation of Fourteenth Amendment that the doctrine of State Action emerged in US. The amendment is addressed only to State Actors. But through judicial interpretation purely private bodies are held to be state actors on the basis of application of various tests. The main tests are public functions test and government nexus test. The presence of these two test in a single fact situation is not necessary rather either of the two and some other test in the given situation is only to make private actor fall under
State action concept. This kind of a fact-to-fact analysis is not found in the Indian scenario of State Action concept.

Though the Indian judiciary is well known for its judicial activism there is less activism as far as Article 12 is concerned in the era of LPG. The judiciary itself is distancing itself from declaring private actors as state actors because of the inability to give a theoretical foundation for the same. The Court should be ready to devise new theories and tests in order to enforce fundamental rights with all its content and purpose. Bodies performing public functions or functions which affect larger public interest or fundamental rights are to be declared state actors in the light of LPG. But this kind of a right centric approach is lacking due to the state centric approach towards enforcement of fundamental rights.

1.7 Research Questions

In the light of the above mentioned objectives the researcher dealt with the following questions in the research work.

1. What is the impact of LPG on the role of the State and on the fundamental rights of the people?

2. What are the interpretation parameters adopted by the Indian judiciary in determining the scope of Article 12?

3. How US Supreme Court has included private actions within the ambit of State Action concept?

4. How far US concept of State Action can be applied in the Indian context?

5. Why Indian judiciary is withholding itself from giving a creative interpretation to Article 12 to bring private actors under state action concept?

1.8 Formulation of Hypotheses

On the basis of the Research Questions the following hypotheses have been formulated for conducting the research.

1. Globalization, privatisation and liberalisation have revolutionized and diluted the concept of ‘State’ and the 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.
2. In India the State Action concept is dynamic in nature and its contents and dimensions vary.

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.

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.

1.9 Objectives of the Study

1. To trace the origin globalization, privatization and liberalization and its impact on the Fundamental Rights of the people of India.

2. To analyze the traditional role of State and the transition of the role of State from service provider to service facilitator in the context of LPG.

3. To examine the contemporary social, political and economic challenges which impede the inclusion of private authorities under Article 12 and to find out justifications for subjecting private entities under the concept of State Action in India.

4. To analyze the judicial approach towards the interpretation of State Action doctrine in U.S. and India and to examine the applicability of American approach to the present Indian context.

5. To probe the extent to which political philosophy can influence judicial decisions and development of constitutional law with reference to the doctrine of State Action in India.

1.10 Significance of the Research

This research work will be helpful to the legislature in giving suitable changes to the provision in the Constitution pertaining to the doctrine of State Action and specifically to implement the recommendations of National Commission to Review the Working of the Constitution (NCWRC) regarding Article 12.
This research work will be helpful to the judiciary while adjudicating upon the cases regarding State Action to adopt a new approach towards interpretation of Article 12.

The work will also be beneficial to academicians, lawyers in understanding the scope and application of State Action doctrine under two jurisdictions i.e. India and US. The work will be advantageous to undergraduate and postgraduate students in Law, Political Science, Economics, Public Administration etc., as well as researchers and such as constitutional law, comparative constitutional law, Public Law etc. The work will be helpful to the executive while implementing the laws, corporate sector and also for Non-Governmental Organisations (NGO’s).

Finally, the research work is useful to the public especially the marginalized or socially or economically vulnerable groups since the main aim of the work is aimed at public welfare and effective social order by bringing private actors under the garb of doctrine of State Action.

1.11 Scope of the Study

This research work seeks to provide a critical analysis of the doctrine of state action under the Indian Constitution in the light of the transformations happening in the role of state due to LPG. It discusses US position of State Action for the purpose of a critical study. Since the area under study is vast, the researcher undertakes to study only the implications of LPG on the State Action concept and fundamental rights and critical analysis of the judicial approach on the realm of state action and private action in India and US.

1.12 Research Methodology

There are mainly doctrinal and non-doctrinal methods of study for conducting research work. Doctrinal method mainly gives emphasis to conducting research by analysis of materials available in the library whereas non-doctrinal research requires researcher to undergo field work to do the research work. Doctrinal method is found to be suitable for the present study since the research involves theoretical analysis of various issues involved like the doctrine of State Action, impact of LPG on fundamental rights etc. Analytical, descriptive and critical methods are used as tools conducting the research and deriving the results. The research analyses the concept of
state action as conceptualised by the Courts in India and US with the help of judicial decisions.

1.13 Sources of Data

There are primarily two sources of data, primary and secondary data. This research work is basically concentrated on the analysis of the available primary and secondary data. Primary data includes Constitutions and legislations of various nations, judicial decisions of different countries, International conventions, Commission Reports etc. The researcher also depends on secondary data such as text books, commentaries, articles on various national and international journals and materials available on the internet.

1.14 Review of Literature: Need for the Present Study

Review of literature is one of the important tasks involved in the research process. For a complete outlook on the area of study the researcher has to expose herself to the various studies and information pertaining to the research area. Regarding the present research very few works have been undertaken. The works done so far, relates to the Concept of State Action under Article 12, the status of judiciary under Article 12 etc. However there are some studies in the area which does not directly but indirectly pertains to the area. One amongst such work is Globalization and Legal Theory,\textsuperscript{72} by William Twining wherein the author has given emphasis on the need for a revival of general jurisprudence in response to the challenges of globalization. Similarly, in Constitutional Rights after Globalization,\textsuperscript{73} Gavin Anderson deals with the question whether the traditional liberal concept of constitutional rights is valid today because of the influence of globalization. Sustainability of Rights after Globalization,\textsuperscript{74} by Ishita Dey, Sabyasachi Chaudhury, Basu Ray deals with analysis of the interdependence of market forces, the State, and the neo-liberal economic policies and how they impact the livelihood of people. Though a comparative study of decisions under Article 12 with US decisions is made by HM Seervai in his book on Constitutional Law of India,\textsuperscript{75} it is not comprehensive and there is no mention of impact of LPG on Article 12.

\textsuperscript{72} WILLIAM TWINING’S BOOK GLOBALIZATION AND LEGAL THEORY (2000).
\textsuperscript{73} GAVIN W ANDERSON, CONSTITUTIONAL RIGHTS AFTER GLOBALIZATION (2005).
\textsuperscript{74} ISHITA DEY, SABYASACHI CHAUDHURY, BASU RAY SUSTAINABILITY OF RIGHTS AFTER GLOBALIZATION (2011).
\textsuperscript{75} H.M. SEERVAI, CONSTITUTIONAL OF INDIA (4\textsuperscript{th} ed. 2005).
Constitutional Law of India by D.D. Basu\textsuperscript{76} also did not discuss Article 12 in the light of LPG, though V.N. Shukla has attempted to discuss it in his book Constitution of India\textsuperscript{77} that is not sufficed in the present context. There is dearth of literature on the concept of State under Article 12 in the light of impact of LPG on Fundamental Rights. So the present study attempts to focus on the preventing the vices of LPG on fundamental rights by expanding the Concept of State Action implied under Article 12 of the Indian Constitution by taking hues from the approach of the US judiciary.

Review of existing Literature on the subject under the study discloses that no major research work was undertaken to study the various facets of Article 12 in the light of globalization. Further, it is also revealed that attempts were not made so far to examine and analyze the doctrine of state action as evolved by the US Supreme Court and its applicability in the Indian context. Review of Literature reveals the following research gaps;

1. The role of the State has undergone a considerable change in the wake of economic liberalization, privatization and globalization.

2. There are constraints on the part of the judiciary to enforce fundamental rights against private actors.

3. There is the necessity for devising new tests to incorporate private actors under the ambit of Article 12.

4. The US doctrine of State Action have not been taken effectively as a model to include private actors/actions under Article 12.

Private players have the potential to invade fundamental rights, therefore, keeping in view the existing research gap in the interpretation of Article 12 and the applicability of State Action in India to bring private players within the ambit and sweep of Article 12, the present study is undertaken in view of sweeping changes in the legal framework and judicial approach with the advent of globalization giving importance to privatization over the individual freedoms and rights.

\textsuperscript{76} D.D. BASU, COMMENTORY ON THE CONSTITUTION OF INDIA (2014)
\textsuperscript{77} V.N. SHUKLA, CONSTITUTION OF INDIA (2003).
1.15 Chapterisation

The whole research work is divided into six chapters

Chapter 1- Introduction

The introductory chapter gives an overview on the subject matter of research by discussing the changing role of the state in the era of LPG, judicial approach towards the concept of interpretation of Article 12 in India. The doctrine of state action in US has also been discussed in nutshell. Beside, the chapter discusses elaborately the research problems existing in the research field, enumerates the research questions, hypothesis, narrates the objectives and explains the significance of the study. The chapter also chalk out the methodology adopted, scope of the study and Chapterisation.

Chapter 2 Evolution of Globalization, Liberalization and Privatization

In 2nd chapter a modest attempt is made to discuss the origin and evolution of globalization, liberalization and privatization in the national and international perspective. It attempts to give an overview on the growth and development of economic liberalization in India. It also analyses the impact of LPG on the role of ‘State,’ various constitutional dogmas and on the fundamental rights guaranteed under the Indian Constitution.

Chapter 3 Concept of State Action under Article 12 of the Indian Constitution

The 3rd chapter elucidates the approach of the Indian judiciary towards interpreting Article 12 of the Constitution and for this purpose an analysis of judicial decisions have been made. The chapter also explains the contours of Article 12 by discussing elaborately the public authorities which are considered to be ‘state’ under Article 12 of the Constitution.

Chapter 4 Nature and Scope of State Action Doctrine in USA

The 4th chapter gives a detailed analysis of the history of the formation of the American Declaration of Independence, Bill of Rights and the formulation of State Action doctrine through the interpretation of Fourteenth Amendment in the Civil Rights cases. It also discusses the way in which the US judiciary has applied state
action doctrine as against private bodies/individuals by discussing various tests pertaining to the area like public functions test and state nexus test etc.

Chapter 5 State Action and Private Actors

The 5th chapter critically analyses the approach of the Indian judiciary in interpreting various private actors as ‘State.’ In addition to mentioning the importance of the concept of ‘horizontal application of fundamental rights,’ a critical evaluation of the concept in the light of the approach of the Indian judiciary is made out. The chapter also discusses the horizontal application of fundamental rights as applied in Ireland, Germany, South Africa, United Kingdom, Canada.

Chapter 6 Conclusion and Suggestions

The 6th chapter being the last chapter summarizes the whole work and enumerates the findings of the research. The chapter also deals with findings of the study, testing of hypotheses and enumerate suggestions for the better enforcement of fundamental rights against private actors.