

THE CONSTITUTIONAL STATUS OF THE BCCI UNDER ARTICLE 12 AND THE AMBIT OF RTI

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In the case of Board of Control for Cricket in India v. Cricket Association of Bihar & Ors ¹, the Supreme Court made a reference to the Law Commission of India to evaluate the issue of bringing the BCCI under the Right to Information Act, 2005 and make recommendations and these issues were then addressed in the 275th report of the Law Commission.

A report by the Working Group for drafting the National Sports Development Bill, 2013 made various suggestions including setting up of an appellate tribunal alongside a sports election commission. However, the most important recommendation from this committee was Chapter IX of the report titled ‘Applicability of Right to Information Act, 2005’ which inter alia provided for all sports federations to be deemed as public authorities under Section 2(h) of the Act, requiring them to perform functions with respect to responsibilities in discharge of the Act.

Further, in 2016, the R.M Lodha Commission in its report submitted to the Supreme Court made some of the following key recommendations:

- The Legislature must “seriously consider” bringing BCCI under the purview of the RTI Act.
- There should be a Steering Committee headed by former Home Secretary G.K. Pillai with former national cricketers, Mohinder Amarnath, Diana Edulji and Anil Kumble as members.
- The term of an office bearer of BCCI shall not be of more than 3 years.
- An office bearer can have a maximum of three terms in all.

¹ (2015) 3 SCC 251

- No office bearer shall have consecutive terms. There shall be a cooling-off period at the end of each term.
- There should be a separate governing body for the IPL.
- Players and BCCI officials should disclose their assets to the Board as a measure to ensure they do not bet.
- In the interest of democratic representations of states, it proposed 'One State – One Member – One Vote'. Also, no proxy voting of individuals should be permitted.
- No BCCI office-bearer should be Minister or government servant.²

The Lodha Panel was well aware that these recommendations could invoke responses from various stakeholders but it agreed with the view that the Supreme Court of India had to step into the matter in order to restore the glory of the game.

THE CONCEPT OF STATE UNDER ARTICLE 12 & APPLICABILITY TO BCCI

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.³

In the Supreme Court case of *Rajasthan State Electricity Board, Jaipur v Mohan Lal*⁴, the term 'other authorities' was interpreted in a manner that it included all constitutional and statutory bodies on whom powers were conferred by law and it was immaterial whether some powers were conferred for carrying commercial activities.

² Report of the Supreme Court Committee on Reforms in Cricket (also known as the 'Lodha Committee Report'), available at: http://www.gujaratcricketassociation.com/file-manager/lodha/Lodha_Committee_Report.pdf

³ Article 12, The Constitution of India, 1949

⁴ AIR 1967 SC 1857

In the case of *Sabhajit Tewary v Union of India*⁵, the Supreme Court held that CSIR does not fall within the ambit of 'other authority' because it does not have a statutory character like the ONGC or the LIC but was merely a society incorporated under the Societies Registration Act, 1860 and the employees did not enjoy the protection available to government servants under Article 311 of the Constitution.

Similarly, the BCCI is not a statutory body but merely a society registered under The Tamil Nadu Societies Registration Act, 1860 and later with the enactment of the Tamil Nadu Societies Registration Act, 1975 it was registered as a private consortium.⁶ The employees of the BCCI do not enjoy the protection available to government employees under Article 311 of the Constitution and thus, the Board of Control for cricket in India cannot be declared a state under article 12.

The Supreme Court in the case of *Ramana Dayaram Shetty v International Airports Authority of India*⁷, the relevant tests laid down to determine the instrumentality of a state are as follows-

1. If the share capital of the Corporation is held by the government, it would go on to indicate the corporation as an instrumentality or agency of the government.
2. Assistance from the state in order to meet the financial expenditure of the corporation is an indication of the corporation being impregnated with a government character.
3. The Monopoly status must either be state conferred or state protected.
4. The state must have a deep and pervasive control over the affairs.
5. The functions of the entity must be of public importance.
6. A separate department of the government must be transferred to the corporation.

If we analyse these essentials with respect to the BCCI, clearly the government does not hold any stake in the BCCI, there is no financial assistance from the government in order to carry on the operations of the BCCI, the Monopoly status is not state conferred or state protected and while its functions may be of public importance, the government clearly does not supply any

⁵ AIR 1975 SC 1329

⁶ *The Legal Status of BCCI as instrumentality of State Under Article 12 of the Indian Constitution*, <http://www.commonlii.org/in/journals/NALSARLawRw.2013/6.pdf> Obtained from the NALSAR Law Review Journal

⁷ AIR 1979 SC 1628

human resources to the board to run its operations which again rules out the possibility of categorizing BCCI as a state because of its failure to meet these essential requirements.

Also, the BCCI happens to be an autonomous institution with all of the decisions being taken by the members of the board itself without any interference from the Ministry of Sports.⁸

PERSUAL OF THE TERMS ‘PUBLIC AUTHORITY’, ‘PUBLIC FUNCTIONS’ AND ‘SUBSTANTIALLY FINANCED’

PUBLIC AUTHORITY & CONTROL

In order to determine whether the BCCI, according to the existing legal framework can be included under the Right to Information Act, 2005 it is important to be ascertained whether the BCCI can be termed as a ‘public authority’ under section 2(h) of the said act.

Section 2(h) defines the term ‘public authority’ as:

‘Public authority’ means any authority or body or institution of self- government established or constituted—

- (a) By or under the Constitution;
- (b) By any other law made by Parliament;
- (c) By any other law made by State Legislature;
- (d) By notification issued or order made by the appropriate Government, and includes any—
 - (i) Body owned, controlled or substantially financed;
 - (ii) Non-Government organization substantially financed, directly or indirectly by funds provided by the appropriate Government.⁹

⁸ <http://economictimes.indiatimes.com/definition/BCCI>

⁹ Section 2(h), The Right to Information Act, 2005

Now, a bare perusal of section 2(h) clearly indicates whether the terms ‘owned, controlled and substantially financed’, as well as a ‘non-governmental organisation substantially financed’ directly or indirectly by the appropriate government would be covered under ‘public authority’.

In light of Section 2(h) (d)(i) of The Right to Information Act, 2005 the word ‘control’ needs to be interpreted in order to determine whether the BCCI was an institution run by the state.

The word ‘control’ has been defined as “the direct or indirect power to direct the management and policies of a person or entity, whether through ownership of voting securities, by contract, or otherwise; the power or authority to manage, direct, or oversee”.¹⁰

In the case of *Prasar Bharati v Amarjeet Singh*¹¹, the Supreme Court has observed that although the term ‘control’ has not been defined in the light of Article 235 of the Constitution of India, it still confers wider powers upon the High Court for interpretation.

Since the meaning of the word ‘control’ has not been properly defined in the RTI Act, there is an uncertainty in its interpretation with respect to the BCCI and it becomes very essential to decipher the scope of this word .

In the case of *Nagar Yuvak Shikshan Sanstha v Maharashtra State Information Commission*¹², the term ‘control’ was viewed as possession of control over management by the petitioners. It has also been observed by the Courts that the control exercised by the government must be ‘deep and pervasive’ in nature.¹³

The Supreme Court in the case of *Thalappalam Service Coop. Bank Ltd. v. State of Kerala*¹⁴ observed that the expression ‘control’ under section 2(h) (d) of the RTI Act must connote the control of a substantial nature exercised by the government and the control must not be merely regulatory or supervisory but rather amounting to control over affairs and management of the body.

¹⁰ Black’s Law Dictionary, 8th Edition

¹¹ 2007(9) SCC 539

¹² AIR 2010 Bom 1

¹³ *Panjabrao Deshmukh Urban Co-operative Bank Ltd. (Dr.) v. State Information Commissioner, Vidarbha Region, Nagpur* AIR 2009 Bom 75

¹⁴ 2013(16) SCC 82

Considering the fact that the BCCI is a private body performing functions of national importance, it is doing so as a society privately registered outside the scope of governmental interference and no transparency in its structure.

PUBLIC FUNCTIONS

Black's Law Dictionary talks about 'Public Function Doctrine' as entailing that a private person's actions constitute State action if the private person performs functions that are traditionally reserved for the State and also talks about 'Governmental-Function Theory' or 'Public-Function Rationale', as a principle by which private conduct is characterised as State action, especially, for due process and equal protection purposes, when a private party is exercising a public function.

The Supreme Court has observed that although it may not be easy to define a public function or public duty, it can be reasonably said that these are functions performed by the state in its sovereign capacity.¹⁵

SUBSTANTIALLY FINANCED

A reading of the section 2(h) of the RTI Act establishes that a body owned controlled or 'substantially financed' as well as a non-Governmental Organisation 'substantially financed', directly or indirectly, by the appropriate Government, is a 'public authority', within the purview of the definition given in the said section.¹⁶

It, therefore, follows that if a body/entity is substantially financed by the appropriate Government, then even if it is not constituted under the Constitution of India or a Statute, and is a Non-Governmental Organisation/private body, it will be well within the ambit of the RTI Act, 2005.

Justice P.B. Sawant, former judge, Supreme Court of India, underscoring the importance of bringing private bodies within the purview of right to information, opined that:

¹⁵ G. Bassi Reddy v. International Crops Research Institute. & Anr AIR 2003 SC 1764

¹⁶ The Right to Information Act, 2005

*Private bodies, especially where their activities affect the fundamental rights of the public, must be required to disclose information. In times of far reaching privatisation, institutions such as electricity boards and banks cannot be left out of law's scope.*¹⁷

In the case of *CIT v Parley Plastics Ltd*¹⁸, the Bombay High Court held that the term substantially financed does not necessarily mean more than 50% and it could be 10% or 20% depending on other terms and conditions.

Furthermore, the Delhi High Court in the case of *Mother Dairy Fruit and Vegetable Private Limited v Hatim Ali & Ors*¹⁹ noted that the term 'substantially financed' is suffixed by words 'directly' or 'indirectly'. Thus, finances provided by the Central government are crucial to determine whether the body is financed by the government or not.

It is worth noting that the BCCI does not receive any substantive funding from the government and the major sources of its revenue include Broadcasting Rights for the cricket matches, both domestic as well as international, Principal Sponsor for having their logos on the team India jersey, Kit Sponsors for the teams and Sponsors for the Bilateral Cricket tournaments held in India. It also earns a considerable amount of money from the sale of tickets for International as well as IPL matches²⁰ and it is nowhere from any of the above sources that the government is involved directly or indirectly and thus, it is fair to say that the board is not substantially financed by the government.

ANALYSIS OF THE CONSTITUTIONAL STATUS OF BCCI

It can be clearly stated that BCCI does not match all the relevant criteria under section 2 (h) of The Right to Information Act, 2005 to be called as a public authority and also, it is very clear that the government does not exercise any control over the Board since the Board has President, Vice Presidents from all five regions elected from State Cricket Associations which are

¹⁷ ILR (2011) 2 P&H 64

¹⁸ 322 ITR Bom 63

¹⁹ AIR 2015 Del 132

²⁰ The BCCI Annual Report, 2016-17

independent of the state governments and post the recommendations of the RM Lodha Committee, the Committee of Administrators has been appointed at the discretion of the Supreme Court of India which has also appointed a CEO based on the recommendations of the Lodha Committee.²¹

In light of the contentions raised before, these arguments clearly go on to show that the Central or the State government clearly had no control over the affairs of the Board and with regards to performing public functions, the Board clearly was not dispatching those functions in its sovereign capacity.

It may also be accurate to say that the central government itself does not provide any financial assistance to the Board directly, it is also on record that the government does give financial assistance in the form of tax concessions, custom duties etc. So while, it may be asserted that the board might have received substantial financing from the government, it clearly fails the test of state having 'deep and pervasive' control laid down in *International Airports Authority case*²², an essential criteria to be declared a state under Article 12 of the Constitution and the steps taken by the government were merely regulatory in nature.

The questions pertaining to the legal status of the BCCI have arisen in several cases before the Delhi High Court in various cases like *Mohinder Amarnath & Ors v BCCI*²³, *Ajay Jadeja v Union of India & Ors*²⁴ and *Rahul Mehra & Ors v Union of India*²⁵.

In the *Mohinder Amarnath* case, the BCCI was held not to be a state taking into account, the contractual nature of rights and duties.

However, in the *Ajay Jadeja* case, the court, taking into consideration the nature of public duties performed by the BCCI, held it to be an instrumentality of the state against which action was maintainable under Article 226 of the Constitution. The court primarily placed its reliance on the case of *Air India Statutory Corporation & Ors v United Labour Union & Ors*²⁶ where the

²¹ The Lodha Committee Report on Reforms in the BCCI, 2015-16

²² AIR 1979 SC 1628

²³ CW.NO.632/89. Decided on 23-08-1989.

²⁴ 2002(95) DLT 14

²⁵ (2004) 78 DRJ 155 (DB).

²⁶ (1997) 9 SCC 377

Supreme Court laid emphasis on public nature of duties performed by private bodies as a necessary criterion for falling under Article 226.

The Observations made in the cases of *Chander Mohan Khanna v National Council for Educational Research and Training*²⁷ and *Som Prakash Rekhi v Union of India*²⁸ are relevant to be noted before any argument in favour of BCCI being declared a State is made. These observations, also applicable to the BCCI with its existing structure are as follows:

1. The Board is not created by a statute
2. No part of share capital of the Board is held by the Government.
3. Practically no financial assistance is given by the Government to meet the whole or entire expenditure of the Board.
4. The Board does enjoy a monopoly status in the field of cricket but such status is not State conferred or State-protected.
5. There is no existence of a deep and pervasive State control. All functions of the Board are not public functions nor are they closely related to governmental functions.
6. The Board is not created by the transfer of a government-owned corporation. It is an autonomous body.

Also, in the case of *Zee Telefilms v Union of India*²⁹, the court went on to identify three other concepts for determining the issue of 'other authorities' under Article 12 which were as follows:

1. The corporations and the societies created by the State for carrying on its trading activities in terms of Article 298 of the Constitution where for the capital, infrastructure, initial investment and financial aid, etc. are provided by the State and it also exercises regulation and control there over.
2. Bodies created for research and other developmental works which are otherwise governmental functions but may or may not be a part of the sovereign function.

²⁷ AIR 1992 SC 76

²⁸ AIR 1981 SC 212

²⁹ AIR 2005 SC 2677

3. A private body is allowed to discharge public duty or positive obligation of public nature and furthermore is allowed to perform regulatory and controlling functions and activities which were otherwise the job of the Government.

The traditional tests of control- financial, functional and administrative would apply only when a body is created by the state itself for different purposes but not to cases wherein a body has been created under the Companies Act or The Societies Registration Act as a private entity and therefore, these tests may not be applicable to a body like the BCCI that was established as a private body, allowed to represent the state at an international stage and it is the magnanimity and enormity and it is these functions that provide the Board with a monopolistic status for all practical purposes.

CONCLUSION

In light of the contentions raised in the above article, it becomes imperative that the BCCI is not an instrumentality of the State under Article 12 of the Constitution of India and does not fall within the category of the expression ‘other authorities’.

Despite being registered as a private society, not falling within the definition of ‘public authority’ under Section 2(h) of The Right to Information Act, 2005, not performing functions of a public nature, not receiving any substantial financing from the government and lastly, the government not exercising any control over the affairs of the BCCI, it comes as a surprise when on 1st October, 2018 the CIC decided to bring the BCCI under the ambit of RTI act, asking the board to start accepting queries within 15 days , after categorizing the BCCI as a national sports federation.

Furthermore, the Information Commissioner Sridhar Acharyulu even went on to recognize the fact that while state funding is indeed one of the elements in determining whether a non-government organisation is a “public authority”, the economic and human rights impact of the body’s powers are dominant themes of the report and its recommendations. However, the view taken by the CIC seems to be more or arbitrary rather than broad and contemporary in nature.

The author opines that the decision is clearly not in the best of the interests of all the stakeholders since it allows interference into matters related to a private body which, by no means should have been brought under the RTI.

