

# LEGAL STATUS OF BCCI AS INSTRUMENTALITY OF STATE UNDER ARTICLE 12 OF THE INDIAN CONSTITUTION

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## Introduction

In the era of globalization when the power is given to private bodies within the state the enforcement of Constitutional Rights is a matter of concern. Political theories underlying globalization rested on the contention that reduction of law to state law is unsustainable and therefore it posited multitude sources of law by non-state actors and private actors. The germinating factors behind this idea of thought emerged with Washington Consensus which sowed the seeds of Economic Neo-liberalism worldwide.<sup>1</sup>With neo-liberalism the concept of 'global economy' emerged which is characterized by global production and global markets for goods, services and finance.<sup>2</sup>With globalization Sports is now a global phenomenon affected by the emergence of a world media system, especially television and corporate capitalism. In the contemporary world sports has become a business for the corporate world and the consumers are the global audiences.

Besides, globalization of sports has shifted the focus of legal regulation increasingly onto certain international and national sports federations which controls and governs international sport. They have their own rulebooks and constitutions, often catered to their own convenience. They take decisions that can have profound effects on the careers of players and that have important economic consequence. They are autonomous organizations and are independent of national governments.<sup>3</sup> When it comes to cricket it is International Cricket

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1 In fact the concept of Neo-liberal state underlying globalization took its shape on the New Right philosophy emerged in Thatcher rite England in the 1970's and Reagan governments in U.S.A in 1980's. It was emerged as an attack on Keynesian Welfare State and has become a global phenomenon since the "Washington Consensus". The Thatcherism and Raeganism type of governance pushed the State into the very basic functional role of role of security, law and order maintenance, and protection of weaker sections. "Economic Policy". A. Adonis., T. Hames. A Conservative Revolution? The Thatcher-Reagan Decade in Perspective. USA: Manchester University Press, 1994

2 Gavin W. Anderson. Constitutional Rights after Globalisation. USA: Hart Publishing, 2005 at 7

3 Ken Foster. "Is there a Global Sports Law?" Entertainment Law 2.1 2010: 1-18, at 1 Warwick University, <http://www2.warwick.ac.uk/fac/soc/law/elj/eslj/issues/volume2/number1/foster.pdf> 22.04.2013 <<http://www2.warwick.ac.uk>>

Conference and Board of Control of Cricket in India<sup>4</sup> which occupies these positions. ICC regulates International Cricket whereas BCCI regulates cricket in India at all the levels.<sup>5</sup>

Cricket originated in England during 1300 as an aristocratic pastime and it was embraced by Indians during the colonial period.<sup>6</sup> In India the game acquired popularity mainly because it helped in the socialization process as it allowed the commoner to mingle with the aristocrats and for both to meet their master i.e. the Englishmen as equals on the fields of play.<sup>7</sup> Imperial Cricket Conference, the then ICC was formed in 1909 and it was viewed as an appendage of British Colonial State<sup>8</sup>. With the entry of Indian team into ICC and eventually to international cricket, BCCI was formed with the support of the elites.<sup>9</sup> Initially it was functioning as an unregistered association and in 1940 it got registered under the Societies Registration Act of 1860. Later with the enactment of Tamil Nadu Registration Act, 1975 BCCI came to be registered under it.

Cricket as a sport attracts the attention of a vast majority of population in India. It has deep implications for the notions of Indian ness and national identity.<sup>10</sup> Internationally and nationally the wide popularity for the game have exemplified in the recent years because of the success of Indian Premier League introduced by BCCI in 2008.<sup>11</sup>

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4 Hereinafter called as ICC and BCCI respectively

5 At the grass-root level, national level, international level and it also regulates private cricket i.e. Indian Premiere League. See BCCI Regulations 2.1

6 The game was deliberately exported to the colonies as part of colonizing policy of transferring British moral code from the messengers of empire to the local population. Parsis who were good at embracing British tradition took interest in Cricket and formed cricket clubs from the year 1848 and subsequently Madras and Calcutta cricket clubs were formed and the game was widely played between Britishers and Indians. Narottam Puri. "Sports v. Cricket", India International Centre Quarterly 9.2 (1982): 146-154, Somshankar Rai. "The Wood Magic: Cricket in India- A Post- Colonial Benediction". The International Journal of History of Sports 25.12 (2008): 1637-1653

7 Puri, *ibid* at 145-146

8 Until 1965 ICC retained its old name and it was the policy of the ICC to admit only Commonwealth countries as members. Id. Jason Kaufman and Orlando Patterson. "Cross-National Diffusion: The Global Spread of Cricket". American Sociological Review 70.1 (2005): 82-110 at p. 85

9 BCCI was formed at Delhi with the initiation of A.S. DE Mellow and support of Maharaja of Patiala in 1927. During those times cricket was a well administered sport in India and was funded mainly by the *nawabs, maharajas*, princes who were at the helm of administration of cricket and they set a noble tradition of managing the game in India. Puri *supra* note 6, at 152

10 Boria Majumdar. "Soaps, serials and the CPI (M), Cricket bet them all: Cricket and Television in the Cotemporary India". Sport in Society 11.5 (2008): 570-582

11 Chris Rumford and Stephen Wagg. Cricket and Globalisation. UK: Cambridge Scholars Publishing, 2010; The success is marked by the fact that in a short span of three years the first franchise based

Internationally IPL is marked as the rise of the non-Western nations primarily India. This changing scenario has also shifted the control and regulation of cricket from ICC TO BCCI.<sup>12</sup> Even then BCCI runs cricket as a private venture least accountable towards the public, players and with no transparency. Now BCCI is an unruly horse wielding enormous power economically as well as politically and enjoys monopoly status in every sense. Simultaneously BCCI could be compared to Black Hole which would eventually bring cricket to nothingness due to the prevailing corruption and irregularities within.<sup>13</sup>

### **India's Globalised Cricket Regime – the Indian Premier League**

IPL was the brainchild of Lalit Modi, unveiled in the year 2008 in lines with the European Premier League. It was the first franchisee based Twenty 20 cricket competition. It was created at a time when cricket started losing its popularity after World Cup 2007 when India could not even make it up to the final ten teams. Lalit Modi, the protagonist of IPL foresaw that IPL would be a great success taking into account the emerging Indian economy and the multibillion population of India. With IPL cricket became a media enterprise-corporatized and catered to fit the needs of sponsors, media corporations and other stakeholders rather than the fans that are also sold as consumers in the commodification process of cricket.<sup>14</sup>

The major breakthrough in cricket in India was the opening up of market and liberalization policies of Narasimha Rao government in 1991.<sup>15</sup> It eventually had put an end to the monopoly of state run Doordarshan in broadcasting the game. This deregulation and subsequent entry of ESPN, Zee sports etc made cricket a global media event having high television rating point.<sup>16</sup> In fact it is “Perfect Television Sport” as

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Twenty 20 cricket has grown into one of the world sports' foremost properties. ShakyaMitra. “India's Foray into World's Sports Business”. *Sport in Society* 13.9 (2010): 1314-1333

12 Amit Gupta. “The Globalization of Sports, the Rise of Non-Western Nations, and the Impact on International Sporting Events”. *The International Journal of the History of Sports* 26.12 (2009): 1779-1790, Amit Gupta. “India and the IPL: Cricket's Globalized Empire”. *The Round Table* 98.401 (2009): 201-211

13 P. Sainath. “BCCI: Billionaires Control Cricket in India”. *The Hindu* 17 Jan. 2012

14 Shakya Mitra. “The IPL: India's Foray into World's Sports Business”. *Sport in Society* 13.9 (2010): 1314-1333

15 M. K. Raghavendra. “Paan Singh Tomar- the Nation and the Sports person”. *Economic and Political Weekly* 28.17 (2012): 20-22

16 The commercial success of the game could be gauged from the fact that in 2008, the IPL captured 9.5% of the Indian television market compared to soap operas and reality shows that made up 5% of the market reflecting the affection of South Asians for the game. David Rowe and Callum Gilmour. “Global

called by Appadurai.<sup>17</sup> IPL is a mix masala of all the things which people of emerging India keep close to their heart viz; Bollywood, corporate culture and finally cricket –the defacto national game of India. Cheerleaders and film stars added new colour to the game and with the new schedule cricket became a “mega one-day soap opera” starring cricketers and film stars.<sup>18</sup>

The cricket -Bollywood nexus is a neo-liberal mechanism to market entertainment products and celebrities which produces increased profits by captivating televised audiences through the appeal of cricket and Bollywood.<sup>19</sup> The game became a vehicle through which increasingly global but also national commercial brands are launched and maintained particularly Bollywood stars as brand ambassadors.<sup>20</sup> This new Hegemonic Sports Culture<sup>21</sup> dominated by cricket in India is intrinsically related to the forces of capitalism. Capital societies heavily depend on cultural products, including sports as they are directly linked to the performance of economy by providing new avenues for growth, dynamism, profit and control. By converting sporting events (not only cricket) into a spectacle major corporations compete for profits, growth and control over the market.<sup>22</sup>

Deregulation without any mechanism for enforcement in the globalized free market era has in fact lead to the weakening of state and

Sport: Where Wembley meets Bollywood Boulevard”. *Contium: Journal Of Media And Cultural Studies* 23.2 (2009):171-182, 178

17 Jason, *supra* note 8, at 90

18 Vikram Bedi. “India Cricket as Synecdoche for Our Times”. *Economic and Political Weekly* 41.25 (2006): 2520-2522

19 Azmat Rasul & Jennifer M. Proffitt. “Bollywood and the Indian Premier League (IPL): The Political Economy of Bollywood's New Blockbuster”. *Asian Journal of Communication* 21.4 (2012): 373-388 (India, being an emerging economic power with a large middle class, has assumed a unique position among cricket playing nations in large part due to the millions of spectators willing to spend money not only on attending matches but also on tourism, shopping, and other consumerist practices following the neoliberal economic policies of the Indian government.) Also see Amit Gupta, *supra* note 12

20 Azmat. al. *supra* note 19, at 380, (Even *Lagaan*, which marked a new awakening in the Indian cinema combined nationalism with cricket and was widely acclaimed for its professionalism besides promoting cricket in rural areas.) M. K. Raghavendra, *supra* note 15; Florian Stadler. “Cultural Connections: *Lagaan* and its audience responses”. *Third World Quarterly* 26.3 (2005): 517-524

21 A hege-monic sports culture is one that "dominates a country's emotional attachments" Markovits., Andrei S., Steven L. Hellerman. *Offside: Soccer and American Exceptionalism*, (2001) as cited in Jason, *supra* note 8, at p. 84

22 Azmat. al. *supra* note 19, at 375; also see Nalin Mehta et al., “Bombay Sport Exchange’: cricket, globalization and the future”. *Sport in Society* 12.4/5 (2009): 694-707

incidental to it is the social acceptance of corruption.<sup>23</sup> Cricket and IPL is no exception to it. Indian cricket has a long tradition in match fixing and betting, with IPL even BCCI officials came to be involved in corruption, thereby tainting the old reputation of cricket as “gentlemen’s game”.<sup>24</sup> Government is giving tax exemption to BCCI, writing-off its debts, also leases and stadiums are given at a cheaper rate for the game but at the same time subsidies to the poor are savaged and this is a clear negation of the social justice principles embodied under the Indian Constitution.<sup>25</sup>

The game of cricket is now part of the entire polity and the politicians also has to share the burden for downfall of cricket.<sup>26</sup> It does not matter which party they belongs to it is all about money making,<sup>27</sup> as rightly noted by Susan Strange “economic globalization signals supremacy or triumph of the market over the nation-state and of economics over politics.”<sup>28</sup> Economic globalization coupled with political globalization<sup>29</sup> has made BCCI enormous power wielding machinery both nationally and internationally, enjoying an economy scale that could be equal to a small nation.<sup>30</sup> Existing situation within BCCI demands transparency in administration and integrity on the part of officials and furthermore a legislation to regulate its affairs.<sup>31</sup>

23 M.K. Raghavendra, *supra* note 15, Prabaht Patnaik. “Ways of Neoliberalism”. Frontline 15 Dec. 2012 at 6.

24 Amit Gupta. “The IPL and India’s Domination of Global Cricket”. Sport in Society 14.10 (2011): 1316-1325, at 1323, “ED probes Money Laundering complaints against IPL”. The Hindu 30 Aug. 2012

25 P. Sainath. “How to feed your billionaires”, The Hindu 17 April 2010, Also see Karan Thaper. “IPL has made cricket just business: MS Gill”, CNN-IBN, 27 Apr. 2010, <http://ibnlive.in.com/news/ipl-has-made-cricket-just-business-ms-gill/112266-5-24.html> 22.04.2013 <<http://ibnlive.in.com>>; (Also government is giving a blind eye to the organised black market dealing in betting on India and the betting in cricket is often organised by the mafia that abets and aids the *fidayeen* funds.) Aditya Sondhi. “The Legal Status of BCCI, Unwarranted Ad-Hocism, Constitutional Hurdles and the Pressing Need for a Cricket Legislation”. Manupatra 22.2 (2010): 1-13

26 AM. “Culcutta Diary”. Economic and Political Weekly 35.38 (2000): 3374-3375

27 Sainath, *supra* note 25

28 Susan Strange. The Retreat of The State: The Diffusion of Power in the World Economy. (1996) as cited in Nilüfer Karacasulu Göksel. “Globalization and the State”. <http://sam.gov.tr/wp-content/uploads/2012/02/1.-NiluferKaracasuluGoksel.pdf>, 22.04.2013, < <http://sam.gov.tr>>

29 (Political Globalization is interpreted as “the shifting reach of political power, authority and forms of rule”, it is characterizes with increasing influence of international organizations, non-state actors, national pressure groups into the international arena.) David Held, A. McGrew. “The End of the Old Order?” Review of International Studies 24.5 (1998): 219-243 as cited in id. at 6

30 The 2013 Pepsi Indian Premier League Player Auction, held in Chennai on Feb 3, 2013, saw 37 players being bought for a whopping sum of USD 11.89 million. <http://www.iplt20.com/news/2013/more-news/2491/2013-ipl-player-auction-at-a-glance>, 22.04.2013. < <http://www.iplt20.com>>

31 (But when discussions on making BCCI under the purview of the National Sports Authority Bill, 2011 came up there had been strong oppositions from the ministers holding positions in the BCCI and they vehemently opposed government regulation in the activities of BCCI.) A. G. Noorani. “Wail of Zamindars”. Frontline 24 Sep. 2011

Equally important is ensuring 'fairness' and 'good faith' in the activities of BCCI by subjecting it to the process of judicial review under Article 32 and 226 of the Indian Constitution and also to make it an instrumentality of the State under Article 12. Courts' supervisory jurisdiction helps to ensure that private bodies like BCCI do not abuse their power and do not act arbitrarily, capriciously, unreasonably or unfairly. Litigation and the possibility of litigation can play a useful regulatory role.<sup>32</sup> And this requires introspection into the judicial stand on BCCI as 'State' under Article 12.

### Legal Status of BCCI

The question regarding legal status of BCCI under Article 12 came before various cases viz; *Mohinder Amarnath & others. v BCCI*,<sup>33</sup> *Ajay Jadeja v Union of India & others*<sup>34</sup> and *Rahul Mehra And Anr. v Union Of India*<sup>35</sup> before the Delhi High Court. The other decisions are by the Supreme Court: *BCCI v Netaji Cricket Club and Ors.*<sup>36</sup>, *Zee. Telefilms Ltd & Anr v. Union India & Ors.*<sup>37</sup> and *A.C. Muthiah v BCCI & Anr.*<sup>38</sup> In *Mohinder Amarnath's case* BCCI was held not to be an instrumentality of State whereas in *Ajay Jadejas' case* writ petition against BCCI was held to be maintainable by Delhi High Court. But decision in *Ajay Jadeja's case* was held as not a precedent subsequently in *Rahul Mehra Case*<sup>39</sup> and it was affirmatively held that writ against BCCI is maintainable although Court declined to express any opinion regarding status of BCCI as an instrumentality of the State or not.<sup>40</sup>

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32 *Ajay Jadeja v Union of India* 95 (2002) DLT 14, 2002 (61) DRJ 639 [*Ajay Jadejas' case*]

33 CW.NO.632/89

34 *Ibid* note 33

35 (2005) 4 Comp. LJ 268 Del, 114 (2004) DLT 323 [*Rahul Mehra's case*]

36 (2005) 4 SCC 741 [*Netaji's Case*]. Per Santosh Hegde J. and S.B. Sinha J.

37 (2005) 4 SCC 649, [*Zee Telefilms case*] (Santhosh Hegde J. and Sinha J. who were the authors of *Netaji case* split over the status of BCCI and majority in the words of Santhosh Hegde J. held BCCI as not a 'State' under Article 12.)

38 (2011) 6 SCC 617 [*Muthiah's case*]

39 (Since petition filed by Ajay Jadeja was withdrawn by him as he agreed to have the matter settled by an Arbitrator, court ordered the decision to be treated not as a precedent in another case of whatsoever nature.) *Supra* note 33, para. 4

40 (The decision was made by virtue of the monopoly nature of BCCI in regulating and controlling the game of cricket and the nature of the duties and functions performed by it. According to the Court the words "any person or authority" used in Article 226 may cover any other person or body performing public duty.) Para 20.

Subsequently in *Netajis' case* Supreme Court upheld the monopoly status of BCCI and further held that having regard to the enormity of power exercised by it the Board is bound to follow the doctrine of 'fairness' and 'good faith' in all its activities and further held that having regard to the fact that it has to fulfill the hopes and aspirations of millions, it has a duty to act reasonably and it cannot act arbitrarily, whimsically or capriciously. As the Board controls the profession of cricket, its actions are required to be judged and viewed by higher standards."<sup>41</sup>

In *Zee Telefilms case* Apex Court elaborately discussed about the position of BCCI as an instrumentality of State under Article 12. Court squarely applied the test in *Pradeep Kumar Biswas v. Indian Institute of Chemical Biology*<sup>42</sup> and held that since BCCI is not financially, functionally and administratively controlled by government cumulatively and so it cannot be held as a State and thus writ petition under Article 12 is not maintainable. Later in *Muthiahs' Case* Supreme Court reaffirmed the decision in *Zee Telefilms Case* and it was held categorically that BCCI is a private autonomous body and its actions have to be judged only like any other similar authority exercising public functions. The Court also rejected the claim that every entity regulating the fundamental rights under Article 19 (1) (g) is a 'State' within the meaning of Article 12.<sup>43</sup> It was held that the functions of the Board do not amount to public functions. In view of this decision observations made by Sinha in *Netajis Case* stands no longer as good law.<sup>44</sup>

Supreme Court has held in *Zee Telefilms Case* that in cases involving violation of fundamental rights the petitioner has to establish as a pre-requisite that the Board is a State for invoking Article 32 and that unless this is done the petitioner cannot allege that the Board violates fundamental rights and therefore it is a State within Article

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41 *Supra* note 36, at para 80 and 81

42 (2002) 5 SCC 111 at 40 [*Pradeep Kumar Biswas Case*] the question was whether CSIR is a State or not under Article 12.

43 (Court denied the claim of the petitioners that the functions of the Board amount to public functions, as the State/Union has not chosen the Board to carry out the duties and as it is not legally authorized by it carry out those functions under any law or agreement and that instead it has voluntarily chosen to perform those functions under its own guidelines which makes it an autonomous body.) *Supra* note 37, at para 28

44 *Ibid* para 34

12.<sup>45</sup> Thus according to the Court it is only in situations involving ‘State Action’ that the fundamental Rights can be enforced. In the era of globalization this vertical approach of Fundamental Rights is no longer accurate because now economic and political power are increasingly given to private actors too.<sup>46</sup> In this situation judiciary has a potent role in protecting and upholding the fundamental rights under the Constitution. But as far as enforcement of fundamental rights against private or non-state actors is concerned our judiciary is constrained in a set of narrow doctrines evolved from time to time.<sup>47</sup> In the present scenario an innovative and liberal approach in tune with the spirit and fundamental values of the constitution is the need of the hour.<sup>48</sup>

### Relevance of Public Functions Test in the era of Globalization

So far there have been two ways in which judiciary has responded to the call of Globalization as far as interpretation of the term “other authorities” under Article 12 is concerned.<sup>49</sup> The first approach of judiciary could be seen in the majority decision in *Sukhdev Singh v. Bhagatram*<sup>50</sup> whereas the second view is embedded in Mathew J.’s opinion in the same case.<sup>51</sup> The first approach culminated into the

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45 *Ibid* para 28; (A similar approach by the judiciary can be seen in the case of *Zoroastrian Coop. Housing Society Ltd. v. District Registrar, Coop. Societies (Urban)*, (2005) 5 SCC 632 wherein the issue was whether bye-law of housing society contravened public policy under Section 4 of the local act under which it was established in so much it was inconsistent with Article 15 of the Constitution and Supreme Court declined to apply constitutional principles to the bye-laws.)

46 V.N. Shukla. Constitution of India. Lucknow: Eastern Book Company, 2003, 10th ed. p.20

47 *Rajasthan Electricity Board v. Mohan Lal* AIR 1967 SC 1857, *Sukhdev Singh v. Bhagath Ram* AIR 1975 SC 1331, *R. D. Shetty v. International Airport Authority* AIR 1979 SC 1628, *Pradeep Kumar Biswas v. Indian Institute of Chemical Biology*(2002) 5 SCC 111.

48 Sanu Rani Paul. “Need for Horizontal Application of Fundamental Rights in the Era of Globalization”. *Christ Uni. Law Journal* 2.2 (2012): 81-96, Ashish Chugh. “Fundamental Rights: Vertical or Horizontal?”. *SCC(J)7.9*: (2005)

49 Constitution of India Art. 12 (Definition of State: “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 other authorities within the territory of India or under the control of the Government of India”)

50 AIR 1975 SC 1331 [*Sukhdev Singh*’s case] (The question that arose for consideration in this case was whether statutory corporations such as the Oil and Natural Gas Corporation, Life Insurance Corporation and the Finance Corporation would fall within the definition of State under Article 12.)

51 He observed that the test to determine whether an entity would satisfy the requirements of Article 12 can be stated as thus - (a) a finding of state financial support together with an unusual *degree of control* over the management and policies of the body may lead to an inference that the body is a State entity; (b) another important indicator is discharging of important *public function* with state support being an irrelevant consideration (c) a corporation is an *agency or instrumentality of the government* for carrying on a business for the benefit of the public.

decision in *Pradeep Kumar's Case* whereas the second one partially lead to the view of minority decision in *Zee Telefilm's Case*.

It was Mathew J. in his concurring opinion in *Sukhdev Singh's case* who propounded Public Functions Test as a criterion to find out instrumentalities of state under the expression 'other authorities' within Article 12.<sup>52</sup> Public Functions Test lays down that when the functions performed by private bodies could be identified with state functions, they would become State Actors in relation to the public functions performed by them. Subsequently in *M.C. Mehta v. Union of India*<sup>53</sup> Supreme Court of India encountered the question whether a private entity discharging important public functions can be a State. Bhagwati J., though expressed his intention to include private authorities under State left the matter undecided on grounds of laxity of time<sup>54</sup> but in spite of this the case remains important as the Court observed that the American doctrine of State Action might be applicable in India, and therefore, all the functions of a body judged as "State" need not be public functions.<sup>55</sup>

Regarding BCCI, starting from *Mohinder Amarnaths' Case* the public functions performed by BCCI was put into limelight. In *Ajay Jadejas' Case* Delhi High Court held that the function like selecting team is a public function and the same has been reiterated by Supreme Court in *Rahul Mehra's Case*.<sup>56</sup> Later in *Netajis Case* also Apex Court

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52 (Opinion of Mathew J. can be taken into consideration in this regard, "Another factor which might be considered is whether the operation is an important public function. The combination of state aid and the furnishing of an important public service may result in a conclusion that the operation should be classified as a state agency. If a given function is of such public importance and so closely related to governmental functions as to be classified as a government agency, then even the presence or absence of state financial aid might be irrelevant in making a finding of state action. If the function does not fall within such a description, then mere addition of state money would not influence the conclusion.") Id. note 51, at para 98

53 AIR 1987 SC 1086 [*M.C. Mehta Case*] (The question that arose in *MC Mehta's case* was whether victims of a gas leak from a private chemical and fertilizer plant could sue for compensation under Article 32 of the Constitution.)

54 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 fact Chemicals and Fertilizers industries are placed in the First Schedule as Items 19 and 18 respectively which according to the objectives of the Policy Resolutions the Industries (Development and Regulation) Act of 1951 and Section 2 of the same to be controlled by the Union in public interest.

55 This view was later upheld by the minority in the *Zee Televisions case* by Sinha J.

56 ("When the Government stands by and lets a body like BCCI assume the prerogative of being a sole representative of India for cricket by permitting BCCI to choose the team for India for appearance in events like the World Cup, then it necessarily imbues BCCI with the public functions at least in or far as the selection of the team to represent India and India's representation in International Cricket for a and regulation of Cricket in India is concerned.") *Supra* note 32, para 15.

reaffirmed this view and imposed upon BCCI the duty to act fairly and reasonably in the manner of conducting elections.

Subsequently in Zee Telefilms Case there had been a detailed discussion on the public functions performed by BCCI and it was observed by the Minority Bench that a body discharging public functions and exercising monopoly power would be an authority under Article 12. BCCI exercises functions like controlling and regulating the game of cricket. It has final say in the matters of selection and disqualification of players, umpires and others connected with the game touching their right to freedom of speech and occupation. It makes law on the subject which is essentially a state function in terms of Entry 33 of the Seventh Schedule<sup>57</sup> to the Constitution;<sup>58</sup> it thus acquires status of monopoly.<sup>59</sup>

It must also be noted that with the coming of IPL the powers of BCCI has extended by leaps and bounds. It is the sole body which regulates television and broadcasting rights which also involves the rights of the viewers to witness the match on television and other visual media.<sup>60</sup> It has powers relating to awarding of franchises, endorsements, distribution of prize money, selection of players, their disqualification etc. BCCI thus enjoys unbridled monopoly power. But it is not bound by any effective provisions of law or regulations or control by the government also it is not bound to act fairly and reasonably within the meaning of Article 14 of the Constitution. According to minority view performance of a public function in the context of constitution would be to allow an entity to perform as an authority under Article 12 which makes it subject to constitutional discipline of fundamental rights. Except in the case of disciplinary measures, the Board has not made any rule to act fairly or reasonably.<sup>61</sup>

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57 Constitution of India Entry 33 of the Seventh Schedule: ("Theatres and dramatic performances; cinemas subject to the provisions of entry 60 of List I; sports, entertainments and amusements.")

58 *Supra* note 37, para 173

59 (It (BCCI) has, thus, enormous power and wields great influence over the entire field of cricket. In sum, the control of the Board over the sport of competitive cricket is deep and pervasive, nay complete. Its monopoly status is undisputed.), *supra* note 37, para. 227 and 229

60 As held by the Court in *Secretary, Ministry of Information & Broadcasting, Government of India and Others v. Cricket Association of Bengal and Others* (1995) 2 SCC 161 at para 75, ("the game of cricket involves the right of the telecaster and that of the viewers. The right to telecast sporting event will therefore also include the right to educate and inform the present and the prospective sportsmen interested in the particular game and also to inform and entertain the lovers of the game.")

61 *Supra* note 37, para 142, also see *Ramana Dayaram Shetty v. International Airport Authority* (1979) 3 SCC 499 at 503

## Position in U.S.A.

In US corporations or associations private in character but dealing with public rights have already been held subject to constitutional standards by applying various tests.<sup>62</sup> Public Functions test implies that “when one devotes his property to a use in which the public has an interest, he in effect grants to the public an interest in that use, and must submit to be controlled by the public for the common good to the extent of the interest he has thus created.”<sup>63</sup> According to this doctrine “when private individuals or groups are endowed by the state with powers or functions governmental in nature, they become agencies or instrumentalities of the State.”<sup>64</sup> Later in 1974 Court held that in order to attract the doctrine of State Action, the functions carried out by the Corporation must be ‘public function closely related to the governmental functions.’<sup>65</sup>

In U.S. Public functions doctrine became stronger with the decision in *Marsh v. Alabama*,<sup>66</sup> wherein the question arose was whether a private township could prevent a person from distributing religious literature i.e.; applicability of the first and fourteenth amendments to the conduct of the corporation that owned the town. The majority opinion delivered by Black J. was premised on the notion that the more an owner opens up his property for use by the public in general for his advantage, the more do his rights become circumscribed by the statutory and Constitutional rights of those who use it. Interestingly, the Court opined that even in cases where the State had merely acquiesced to an entity performing an important public function, the entity would be subject to Constitutional standards.

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62 John E. Nowak., Ronald D. Rotunda and J. Nelson Young, *Constitutional Law*. U.S.A: West Publishing Co., 1983, 497-525; In United States of America a public body would answer the description of a state actor if one or the other tests laid down therein is satisfied on a factual consideration and therefore the cumulative effect of all or some of tests is not required to be taken into consideration. *Supra* note 37, para 124

63 Hale C.J. in *Munn v. Illinois* 94 U.S. 113 (1877)(Further in *Civil Rights Case*109U.S.3(1883)Harlan J. in his dissenting opinion observed that railroad carriers and inn keepers performed important public functions and were akin to public servants. Therefore, the protection afforded by the Thirteenth Amendment would be applicable against them. Interestingly, in analyzing the case of places of public amusement, he found that Congress could enforce the rights of blacks in relation to public accommodations, facilities and public conveyances since discriminations in those “public” or a “quasi-public” function was a continuing badge of servitude.)

64 *Evans v. Newton* (1966) 382 U.S. 296

65 *Jackson v. M.E. Co.* (1974) 419 U.S. 345

66 326 U.S. 501 (1946)

Another test which is applied by the Court is 'Entanglement Test'. In *Brentwood Academy v. Tennessee Secondary School Athletic Association*<sup>67</sup> Court held that sport-association can be sued as a state actor because its actions and history have been "entangled" with state action. The Court acknowledged that the analysis of whether state action existed was a "necessarily fact-bound inquiry" and noted that state action may be found only where there is "such a close nexus between the State and the challenged action that seemingly private behavior may be fairly treated as that of the State itself".<sup>68</sup> Following the judgment, in *Communities for Equity V. Michigan High School Athletic Association*<sup>69</sup> US Supreme Court held that Michigan High School Athletic Association is a 'state actor' and thus is subject to the Equal Protection Clause of the Fourteenth Amendment.

If these principles are squarely applied to bodies like BCCI it would become an instrumentality of State under Article 12. The traditional principles are inappropriate to meet the ends of justice in cases like BCCI. As opined by the minority bench in *Zee Telefilms case* "the traditional tests of a body controlled financially, functionally and administratively by the Government as is laid down in *Pradeep Kumar Biswas* would have 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 private body long time back."<sup>70</sup>

Earlier there had been instances like *Netaji case* and *Central Inland Water Transport Corporation v. Brojonath Ganguly*<sup>71</sup> wherein Court translated public law norm of anti-arbitrariness contained in Article 14 into private law norm of public policy as required under

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67 531 US 288; (The question was whether the actions of an interscholastic sport-association that regulated sports among Tennessee schools could be regarded as a state actor for First Amendment and Due Process purposes. The Court stated that TSSAA's "nominally private character... is overcome by the pervasive entwinement of public institutions and public officials in its composition and workings.")

68 *Supra* note 37, para. 123.

69 377 F3d 504; (This case posed a question regarding the application of the state action doctrine of the Fourteenth Amendment to a state high school athletic association that sets rules for athletic programs throughout the State of Michigan.)

70 *Supra* note 37, para. 173.

71 (1986) 3 SCC 156

Section 23 of the Contract Act.<sup>72</sup> Similar was the dictum of Saghir Ahmad, J. in awarding compensation to a rape victim for the violation of her right to live life with dignity under Article 21, independent of any constructive causal link with the State authorities.<sup>73</sup> There are similar instances in environmental pollution cases.<sup>74</sup> But judicial activism regarding horizontal application of fundamental rights is halted and is not found as a welcome trend by Indian judiciary.<sup>75</sup>

## Conclusion

The vertical application of fundamental rights is based on the theory of 'Classical Liberalism' which emphasizes on the preservation of the private sphere against coercive State intrusion.<sup>76</sup> With the foray of neo-liberalization governmental policies like deregulation, privatisation, disinvestment etc. has whittled down the extent of state power. As a result of neo-liberalization private actors can infringe the fundamental rights of the people. This state of affairs poses a challenge to the rights constitutionalism as to whether it can protect the freedom and autonomy of the individuals in the age of globalization. An apt solution to this is subjecting the private actors to constitutional limits by expanding the definition of "State" under Article 12.<sup>77</sup> Only then the aims and aspirations of Constitution makers can be realised to the fullest extent possible. As Holmes put it "a word in the constitution is not a crystal clear, transparent and unchanging; in the more important interpretative

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72 Udai Raj Udai. *Fundamental Rights and their Enforcement*. New Delhi: PHI Learning Private Limited, (2011) at 714

73 *Bodhisattwa Gautam v. Subra Chakraborty*, (1996) 1 SCC 490 at 499; Ashish Chugh. "Fundamental Rights: Vertical or Horizontal". SCC (J) 7:9(2005); also see '*X*' v. *Hospital 'Z'* 1998 (8) SCC 296, *Vishaka v. State of Rajasthan* AIR 1997 SC 3011; V.N. Shukla. *Constitution of India*. Lucknow: Eastern Book Company, 2003, 10th ed., p.20

74 *M.C. Mehta v. Union of India*, (1987) 1 SCC 395 at 419, *Indian Council for Enviro-Legal Action v. Union of India*, (1996) 3 SCC 212 at 238, *M.C. Mehta v. Kamal Nath* 2000 (6) SCC 213

75 Hina Doon. "The Doctrine of State Action - Politics of Lawmaking: A Comparison of US & Indian Constitutional Law". *Nalsar Students' Law Rev.* 5.4 (2009): 1-6; (to Anderson, two developments in particular have resulted in (some) constitution lawyers no longer treating private power as a peripheral issue: the extent to which, as result of the reconfiguration of the state, private actors are now deeply involved in the performance of traditional state function, and the political concern over the exercise of private power, and the extent to which this threatens rights constitutionalism's goals of protecting freedom and autonomy), Gavin W. Anderson. *Constitutional Rights after Globalisation*, USA: Hart Publishing, 2005

76 Ashish, *supra* note 74 (In the liberal philosophy of the moderns the most rational form of organisation was one that gave priority to individual freedom and that was to be delivered through the modern state upon which political and legal sovereignty is located. It is this power which makes the state as the supreme source of laws and guarantees protection of individuals from capricious interference with their liberty.) *Id.* at 5

77 Gavin, *ibid* at 9, V. N. Shukla, *supra* note 74, at 20

parts, the constitutional words are the skins of living thoughts which change with the times and as society changes.”<sup>78</sup>

### **Suggestions**

Lord Denning recognised many years ago that domestic bodies like the Stock Exchange, the Jockey Club, the Football Association and major trade union have "quite as much power as statutory bodies and that they can make or mar a man by their decisions."<sup>79</sup> Similar is the case of BCCI. It is quite true that BCCI is an autonomous body having its own rules and regulations and it do not take any financial aid from the government. But that does not belittle the importance of the public functions and duties performed by it. Besides there is state encouragement for the game directly as well as indirectly which gives it a 'state-like' identity. Taking this into account BCCI can be held as an instrumentality of State under Article 12 of the Indian Constitution. 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'. Moreover the 'public policy' with regard to BCCI should not be limited to BCCI Rules and Regulations and Societies Registration Act rather it has to be judged in the light of constitutional provisions also.

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78 Arthur Selwyn Miller. *Social Change and Fundamental Law: America's Evolving Constitution*. USA: Greenwood Press, 1979, p. 349

79 *Breen v. Amalgamated Engineering Union* (1972) 2 Q.B. 175, 190