Private concerns with public duties: amenability to writ jurisdiction

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In a modern society, State has to undertake a multitude of socio-economic activities. This in turn results in transferring its obligation to other bodies and at the same time retaining certain control over them. This gives a great impetus for the public and private bodies to acquire gigantic concerns, and thereby exercise monopoly power over its activities, which are so akin to governmental function. However, the fundamental rights of the citizens are being strained to a very large extent by these activities. In order to protect the rights from the clutches of legislature, executive, public, private and other agencies, Indian courts are extending the ambit of writ jurisdiction.

Articles 32¹ and 226² of Indian Constitution are the indispensable devices to the citizens of India for approaching directly the Supreme

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1. Article 32 reads as follows:
   "Remedies for enforcement of rights conferred by this Part:—
   (1) The right to move the Supreme Court by appropriate proceedings for the enforcement of the rights conferred by this Part is guaranteed.
   (2) The Supreme Court shall have power to issue directions or orders or writs, including writs in the nature of habeas corpus, mandamus, prohibition, quo warranto and certiorari, whichever may be appropriate, for the enforcement of any of the rights conferred by this Part."

2. Article 226 reads as follows:
   "Power of High Courts to issue certain writs:—
   (1) Notwithstanding anything in Article 32, every High Court shall have power, throughout the territories in relation to which it exercises jurisdiction, to issue to any person or authority, including in appropriate cases, any Government, within those territories directions, orders or writs, including writs in the nature of habeas corpus, mandamus, prohibition, quo warranto and certiorari, or any of them, for the enforcement of any of the rights conferred by Part III and for any other purpose."
Court and High Courts respectively and to seek remedy against ‘state action’. Compared to the former, the latter has a wider scope and ambit in exercising writ jurisdiction. Article 32 can be invoked for an infringement of fundamental rights whereas Article 226 can be invoked for exercising not only fundamental rights but also for any other purpose. The main purpose behind the bringing of various authorities within the realm of State under Article 12 is to acquire a speedy and competent remedy by invoking Articles 32 and 226 as against the action of the State.

This paper discusses the issue whether private bodies performing public duties can be brought within the purview of ‘judicial review’.

The innovative steps taken by the judiciary has opened new vistas to the meaning of ‘State’ in Part III and thus stimulated the judiciary to protect the fundamental rights not only from the clutches of legislature and executive but also from ‘public’ and ‘private’ bodies. Even though various tests, such as constitutional and statutory authorities on whom powers are conferred by law, agency or instrumentality of State, functional realism and so forth were evolved by the Supreme Court from time to time for determining the ambit of ‘State’ under Article 12, still there is uncertainty and confusion. It is so because, if a body either private or public is brought within the purview of Article 12, it is subject to the constitutional limitations.

Foreign position

The exercise of judicial review of ‘private bodies’ performing public duties got momentum in modern period. In the earlier period, ordinarily, the amenability to writ jurisdiction was provided against legislature, executive and other public bodies while writ of habeas

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3. Article 12 reads as follows:

"Definition :- 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 and other authorities within the territory of India or under the control of the Government of India”.

4. Ibid.
corpus, was applicable even against private persons. It is applicable against private bodies only in rare instances because one can resort to ordinary forums of judiciary for entertaining ordinary venture which are of personal in nature.

Owing to the shortcomings in the law and the lack of effective control, the private bodies have acquired more and more powers similar to that of public authorities. For example, in the United Kingdom and the United States of America there are giant monopoly concerns in the private sector having wide accessibility over the individuals by virtue of takeovers and mergers. Therefore, the trade associations and professional groups have considerable power that can act in a way that are inimical to individual members as well as to the general public. The decision of Lord Denning in *Breen v. Amalgamated Engineering Union* is a significant contribution in this area. His Lordship recognised that the so called business bodies such as Stock Exchange, the Jockey Club, the Football Association and major Trade Unions have "quite as much power as statutory bodies... They can make or mar a man by their decisions not only by expelling him from membership, but also by refusing to admit him as a member; or, it may be, by a refusal to grant a licence or to give their approval." Private power has also developed a pace through deregulation and the removal of many legal and informal restrictions on the activities that particular types of business may engage in.

Thus accountability of public authorities or bodies to judiciary shall be extended to the private bodies also because the frontiers of the public sector are pushed back by privatisation and it has generally replaced public monopoly power by substantial elements of private monopoly power. In short, the natural concern of public law to ensure the accountability of public bodies might usefully be complemented by further adaptation and expansion so as to ensure that powerful private bodies are made more accountable.

7. *Id.*, p.190.
The development and status of private bodies are more or less equal to that of public bodies in a modern period. It paved the way for judiciary to take powerful measures over private bodies. Now judicial review is extended against private bodies which are entrusted with public duty. A striking example to this is *R. v. Panel on Take-overs and Mergers, Exparte Datafin plc*\(^9\). In this case, the Court of Appeal in England considered the issue that whether the decision of the Panel on Take-overs and Mergers could be subjected to judicial review? It was a self regulating unincorporated association which devised and operated the City Code in Take-overs and Mergers prescribing a code of conduct to be observed in the take overs of listed public companies. The Panel had no direct statutory, prerogative or common law powers and no contractual relationship with persons who dealt in the financial market. The decisions of the Panel were enforced in fact through the panel powers of the Department of Trade and Industry and the Stock Exchange.

Sir John Donalson, M.R. held that the Panel on Take-overs and Mergers was a truly remarkable body which oversees and regulates a very important part of the United Kingdom’s financial market. Yet it performs this function without visible means of legal support. According to the Master of Rolls the Panel was performing an important ‘public duty’. He observed:

“This is clear from the expressed willingness of the Secretary of State for Trade and Industry to limit legislation in the field of take-overs and mergers and to use the panel as the centrepiece of his regulation of that market. The rights of citizens are indirectly affected by its decisions, some, but by no means all of whom, may in a technical sense be said to have assented to this situation, e.g., the members of the Stock Exchange.... Its source of power is only partly

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based on moral persuasion and the assent of institutions and their members, the bottom line being the statutory powers exercised by the Department of Trade and Industry and the Bank of England.”

The Court of Appeal held that in determining whether the decisions of a particular body were subject to judicial review, the court was not confined to considering the source of that body’s powers and duties but also had to look to their nature. Accordingly, if the duty imposed on a body, whether expressly or by implication, was a public duty and the body was exercising public law functions, the court had jurisdiction to entertain an application for judicial review of that body’s decisions. Having regard to the wide-ranging nature and importance of the matters covered by the City Code on Take-overs and Mergers and to the public consequences of noncompliance with the Code, the Panel on Take-overs and Mergers was performing a public duty when prescribing and determining the code and its rules and hence was subject to public law remedies.

Lord Justice Lloyd, in his concurring judgement held that if the source of power was contractual as in the case of private arbitration, judicial review was not possible. According to him, if the body exercises public law function or if exercise of its functions had public law consequences, the body would be subject to judicial review. Lord Justice Nicholls also viewed that the Panel was exercising a public duty. Thus this case is a clear authority for the view that if the administration permits a private body to exercise public law powers or powers having public consequences it will be subjected to judicial review.

Appraising the impact of this decision jurists hold the view that “the law in India has yet to grapple with such a situation”.

10. Id., p.577.
Another significant aspect of judicial review is to award discretionary remedies such as injunction or declaratory judgement by the court through its supervisory jurisdiction, though the prime remedy for damages are available in private law. In *Nagle v. Feilden*, the Court of Appeal held that the Jockey club, which exercised a ‘vital monopoly in an important field of human activity’ must not act arbitrarily and capriciously in rejecting the plaintiff’s application for membership.

The amenability to writ jurisdiction against private association was decided by the Court of New Zealand in *Finnigan v. New Zealand Rugby Football Union*. The question was whether writ petition was tenable against New Zealand Rugby Football Union, purely a private association. The contention raised by the appellant was that while selecting the players for the tour of South Africa, the Association had acted in an arbitrary manner by dropping competent and expert players. In other words, the Football Union had shut their eyes to public concern over the tour and closed their minds to any genuine consideration of its effect on the welfare of Rugby Football. The Court upheld this contention and held that this case had an analogy with public law issues. So writ could be maintainable. While evaluating the impact of ‘judicial review’ over private concerns one jurist observed:

“... the boundaries between public and private law and their respective supervisory functions are breaking down, and that principles of good administration which bear a strong resemblance to the substantive rules of judicial review were applied to a private body...”

**Indian position: Concepts of public law and private law domains**

Indian judiciary has taken many substantial holdings through its decisions. An important example in this regard is *L.I.C. of India v.*

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The questions raised in this case were, whether all the actions of the instrumentality of State will come within the writ jurisdiction of High Courts and Supreme Court. If the answer is in the affirmative, to what extent it will come in this respect? In this case, the notice requisitioning a meeting of the Company by Life Insurance Corporation of India as a shareholder which was consistent with the Government policy and direction of the Reserve Bank of India read with the Foreign Exchange Regulation Act 1973 for ‘Indianisation of Companies’ incorporated in India was alleged as malafide. It was so because its aim was to purchase the shares arising out of Indianisation of the Company and thereby change the management of the Company. Besides, Life Insurance Corporation of India had already been held by the Supreme Court in an earlier case to be an instrumentality or agency of state under Article 12 of the Indian Constitution.

Justice Chinnappa Reddy held that the notice requisitioning a meeting of the company by Life Insurance Corporation of India of which it was a shareholder was not liable to be questioned on any of the stated grounds as the grounds did not reveal malafides on the part of the Corporation. It was also held:

“If the action of the State is related to contractual obligation or obligations arising out of the Court, the Court may not ordinarily examine it unless the action has some public law character attached to it”.

By upholding the maintainability of writ jurisdiction, the learned judge expressed that the Court will examine actions of State if they pertain to the public law domain and refrain from examining them if they pertain to the private law field eventhough the demarcation of the frontiers is too difficult to discern. In short, ‘there is no reason why the State as a shareholder should be expected to state its reasons when it seeks to change the management, by a resolution of the Company, like any other shareholder.”

17. Supra, n.15.
18. Ibid.
Therefore, the crux of this case is that if the action of a concern which is of an instrumentality of State under Article 12 of the Indian Constitution is pertaining to the private law field, it is not to be treated as ‘State action’ but if it is to public law, it is amenable.

The Supreme Court thinks aloud in Shriram case

The decision of the Supreme Court in *M.C. Mehta v. Union of India*¹⁹ is a striking illustration. The question involved in this case was whether a writ could be maintainable under Article 32 against Shriram Foods and Fertiliser Industries, a private corporation, as ‘other authorities’ within the meaning of Article 12 so as to achieve the true spirit envisaged under Article 21 of the Constitution? By virtue of the writ petition, the petitioner sought the help of Supreme Court to direct Shriram to pay compensation to the victims of oleum gas leak caused from one of its units, though another writ petition filed by Legal Aid and Advice Board and Delhi Bar Association for closure of certain units of Shriram and replace it in a thinly populated area, was pending before the same Court.

The petitioner contended that by applying the doctrine of ‘State action’ developed by the Supreme Court of America in relation to private concerns and broader tests of Justice Mathew and others concerning Article 12 of the Constitution such as funding of resources, pervasive state control, functional activities so akin to public interest and governmental in nature, Shriram was an ‘authority’ within the meaning of Article 12.

Countering this, Shriram cautioned the Court against the expanding of Article 12 so as to bring ‘private corporations’ within its ambit because once a private concern comes under this, it will be subjected to constitutional limitations contained under Part III of the Constitution. So it was contended that control or regulation of a private

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corporation’s function by the State under general statutory law such as the Industries (Development and Regulation) Act 1957 was only in exercise of police power of the State. Moreover, such regulation did not convert the activity of the private corporation into that of the State. Similarly, the application of ‘State action’ prevailing in the United States on private concern was inappropriate to Indian situation because the rights which were intended by the framers of our Constitution for this purpose are explicitly stated under Articles 17, 20, 23 and 24. Hence bringing of private concerns under Article 12 was itself against the fundamental rights.

The Court examined the facts and issues involved in this case with the objectives of functional test, control test and human rights jurisprudence. Relying on functional test the court held that the activity of producing fertilisers and chemicals was deemed by the State as an industry of vital public interest, whose public importance necessitated that the activity should be carried out by the State itself, though in the interim period with State support and State control, private corporations might have been permitted to supplement the State effort. Here, Shriram was manufacturing chemicals and fertilisers which are so fundamental to the society and so it could be considered as governmental function.

20. Article 17 reads as follows:
"Abolition of Untouchability" - "Untouchability" is abolished and its practice in any form is forbidden. The enforcement of any disability arising out of "Untouchability" shall be an offence punishable in accordance with law".

21. Article 23 reads as follows:
"Prohibition of traffic in human beings and forced labour -
(1) Traffic in human beings and begar and other similar forms of forced labour are prohibited and any contravention of this provision shall be an offence punishable in accordance with law.
(2) Nothing in the article shall prevent the State from imposing compulsory service for public purposes, and in imposing such service the State shall not make any discrimination on grounds only of religion, race, caste or class or any of them.

22. Article 24 reads as follows:
"Prohibition of employment of children in factories, etc. -
No child below the age of fourteen years shall be employed to work in any factory or mine or engaged in any other hazardous employment."

23. Supra. n.19 at p.1096.
Regarding the control test, its activities were subjected to the extensive control of Government by various Acts. Though the control was not there in internal administration of the private concerns a certain amount of power is however vested on the Government towards public interest. But conferring of too much rights to private bodies was not good because they could jeopardize the public interest. It was remarked that when the State acts as an economic agent, economic entrepreneur and allocator of economic benefit it is subject to the limitations of fundamental rights. Since Shriram is carrying out functions which are governmental in character and under the control of Government, the court tried to answer the question whether Shriram was 'State' under Article 12, but finally evaded from this attempt.

The court rejected the apprehension of including private concerns under Article 12, put forward by Shriram. At the same time, it elaborated the importance of human rights jurisprudence in the following words:

"It is through creative interpretation and bold innovation that the human rights jurisprudence has been developed in our country to a remarkable extent and the forward march of human rights movement cannot be allowed to be halted by unfounded apprehensions expressed by status quoists".

In this case, Bhagwati, C.J., restrained himself from making an express declaration that Shriram was a 'State' under Article 12. The learned judge observed:

"...we do not propose to decide finally at the present stage whether a private Corporation like Shriram would fall within the scope and ambit of Article 12, because we have not had sufficient time to consider and reflect on this question in depth. The

24. Id., p.1098, per Justice Bhagwati.
hearing of the case before us concluded only on 15th December 1986 and we are called upon to deliver our judgement within a period of four days, on 19th December 1986. We are therefore of the view that this is not a question on which we must make any definite pronouncement at this stage. But we would leave it for a proper and detailed consideration at a later stage if it becomes necessary to do so”25.

An interesting remark of this case is that even without defining Shriram as ‘State’ under Article 12, the court maintained the writ petition and laid down the rule of absolute liability of compensation to the victims by modifying the principle of ‘strict liability’ in Rylands v. Fletcher26. For substantiating this, the learned judge held:

“... where an enterprise is engaged in a hazardous or inherently dangerous activity and harm results to anyone on account of an accident in the operation of such hazardous or inherently dangerous activity resulting for example, in escape to toxic gas the enterprise is strictly and absolutely liable to compensate all those who are affected by the accident and such liability is not subject to any of the exceptions which operate vis-a-vis the tortious principle of strict liability under the rule of Ryland v. Fletcher”27.

In short, the Court held that since Shriram was engaged in a hazardous or inherently dangerous industry which posed a potential threat to the health and safety of the persons working in that concern and residing in the surrounding areas, the same should compensate for such harm and it was not in a position to avert its liability by saying that

25. Ibid.
27. Supra. n.19 at p.1099.
it had taken all reasonable care and that the harm occurred without any negligence on its part. The Court directed the Delhi Legal Aid and Advice Board to file actions in the appropriate court, on behalf of the victims of oleum gas leak, for claiming compensation against Shriram.

Public duty and writ of mandamus: need not be an authority under Article 12

The too liberal methods enunciated by the foreign courts in various cases for bringing ‘private bodies’ performing public duties, under the writ jurisdiction is evolved and adopted by the courts in India also. Eventhough the admission of writs was a prerogative power in the early period, now its application is so relaxed by the judiciary because the purpose of law is to impart justice to the needy people. The best illustrative judgement rendered by Supreme Court is Shri Anadi Mukta Sadguru S.M.V.S.J.M.S. Trust v. V.R. Rudani. The question in this case was whether the performance of a ‘public duty’ will make a private person or body amenable to writ jurisdiction even if they are not an authority within the meaning of Article 12 of the Constitution of India.

The facts of the case disclose that the appellant decided to close down a college run by it as a measure to protest against a decision by the University of Gujarat to implement and award the revised pay scale of the teachers with retrospective effect. The appellant refused to pay the teachers the terminal benefits under an Ordinance of the University and the amount of arrears of salary under the award even after repeated requests. The teachers finally approached the Gujarat High Court under Article 226 and the petition was granted. In appeal before the Supreme Court also the main contentions raised on behalf of the appellants were: the Trust, being a private body was not amenable to writ jurisdiction of High Court under Article 226 and the awarding arrears of salary under the Chancellor’s award was under the liability of the Government and not of the management of the college.
The court found that the college was receiving monetary grants from the Government, discharging a public function by imparting education and activities of the institution were closely subject to the Rules and Regulations of the affiliated University. By giving due respect to these conclusions, Justice Jaganatha Shetty categorically held that if the rights are purely of a private character no *mandamus* can be issued. If the management of the college is purely a private body with no public duty, *mandamus* will not lie. These are two exceptions to *mandamus*. But once these are absent and when the party has no other equally convenient remedy, *mandamus* cannot be denied. Moreover, the employment in such institutions was not devoid of public character and the rights and duties which arise from the service conditions could be enforced through *mandamus*. Supplementing this holding, the learned judge observed:

"The term "authority" used in Article 226, in the context, must receive a liberal meaning unlike the term in Article 12. Article 12 is relevant only for the purpose of enforcement of fundamental rights under Article 32. Article 226 confers power on the High Courts to issue writs for enforcement of the fundamental rights as well as non-fundamental rights. The words "Any person or authority" used in Article 226 are, therefore, not to be confined only to statutory authorities and instrumentalities of the State. They may cover any other person or body performing public duty. The form of the body concerned is not very much relevant. What is relevant is the nature of the duty imposed on the body. The duty must be judged in the light of positive obligation owed by the person or authority to the affected party. No matter by what means the duty is imposed. If a positive obligation exists mandamus cannot be denied."  

29. *Id.*, p.1613.
The significance of this decision is that without going into the details of deciding the Trust as 'State' under Article 12, the court rendered this object by highlighting the wide scope of Article 226 and thereby validated the maintainability of writ petition against private body which is performing a public duty.

Decisions of the Kerala High Court

The High Court of Kerala has duly adopted this view of the Supreme Court in Saraswathi Amma v. Kerala State Co-operative Bank. The petitioners were working as Clerk-cum-Typist in the Kerala State Co-operative Bank. They were denied promotion eventhough having the requisite qualifications prescribed under the Kerala State Co-operative Bank Staff Regulation. This was challenged by the petitioner as arbitrary and malicious and therefore urged for the issue of writ of mandamus against the respondent for providing proper redressal. The contention of the Bank was that since it was not a statutory body but only an ordinary society registered under the Kerala Co-operative Societies Act, 1969 no writ would lie against it.

Justice Radhakrishna Menon rejected this contention and furnished the remedy which was sought by the petitioner. For drawing this conclusion, the learned judge relied on the Supreme Court decision in Shri. Anadi Mukta Sadguru and held that since Banks are performing some public duties, they should be amenable to writ jurisdiction even if they are not an authority within the meaning of Article 12 of the Constitution.

The Kerala decision, Saraswathi Amma has a wider impact. The earlier decisions of the Kerala High Court were different in nature. There were more decisions than one which had narrow approach to the question. In Thomas v. South Indian Bank Ltd., the Chief Justice

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31. Supra, n.28.
32. Supra, n.30.
Malimath held that the writ petition under Article 226 was not maintainable since the Scheduled banks such as Catholic Syrian Bank Limited and South Indian Bank Limited under the Reserve Bank of India were not coming within the meaning of "State" under Article 12 and thereby dismissed the petition. The learned judge held that the banks were not instrumentalities of State because Government had no shares in the concerned banks, deep and pervasive state control and moreover banks were not discharging public functions. Similar view was taken in Chemosyn (P) Ltd. v. Kerala Medical and Sales Representatives' Association. In this case, Justice Fathima Beevi, dismissed the writ petition and held that a Trade Union, registered under the Indian Trade Union Act 1926 was not amenable to writ jurisdiction of the court because it was not 'state' within the meaning of Article 12. The Court rejected the contention of the petitioner that the Trade Union was enjoying privileges and immunities owing to registration. Moreover, it was an organisation commanding vast powers and had public duties and obligations read in the light of dynamics of legal control. The Full Bench of the same High Court in Bhaskaran v. Addl. Secretary, held that Co-operative Society registered under Kerala Co-operative Societies Act 1969, is not a 'state'. Chief Justice Malimath held that due to the lack of substantive state control, functional test is not applicable and hence no writ would lie against the respondent.

Conclusion

The decisions of Supreme Court in Shri Anadi Mukta Sadguru and High Court of Kerala in Saraswathi Amma are of far reaching importance in a modern period because there are numerous private bodies performing functions similar to those of the State. Even though the writ amenability on private bodies performing public duty is

34. 1987 (2) K.L.T. 654.
36. Supra. n. 28.
37. Supra. n. 30.
validated, the judiciary has to take a striking balance between the interests of the society and private individual concerns. The reconciliation of these two interests are inevitable for the betterment of the society. But excessive liberal interpretation may have adverse impact on the interest of the private concerns. Many of their activities undertaken may have the trappings of a public function. But should they be victimised for the public service and duties by carrying out indiscriminate entry of judiciary into their autonomous domain? A harmonious, but progressive, interpretation with public interest as paramount is the need of the law.