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STATE ACTION REQUIREMENT UNDER INDIAN CONSTITUTION: CONCEPTUAL CHALLENGES IN THE ERA OF HUMAN RIGHTS

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The period from the second half of twentieth century is usually regarded as the age of human rights. The concept of human right is generally conceived as minimum guaranteed right protecting individual against the excesses of state.[1] In fact, the legitimacy of the state itself depends on its fulfilling the obligation of protecting the basic human rights of life, liberty and estate of its subjects. This is the reason for the incorporation of most of these human rights in the constitutional documents of world nations as fundamental rights.[2] Fundamental rights have dual aspects.[3] First point of view is that, it confers justiciable rights on the people which can be enforced through the courts against the state.[4]Second point of view is that, Fundamental rights constitute restriction and limitation on state action.[5] However, later a consensus have developed that these Fundamental rights are no longer at the disposal of the state and that they are entitlements guaranteed directly to individuals under the International human rights regime.[6] But these developments have not led to the change in the concept of human rights[7] which generally remained state centric. Thus, a person who alleges the infringement of his human rights has to establish before the court that, there was arbitrary invasion upon his rights by the state. Hence the scope of human rights is mainly limited to the state - individual relationship and it leaves all other areas without interference.[8]

[1] This idea could be traced to the writings of natural law philosophers like Locke, Rousseau and also in the political documents like, Magna Carta, the Declaration of Arbroath, The Virgina Declaration, The American Declaration of independence, the American Bill of rights, as well as in the French Declaration of rights of Man. These documents assert that, that there are certain rights which are, natural, inherent and essential in every human being and are to be honoured and protected by the state.
[2] US constitution is the first constitution to give concrete shape to human rights by incorporating them into their constitution in 1791.
[3]M. P. Jain, Indian Constitutional law, 898 (6 ed. 2010).
[4] ibid
[5] Ibid see also Chairman railway Board v. Chandrima Das, A.I.R. 2000 S.C. 988 at 997 where it was observed that "The purpose of incorporating Fundamental rights in the constitution is "to safeguard basic human rights from the vicissitudes of political controversy and to place them beyond the reach of political parties, who, by virtue of their majority, may come to form the Govt"
[6] By virtue of U N Declaration on Human Rights, UDHR, ECHR etc. See also The changing international legal frame work for dealing with non state actors, August Reinisch From the book non state actors and Human rights edited by Philip Alston, Oxford University Press, New York available at www.univie.ac.at/intlaw/reinisch/non_state_actors_alston_ar.pd visited on 30-05-2014
[7] ibid
[8] N.S. Soman, *Private Action- state Action*,[2002]C.U.L.R. 393.

In fact the concept of state action requirement, which owes its origin to US Constitution[9], has also found recognition in international law[10] and international Human rights law[11]. Accordingly, States have the obligation to 'respect, protect and fulfil' human rights. [12]The obligation to respect means that the state must refrain from interfering with or curtailing the enjoyment of Human rights.[13] The obligation to protect requires state to protect individuals and groups against human rights' abuses. [14]The obligation to fulfil means that the state must take positive action to facilitate the enjoyment of basic Human Rights.[15]

However in the contemporary era of economic globalisation, [16]which is characterised by a series of intensification of cross border transactions, free flow of people, ideas, goods and

[9] In fact this concept was first recognised by US Supreme Court in Civil Rights case[9].Since then court had been expanding the concept and when some or other form of Government involvement was there, it was held as state action, though the perpetrator was a private party.[9] When the act is done by private entity with no Government involvement,The US Supreme court had devised Govt function theory of state action, under which private entities are subject to restraints of fundamental rights/ human rights enshrined in the constitution, when they undertake functions or assume powers that govt ordinarily performs or exercises. Thus it is submitted that in USA, the judiciary has devised several theories by which the state action extends even with respect to activities of private entities not only when some or other form of governmental connection is there, but, even when it purely a private action when they discharges Governmental functions. Thus the scope remedy for the individual for breach of his human rights enshrined in the constitution has been widened by judicial creativity. 109 US 3 (1883). In this case court was interpreting the meaning of Fourteenth Amendment.The court had addressed the issue of state action requirement,earlier, but in lesser depth in US v. Harirs 106 U.S 629(1883) , Ex Parte Virgina, 100 U.S 339 (1880) Cruikshank, 92 U.S 554-555. For discussion, see also the state Action doctrine and the Rehenquist court, by Henry C Strickland, Hastings Constitutional Law Quarterly, Vol 18, p586-665 available at www.**hastingsc**onlawquarterly.org/archives/V18/I3/**Strickland**.pdf visited on 31-12-2013

[10] When we analyse the international law, it is seemed that the concept of state resonsibility has a close resemblence with the state action requirement. The rules are now provided in the draft articles on state responsibility adopted by the international law commission. As per the international Law, State is held responsible for the international wrong committed against other states and it has to be proved that the act complained of was state action. The horizontal application of constitutional rights in a comparative perspective by Danwood Mzikenge Chirwa* available at www.saflii.org/za/journals/LDD/2006/9.pdf visited on 30-04-2014 , see also
Walter Kalin & Jorg Kunzli, The law of international human rights protection, 78 (2010). see also ILC draft articles on the responsibility of states for internationly wrongful acts (draft articlaes on state responsibility)'Report of the ILC on its fifty third session' (2001) , UN Doc A/ 56/10, supplement No. 10 (*official records of the general assembly*)

[11] Under human rights treaties and customary international law also, States are the principle duty bearers of the human rights obligations. Article 2(1) ICCPR & ICESCR, Article 1 ECHR.. See Walter Kalin & Jorg Kunzli, The law of international human rights protection, 82 (2010). See also Dr N. S. Soman ,*Conceptual challenges to human rights jurisprudence*, in Dialetics and dynamics of human rights 555 (Dr Mrs Annie John ed.2012)

[12] Frederic Megret, *Nature of obligations*, in International Human rights law 130 (Daniel Moeckli, Sangeetha shah and Sandesh sivakumaran ed.2010) see also Art 2 ICCPR : states are supposed to respect and ensure rights to all individuals.
[13] The obligation to respect means that state should not consciously violate human rights either through their organs or agents. From the point of view of right holders, this obligation entails a corresponding right to be let alone vis-a-vis the state. They derive an entitlement to freedom from state interference in their rights Obligation to respect flow automatically from human rights ie without further prerequisites. They are thus characterised as negative obligations. See also Walter Kalin & Jorg Kunzli, The law of international human rights protection, 96 (2010).
[14]Ibid. The obligation to protect, which may be either be preventive or remedial, means, state has to take steps to ensure that persons within its jurisdiction do not suffer from human rights violations at the hands of the third parties. The protection may either be immediate and operational or may take form of legislative enactment. They are positive obligations. This obligation can either be preventive; where the objective is to prevent violations of human rights by third parties, by natural hazards or dangers emanating from technical installations; is remedial, where the consequence of violation are redressed or the victim receive compensation or the perpetrator is punished.

[15] Supra note 26 at 112.Obligation to fulfil means state should proactively engage in activities that have the consequence of greater enjoyment of human rights like adopting appropriate laws that implement international undertakings. The right holders in this context are entitled to receive such benefits to the extent that the state is able to provide to them.This obligation requires that the state has to create the legal, institutional and procedural conditions that the right holders need in order to realise and enjoy their full rights.

[16] Upendra Baxi, The Future of human Rights, 238 (3 ed, 2010)According to the author different forms of globalisation provide distinctive histories of human rights. He calls them G1 , G2 and G3. The two centuries long history of colonization and imperialism constitutes the first phase, GI/ Globalisation 1 develop a modern human rights paradigm. The second phase, Globalisation 2/ G2marks the period animated by visions of an emergent post- Westphalian international law/order, which subverts formative antecedent histories of globalised racism through the unique invention of the right to self determination and struggles against apartheid everywhere. The third phase is the contemporary economic globalisation G3, under which we live.

services, popular cultures, technical and scientifi advancements ,transnational advocacy networks[17] etc have resulted in the waning or retreat of sovereign state. An inevitable consequence [18]is that, the country would exhibit features of both "soft state"[19] and "hard state"[20]simultaneously. Soft State is the one which is unable to fulfil any of its any of its major roles as a social welfare state.[21] The softness of the state is mainly constituted by the profiles of over developed bureaucracy, corruptional practises of politics and state formation marked by apparent lack of discipline.[22]The reversal of these trends by means of planned social and economic development would eventually lead to a progressive state.[23]In the era of contemporary globalisation, 'progressive state' is a new version of soft state .Such state is conceived not in its internal relations with its own people but in relation to the global community of foreign investors.[24] It is a good 'host state'[25] for global capital which protects global capital against political instability and market failures. [26]It represents accountability not directly to its people but actually offers itself as a good pupil as far as world organisations[27] are concerned. Hence, to achieve this goal, the state has to be empowered both locally and globally and it becomes necessary for it to unleash a reign of terror against its own people.[28] In such a scenario freedom of trade has become one of the basic human right.[29] It is even stated that the paradigm of UDHR is being steadily but surely, supplanted by TRMFHR(Trade related Market friendly human rights) under the auspices of contemporary globalisation. This requires need for reconsideration of the concept of state action requirement. In this article attempt has been made to analyse this aspect in the light of Indian Constitution with respect to the expression "other authorities" under Article12.

1. Scheme of Human rights under Indian Constitution:

[17] ibid
[18] This is the inevitable consequence of globalisation.
[19] supra note 18 at p249. Gunnar Myrdal identified the crisis of development in south Asia, as caused by soft states that lacked power of disciplining practices of politics and governance. His concern was to portray South Asian States as lacking in social and institutional discipline that made society and state vulnerable to crisis of development and the revolution of rising expectations

[20] Hard state is the one which must be market efficient in suppressing and delegitimizing human rights based practice of resistance or the pursuit of alternate policies.
[21] Upendra Baxi, The Future of human Rights, 249(3d ed. 2010)
[22]Ibid at p249.
[23] ibid
[24] ibid
[25] state becomes a willing, or even an enthusiastic promoter of 'free market' by fully pursuing the 3 Ds of contemporary globalisation, de-regulation, de-nationalisation and disinvestment
[26] ibid
[27] ibid
[28] ibid
[29] See Prof A. Jaya Govind, *Human rights dimensions of Unequal Trade*, Journal of NHRC vol 7, pp13-21 available at nhrc.nic.in/Documents/Publications/PART-3.pdf visited on 05-06-2014.

Part III of the constitution guarantees a comprehensive list of Fundamental rights which includes right to equality, freedom, against exploitation, freedom of religion, cultural and educational rights and right to constitutional remedy. While some of the Fundamental rights are available only to citizens, some others are available to non citizens, corporate and even to group of persons. Part IV of the Constitution imposes positive obligation[30] of the state to take steps for the welfare of the individuals. Moreover judiciary by its creative interpretation has declared most of the directives as Fundamental Rights.[31] The Human Rights Act, 1993, defines[32] Human right as the rights relating to life, liberty, equality and dignity of the individual either (i) guaranteed by the Indian Constitution or (ii) embodied in the international conventions (such as the ICCPR, ICESCR and other conventions which the government may specify) that are enforceable by courts in India. Thus all rights incorporated in Part III and Part IV of the constitution can be categorised as Human Rights.[33]

As these Rights form the basic structure of the constitution,[34] it cannot be curtailed by the Parliament by way of constitutional amendment. More over very special feature of the constitution of India is that, right to constitutional remedy is itself a fundamental right/human right.[35] Thus aggrieved person has the right to move to Supreme Court directly for the enforcement of his Fundamental right/human right. As Judicial review is declared as the Basic Structure of the Constitution,[36] Supreme Court act as Sentinel on the Qui Vive with respect to protection of Fundamental rights/ human rights.

2. State Action Requirement under the Indian Constitution:

One of the main questions in this regard is, against whom these rights are to be claimed? Prima facie it may appear that, since these rights are guaranteed by the fundamental law of the land, it is available only against the state. However there is enough in the text of the constitution to

[30] The essence of these rights are stipulated in Art38 which provides that the state shall not only strive to promote the welfare of the people by securing a social order in which social, economic and political justice shall inform all the institutions of the national life, but also try to minimise income inequality.
[31] For instance right to education was made a Fundamental right in the wake of Unnikrishnan v. State of Andhra Pradesh, (1993)1 S.C.C.645, See chameli singh v. State of Uttar Pradesh (1996)2 S.C.C. 549 etc to quote a few
[32] Section 2(1) (d) of The protection of Human rights Act, 1993
[33] Justice Hosbet Suresh, All Human Rights are Fundamental Rights, 9 (ed. 2010).
[34] Kesavananda bharathi v. State of Kerala A.I.R. 1973 S.C. 1461
[35] Art 32 itself is part of PartIII, empowers the Sc in an appropriate proceedings to issue not only writ of mandamus, certiorari, prohibition or quo warranto but also any other direction, order or writ for the enforcement of Fundamental right. Under Art 226, aggrieved person can approach High Court for the enforcement of his fundamental right.
[36] Supra note 55

suggest a much wider dispensation.[37] There are several provisions in part III like Articles 17[38], 23[39], 24[40] which do not restrict its scope to action or inaction on the part of state. These rights are available even against non state actors including civil society and their justiciability does not require state action.[41]Not only that, restricting the scope of these rights to state action alone would in fact do injustice to the intention of the constitutional maker. When we peruse the language of Part IV, it could be seen that all directives without exception uses the word "state". Thus technically they cannot be employed against non state actors. However judiciary has in some cases held that directives are applicable even to non state actors.[42]

Thus the perusal of the provisions of constitution reveals that[43] though States powers are circumscribed in some cases;[44] with respect some human rights, state has direct obligation,[45] while with respect to others, state is the intended respondent.[46] State intervention by way of aid or otherwise is the reason for reconstruction of rights in some cases.[47] There are also certain human rights which can be claimed against anybody without necessarily establishing a nexus with State action.[48] Thus as per the constitutional scheme, human rights are not only elaborately enumerated and are available not only against state, but even against non state actors including civil society.

[37] B.P. Jeevan Redy& Rajiv Dhawan ,in Human Rights and judicial review – A Comparative perspective 186 (Beatty ed. 1994) This is not because the concept of state[37] upon which human rights restrictions are imposed, and that the Laws[37] which are subjected to human rights scrutiny, are widely defined[37] but because most of the human rights enumerated in Part III are articulated in universal terms.[37]

[38] of Article 17, by which untouchability is abolished and its practice in any form is forbidden

[39] Articles 23 which respectively prohibits trafficking in human beings and similar forms of forced labour

[40] Article 24, by which child below 14 years is prohibited from being employed in hazardous labour.

[41] Supra note 58.Art 15 (2) , 17, 23)

[42] Access to justice: Human **Rights Abuses**. **Involving Corporations**. **INDIA**. www.**indian**et.nl/pdf/**AccessToJustice**.pdf visited on 15-04 2014see also Kirloskar Brothers Ltd. v. Employees State Insurance Corp., 1996 SCALE 1. Again, in Air India Statutory Corporation v. United Labour Union, (1997) 9 SCC 377, the Court observed that: "It is axiomatic, whether or not industry is controlled by Government or public corporations […] or private agents, juristic persons,their constitution, control and working would also be subject to the same constitutional limitations in the trinity, viz., Preamble, Fundamental Rights and the Directive Principles."

[43] For discussion see supra note 62

[44] Articles 15 (3), (4), 16 (3), (4), (5), 18, 19 (2) to (6),25 (2), 26, 28, 30 (1A)(2)

[45] Articles 14, 15, 16, 18.

[46] Articles 20 &22

[47] 28, 29 (2) and 30(2).

[48] Articles 17, 23, 24, 25, 26,29,30.

Article 12 of the Constitution of India explicitly defines the concept of state. It is defined in wider terms as to construe it to subject every exercise of its power to fundamental Rights in Part III of the Constitution.[49] State under Article 12 [50] includes the following:

1. The Government and parliament of India
2. The Government and legislature of each state
3. All local and other authorities within the territory of India
4. All local and other authorities under the control of Govt of India

As the first two categories are clear, the confusion and perplexity revolves around the third category ie "other authorities".[51] This expression has in fact given the courts adequate room to expand the applicability of human rights so as to discipline various instrumentalities of state.[52]In the beginning of the working of the constitution, courts were reluctant to give wider interpretation to human rights under the constitution[53] and had adopted very restrictive

[49] By defining State under Art 12, they made it clear, against whom FR's are available and by defining Art13it was clearly stated against what activity FR are enforceable. In Fact there was a riddle in the constituent assembly regarding inclusion of definition of state in Art 12 in part III. (Art7 of the Draft constitution)In the draft Art 7, the term under the control of Govt of India was not there. In order to add these words an amendment was proposed by Dr. Ambedkar. The purpose of this amendment was that even the territories which may not form part under the control of Govt of India by way of mandate or Trusteeship would also come under State in order to avoid indiscrimination and to extent Human Right's to the citizens of India as well as to the residents of these territories. This was done by him because some of the members vehemently criticised the incorporation of draft article into the constitution of India. The prominent among them were Mr. Naziruddin Ahmed and Mr. Mahmood Ali Baig. Mr Mahmood objected to the different meaning given to the expression 'state' at different places in the constitution. He remarked that it was not advisable that an expression in a legislative enactment bear different meaning in different parts of the enactment and that it would create confusion. In fact he wished that "this definition of state has not been entered in this article at all. He questioned the wisdom of including the words "other authorities" which were not defined anywhere in the constitution because local authorities had been defined in the General clauses act as District Boards and Municipalities. Along with the criticism of conferring wider meaning to the word " state" , Ali Baig again raised doubt that what the ' other authorities are' It was so because in a comprehensive manner state includes legislative bodies, executive bodies, local authorities, co-operative societies, sub magistrates of a locality. In order to clarify the doubts regarding this article, Dr Ambedkar stated that the citizens should be in a position to exercise their FR's upon every authority which is coming within its preview. He explained that the object of Fundamental rights are 2 fold.1, that every citizen must be in a position to claim those rights, 2, they must be binding upon every authority which has got either the power to make laws or the power to have discretion vested on it. Therefore it is quite clear that Fundamental rights must be binding not only on Central Govt, provincial Govt, Govt established in Indian states, district local boards, in fact every authority which has been created to make laws, rules or bye laws If the proposition were accepted he asked, what they were to do to make their intention clear. There are 2 ways either to use a composite phrase such as state as used in Art7 or to keep on repeating every time the CG, SG, etc. Evidently repetition of this phraseology every time is boredom when one has to make a reference to some authority. Consequently Dr Ambedkar found that such course was only to have this comprehensive phrase and economy in words. (p610) C.A.D. Vol. VIII (1948-49), pp 607-610.see also Dissertation, *Concept of state under Art 12: Trends of judicial review*, (school of legal studies library), cusat, june 1991

[50] Authority means a person or body exercising power or command and in the context of Article 12, authority means the power to make laws, orders, regulations, bye laws, notification etc which have the force of law and the power to enforce the same. ' Local authorities' means authorities like municipalities, district boards, panchayats etc. Seepandey p57 includes means this definition is inclusive. Ie it is apt to indicate that besides Govt an dlegislature there might be other instrumentalities of state action which might be comprehended within the expression " state".... there is no characterisation of the nature of authority in this residuary clauseand consequently it must include every type of authority set up under a statute for the purpose of administering laws enacted by the parliament or by the state including those vested with the duty to make decisions in order to implement those laws.- SEE Ujjam Bai v. State of UP AIR 1962 SC1621 para 152.

[51] In fact even in constitution Assembly debates, this was raised as an apprehension According to Mr. Muhamood Ali Beg, leeways to the words ' other authorities" would culminate in absurdity and adversely affect the true spirit behind the incorporation of Fr's in the constitution. C.A.D. Vol. VIII (1948-49), pp 610.

[52] See also Dr N. S. Soman ,*Conceptual challenges to human rights jurisprudence*, in Dialetics and dynamics of human rights 555 (Dr Mrs Annie John ed.2012)

[53] In the beginning of the working of the constitution, courts were reluctant to give wider interpretation to human rights under the constitution. [53]The reasons were that as Fundamental Rights had come into existence for the first time, there was lack of perception as to its exact Scope.[53] Secondly the judges who were brought up under British traditions of judicial restraint adopted legalistic attitudes.[53] Courts were actually attracted by the lure of positivism viz, uniformity, consistency and certainty and applied this theory in constitutional interpretation.[53] They considered themselves subservient to govt and were hesitant to assert an independent role. This attitude was reflected in the earlier decisions and courts were reluctant to hold private individuals responsible for infringement of human rights[53] S.B. Talekar, The concept of State for

approach in interpreting the expression "other authorities" to mean authorities exercising governmental functions[54]. The court had applied the principle of ejusdem generis.But later when the court found that in a social welfare state, it is not necessary that the state must discharge its functions only through Government departments and officials and that some of its functions may be discharged through autonomous bodies, which may be a statutory body or a non statutory body like body registered under Companies Act, Societies Registration Act etc, court adopted a new approach.This was found expression in Ujjambhai v. State of UP,[55] Rajasthan electricity Board Case.,[56] sukdev Singh v. Bhagat Ram[57], International Airport Authority case.[58] U.P. warehousing corporation v. Vijay Narayan ,[59] Ajay Hasia v. Khalid Mujib[60], and Som Prakash[61]. In this contest the observations of J Mathew in Suk Dev singh' s case and J KrishnaIyer[62] in Som prakash case are worth mentioning. Mathew J had observed that

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Fundamental rights, The Academy law Review, 1982, Vol 6:1, 69-110. For instance , In A. K. Gopalan v. State of Madras A.I.R. 1950 S.C. 27,Court relied on positive school approach to determine that validity of preventive detention Act P.D. Shamdasani v. The Central Bank of India, A.I.R. 1952 S.C. 59.State of West Bengal v. Subodh Gopal, A.I.R. 1954 S.C. 9where the apex court has held that protections against fundamental freedoms under Part III is available only against state invasion. Kerala HC has also followed these decisions in Chemagyn PVT ltd v. Kerala medical and sales representatives asson, 1987 (2)K.L.T. 654, when it held that no writ could be issued against a trade union for the violation of Fundamental right

[54] SUPRA NOTE 109 Thus Madras High Court had in university of Madras v. Santa Bai [54]held that university of Madras is not a State under Art12. The court had come to this conclusion by applying the doctrine of 'ejusdem generis'.

[55] A.I.R. 1962 S.C. 1621 the application of ejusdem generis to Art12 was rejected by the Supreme Court, which in fact had ingrained the seeds of new approach

[56] Rajasthan state Electricity Board v. Mohanlal, A.I.R. 1967 S.C. 1857. The Supreme Court had held that the expression "other authorities" is wide enough to include all authorities created by the Constitution or statute on whom powers are conferred by law and it is not necessary that the statutory authority should be engaged in performing Governmental or sovereign function.

[57] A.I.R. 1975 S.C. 1331. Supreme Court held that three statutory corporations, LIC, ONGC &IFC are created by statutes and have the power to make binding rules and regulations and are subject to pervasive state control and therefore they fall within the meaning of "other authorities" and hence State within the meaning of Art 12.Justice Mathew ,concurring, in a separate judgement held that Statutory corporations are agencies or instrumentalities of state for carrying on trade or business which otherwise would have been carried on by the State departmentally. Hence it must be subject to the constitutional limitation as the state itself.

[58] R.D.Shetty v. International AirPort Authority, A.I.R. 1979 S.C. 1628. Justice Bhagwati, held that International Airport Authority is a State and discussed in detail various factors relevant for determining whether a body is an instrumentality or agency of state

[59] A.I.R. 1980 S.C. 840,[59]Chinappa Reddy. j went further and brought out the preamblur objectives of the constitution which resulted in the multifarious functions of the Government.

[60] A.I.R. 1981 S.C. 487. wherein the apex court held that the agency or instrumentality is not limited to corporation but is equally applicable to a non statutory body like a company or a society. The court summarised the tests to determine the agency or instrumentality of the state as follows.

1. Whether the financial assistance of the state is so much as to meet almost entire expenditure of the corporation

2. Whether the corporation enjoys monopoly status which is state conferred or state protected.

3. Existence of deep and pervasive state control

4. If the function of the body are of public importance and closely related to governmental functions

5. If a department of the Govt is transferred to corporation

[61] Som Prakash Rekhi v. Union Of India AIR 1981 SC 212In Som Prakash Rekhi v. Union of India,A.I.R. 1981 S.C. 212, court applied the criterion laid down in R.D.Shetty case and held that the company registered under the Comp's Act is a state.Ajay Hasia case and Som Prakash case was delivered on the same date. Justice Krishna Iyer who was common in both cases, had written the judgement in som prakash case and he was aware of what was stated by Bhagwati J in Ajai Hasia case

[62] "Before our eyes the corporate phenomenon is becoming ubiquitous. What was archaically done yesterday by Govt departments Is alertly executed today by Govt Comps, Statutory corporations and like bodies and this tribe may legitimately increase tomorrow. This efficiency is not to be purchased at the price of Fundamental rights..... the extended definition of state in Art 12 is not be deadened by quickened by judicial construction"[62]

" ...Today, probably the giant corporations, the labour unions, trade associations and other powerful organisations have taken the substance of sovereignty from the state. That they have a direct and decisive impact on the social, economic and political life of the nation is no longer a matter of argument. Suggestions are being made that the corporate organisations of big business and labour arc no longer private phenomena; that they are public organisms and that Constitutional and common law restrictions imposed upon State agencies must be imposed upon them. *The governing power wherever located must be subject to the fundamental Constitutional limitations.* The need to subject the power centres to the control of Constitution requires an expansion of the concept of State action."[63]Thus Justice Mathew's approach has given a new direction to the concept of state, with respect to human rights and this was in consequence of changing role of state and the changing needs of the society. Taking cue from these views, Justice Bhagwati in M. C. Mehta v. Union of India[64] had observed that

"*.... ...conferring all the powers of the state on private bodies is not good and it would jeopardise public interest and when the state acts an economic agent or economic entrepreneur or as an allocator of economic benefit, it is subject to the limitations of FR's...*"

In fact this caution given by Bhagwati two decades before is of great relevance in this era of human rights. Though court did not categorically decided whether a private body would fall within the ambit of state, it awarded compensation to the victims against the private body. Thus through this decision the apex court went a leap forward by bringing private bodies having public rights to be accountable to Part III of the constitution.

In subsequent cases also the trend to expand the concept of state continued by following the dictum laid down in Ajai Hasia and various types of bodies such as a company, co-oporative society, corporation etc, through which the Govt acts, were brought within the ambit of other authorities under Art 12. Almost all Governmental activities whether Governmental, semi Governmental, educational, banking, commercial or social service, have been subjected to the obligation of Fundamental Rights.[65]Thus by expanding the scope of other authorities, Supreme Court has in fact has given more emphasis to the constitutional objective of "social justice" to the needy rather than legal formalism.[66] But what has emerged from the decisions of the

[63] Para 93.
[64] A.I.R. 1987 SC 1086 at 1093 Italics supplied by the author.
[65]Supra note 5 at p915
[66] ibid

Supreme Court may prima facie appear to be puzzling.[67] Whilst Indian Statistical institute,[68] Indian Council of Agricultural Research,[69]ICSE,[70]Government Companies[71],Regional rural banks[72], Sainik School Society[73] and Children's aid Society registered under Society's registration Act,State Financial corporation,[74] NAFED,[75]Delhi stock Exchange [76], FCI[77], IOC[78]etc were held as State, but the institute of constitutional and parliamentary studies,[79] NCERT[80],BCCI[81]etc is not a State under Article 12.Thus the tests laid down in Ajai Hasia does not seem to be rigid one.[82]In Pradeep Kumar Biswas v. Indian institute of chemical biology[83], the court suggested the general guidelines as follows:

"The question in each case would be whether in the light of cumulative facts as established, the body is financially, functionally and administratively dominated by or under the control of Government. Such control must be particular to the body in question and must be pervasive. If this is found then the body is a state within the meaning of Art 12.On the other hand, when the control is merely regulatory whether under the statute or otherwise, it would not serve to make the body a state. "[84]

Thus it can be stated that the tests laid down in Ajai Hasia is not exhaustive but only illustrative.[85] Just because these tests are satisfied the body would not fall within the meaning of state under Art12. Mere regulatory control is not sufficient to make a body a part of state.

But these traditional tests are inadequate to meet the ends of justice in today's globalised world. Moreover, the judicial activism in the era of economic globalisation, regarding horizontal application[86] of human rights seems to lack its earlier swiftness. The trend of

[67]Supra note 58
[68] B.S. Minhas v. Indian Statistical institute A.I.R. 1984 S.C. 363.
[69] P.K. RAMACHANDRA IYER v. Union of India, (1984)2 S.C.C. 141.
[70] Vibhu Kapoor v. Council of ICSE A.I.R. 1985 Del.142.
[71] Western Coal Fields ltd v. Special Area Development authority, A.I.R. 1982 S.C. 697,Central Inland Water Transport corporation v. Brojo Nath A.I.R. 1986 S.C. 1571,Steel Authority of India Ltd v. Ambika Mills , A.I.R. 1988 S.C. 418, Hindustan Steel works Construction ltd v. State of Kerala A.I.R. 1997 S.C. 2275, State of Uttranchal v. Alok Sharma , Subsidiaries of Kumaon Mandalvikas Nigam Ltd (2009) 7 S.C.C. 647, Mysore paper Mills v. Mysore paper Mills officers Association, (2002) 2 S.C.C. 167
[72] Chairman Prathama Bank Moradabad v. Vijay Kumar A.I.R. 1989 S.C. 1977
[73] All India Sainik school employees association v. Board of Governors sainik School society, A.I.R. 1989 S.C. 88
[74] Everest Wools Pvt. Ltd. V. U.P. Financial corporation, (2008)1 S.C.C. 643.
[75] Ajoomal v. Liaram , 1983 (1) S.C.C. 119.
[76] K. C. Sharma v. Delhi Stock Exchange (2005) 4 S.C.C.4.
[77] workmen FCI v. M/S FCI A.I.R. 1986 S.C. 670
[78] Mahabir auto stores v. IOC (1990) 3 S.C.C. 752.
[79] A.I.R. 1988 S.C. 469
[80] Chandra Mohan Khanna v. NCERT A.I.R. 1992 S.C. 76.
[81] Zee Tele Films ltd. V. Union of India, A.I.R. 2005 S.C. 2677
[82] Pradeep Kumar Biswas v. Indian institute of chemical biology, (2002) 5 S.C.C. 111.This decision overruled the decision in Sabajith Tewari case A.I.R. 1979 S.C. 1329, which was decided on the same date as Sukdev singh. In fact Ajai hasia had read down the import of Sabajith Later in K. Ramachandra Iyer v. UOI (1984) 2 S.C.C. 141, Sabajith was confined to peculiar facts which finally resulted in its specific overruling in Pradeep .
[83] (2002) 5 S.C.C. 111.
[84] supra note 5 at 911.
[85]ibid
[86] Horizontal application of human rights refers to their application to private individuals or persons as much as state

judiciary is to defer wider power on the executive, especially regarding the Govt's policy on economic reforms.[87]Earlier it was held that if the legislature is inactive or indifferent to make appropriate amendments to the law in force, the courts will make the provisions viable by evolution of supplementary principles even if it may appear to possess the flavour of law making.[88] However in this era of market friendly human rights, court has opined that court cannot amend the law and it would amount to usurpation of legislative power and that it must exercise judicial restraint in this connection.[89]Though the policy of non interference may be proper in certain cases, but the recent inclination shown by judiciary, towards giving legislature and executive, a completely free hand to carry out the policy of liberalisation irrespective of its conformity with constitutional mandate is not appreciable.[90] In the interpretation of 'other authorities' under Art 12 also, impact of globalisation is visible. In Zee Tele Films, court has expressly stated that in the era of globalisation there has to be demarcation between state and non state enterprise. Though court has followed Pradeep Kumar Biswas, it seems more influenced by the dictum in Balco Employees case.

However, it is heartening to note that in several instances, court has departed from these technicalities especially in cases involving human rights. The apex court had in Anandi Mukta Sadguru SMVSJMS trust v.r. Rudani [91] held that, even a private authority is amenable to writ jurisdiction under Art226 and granted remedy to the aggrieved party whose human rights were violated.[92] Court had also translated public law norm of arbitrariness in Art 14 into private law

[87] Azadi Bachavo Aandolan (2003) SCALE ,287 See also BALCO employees union v. Union of India,(2002) 2 S.C.C. 343 See also Delhi Science forum v. Union of India AIR 1996 SC 356,**Globalization and Indian Constitution**. **Prof**. **Ranbir Singh** nhrc.nic.in/Documents/Publications/PART-3.pdf visited on 05-06-2014.

[88] Rajendra Prasad v. State of UP (A.I.R. 1979 S.C. 916). In Sunil Batra v. Delhi admn A.IR. 1980 S.C. 1579 , it was categorically stated that judges do make law.

[89] State of UP v. Jeet S Bisht (2007) 6 S.C.C. (cri.) 586.see opinion of Justice Markandey Katju. See Globalisation, Human rights and courts-The Indian Experience , Dr. K. N. Chandrasekaran Pillai, Journal of National Human rights Commission, Vol 6, (2007) 45-48, available at nhrc.nic.in/Documents/Publications/PART-3.pdf visited on 05-06-2014

[90] **Globalization and Indian Constitution**. **Prof**. **Ranbir Singh** nhrc.nic.in/Documents/Publications/PART-3.pdf visited on 05-06-2014. Earlier the attitude of judiciary was pro environment, where as recently in similar situations, it is pro development. For instance, in Narmada Bachao Andolan v. Union of India(2000) 10 S.C.C. 664.[90] Earlier the attitude of judiciary was pro environment, where as recently in similar situations, it is pro development. For instance, in Narmada Bachao Andolan v. Union of India[90](2000) 10 S.C.C. 664.

,majority judges went on approve the project and allowed it to go on even without any comprehensive EIA, that was necessary according to Govts own rules and notifications. Similar view was taken in Fertilizers & Chemicals Travancore Ltd. Employees Association v. Law Society of India, (2004) 4 SCC 420, where supreme court refused to entertain the PIL , seeking to shut down an ammonia tank which poses serious risk to the life of the public

[91] A.I.R. 1989 S.C. 1607

[92] In Ramesh Ahulwalia v. State of Punjab (2012) 12 S.C.C. 331, an administrative officer in DAV public school , was removed from service by the school authorities. He challenged this in P&H HC which dismissed his writ holding that the institution is purely unaided private educational institution and hence no writ will lie. Apex court relied on Anandi Mukta Sadguru case and held that and held that the authority is performing public function and hence writ petition is maintainable under Art226.

[92] Anandi Mukta was also followed by Patna HC (FB) in Organiser , Dehri CD and CM Union ltd., Fazalganj v. State of Bihar A.I.R. 2014 PATNA 67 Even though the nature of a pvt co-operative , which is otherwise not a state within the meaning of Art12 it does not change by appointment of a special officer making co-operative a " state' under Art12.But the very fact of appointment of special officer in terms of co-operative societys Act, makes the special officer an authority under Art12 and thus amenable to writ jurisdiction.

norm of public policy as required under Contract Act. [93]In many situations, courts have sidelined the issue of state action, in order to grant remedy under the public law. [94] In several environmental pollution cases,[95] and in the cases protection of women rights[96] court had been awarding compensation, independent of any constructive casual link with state authorities. [97] In Visakha v. State of Rajasthan,[98] it was observed that both entities public and private would take positive steps not to infringe the fundamental rights guaranteed to the female employees under the Constitution. [99]

Binny Ltd. & Anr vs V. Sadasivan & Ors [100]court held that **"*...The scope of mandamus is determined by the nature of the duty to be enforced, rather than the identity of the authority against whom it is sought. If the private body is discharging a public function and the denial of any right is in connection with the public duty imposed on such body, the public law remedy can be enforced...*"[101]**

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[93] Section 23 Indian Contract Act, D.T.C. v. D.T.C. Mazdoor Congress, A.I.R. 1991 S.C 101; K.C. Sharma v. Delhi Stock Exchange & Ors., A.I.R. 2005 S.C. 2884; and Punjab National Bank by Chairman & Anr. v. Astamija Dash, A.I.R. 2008 S.C. 3182). **Balmer Lawrie & Co. Ltd. & Ors vs Partha Sarathi Sen Roy & Ors 2013 (4) TMI 132** *Central Inland Water Transport Corporation v. Brojonath Ganguly*71(1986) 3 S.C.C. 156. Life Insurance Corporation of India & Anr. Vs. Consumer Education & Research Centre & Ors 1995 (5) S.C.C. 482., Kumari Shrilekha Vidyarthi Vs. State of Uttar Pradesh 1991 AIR 537, 1990 SCR Supl. (1) 625, the Praga Tools Corporation vs. Shri C.A.Imanual & Ors.1969 (1) S.C.C. 585.

[94] For discussion on this see supra note 10at p395 In M. C Mehta v. Union of India, (1987) 4 S.C.C. 463 and in M.C. Mehta v. State of Tamil Nadu (1991) 1 S.C.C. 283, SC entertained applications under Art 32 without bothering whether there is state action or not. This may be because none of the parties to such proceedings cared to raise it as an issue.The Kerala High Court in Bharat Kumar K paliacha v. State A.I.R. 1997 Ker. 291, had in fact sidelined the issue of state action, while entertaining a writ petition challenging the calling of bandh by the political parties as violative of Fundamental rights of the citizens, this it was specifically raised. Other cases are Ashok. V. Union of india (1997) 5 S.C.C. 10; PUDR v. Union of India; Bandhua Mukti Morcha v. Union of india (1984) 3 S.C.C. 161; Bodhisattwa Gautham v. Subhra Chakraborthy (1996) 1 S.C.C. 490,.; Mr X v. Hospital Z, (1998) 8 S.C.C. 296, NHRC v. State of Arunachal Pradesh, (1996) 1 S.C.C. 742, and in numerous environment protection cases see for eg: M. C. Mehta v. Kamal Nath AIR 2000 S.C. 1997_,

[95] : M. C. Mehta v. Kamal Nath A.I.R. 2000 SC. 1997;In M. C Mehta v. Union of India, (1987) 4 S.C.C. 463 and Indian Council for Enviro-Legal Action v. Union of India, (1996) 3 S.C.C. 212 at 238

[96] Bodhisattwa Gautham v. Subhra Chakraborthy (1996) 1 S.C.C. 490, see also,Ashish Chugh, *Fundamental Rights: Vertical or Horizontal* SCC (J) 7:9(2005

[97] Dr. M. Suresh Benjaminand Sanu Rani Paul, *Legal Status of BCCI as Instrumentality of State Under Article 12 of the Indian Constitution*2013 241NALSAR Law Review [Vol.7 : No. 1]

[98] AIR 1997 S.C. 3011see also Supra note 52 at p30

[99] See also In Air India Statutory Corporation v. United Labour Union,[99] (1997) 9 S.C.C. 377
The Court observed that: "It is axiomatic, whether or not industry is controlled by Government or public corporations […] or private agents, juristic persons, their constitution, control and working would also be subject to the same constitutional limitations in the trinity, viz., Preamble, Fundamental Rights and the Directive Principles."
In J.p Unnikrishnan v. State of Andhra Pradesh(1993) 1 S.C.C. 645
Court had subjected private educational institution to the discipline of Art 14 on the ground that they were performing a function in furtherance of state function- a provision for education.
In Biman Krishna Bose v. United India Insurance company ltd (2001) 6 S.C.C. 477[99], a non govt comp was subjected to the requirements of Art 14 as having the trappings of the state[99].-

[100] A.I.R. 2005 S.C. 3202

[101]The court had held that it can very well be said that a writ of mandamus can be issued against a private body which is not a State within the meaning of Article 12 of the Constitution and such body is amenable to the jurisdiction under Article 226 of the Constitution **S**ame view was taken in Ramesh Ahulwalia v. State of Punjab2012) 12 S.C.C. 331[101]Apex court relied on Anandi Mukta Sadguru case and held that and held that the authority though is an unaided private educational institution, is performing public function and hence writ petition is maintainable under Art226.[101]. In society for unaided private schools of Rajasthan v. Union of India and Anr, (2012) 6 S.C.C. 1, Anandi Mukta was also followed by Patna HC (FB) in organiser , Dehri CD and CM Union ltd., Fazalganj v. State of Bihar AIR 2014 PATNA 67 Even though the nature of a pvt co-operative , which is otherwise not a state within the meaning of Art12 it does not change by appointment of a special officer making co-operative a " state' under Art12.But the very fact of appointment of special officer in terms of co-operative societys Act, makes the special officer an authority under Art12 and thus amenable to writ jurisdiction see

However, an entirely different approach could be seen in Zee tele films case,[102] in Jatya Pal Singh v. Union Of India[103], and in Pramati Educational and Cultural trust v. UOI[104].In all these cases court was taking a pro liberalisation approach than a pro human rights approach.
Thus the zig zag journey of case law, without drawing a compact theory and without attempting to reconcile differing views provides no certain guide of the definition of the state with respect to human rights [105]

Conclusion and suggestions:

It is thus found that the concept of state under Art 12 is only inclusive and not conclusive. The analysis of case law reveals that the tests for determining whether an authority is an agency or instrumentality of the state are also not devoid of confusion. The court has derived several tests like control test, financial assistance, monopoly, public function tests etc and has tried to arrive at the decision considering the cumulative effect, based on facts and circumstances of each case. But, how to consider the cumulative effect? How much weightage has to be given to each of these factors? [106] A lee way is also necessary to meet unforeseen situations and to accommodate new factors which are essential to determine the "state instrumentality".[107] Thus

alsohttp://practicalacademic.blogspot.in/2011/01/horizontal-application-of-fundamental.html, horizontal application of fundamental rights-Some thoughts, posted on Tuesday January 2011

[101] Court made horizontal application of human rights and held that private schools are also obliged to provide right to education in conformity with right to education Act. [101]

[102] Zee Tele Films ltd. V. Union of India, A.I.R. 2005 S.C. 2677 court held that BCCI is not a state and observed that 'It is to be noted that the socio-economic policy of the Government of India has changed and the State is today distancing itself from commercial activities and concentrating on governance rather than on business. Therefore, the situation prevailing at the time of Sukhdev Singh (supra) is not in existence at least for the time being, hence, there seems to be no need to further expand the scope of "other authorities" in Article 12 by judicial interpretation at least for the time being. It should also be borne in mind that as noticed above, 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.'[102]

[103] A.I.R. 2013 SC 1535 (CIV); (2013) 6 S.C.C. 452 Jatya Pal Singh v. Union of India[103], the question was whether Videsh Sanchar Nigam ltd/ tata communications ltd is a State within the meaning of Art12. Court held that merely because TATA Communication Limited is performing the functions which were initially performed by OCS would not be sufficient to hold that it is performing a public function. Only if the functions of the Corporation are of public importance and closely related to Government functions, it would be a relevant factor in classifying the Corporation as an instrumentality or agency of the Government. In fact Jatya pal Singh case is a typical instance of impact of globalisation on Human rights of citizens. when the Government, in the exercise of its executive power by way of a policy decision, creates an entity or divests its functions, which may have a bearing upon the Fundamental Rights, in favour of a private body or transfer of public entity to a private body, in such an eventuality, the functions earlier discharged by the Govt cannot be considered as Private function. But court by refusing to accept this contention has in fact taken as in Zee Tele films case, a pro liberalisation approach, than pro human rights approach. In Jatypal Court also held that the dicta of Anandi mukta Sadguru is not applicable in that case as the authority is not performing a public function like imparting education.

[104] 2014 (2) KLT 547 (SC)

[105] S.B. Talekar, The concept of State for Fundamental rights, The Academy law Review, 1982, Vol 6:1, 69-111. At 110

[106] ibid

[107] ibid

it can be seen that though some flexibility is necessary, it will result in vesting of more discretion in judiciary and there always remain scope for subjective evaluation of the judges.[108]

With respect to amenability of writ jurisdiction against private concerns, though earlier judiciary was influenced by positivistic approach, later it has tried to maintain the balance between public interest and private sector. By giving more stress to human rights jurisprudence, court had held in several cases[109] that writ may be maintainable even against private concerns performing public function. Court had also stated that even if the authority is a state under Art12, judiciary will interfere only if the act pertains to public function.[110]The position taken by Judiciary since Sukdev Singh and which was found acceptance in later cases seems to be that, if the private body was discharging a public function and the denial of any right was in connection with the public duty imposed on such body, the public law remedy could be enforced. [111]But it is difficult to distinguish between public function and private function. The problem aggravates when the function is being discharged by a purely private authority.[112] In Binny Ltd v. Sadasivan, apex court had observed with approval that that,

" ... a body is performing a "public function" when it seeks to achieve some collective benefit for the public or a section of the public and is accepted by the public or that section of the public as having authority to do so. Bodies therefore exercise public functions when they intervene or participate in social or economic affairs in the public interest."[113]

This approach seems apt in the era of globalisation, where market friendly human rights have an upper hand, especially when private bodies have grabbed wider space through deregulation and that they have considerable power to act in a way that is inimical not only to its individual members but even towards general public.[114] In England also the position is that judicial review has been extended to private bodies exercising public functions or public powers or powers

[108] ibid For instance by applying Pradeep Kumar Biswas, in Zee tele films Case, it was held that BCCI is not a State and in Jatpal Singh, VSNL was held not be a state. In Bassi Reddy court refused to apply praddep kumar Biswas and the minority in Zee tele film case even opined that Pradeep is not a precedent at all.

[109] Anandi sad Guru AIR 1989 S...C 1607, Saraswathi Amma v. Kerala State orporative Bank, 1990 (2) K.L.T. 755, Binny limited A.I.R. 2005 S.C. 3202. In Federal Bank Limited vs. Sagar Thomas & Ors. (2003) 10 S.C.C. 733." The Praga Tools Corporation vs. Shri C.A. Imanual and Others (1969) 1 S.C.C. 58see alsoIn VST Industries Limited vs. VST Industries Workers' Union & Anr. (2001) 1 S.C.C. 298, General Manager, Kisan Sahkar Chini Mills Limited, Sultanpur, UP vs. Satrughan Nishad and Ors. (2003) 8 S.C.C. 639 Federal Bank Limited vs. Sagar Thomas & Ors. (2003) 10 S.C.C. 733

[110] LICv. Escorts A.I.R. 1986 S.C. 1370

[111] Binny ltd v. sadasivan A.I.R. 2005 S.C. 3202.

[112] Ibid

[113] ibid

[114] As quoted by Lord Denning as early as in 1971, in Breen v. Amalgamated Engineering union[1971] 2 QB 175 [114]the so called business bodies such as football associations, major trade unions, etc have " quite as much power as statutory bodies ..... They can make or mar a man by their decisions."

having public consequences.[115] Moreover Human Rights Act, 1998, also gives emphasis on nature of function than the source of authority when it defined "public authority" as 'any person certain of whose functions are functions of a public nature."[116]

When we analyse Indian position with respect to interpretation of "other authorities", it can be concluded that, the liberal interpretation and farsightedness adopted by judges like Mathew J, Bhagwati J, Krishna Iyer j, Chinnappa Reddy J, Sinha J etc are really remarkable and is very much relevant in this era of human rights. As Observed by Mathew J in *Sukdev Singh's* case, it is true that Giant Corporation, Trade associations, MNC, civil society's and other powerful corporations has grabbed wider power and has taken the substance of sovereignty from the state. They are having direct and decisive impact upon the social economic and political life of the nation. Hence these bodies are no longer private phenomena and hence they must be imposed with the same constitutional restrictions as is imposed upon states. Therefore, ***the position must be that if a body exercises powers or functions which have public consequences or interferes or affects the social, economic or political life of the nation, it must be construed as a public function, and must be subject to same constitutional limitations as State, irrespective of the nature of the body. The governing power wherever located must be subjected to fundamental constitutional limitations.***

Moreover when we analyse the constitutional jurisprudence of other countries, it is evident that, there is growing trend of horizontal application of human rights in these countries. Though some constitutions like that of USA , Canada and Germany are traditional in the sense that they do not recognise direct horizontal application of human rights to non state actors, however the courts in these countries recognise that private conduct may, in certain limited circumstances, fall within the reach of constitutional rights. [117]Modern Constitutions like that

[115] EG: in R.V. Panel on take overs and Mergers Expartee Datafin plc and anr [1987] 1 ALL ER 564, in this case it was held that if a body is exercising public powers or functions or powers having public consequences, it must be subjected to judicial review

[116] Sec 6 (3) (b)

[117] The **horizontal application** of **constitutional rights** in a **comparative perspective**. **Danwood Mzikenge Chirwa*** www.saflii.org/za/journals/LDD/2006/9.pdf visited on 30-04-2014

[117]For US position, see *Jackson v Metropolitan Edison Co*415US, 912,94S, CL 1407 U.S" 197*Peterson vCity OJ Greenville*, 17373USZ44 (1963*Marsh v Alabama*326 U.S. 501. Apart from enforcing Hr's against non state actors by suing state, Canadian courts have also held that Constitutional rights have relevance in private litigation *Dunmore* v *Ontario (Attorney General*[2001J 3S,C.R. 1016*Vriend v Alberta*[1998] I S.C.R.493) In Germany, this recognition has occurred through the doctrine of *Drittwirkung,* which posits that basic rights influence the Development of private law. The cases decided by the Federal Constitutional Court effectively establish that basic rights have a strong indirect effect on private actors. Failure by a court to consider a basic right in private litigation amounts to a dereliction of duty on the part of the court, which entitles the aggrieved party to apply to the Federal Constitutional Court to set aside the decision of that court. This doctrine has received wide acceptance and has been adopted byamong others, the European Court of Human Rights and many courts in many countries cf the **horizontal application** of **constitutional rights** in a **comparative perspective**. **Danwood Mzikenge Chirwa*** www.saflii.org/za/journals/LDD/2006/9.pdf visited on 30-04-2014

of South Africa in fact stipulates that Fundamental rights entrenched in the Constitution binds private bodies. At the International level also, efforts are being made which exhibit a departure from traditional vertical application of Human Rights. In fact even in UDHR there are provisions which impose obligations on Non state actors.[118]Similar provisions could be seen in ICCPR [119]& African Charter of Human Rights[120].Similarly In Genocide Convention 1948[121] and Convention on discrimination against woman, 1979,[122] there are provisions imposing duties on Non state actors. Nuremberg International War Crimes Tribunal had indeed sentenced two leading German Corporations for participation in genocide and crimes against humanity.[123] The Global combat' initiative launched by UN in 1999 and UN Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with regard to Human Rights are other mile stone in this arena.[124]

Moreover European Court of Human Rights had also held that Private persons or entities also form part of the "state", if they are empowered to perform public function. [125]Thus the trend in foreign constitutional jurisprudence and in International arena is also towards horizontal application of human rights. Hence the law in our country has to grow in tune with this trend of the fast changing society and keep abreast with these developments. Therefore an amendment of the constitution in tune with the recommendation of the National Commission on the review of the constitution so as to include private bodies within Art 12 is an acute necessity. It is really laudable that the legislature in India has taken a positive step in tune with human rights norms by making the concept of corporate social responsibility mandatory, in the new Companies Act, 2013.[126]

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[118] Article 28, 29 & 30
Art 28 states that "everyone is entitled to a social and international order in which the rights and freedoms set forth in this declaration can be fully realized... "This certainly imposes obligations on states, individuals and corporate bodies.
Article 29.1 States "Everyone has duties to the community in which alone the free and full development of his personality is possible.
Art 30 states "... Nothing in this Declaration may be interpreted as implying for any state, group, or person to engage in any activity or to perform any act aimed at the destruction of any of the rights and freedom set forth herein."Thus Non state actors are also having a duty to conduct themselves as not to engage in the destruction of the rights and freedoms thus enshrined.
[119] ICCPR Article 5.1 similar to Art 30 UDHR
[120] Art 27 & 28 African charter on Human and peoples right
[121] Art IV provides for punishment for 'persons 'committing genocide. This includes non state actors.
[122] Art 2(e) imposes duties on private bodies. It uses the expressions any person, organisation, enterprise.
[123]Supra note 1 at p254.
[124] Regarding international organisations ILC draft Articles on responsibility of international organisations and their member states , 2008, states that international organisations incurs responsibility for the breaches of its agents under international human rights law. See Walter Kalin & Jorg Kunzli, The law of international human rights protection, 82 (2010). See also Dr N. S. Soman ,*Conceptual challenges to human rights jurisprudence*, in Dialetics and dynamics of human rights 555 (Dr Mrs Annie John ed.2012)
[125] Costello Roberts v. The UK SeriesA, No.247-C(1993), para 27 concerning corporal punishment of a child attending a private school.cf Walter Kalin & Jorg Kunzli, The law of international human rights protection, 82 (2010).

[126] Section 135 Companies Act, 2013 provides that every company having specified net worth or turnover during the financial year shall constitute the corporate social responsibility committee of the Board. The Board shall disclose the content of the policy in its report and place it on the website, if any of the company. The provision further provides that if the company fails to spend for the activities of CSR, the board

It is important to note that the primary responsibility to step up for the civil and democratic human rights is upon the state. This onus falls more on judiciary than any other organ of the state, making it vital for it to play an activist role.[127] In fact regarding constitutional interpretation as to the concept of state, the judiciary has rendered a commendable job. The growth of the concept of state from the narrow interpretation of sovereign functions and statutory functions even to the extent to include actions of private bodies exercising public functions may be in based on the intention of the constitutional makers that the Fundamental rights must be available to every citizens and it must be binding on all authorities which has the power to make laws or the power to make discretion vested on it. In this era of human rights, the expansion of state activities towards every stature of human activities and the participation of non state actors in political spheres and in the development of nation justifies the enlarged definition of state by judicial innovation. However it is also apprehended that stretching the definition of state so as to include every autonomous body is tantamount to individual liberty. It is to be remembered that the situation which prevails in this era with respect to private authorities exercising public function, is analogous to the situation that existed when concept of state was extended as to include PSU ie with respect commercial dealings of state activities in the wake of the decision of SC in Central Inland Water Transport corporation case. It was apprehended that inclusion of PSU within the ambit of state under Art12 will adversely affect their functioning in commercial and industrial principles. In fact this matter was referred to the law commission[128] and after much deliberation law Commission came to the conclusion that Article 12 shall not be amended so as to exclude Public Sector Undertakings and such a move will be in inconformity with the values enshrined in Indian constitution. The Commission emphasised on *the public character* of PSU, as one of the grounds to refuse its exclusion from the ambit of Article 12. In fact same line of argument may be taken with respect to private bodies exercising public functions.

In some instances, it has come in evidence that judiciary has taken very restrictive approach and has been hesitant to interfere even when human rights were at stake. It is to be remembered that whatever be the policy of the State, whether pro development or pro human rights, it is the

shall give the reasons for not doing so. Schedule VII provides the activities which may be included by the company in its CSR policies. See also companies (corporate social responsibility) Rules, 2014.

[127] **Globalization and Indian Constitution**. **Prof**. **Ranbir Singh** nhrc.nic.in/Documents/Publications/PART-3.pdf visited on 05-06-2014.

[128] 145th LCR on Art12 of the Constitution and Public Sector Undertakings, 1992, Law Commission also emphasised on the public character of pSU, as one of the ground to refuse to refuse the exclusion of pSU from the ambit of Article 12. P 19 available at lawcommissionofindia.nic.in/101-169/Report145.pdf visited on 05-05-2014

judiciary, which is the guardian of the Constitution and it has to act as the temple of justice for the masses by compelling non state actors including the big business giants to comply with human right norms. In this era of human rights, judiciary has to shoulder greater responsibility than ever before. Because, Global capital is already in the throes of the "politics of human rights",[129] and it is the task of judiciary to seek to convert it into a "politics for human rights".

[129] Supra note 1 at P 258The expressions "politics of human rights" and "politics for human rights" are coined by Prof Upendra Baxi. "Politics of Human rights "insists that human rights belong as to individuals as to economic collectives. The "politics for human rights" argues for teh primacy of the human rights of human beings over the human rights of aggregations of technoscience capital, entailing the consequence thatTrade related market friendly human rights remain secondary to the UDHR.