WIDENING THE SCOPE OF ACCOUNTABILITY OVER PRIVATE ENTITIES UNDER THE INDIAN CONSTITUTION

Dissertation submitted to National Law University and Judicial Academy, Assam
in partial fulfilment for award of the degree of
MASTER OF LAWS

Submitted By

Mohd Yasin

UID: SM0221019

1st Year & 2nd Semester

Supervised by

Mr. Himangshu Ranjan Nath

Assistant Professor of Law

National Law University and Judicial Academy, Assam

July 2022

SUPERVISOR CERTIFICATE

It is to certify that **Mr. Mohd Yasin** is pursuing Master of Laws (LL.M.) from National Law University and Judicial Academy, Assam and has completed his dissertation titled **"WIDENING THE SCOPE OF ACCOUNTABILITY OVER PRIVATE ENTITIES UNDER THE INDIAN CONSTITUTION"** under my supervision. The research work is found to be original and suitable for submission.

Date: 11.07.2022

(Mr. Himangshu Ranjan Nath)
Assistant Professor of Law
National Law University and Judicial Academy, Assam

DECLARATION

I, **Mohd Yasin,** pursuing Master of Laws (LL.M.) from National Law University and Judicial Academy, Assam, do hereby declare that the present dissertation titled **"WIDENING THE SCOPE OF ACCOUNTABILITY OVER PRIVATE ENTITIES UNDER THE INDIAN CONSTITUTION"** is an original research work and has not been submitted, either in part or full anywhere else for any purpose, academic or otherwise, to the best of my knowledge.

Date: 11.07.2022

Mohd Yasin

UID : SM0221019

Date :11th July 2022

Place: Guwahati

TABLE OF CONTENTS

Acknowledgement……i

Table of Cases……...ii

Table of Statutes……vii

List of Abbreviations……...ix

CHAPTER 1- INTRODUCTION

1.1 Statement of Problem……3

1.2 Literature Review…….……4

1.3 Aims and Objectives……...…11

1.4 Research Questions……12

1.5 Research Methodology……...12

1.6 Chapterisation…….…13

CHAPTER 2- INITIATIVES TAKEN BY THE GOVERNMENT TO INCREASE ACCOUNTABILITY OF CERTAIN PRIVATE SECTORS

2.1 Corporate Social Responsibility……..14

2.2 Reservation for Economically Weaker Students in private schools……17

2.3 Reservation in Private Unaided Educational Institutions……19

2.4 Public-Private Partnerships……21

2.5 Sexual Harassment at Workplace……22

2.6 Employees' State Insurance Corporation ……...24

2.7 IT Rules for Intermediaries and Digital Media Platforms……25

2.8 Directors of the Company liable under Prevention of Corruption Act, 1988…….....27

2.9 Public Trust Doctrine……..29

CHAPTER 3- GROWTH OF PRIVATISATION AND LIBERALISATION IN INDIA LEADING TO DIMINISHING ACCOUNTABILITY

3.1 Position between 1950 and 1991……32

3.2 Liberalisation, Privatisation and Globalisation (LPG) in 1991……33

3.3 Rangarajan Committee Report on privatisation and disinvestment……34

3.4 Growth in privatisation from 1991 till date……35

3.5 Sector-wise privatisation and liberalisation……37

3.5.1 Education Sector…….37

3.5.2 Health Sector……...38

3.5.3 Banking Sector……38

3.5.4 Energy Sector……..39

3.5.5 Infrastructure Sector……39

3.5.6 Aviation and Railways Sector……..39

3.5.7 Telecom Sector ……40

3.6 Legal implications of privatisation policies of the government and the role of judiciary ……...41

CHAPTER 4- HORIZONTAL APPLICATION OF FUNDAMENTAL RIGHTS AND AFFIRMATIVE ACTION IN PRIVATE SECTORS IN INDIA

4.1 Meaning and Scope of 'Horizontal Application of fundamental rights'…..43

4.2 Jurisprudential Debates on Affirmative Action in Private Sector and justifications for horizontal effect…….44

4.2.1 John Rawls' Justice as Fairness ……..45

4.2.2 Robert Nozick's Libertarianism ……..46

4.2.3 Bentham's Utilitarianism ……47

4.2.4 Immanuel Kant's Categorical Imperative ……...48

4.2.5 Amartya Sen's Capability Approach……48

4.2.6 Michael J. Sandel's Morality Arguments……49

4.2.7 Ronald Dworkin's Merit Approach ……51

4.3 Understanding the Horizontal Application from foreign jurisdictions …...52

4.3.1 USA's Shelley v. Kraemer ……...52

4.3.2 Canada's RWDSU v. Dolphin Delivery Ltd. ……54

4.3.3 South Africa's Du Plessy v. De Klerk ……...56

4.3.4 Germany's Luth Case……...59

4.4 Role of Judiciary in applying the fundamental rights horizontally in various cases…….60

4.5 The United States' Model of Affirmative Action in the Private Sector……61

CHAPTER 5- UNADDRESSED ISSUES IN THE PRIVATE SECTOR LEADING TO LACK OF ACCOUNTABILITY

5.1 Implementation of disability laws in private sector…….65

5.2 Social and economic security for gig workers ……....68

5.2.1 Who is a "gig-worker"……69

5.2.2 Issues with the new Code……..70

5.2.3 Collective bargaining ……..72

5.3 Liability of private company for breach of data …….74

5.3.1 Liability under the Information Technology Act, 2000……74

5.3.2 Excessive Delegated Legislation……..76

5.4 Enforcing the right to be forgotten against a private IT-company ……78

5.4.1 The Right to be forgotten in the European Union legal framework…….78

5.4.2 The right to be forgotten in the Indian legal framework…….....80

5.4.3 Issues in enforcing the right to be forgotten against private entities in India…….……82

5.5 "Private entities discharging public functions" and writ jurisdictions of Supreme Court and High Courts……...83

5.5.1 Judicial interpretation of 'public functions' and the test for determining 'government agency' or 'state-instrumentality' under Article 12……..84

5.5.2 Discharge of 'public functions' by private entities or non-state actors……88

5.5.3 Should private entities which are capable of discharging public functions be covered within the sweep of Article 12 for enforcing certain fundamental rights?.....89

CHAPTER 6 – CONCLUSION AND SUGGESTIONS

6.1 Conclusion……..92

6.2 Findings……..94

6.3 Suggestions…….96

BIBLIOGRAPHY……..xii

ACKNOWLEDGMENT

At the outset, I would like to express my sincere gratitude to Mr. Himangshu Ranjan Nath, Assistant Professor of Law, NLUJAA, for his constant support and encouragement in completing this dissertation. I am truly grateful to him for providing me with insightful input and highlighting corrections during the course of my dissertation. Apart from this, his positivity, optimism and support have helped me to complete this dissertation meticulously.

I would like to express my sincere thanks and gratitude to Dr. Kankana Baishya, Assistant Librarian, National Law University and Judicial Academy, Assam and the library staff members of National Law University and Judicial Academy, Assam who rendered their help during the period of my research by providing proper access to the library and online sources, and also by keeping the library open till midnight.

Lastly, I am grateful to my parents and my friends who helped and supported me to complete this dissertation.

Date: 11.07.2022

Mohd Yasin

UID : SM0221019

Date : 11th July 2022

Place: Guwahati

TABLE OF CASES

A

1. *A.L. Kalra v P & E Corp. of India*
2. *ABC v Union of India and Ors.*
3. *Adarand Constructors, Inc. v Peña*
4. *Ajay Hasia v Khalid Mujib Sehravardi*
5. *Ajoomal v Lilaram*
6. *All India Sainik Schools Employees Ass. v. Defence Minister-cum-Chairman, Board of Governors, Sainik School Society*
7. *Andi Mukta Sadguru Shree Muktajee Vandas Swami Suvarna Jayanti Mahotsav Smarak Trust and Ors. v V.R. Rudani and Ors.*
8. *Anuj Garg v. Hotel Association of India and Ors.*
9. *Ashok Kumar Thakur v Union of India*
10. *Association of Victims of Uphaar Tragedy v Union of India and Ors.*

B

11. *BALCO Employees' Union (Regd.) v Union of India*
12. *Baloro v University of Bophuthatswana*
13. *Balwant Rai Saluja v Air India Ltd.*
14. *Bineeta Patnaik Padhi v Union of India*
15. *BK Pavitra (II) v Union of India and Ors.*
16. *Brown v Board of Education of Topeka*

C

17. *Central Bureau of Investigation, Bank Securities & Fraud Cell v Ramesh Gelli and Others*
18. *Centre for Public Interest Litigation v Union of India*

19. *Cheryl Hopwood v University of Texas*

20. *Consumer Education & Research Centre v Union of India & Others*

D

21. *Daalco Engineering Private Limited v Satish Prabhakar Padhye and Ors.*

22. *DC Dewan Mohideen Sahib v The Industrial Tribunal, Madras*

23. *Delhi Science Forum v Union of India*

24. *Delhi Science Forum v. Union of India*

25. *Dharamraj Bhanushankar Dave v State of Gujarat and Others*

26. *Dharangadhara Chemical Works v State of Saurashtra*

27. *Dread Scott v Sandford*

28. *Du Plessy v De Klerk*

F

29. *Franklin Templeton Trustee Services Private Limited v Amruta Garg*

G

30. *Gardener v Whitaker*

31. *Google LLC v. Equustek Solutions Inc.*

32. *Google Spain SL v Agencia Española de Protección de Datos*

33. *Google, Inc v. Commission nationale de l'informatique et des libertés (CNIL)*

34. *Grutter v Bollinger*

H

35. *Holomisa v Argus Newspapers*

I

36. *In Re: Delhi Laws Act 1912*

37. *Indian Young Lawyers Association v State of Kerela*

38. *Islamic Academy of Education v State of Karnataka*

J

39. *Jaishri Laxmanrao Patil v State of Maharashtra*

40. *Jatya Pal Singh v Union of India*

41. *Johnson v Transportation Agency, Santa Clara County, California*

42. *Jorawer Singh Mundy* v. *Union of India and Ors.*

43. *Joseph Shine v Union of India*

K

44. *K. C. Sharma v Delhi Stock Exchange*

45. *KS Puttaswamy and Anr. v Union of India and Ors.*

M

46. *M.C. Mehta v Kamal Nath*

47. *Mandela v Falat*

48. *Marwari Balika Vidyalaya v Asha Srivastava & Ors.*

49. *Mohini Jain v State of Karnataka*

50. *Motala v University of Natal*

N

51. *Natural Resources Reference, In Re, Special Reference No. 1 of 2001*

52. *Navtej Singh Johar v Union of India*

P

53. *P.A. Inamdar v State of Maharashtra*

54. *People's Union for Democratic Rights v Union of India*

55. *Plessy v Fergusan*

56. *Plessy v Ferguson*

57. *Pradeep Kumar Biswas v Indian Institute of Chemical Biology and Ors.*

58. *Pramati Educational and Cultural Trust & Ors. v Union of India & Ors.*

R

59. *Rajasthan State Electricity Board v Mohan Lal and Ors.*
60. *Ramana Dayaram Shetty v. International Airport Authority of India*
61. *Ramkrishna Mission and Anr. v Kago Kunya and Ors.*
62. *Ramkrishna Mission and Anr. v Kago Kunya and Ors.*
63. *Retail, Wholesale and Department Store Union, Local 580 v Dolphin Delivery Ltd.*

S

64. *Sheela Barse v Secretary, Children Aid Society*
65. *Shelley v Kraemer*
66. *Siddaraju v State of Karnataka*
67. *Society for Unaided Private Schools of Rajasthan v Union of India and Another*
68. *Sri Vasunathan v The Registrar General*
69. *State of Kerela and Ors. v. Leesamma Joseph*
70. *State of Rajasthan v Gotan Limestone Khanji Udyog*
71. *Subhranshu Rout v State of Odisha*
72. *Sukhdev Singh and Ors. v Bhagatram Sardar Singh and Ors.*

T

73. *The Indian Federation of App Based Transport Workers (IFAT) v. Union of India*
74. *Thressiamma Jacob v Deptt. of Mining & Geology*
75. *Thressiamma Jacob v Deptt. of Mining & Geology*
76. *TMA Pai Foundation & Ors. v State of Karnataka*

U

77. *United Steelworkers of America, AFL-CIO v Weber*

V

78. *Vibhu Kapoor v Council of I.S.C. Examination*

79. *Vikas Kumar v Union Public Service Commission and Ors.*

80. *Vishakha v State of Rajasthan*

W

81. *Wokeflix Through Mega Choubey v Union of India and Ors.*

X

82. *X v. Youtube.com*

Z

83. Zee Telefilms Ltd. and Anr. v. Union of India

84. *Zoroastrian Cooperative Housing Society v District Registrar*

85. *Zulfiqar Ahman Khan v Quintillion Business Media Pvt. Ltd. and Ors.*

TABLE OF STATUTES

1868- Fourteenth Amendment, US Constitution

1908- Code of Civil Procedure

1946-The Delhi Special Police Establishment Act

1948- Employees' State Insurance Corporation Act

1950- Constitution of India

1982- Canadian Constitution Act

1993- Constitution of the Republic of South Africa Act

1995- Persons with Disabilities (Equal Opportunity Protection of Rights and Full Participation) Act

1996- Constitution of the Republic of South Africa Act

2000- Information Technology Act

2011- Information Technology (Reasonable security practices and procedures and sensitive personal data or information) Rules

2013- The Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act

2016- EU General Data Protection Regulation (GDPR): Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016

2016- Directive 95/46/EC (General Data Protection Regulation), OJ 2016 L 119/1

2016- The Rights of Persons with Disabilities Act

2017- Rights of Persons with Disabilities Rules

2020- The Social Security Code

2021- Companies (Corporate Social Responsibility) Amendment Rules

2021- The Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules

LIST OF ABBREVIATIONS

1.	AIR	All India Reporter
2.	Co.	Company
3.	CSR	Corporate Social Responsibility
4.	CJEU	Court of Justice of the European Union
5.	CVC	Central Vigilance Commission
6.	CPIL	Centre for Public Interest Litigation
7.	CPSEs	Central Public Sector Enterprises
8.	DIPAM	Department of Investment and Public Asset Management
9.	ed.	Edition
10.	ESIC	Employees' State Insurance Corporation
11.	GDP	Gross Domestic Product
12.	GDPR	General Data Protection Regulation
13.	ICC	Internal Complaints Committee
14.	IPC	Indian Penal Code, 1860
15.	IT Rules	Information Technology (Intermediary Guidelines and

		Digital Media Ethics Code) Rules, 2021
16.	MMDR Act	Mines And Minerals (Development and Regulation) Act, 1957
17.	MeITY	Ministry of Electronics and Information Technology
18.	NMP	National Monetisation Pipeline
19.	LPG	liberalisation, privatisation and globalisation
20.	Ltd.	Limited
21.	p.	Page Number
22.	Prof.	Professor
23.	PDPB	Personal Data Protection Bill 2019
24.	PC Act	Prevention of Corruption Act, 1988
25.	POSH Act	The Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013
26.	PPP	Public-Private Partnership
27.	RTE Act	Right of Children to Free and Compulsory Education Act, 2009
28.	RTI Act	The Right to Information Act, 2005

29.	RPD Act	The Rights of Persons with Disabilities Act 2016
30.	SEBCs	Socially and Educationally Backward Classes of Citizens
31.	S.	Section
32.	SC	Supreme Court
33.	TFP	Total Factor Productivity
34.	UNCAC	United Nations Convention against Corruption, 2005
35.	v.	Verses

CHAPTER 1

INTRODUCTION

Accountability lies at the root of democracy. A democratic setup would no longer be democratic in the true sense if accountability is diminished, eroded or tinkered with. Accountability is one of the key elements of constitutionalism. Constitutionalism aims to promote a limited government which includes separation of powers, accountable and transparent government with the ultimate objective of good governance. A responsible government and the absence of arbitrariness are a few other manifestations of constitutionalism.[1] Constitutionalism is mostly construed to limit the powers of the government to the extent that it does not act arbitrarily. Therefore, the government, in its economic wisdom should ensure that accountability of private entities is maintained due to the rise of private entities in the public sector.

Hilaire Barnett[2] explains key elements of constitutionalism which includes separation of powers, limited government, and accountable and responsible government. On the third element of 'accountable and responsible government,' he states that while formulating policies, the government is accountable to the electorate on whose trust the power is held. However, as far as the applicability of constitutionalism over private entities which are capable of discharging public functions is concerned, it is yet to be a settled proposition.

It is necessary to explore the dynamic concept of constitutionalism vis-à-vis private entities capable of discharging public functions. The scope of 'public functions'

[1] Samaraditya Pal, *India's Constitution- Origins and Evolution*, (1st edn, 2015)
[2] Hilaire Barnett, *Constitutional and Administrative Law*, (4th edn, 2002)

discharged by private entities should also be construed effectively to address this issue. The same shall be dealt with extensively in the foregoing chapters of this dissertation.

The reason behind extending the scope of constitutionalism becomes significant is due to the continuing liberalisation, privatisation and globalisation ("LPG") policy by the Indian government after 1991 and the significant rise of private companies in various sectors. The recent trends of liberalisation and privatisation depict that the natural and public resources have now been taken over by huge private companies. Durga Das Basu states that constitutionalism must be reflected at every stage of the distribution of natural resources.[3] The government is considered as the trustee of natural resources and the public as its beneficiaries.[4]

The recent trends show that the government is reducing its burden of commercial activities and is focusing more on governance.[5] The State is distancing itself from business activities as well.[6] There are state actors and non-state actors, and the court should not erase the line which differentiates them. However, the same can be done if compelling circumstances arise.[7]

Presently, there are various sectors which are being privatised and disinvested by the government of India through DIPAM. Such sectors are banking, airways, railways, education, health, and infrastructure are being privatised. It is pertinent to note that central public sector enterprises or government companies were the major stakeholders and ran these sectors two decades ago. However, after 1991, either more private companies established on their own, or the government itself sold-off majority shares

[3] DD Basu, *Commentary on the Constitution of India*, (9th edn, 2014)
[4] *Natural Resources Reference, In Re, Special Reference No. 1 of 2001* [2012] 10 SCC 1.
[5] *BALCO Employees' Union (Regd.) v Union of India* [2002] 2 SCC 333.
[6] *Zee Telefilms Ltd. and Anr. v Union of India* [2005] 4 SCC 649.
[7] *Ibid.*

in such PSEs realise money. Despite the significant rise of private entities in these sectors, the services given out in these sectors have a close nexus with the idea of 'public function'.

The Indian government's National Monetisation Pipeline ("NMP") is a big step towards disinvestment where the government estimates aggregate monetisation potential to the tune of Rs. Six Lakh Crore.[8] In *Delhi Science Forum v. Union of India*[9], the government's power to grant licence to no-governmental sectors to run the Telecommunications System was challenged. It was a significant move to private the telecom sector in India. The Supreme Court upheld the granting of license. Quite interestingly, Justice N.P. Singh who delivered the judgment also took note of the threat to national security posed due to privatisation. Hence, even though licence was given to non-government companies, few aspects like tariffs, licensing, etc. were still regulated by the government.

Similarly, there have been plethora of privatisation policies of the government which have taken place after 1991, and have also been challenged time and again before the Supreme Court. Therefore, in the foregoing sections of this paper, an analysis of impact of privatisation and the decisions of Supreme Court over these policies on constitutionalism shall be vehemently analyzed.

1.1 Statement of Problem

With the constant privatisation and disinvestment taking place in India, more private companies are taking over the assets and sectors which once belonged to the government. Despite privatisation, the public nature of such sector does not go away.

[8] NITI Aayog, 'National Monetisation Pipeline, National Portal of India', <https://www.india.gov.in/spotlight/national-monetisation-pipeline-nmp> accessed 29 June 2022
[9] *Delhi Science Forum v. Union of India* [1996] SCC (2) 405

For instance, education, health, infrastructure, telecom, banking sectors, even though owned by the private companies, still serve the public. Therefore, the private companies who take over such sectors, should be subject to accountability either under a statute or constitution. Moreover, since more jobs are now being created in private sector, affirmative action policies are turning out to be fruitless due to the diminishing jobs in public sector. The problem lies in the absence of such legislative safeguards to build accountability of private sectors. With the privatisation and disinvestment policies, even the doors of constitutionalism are shrinking because the same cannot be enforced vehemently against private entities.

1.2 Literature Review

- **"John Rawls, *A Theory of Justice*, (first published 1971, Harvard University Press, Cambridge)"**

The author has given a jurisprudential analysis of the idea of 'Justice' in this book. Rawls has explained his theory 'justice as fairness' with an ultimate object that the least advantaged are benefitted and not forgotten. In essence, he has emphasised on 'distributive justice' system. The author has referred to other legal philosophers from different schools and has given a critical account of their works. Apart from the principles of justice, he also explains fair equality of opportunity principle and the difference principle. This book has been instrumental in understanding the concepts of justice, be it social, political or economic.

- **Micheal J. Sandel, *Justice: What's the Right thing to do*, (Penguin UK, 2010)**

The author is a Harvard Professor and, in this book, he has used different philosophies to explain the idea of justice, and the best moral practices which could be considered as justice in true sense. There is total ten chapters in the book and each chapter is

dedicated to a philosopher's idea of justice. He has explained them by giving some real-life examples and cases decided by courts in the United States and various other countries. In essence, he has highlighted several conflicting theories such as Jeremy Bentham's utilitarianism, John Stuart Mill's refinement, Immanual Kant's Categorical Imperative, Aristotle's concept of 'telos', John Rawl's 'Justice as Fairness'. Chapter 6 and Chapter 7 of this book has been very helpful in understanding the three moral arguments on affirmative action (both in public and private sector) for the purpose of this dissertation.

- **Katherine G. Young, *Constituting Economic and Social Rights*, (1st edn, Oxford University Press, 2012)**

This focusses on how the governments in various countries like USA, South Africa, India, United Kingdom, Ghana, and Columbia have framed policies and legislations to deal with social and economic rights. The author has also focussed on theories of constitutionalism and governance to address the material inequality, poverty and social conflict caused by the legislations itself. In Chapter 7, with respect to India, the author focuses on the role of Supreme Court in securing and safeguarding social and economic rights of its citizens. This book has been instrumental in understanding the concepts of socio-economic rights and the comparative topology of the courts in enforcing them.

- **O. Chinappa Reddy, *The Court and the Constitution of India*, (6th edn, Oxford University Press, 2013)**

In order to write a chapter on affirmative action in the private sector for this dissertation, this book has some important chapters on this issue. Chapter 11 of this book highlights the reservation policies for Scheduled Castes and Scheduled Tribes in India. While highlighting the affirmative action policies of India, the author has also highlighted the

history of discrimination in the United States of America. He has also highlighted various judgments of the US Supreme Court which pertains to affirmative action in private sector. Apart from the affirmative action policies, this book also elucidates the evolution of the Indian Constitution. It explains various concepts like judicial activism, equality, public interest litigation, socialism, and secularism.

- **Durga Das Basu**, ***Commentary on the Constitution of India,*** **(9th edn, Lexis Nexis)**

This volume discusses Article 12 in great details. The author has analysed the expression 'other authorities' under Article 12 in light of the Supreme Court judgments. The author has also covered those cases where certain entities do not fall within the ambit of 'other authorities' under Article 12. On a summary note, the author has highlighted that the constitutional courts will not interfere in policy matters of the government, especially if a private entity has been made the sole party in the writ petition. A challenge to any disinvestment policy of the government shall succeed only if such policy is arbitrary or it violates the Constitution of India. An analysis to this effect has been successfully done by the author. However, this analysis remains incomplete in view of the present circumstances in India. Dr. Basu does not address the issue as to how a 'private entity which is capable of discharging public functions' should be amenable to writ jurisdiction of the Supreme Court. Furthermore, the book is also silent on the impact of liberalisation and privatisation on constitutionalism.

- **Ashwini Deshpande, *Affirmative Action in India*, (1st edn, Oxford University Press, 2013)**

This book offers a stimulating debate on Affirmative Action in India. The author has given insights, rationale behind affirmative action and historical evolution of

affirmative action in India. The author gives a perspective on the existing disparities in several groups and projected solutions. In sum and substance, the author analyses whether affirmative action policies have been successful in providing socio-political and economic justice. This book has been instrumental in understanding the nuances of affirmative action policies in India, and the areas where it falls short to extend its benefits to the truly deserving persons.

- **Robert Alexy, *A Theory of Constitutional Rights*, (1st edn, Oxford University Press, 2010)**

The author explains various theories of constitutional rights as practiced in various jurisdictions. The author has emphasised on the concepts of equality, liberty, constitutional norms, positive state action, and horizontal application in different legal systems. The book gives a succinct and detailed analysis of these theories. Chapter 10 of this book has been important for my research. This chapter focuses on horizontal effect. He has given three theories of horizontal effect, *viz.*, indirect, direct and one mediated by rights against the State.

- **Hilaire Barnett, *Constitutional and Administrative Law*, (4th edn, Cavendish Publishing Limited, London, 2002)**

The author explains key elements of constitutionalism which includes separation of powers, limited government, and accountable and responsible government. On the third element of 'accountable and responsible government' he states that the while formulating policies, the government is accountable to the electorate on whose trust the power is held. However, as far as impact on constitutionalism due to liberalisation and privatisation is concerned, the book is silent.

- **Professor Karl Klaire**, **‘Legal Culture and Transformative Constitutionalism’ [1998] SAJHR 146**

This book leads us to a conclusion that transformative constitutionalism primarily manifests the idea of undoing the historical wrongs, and thus, the present generations should not bear the brunt of past-wrongdoings.

- **Ashwini Deshpande and Rajesh Ramachandran, ‘Traditional hierarchies and affirmative action in Globalising economy: Evidence from India’ [2019] Elsevier Journal World Development 63**

The authors of this article are professors of economics. The authors have attempted to apply scientific and statistical methods to calculate whether affirmative action policies in India have been successful in achieving its goals or not. The authors have argued that traditional caste hierarchies have not changed in India, and caste gaps have either remained the same or have increased over the last few decades. However, quota system has provided some representation in government jobs, although an adequate representation is yet to be achieved.

- **Pradip Baijal, ‘Compulsions and Options for Economic Reform’ [2002] EPW 4189**

In this research paper, the author traces down the history and evolution of privatisation in India. The author refers to various statistical data published by the World Bank and the Government of India to trace the privatisation and liberalisation of the Indian economy. This paper has been instrumental in supporting my arguments in this dissertation, especially how the Indian government has consistently privatised the major public sectors.

- **Prachi Srivastava, 'Public-private partnerships or privatisation? Questioning the state's role in education in India', [2010] Taylor and Francis Routledge 540**

In this paper, the author has critically analysed the Tenth (2002-2007) and Eleventh (2007-2012) Five Years Plans which introduced PPP models for education. The author explains that despite adopting PPP models, the state has yet played a minimal role in the areas of education, and management.This research paper adds value to my research especially when it comes down to establishing accountability of private entities in the education sector.

- **Anagha Sarpotdar, 'Sexual Harassment of Women: Reflections on the Private Sector' [2013] EPW 18**

In this paper, the author has focussed vehemently on the issue of sexual harassment which takes place in private sector. The author has highlighted how private sectors have given a deaf ear to the Vishakha guidelines. The private sectors have not constituted Internal Complaint Committees as per the Vishakha guidelines. Because of this reason, the POSH Act, 2013 was enacted to include the private sector also to make it mandatory for them to constitute ICC as the Vishakha guidelines and the POSH Act. This paper has been instrumental in understanding the issues pertaining to sexual harassment in private sector.

- **Clarence J. Dias, 'Corporate Human Rights Accountability and The Human Right to Development: The Relevance and Role of Corporate Social Responsibility' [2011] NUJS Law Review 495**

The author has analysed the Corporate Social Responsibility (CSR) though the lens of human rights protection. He analyses the implications and relevance of CSR in a commercialised and a globalised world. He states that corporate power has grown significantly and is still growing around the word, but without accountability. This paper has helped me to understand how CSR can be used as an effective tool to bring accountability in private sector.

- **Sudipto Banerjee, Renuka Sane, Srishti Sharma, and Karthik Suresh, 'History of Disinvestment in India: 1991-2020' (2022) NIPFP Working Paper Series No. 373 <https://nipfp.org.in/media/medialibrary/2022/03/WP_373_2022.pdf> accessed 2 July 2022**

The authors of this working paper have discussed the evolution of privatisation trends in India. They have classified the evolution period in four phases starting from 1991 till present date. The author has covered various aspects like establishment of Department of Investment and Public Asset Management (DIPAM), policies of the government to carry out strategic sales of Central Public Sector Undertakings, policy of sale of minority shares, etc. The author has succinctly highlighted the challenges to disinvestment policies of the government. Therefore, this paper has played an instrumental role in writing this dissertation.

- **Danwood M. Chirwa and Christopher Mbazira, 'Constitutional rights, horizontality, and the Ugandan Constitution: An example of emerging norms and practices in Africa' [2020] International Journal of Constitutional Law**

The author has emphasised on the Ugandan Constitution as an example of the horizontal application of constitutional rights. Apart from the Ugandan constitution, the author focuses on other examples also tries to explain the significance of horizontal application of constitutional rights. This paper gives us a clear picture of direct and indirect horizontal application of fundamental rights.

- **Mark Tushnet, 'The issue of State action/horizontal effect in comparative constitutional law' [2003] International Journal of Constitutional Law 1**

In this article, the author has analysed the concept of horizontal effect in light of various constitutions. Apart from the constitutional provisions, the author has vehemently relied on the decisions given by the constitutional courts on horizontal effect. He refers to various jurisdictions such as USA, Canada, South Africa, Germany, and Czech Republic to highlight the existence of horizontal effect in their legal system. In sum and substance, he states that those countries which have greater sensitivity towards the protection of socialistic goals will find it easier to adopt the horizontal application of fundamental rights.

More scholarly works of eminent authors like M.P. Jain, Henkin, and H.M. Seervai have explored constitutionalism only in view of checks and balances on the powers of the government. However, this new dimension of widening the scope of constitutionalism to private entities haven't been explored yet. Moreover, neither the Supreme Court of India nor any of the High Courts of this country have emphasised on this issue.

1.3 Aims and Objectives

This research has been undertaken to fulfil the following aims and objectives-

i. To understand the existing legislative enactments to establish accountability of private companies.
ii. To assess the concept of horizontal application of fundamental rights.
iii. To assess and analyse the privatisation, liberalisation and disinvestment policies of the government since 1950 with respect to the idea of constitutionalism.
iv. To assess and analyse the enforcement of POSH Act, disability laws, affirmative actions in private sector.

1.4 Research Question

i. Whether affirmative actions in private sector, voluntary or involuntary, should be regulated in India?
ii. What is the scope of horizontal application of fundamental rights in India and should it be applied to private entities capable of discharging public functions?
iii. Whether the private sector in India failed to implement disability laws, and provide social security for gig-workers?
iv. Whether the 'private entities which are capable of discharging public functions' be amenable to writ jurisdiction of the Supreme Court?

1.5 Research Methodology

For the completion of this dissertation, the doctrinal method has been used. This study has been carried out critically analysing the primary sources such as legislations and judicial pronouncements. Thereafter, the researcher has analysed secondary sources such books, research papers published in journals, and online authoritative sources. The proposed research follows a Critical and Analytical Methodology.

1.6 Chapterisation

The **first chapter** gives an introduction to the accountability of private entities and highlights the statement of the problem. It also gives an introductory discussion on how accountability is considered as part of constitutionalism.

The **second chapter** discusses the initiatives which have been taken by the government and the judiciary to increase accountability of private entities in certain areas. It covers various aspects like CSR, reservation in private educational institutes, sexual harassment at workplace, IT Rules, and Public Trust Doctrine. This chapter intends to highlight that constitutional and statutory obligations can be created for a private entity.

The **third chapter** discusses the growth of privatisation and liberalisation in India. It covers the rise of the private sector from 1950 to the present date succinctly. The purpose of this chapter is to show and prove that a major chunk of the public sector is now in the hands of private companies.

The **fourth chapter** discusses the horizontal application of fundamental rights and the application of affirmative action in private sectors in India. For horizontal application, foreign legal systems have also been discussed. And for affirmative action in private sector, apart from the legal and constitutional arguments, jurisprudential debates on the issue have also been discussed briefly. Lastly, it provides justifications for incorporating them into the Indian legal system.

The **fifth chapter** provides the unaddressed issues in the private sector leading to the lack of accountability. The issues such as the implementation of disability laws in the private sector, providing social and economic security to gig workers, enforcing the right to be forgotten against a private company, and liability of a private entity for breach of data have been discussed.

Lastly, in the **sixth chapter,** the conclusion, findings and suggestions have been given.

CHAPTER 2

INITIATIVES TAKEN BY THE GOVERNMENT TO INCREASE ACCOUNTABILITY OF CERTAIN PRIVATE SECTORS

As a general rule, the Constitution does not explicitly provide for accountability and transparency of the private entity. It is for a simple reason that fundamental rights are enforceable only against the State barring some exceptions such as in the case of *habeas corpus* and exploitation of children,[10] forced labour, or human trafficking[11]. However, there are many issues wherein the accountability of private entities must be ensured.

To this end, the government has taken various initiatives to hold the private entities accountable such as Corporate Social Responsibility, enforcing reservation and affirmative action policies in private unaided schools and colleges, enforcing the Vishakha guidelines in private companies, and the liability of intermediaries by regulating them under the IT Rules 2021, creating liability of Directors of a private company under the Prevention of Corruption Act, 1988 by removing the corporate veil. This list is not exhaustive. Many other unregulated issues in the private sector must be brought to the fore of accountability.

2.1 Corporate Social Responsibility

The aim of the CSR law to attain a socio-economic and an overall environmental development, which be done none other than the corporates and the commercial sector. CSR also helps in sensitising about the importance of surroundings and the duty which have towards the community and environment. It aims to create responsiveness from

[10] Constitution of India 1950, art 24
[11] Constitution of India 1950, art 23

the corporate section to fulfil their duty.[12] CSR is also considered a moral, ethical, and philanthropic responsibility of Companies towards society.[13] In essence, corporations have a socialistic duty toward society.[14] The corporate power has grown significantly in various countries, there CSR can be one of the effective tools to make private entities liable.[15]

Corporate Social Responsibility (CSR) has been made mandatory for companies under S. 135 of the Companies Act, 2013. A company which has a net worth of Rs. 500 crore or more, or any company with a total turnover of Rs. 100 crore or more, or any company which makes a net profit of Rs. 5 crores or more shall be required to constitute the Corporate Social Responsibility Committee (CSR Committee) to carry out the activities mentioned in Schedule VII of the Companies Act, 2013.

Schedule VII lays down 12 activities which the CSR Committee can carry out. These activities briefly include activities like education, eradicating hunger, promoting healthcare and sanitation, promoting gender equality and setting up shelter homes for orphanages, contributing towards environmental sustainability, protection of forests, animal welfare, conserving natural resources such as air, water, and soil, protecting any national heritage in the country, providing benefits to armed forces and their personnel, contributing to PM Cares Fund, or disaster management fund, etc. Companies that fulfill their criteria of S. 135 must spend 2% of their income on CSR.

[12] Kalpana Sharma, 'Corporate Social Responsibility (CSR): An Overview of the Indian Perspective' [2016] IJLPP 1

[13] Uma Rani and M. Sarala, 'A Study on Corporate Social Responsibility in Singareni Colleries Company Limited, [2013] International Journal of Research in Management' 31

[14] C. Gopala Krishna, *Corporate Social Responsibility in India: A Study of Management Attitudes* (Mittal Publications, 1992)

[15] Clarence J. Dias, 'Corporate Human Rights Accountability and The Human Right to Development: The Relevance and Role of Corporate Social Responsibility' [2011] NUJS Law Review 495

The Committee is required to submit an "action plan" every year to its Board in order to get approval. It must contain "a list of authorised CSR projects, their methods of implementation, fund utilization modalities, implementation timetables, tracking and review mechanisms, and details of need and impact assessments if any. In addition, the approved CSR projects are to be uploaded on the website"[16].

The Companies (Corporate Social Responsibility) Rules 2014 were amended by the Companies (Corporate Social Responsibility) Amendment Rules, 2021, and came into effect on 22nd January 2021. The amendment provided for the definition of "administrative overheads"[17] and widened the definition of CSR[18].

Regarding accountability and implementation, Rule 5(2) makes it mandatory for the CSR Committee to formulate an annual action plan in pursuance of its CSR Policy and make recommendations to the Board accordingly. Furthermore, Rule 8 requires the Company to give an annual report on CSR carried out by the Company in the format prescribed in Annexure 1 and Annexure 2 of the Companies (Corporate Social Responsibility) Amendment Rules, 2021. Lastly, Rule 9 makes it mandatory for the Company's Board of Directors to mandatorily disclose the composition of the CSR Committee, the CSR Policy of the Company and the projects approved by the Board to publish on their website for public access.

After the 2021 amendment in the CSR Rules, CSR has been made mandatory for the Companies that meet the rigours of S. 135 of Companies Act, 2013. Therefore, CSR is one of the most significant examples where the government has made laws to make it

[16] Companies (Corporate Social Responsibility) Amendment Rules 2021, r 9
[17] Companies (Corporate Social Responsibility) Amendment Rules 2021, r 2(1)(b)
[18] Companies (Corporate Social Responsibility) Amendment Rules 2021, r 2(1)(d)

mandatory for companies to formulate and implement policies to fulfil their socialistic obligation.

2.2 Reservation for Economically Weaker Students in private schools

Initially, the framers of the Constitution did not insert any provision which explicitly made it mandatory for private educational institutions to incorporate affirmative action policies in their admission process. However, on this issue, the constitution has undergone an enormous transformation. Moreover, there was no express provision in the Constitution which stated that the right to education is a fundamental right.

In *Mohini Jain v. State of Karnataka*,[19] the Supreme Court held that the right to education is a fundamental right under Article 21 of the Constitution. The Court held:

> *"Every citizen has a "right to education" under the Constitution. The State is under an obligation to establish educational institutions to enable the citizens to enjoy the said right. The State may discharge its obligation through state-owned or state-recognised educational institutions. When the State Government grants recognition to the private educational institutions it creates an agency to fulfil its obligation under the Constitution. The students are given admission to the educational institutions - whether state-owned or state-recognised in recognition of their right to education under the Constitution. Charging capitation fee in consideration of admission to educational institutions is a patent denial of a citizen's right to education under the Constitution."*

After ten years of Mohini Jain's case, the government introduced the Constitution (Eighty-Sixth Amendment) Act, 2002 and inserted Article 21A. By virtue of this

[19] *Mohini Jain v State of Karnataka* [1992] AIR 1858

provision, the state was required to provide free and compulsory education to all children between the age of six and fourteen. The state was also empowered to make laws to implement this fundamental right.[20] Therefore, the Parliament enacted the Right of Children to Free and Compulsory Education Act, 2009 ("RTE Act") in exercising power under Article 21A.

Whether a private or a non-state actor can be compelled to abide by the constitutional rigours of providing free and compulsory education has been debated in the plethora of cases before the Supreme Court. A three-judge bench in the case of *Society for Un-aided Private Schools of Rajasthan v. Union of India*[21] upheld the constitutional validity of the RTE Act. Compelling a non-state actor or a private educational institute to implement the constitutional obligations, which initially the state had, is called horizontal affirmative action.

Section 12 of the RTE Act provides for the responsibilities of private schools to provide free and compulsory education to children between the age of 6 and 14 years. S. 12(1)(c) requires the school to admit at least 25% of the total strength of the class those children who belong to a weaker and disadvantaged group.

In *Pramati Educational and Cultural Trust & Ors. v. Union of India & Ors.*[22], the Constitutional validity of the 86th and 93rd Amendments were challenged. Apart from this, RTE Act was also challenged on the ground that it destroys the right to carry out occupation under Article 19(1)(g) of the Constitution. The Court upheld the validity of all the amendments and legislations which were under challenge. The Court held that

[20] Constitution of India 1950, art 21A
[21] *Society for Un-aided Private Schools of Rajasthan v Union of India* [2012] 6 SCC 1
[22] *Pramati Educational and Cultural Trust & Ors. v Union of India & Ors.* [2014] 8 SCC 1

freedom enshrined under Article 19(1)(g) has an element of "voluntariness", but it is not absolute and subject to reasonable restrictions under Article 19(6) of the Constitution.

The Court also held that admission of a small percentage of students who belong to a weaker and disadvantaged group does not infringe any right of private unaided schools under Article 19(1)(g), and such admissions under the RTE Act and Article 21-A may be permissible. There is nothing in Article 21-A which is in derogation with the rights of private unaided schools under Article 19(1)(g). Both these provisions must be given a harmonious construction which shall ultimately achieve socialistic goals enshrined in the Constitution.

Article 21-A and the RTE Act are the manifestations of socialistic principles which are enshrined under the Constitution. Such socialistic duty is cast not only upon the state but also on the non-state actors or private entities which perform public functions.

2.3 Reservation in Private Unaided Educational Institutions

The issue of reservation in private unaided educational institutions arose in the 1990s. In legal parlance, the private unaided institutions used to claim autonomy in the admission process, setting-up NRI quota, fees, and administration of the college. During that period, they claimed that it was their fundamental right to carry on occupation under Article 19(1)(g) of the Constitution. However, the same came to be challenged in a landmark case *TMA Pai Foundation & Ors. v. State of Karnataka*[23].

An eleven-judge bench of the Supreme Court drew a distinction between private aided and unaided educational institutions and held that different sets of regulations would

[23] *TMA Pai Foundation & Ors. v State of Karnataka* [2002] 8 SCC 481

apply to both. Private unaided institutions would have greater autonomy in matters of admission and regulation of administration. Neither the court nor the state can insist the private unaided educational institutes to give reservations. The Court also held that minority educational institutes under Article 30(1), whether aided or unaided, shall be bound by the restrictions of Article 29(2) of the Constitution. The Court also held that "education" is an "occupation" within the meaning of Article 19(1)(g) of the Constitution.

In *Islamic Academy of Education v. State of Karnataka,*[24] a five-judge bench clarified the TMA Pai's ratio directed for the establishment of two committees. The Committees shall oversee the fee structure and inspect admission test procedures. However, autonomy was still maintained for the private unaided institutes. Thereafter, in *P.A. Inamdar v. State of Maharashtra,*[25] the constitutional validity of these committees was upheld on two grounds. Firstly, the committees will protect the interest of all students, and secondly, it will prevent the management to charge exorbitant fees to the students. These grounds were considered reasonable restrictions within the meaning of Article 19(6), however, the autonomy of private institutes was maintained in view of the TMA Pai's case.

On a bare perusal of these three cases, it can be concluded that the Supreme Court's stance was against the incorporation of affirmative action in private unaided institutes and as a result gave them greater autonomy in many respects. Therefore, to nullify the effect of these three judgments, the Constitution (Ninety-third Amendment) Act, 2005 was enacted which inserted Clause (5) in Article 15 of the Constitution. This provision gave power to the State to make special laws for socially and educationally backward

[24] *Islamic Academy of Education v State of Karnataka* [2003] 6 SCC 697
[25] *P.A. Inamdar v State of Maharashtra,* [2005] 6 SCC 537

classes of citizens (SEBCs), Scheduled Castes, and Scheduled Tribes in educational institutions including private aided and unaided institutions excluding minority institutions established under Article 30(1) of the Constitution.

The Constitution (Ninety-third Amendment) Act, 2005 was challenged in the case of *Ashok Kumar Thakur v. Union of India*[26]. The Court upheld that validity and said that it is important to provide equal opportunity to all including the disadvantaged section of the society. The Court observed that reservation itself is a tool to establish equality. This is called substantive equality. Moreover, caste can be the basis for reservation while taking into consideration other criteria such as social, economic, and educational backwardness. Therefore, affirmative actions in private institutes were also allowed.

The TMA Pai case closed all the doors for the government to implement its affirmative action policies in private unaided institutes. However, it was the government that has taken proactive measures to bound private educational institutes to apply affirmative action policies in their professional or technical courses.

2.4 Public-Private Partnerships

Public-Private Partnership (PPP) has no specific definition in any legislation. PPP is an agreement between the government and a private company to carry out a particular project or venture. In such an agreement, the government relies heavily on the advanced infrastructure and technology of the private sector, and the private entity so involved enjoys certain governmental incentives. PPP agreements are one of the ways to include private companies in carrying out public projects.

[26] *Ashok Kumar Thakur v Union of India*, [2007] 4 SCC 397

Planning Commission defines PPP as: *"the PPP is a mode of implementing government programmes/schemes in partnership with the private sector. It provides an opportunity for private sector participation in financing, designing, construction, operation and maintenance of public sector programmes and projects."*[27]

Since the PPP requires a private entity to participate in the maintenance of public sector programmes or projects, it would be trite to state that private entities should still enjoy the same immunity as always. In such partnership agreements, the private entity should be covered within the rigours of accountability and transparency. Any person can take information regarding the project from the 'public partner' in a PPP Agreement, however, no information under the RTI Act can be taken from a 'private partner'. While PPP brings the best of both worlds on one platform, however, the same has to be undertaken keeping in mind that the doors of accountability and transparency are open.[28]

2.5 Sexual Harassment at Workplace

Until the enactment of The Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013 ("POSH Act"), the Indian Penal Code, 1860 ("IPC") did not provide any explicit provision for sexual harassment at workplace. All such offences were covered within the meaning of 'sexual harassment' under S. 354 of IPC. The POSH Act was enacted after 15 years of the Vishakha guidelines given by the Supreme Court in Vishakha v. State of Rajasthan.[29]

---

[27] Planning Commission, *Towards Faster and More Inclusive Growth: An Approach to the 11th Five Year Plan* (2006)
[28] Prachi Srivastava, 'Public-private partnerships or privatisation? Questioning the state's role in education in India' [2010] Taylor and Francis Routledge 540
[29] *Vishakha v State of Rajasthan* [1997] 6 SCC 241

S. 2(o) provides for an inclusive definition of "workplace". According to the definition, apart from the governmental entities, the "workplace" would include an office of a private entity. 'Workplace' under S. 2(o) includes the following-

i. Any private sector which is non-governmental organisation (NGO), a society, a trust, any private sector undertaking or enterprise, a private society, or any private unit which carries out educational services, health services, entertainment services, health services, or some financial activities such as sale, supply or distribution of services;
ii. Any nursing home or a hospital, which may be a private one;
iii. Any sports complex, or a stadium which may be used for various purposes such as for playing games, training for any other similar activity;
iv. Any other place or area which the employee is required to visit because of the employment. This would include transportation also if it is done to carry out the job;
v. Any dwelling house or a place.

Moreover, the POSH Act also covers sexual harassment within its fore even if they committed against a woman in an unorganised sector as well. S. 2(p) provides for the definition of an "unorganised sector". It states that "an unorganised sector in relation to a workplace means an enterprise owned by individuals or self-employed workers and engaged in the production or sale of goods or providing service of any kind whatsoever, and where the enterprise employs workers, the number of such workers is less than ten."

In light of the above definitions, an employer of a private enterprise is required to constitute an Internal Complaints Committee ("ICC").[30] However, various articles and reports suggest that the private sector has not been very sensitive toward the acts of sexual harassment at workplace.[31]

In 2006, an incidence of sexual harassment at workplace took place in a multinational audit firm, KPMG, which operates in 156 countries, including India. A chartered accountant was sexually harassed at the workplace, however, the firm did not constitute an ICC as per the Vishakha guidelines. She was instead terminated from the firm.[32]

The implementation of laws in India has always been improper. However, from a legal point of view, the applicability of POSH Act in private sectors aims to protect dignity of women under Article 21, equality under Article 14, and various other freedoms under Article 19.

2.6 Employees' State Insurance Corporation

Employees' State Insurance Corporation (ESIC) is a statutory authority which dates back to pre-constitutional enactment phase. It is one of the statutory bodies which falls under the Ministry of Labour and Employment.[33] It is an autonomous body under the government of India which maintains funds contributed towards the welfare of employees. A partial contribution is made by the employee and the rest contribution is made by the employer himself.

---

[30] The Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act 2013, s 4

[31] Anagha Sarpotdar, 'Sexual Harassment of Women: Reflections on the Private Sector' [2013] EPW 18

[32] Deshpande, Vinaya, 'At MNCs, Sexual Harassment Complainants Face Uphill Battle' *The Hindu* (8 March 2013)

[33] Employees State Insurance Corporation, Ministry of Labour and Employment, Government of India, https://www.esic.nic.in/

ESIC has been established under ESIC Act, 1948.[34] The 1948 Act makes it mandatory for the employer to get all the employees insured as per the provisions of the Act.[35] Sections 46 to 52 provides for various benefits to the employees such as medical benefits, sickness benefit[36], maternity benefit[37], disablement benefits[38], and dependant's benefits[39].

ESIC Act is the manifestation of socialistic goals and provides security to the employees in private or unorganised sector. Therefore, ESIC is one of the prime examples which provides for accountability of private employers towards their employees.

2.7 IT Rules for Intermediaries and Digital Media Platforms

The Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021 ("IT Rules 2021") replaced the earlier Information Technology (Intermediaries Guidelines) Rules, 2011. These rules were enacted to regulate the flow of data on social media websites which acts as an intermediary. Section 79 of the Information Technology Act, 2000 provides immunity to the intermediaries from any action or posts shared on their website through their users. However, IT Rules 2021 makes the intermediary accountable if the rules are not complied with.

While the IT Rules have been criticised for privacy concerns, it still creates a strong mechanism for accountability of private intermediaries which collect and host data of millions of users. Every intermediary shall establish three levels of self-regulating

[34] Employees' State Insurance Corporation Act 1948, s 3
[35] Employees' State Insurance Corporation Act 1948, s 38
[36] Employees' State Insurance Corporation Act 1948, s 49
[37] Employees' State Insurance Corporation Act 1948, s 50
[38] Employees' State Insurance Corporation Act 1948, s 51
[39] Employees' State Insurance Corporation Act 1948, s 52

mechanism along with the Grievance Redressal Mechanism.[40] Level 1 shall consist of a publisher[41], Level 2 shall consist of one or more self-regulatory bodies of publishers[42], and Level 3 shall be the Oversight Mechanism which will fall under the Ministry of Electronics and Information Technology[43].

The 2021 Rules also make it mandatory for the intermediaries to carry out due diligence and set up a grievance redressal mechanism[44] and appoint a grievance officer therein. Such an officer shall be required to acknowledge the complaint within 24 hours and dispose of the complaint within 15 days from the date of its receipt. Such an officer shall also be required to receive and acknowledge any direction or order passed by the government or any competent authority or court to comply with the provisions of 2021 Rules.

Apart from due diligence mentioned in Rule 3, the significant social media intermediaries are also required to appoint a Chief Compliance Officer "who shall be responsible for ensuring compliance with the Act and rules made thereunder and shall be liable in any proceedings relating to any relevant third-party information, data or communication link made available or hosted by that intermediary where he fails to ensure that such intermediary observes due diligence while discharging its duties under the Act and rules made thereunder."[45]

If an intermediary fails to comply with the 2021 Rules, then such intermediary shall not get the protection under S. 79(1) of the IT Act, 2000.[46] Therefore, the IT Rules 2021 play a significant role in creating accountability for an intermediary which holds

[40] Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules 2021, r 10
[41] Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules 2021, r 11
[42] Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules 2021, r 12
[43] Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules 2021, r 13
[44] Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules 2021 r 3(2)
[45] Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules 2021, r 4
[46] Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules 2021, r 7

terabytes of data of millions of its users. However, there is no concrete legislation that deals with the management and regulation of data by intermediaries and information technology companies. This issue has been covered in Chapter 6.

2.8 Directors/Chairman of the Private Bank liable under Prevention of Corruption Act, 1988

The legislative scheme of the Prevention of Corruption Act, 1988 ("PC Act") is that offenses of bribery and corruption shall be made out only against a "public officer". S. 2(c) defines who is a public officer for the purpose of PC Act. Central Vigilance Commission (CVC) is empowered to issue directions for investigation under this Act. Such a direction can be given to agencies like the Central Bureau of Investigation established under the Delhi Special Police Establishment Act, 1946 for investigating offences committed under the PC Act.[47] However, no such investigation can be carried out against a private individual relating to an offence committed under the PC Act. S. 8 of the Central Vigilance Commission Act, 2003 (CVC Act) does not empower the CVC to carry out such an investigation if bribery or corruption has taken place in a private sector.

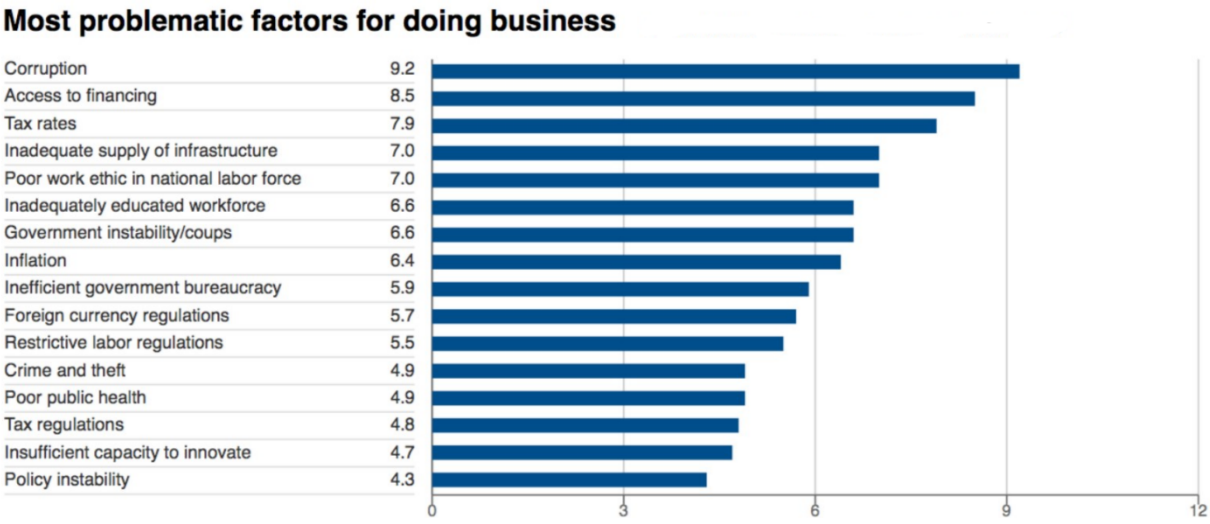
It would be trite to say that CVC should be empowered to investigate bribery and corruption cases between two private entities or private individuals. This is because if oppression or mismanagement, or corruption occurs in a private company, then the corporate veil can be removed at any time and the concerned person can be prosecuted as per the provisions of the Companies Act, 2013.

In 1990, the Indian government allowed liberalisation, privatisation and globalisation ("LPG"). The LPG policy led to the establishment of private companies in various

[47] The Delhi Special Police Establishment Act 1946, s 4.

sectors such as education, telecom, services, infrastructure, etc. With the significant rise in the incorporation of private companies, corruption also increased.[48] The United Nations Office on Drugs and Crime has acknowledged the issue of corruption in India's private sector.[49]

The World Economic Forum in its 2017 survey identified certain factors which are problematic for doing business.[50] On the scale of 0 to 10, corruption has been rated as the most dominant factor in private sector for doing business.



Source: World Economic Forum, Executive Opinion Survey 2017

In 2011, India ratified the United Nations Convention against Corruption ("UNCAC"), 2005 and agreed to make laws in its domestic sphere in accordance with UNCAC. However, the present PC Act still does not apply to private sector. As usual IPC applies for such offences.

[48] UNODC, 'India: Countering Corruption in private sector: a shared responsibility' <https://www.unodc.org/southasia/frontpage/2013/may/india-countering-corruption-in-the-private-sector-a-shared-responsibility.html> accessed 3 July 2022
[49] *Ibid.*
[50] 'Reporting Bribery & Corruption in Private Sector in India', IntelLaw Consulting, (13 December 2021), <https://www.intelawconsulting.com/post/reporting-bribery-corruption-in-private-sector-in-india> accessed 3 July 2022

In *Central Bureau of Investigation, Bank Securities & Fraud Cell v. Ramesh Gelli and Others*,[51] the issue before the Court was whether the Director or Chairman and Officers of the Bank (which was a private bank before amalgamation) be considered as "public officers" for prosecution under the Prevention of Corruption Act, 1988?While relying on Section 46-A of the Banking Regulation Act, 1949 which provided for Executive and Managing Director of banking private company operating under a licence issued to them by RBI, the Court held that they were already "public servants", and therefore, they cannot be exempted from the definition of "public servant". The Court also relied on the general definition provided under S. 21 of IPC which defined who is a public servant. The Court further held that the definition given in S. 21 of IPC is same as the definition given in the PC Act, and these definitions must be read with S. 46-A of the Banking Regulation Act, 1949. This Regulation still applies on the offences which fall under the PC Act.

2.9 Public Trust Doctrine

State is the trustee of natural resources which are by nature meant for public use and enjoyment. The question then arises is whether public trust doctrine apply over private entities also? To what extent can the government be made liable for the acts of private entities which violate public trust doctrine? The Supreme Court's decision appears to be dichotomic in some cases as far as the state being the owner of natural resources is concerned.

[51] *Central Bureau of Investigation, Bank Securities & Fraud Cell v Ramesh Gelli and Others* [2016] 3 SCC 788

In the case of *Centre for Public Interest Litigation v. Union of India*,[52] (CPIL) the Supreme Court in paragraph 89 held that the State is the trustee of natural resources and the citizens are its beneficiaries. The State is empowered to distribute these resources, however, such process of distribution must be in accordance with the constitutional principles such as equality code and larger public good. This case still holds good as far as public trust doctrine is concerned.

In contrast to the above, the Supreme Court in *Thressiamma Jacob v. Deptt. of Mining & Geology*[53], held that the law does not explicitly declare that the State is legal owner of all the minerals and soil, rather it is the ownership of the land which must have been acquired in accordance with the procedure established by law. This case deviates slightly from the CPIL's case on the aspect of ownership of natural resources.

The "Mines and Minerals (Development and Regulation) Act, 1957" ("MMDR Act") is silent on proprietary rights of the state as far as mineral wealth is concerned. On the other hand, other legislations like "Coking Coal Mines (Nationalisation) Act, 1972" and the "Coal Bearing Areas (Acquisition and Development) Act, 1957" expressly declare about the state's proprietary rights.

Moreover, "Oilfields (Regulation and Development) Act, 1948" which deals with the oilfields containing crude oil, petroleum, etc. "Atomic Energy Act, 1962" does not mention anything about the proprietary or ownership rights of the State.

On the one hand, the State is the trustee of all the natural resources as per the Public Trust Doctrine, whereas on the other hand, these statutes do not expressly declare that the State has ownership rights on the natural resources. While CPIL's case is still

[52] *Centre for Public Interest Litigation v Union of India* [2012] 3 SCC 1
[53] *Thressiamma Jacob v Deptt. of Mining & Geology* [2013] 9 SCC 725

followed, it can be said that an action can be taken against private entities if any such exploitation of natural resources take place at their behest.

CHAPTER 3

GROWTH OF PRIVATISATION AND LIBERALISATION IN INDIA LEADING TO DIMINISHING ACCOUNTABILITY

Private companies have established themselves in almost all sectors possible. They also hold a major stake in the public sector. But this has happened over a seven decades. Therefore, it is necessary to trace down the growth of privatisation in light of certain data and facts.

3.1 Position between 1950 and 1991

After Independence, India adopted a government-regulated economy owing to the damage caused by the British during their colonial regime for over 200 years. As opposed to other Asian countries, India refrained from adopting a liberalised framework. Because of this reason, the State became a dominant regulator of the economy, and almost everything was owned by the State. There were no significant imports, and competition in the market was almost negligible. The word "Socialist" was inserted in the Preamble of the Constitution. This signifies that initially, the framers intended to adopt a socialistic economy and not a mixed economy as we have today.

India's GDP growth between 1965 and 1980 was 3.7%. Between 1980 and 1990, the GDP growth was 5.3%, and between 1990 and 2000, the GDP growth was 6.0%.[54] During these three phases, India was behind China, Korea, Malaysia, Thailand and Indonesia, among Asian countries. The decade of and 1970s and1980s are one of the most dreaded years of the Indian economy because it is often called the "decade of jobless growth".

[54] Pradip Baijal, 'Compulsions and Options for Economic Reform' [2002] EPW 4189

The government introduced the First Five Year Plan in 1951. With merely five PSUs, a total investment of Rs. 26 Crores could only be managed. The capital requirements were so large that no private company or firm could have invested in infrastructure and resources.[55]

It is believed that the major privatisation and liberalisation policies began in 1991 with the adoption of the LPG policy. However, due to a terrible economic crisis and fiscal deficit down in the dumps, privatisation trends started in 1985-86.[56] This plunged into a macro-economics crisis in 1991.

3.2 Liberalisation, Privatisation and Globalisation (LPG) in 1991

Public sectors like education, telecom, defence, petroleum, banking, health, etc., were liberalised after the crisis of 1991 in India. Public Sector Undertakings (PSUs) were created; however, later on, the government either sold off its majority shares to a 'strategic partner' or privatised the entity wholly. The need to privatise the public sector was undertaken because Indian PSUs were making lower profits as compared to the private firms.[57]

The LPG Policy had shown some positive growth in various sectors. From 1960 to 1985, annual agricultural growth was 3.9%. This increased to 7.2% between 1985 and 2000.[58] Apart from the agricultural sector, the private non-agricultural sector also witnessed significant growth due to the LPG policy. The Total Factor Productivity (TFP) increased significantly between 1985 and 2000. Liberalisation of the economy opened gates to cheaper access to imported capital goods and global technology. This

[55] ibid.
[56] Prachi Srivastava, 'Public-private partnerships or privatisation? Questioning the state's role in education in India' [2010] EPW 540-553.
[57] Anil K Makhija, 'Privatisation in India' [2006] EPW.
[58] cf Baijal (n 54)

was possible because restrictions on trade, import and export were relaxed. Reduced tariff rates and increased competition in the international and domestic market compelled the private companies to organize their operational efficiency.

In 1999, the Department of Disinvestment was set up to carry out disinvestments and privatisation. However, in 2014, it was renamed as Department of Investment and Public Asset Management (DIPAM) and now it comes under the domain of the Ministry of Finance.[59] Therefore, it is pertinent to take a brief note of which public sectors have been privatized or sold off to willing private entities. Based on the disinvestment trends, it is also necessary to examine the impact it has had on constitutionalism.

3.3 Rangarajan Committee Report on privatisation and disinvestment

In 1993, the Rangarajan Committee, in its report suggested a 49% disinvestment of public sector enterprise equity, and further recommended the exclusion of six public sectors from disinvestment, *viz.*, coal, minerals and oils, armaments, atomic energy, radioactive minerals, and railways.[60] Analysing from a national security perspective, the Committee was justified in excluding the above-said sectors from the disinvestment policy. However, PSUs like LJMC, BALCO, CMC, IBP, Maruti Udyog, HCI, ITDC, etc. were all subject to strategic sales by 2002. In 1994, the Central Government also granted licences to private entities including foreign companies in order to establish and maintain the telecommunication system in India.

[59] 'Department of Investment and Public Asset Management', Ministry of Finance, Government of India, <https://dipam.gov.in/vision-mission> accessed 30 June 2022
[60] Department of Investment and Public Asset Management, Ministry of Finance, Government of India, <https://dipam.gov.in/vision-mission> accessed 30 June 2022

3.4 Growth in privatisation from 1991 till date

In order to analyse the growth in privatisation and disinvestment, it can be divided into four phases, *viz.,* First Phase (1991 to 1999); Second Phase (1999 to 2004); Third Phase (2004 to 2014); Fourth Phase (2014 to present).

During the first phase, disinvestment was carried out by auctioning the shares. The government realized Rs. 16,809 crores out of the total target of Rs. 34, 300 crores.[61] The government diluted an average of 8.87% of the shareholding in Central Public Sector Enterprises (CPSEs). During this phase, privatisation was also referred to as "disinvestments."

During the second phase, privatisation was, for the first time, referred to as a "strategic sale". A separate Department of Disinvestment was constituted on 10th December 1999 to carry out the strategic sale by the government. This Department was later converted into a ministry.[62] During this phase, 12 strategic sales were carried out by the government, and Rs. 24,619 crores could be realized against a target of Rs. 58,500 crores. However, in 2002 CPSEs were prohibited to participate in the disinvestment process.[63]

During the third phase, the CPSEs regained autonomy and they were encouraged to access the capital markets and achieve the requisite public shareholding. This phase, in conclusion, did not involve any "strategic sales" as such.[64]

---

[61] Sudipto Banerjee, Renuka Sane, Srishti Sharma, and Karthik Suresh, 'History of Disinvestment in India: 1991-2020' (2022) NIPFP Working Paper Series No. 373 <https://nipfp.org.in/media/medialibrary/2022/03/WP_373_2022.pdf> accessed 2 July 2022

[62] Department of Investment and Public Asset Management, Ministry of Finance, Government of India, <https://dipam.gov.in/vision-mission> accessed 2 July 2022

[63] cf Banerjee (n 61)

[64] Department of Investment and Public Asset Management, Ministry of Finance, Government of India, <https://dipam.gov.in/vision-mission> accessed 2 July 2022

In the fourth phase, the NDA government intended to continue its policy which it had during the second phase. NITI Aayog was entrusted to play a seminal role in advising the DIPAM for disinvestments and privatisation. It included five modes of disinvestment such as Offer for Sale (OFS), Sale of CPSEs, compulsory buybacks, exchange-traded funds, and public offers. Until Financial Year 2020, the government, against a target of Rs. 4,26,925 crores, had realized Rs. 3,05,357 crores only.

Since the adoption of LPG in 1991, the Indian Government's National Monetisation Pipeline (NMP)[65] policy is by far the largest disinvestment so far. NMP was launched in 2021. It involves 'Asset Monetisation' to the tune of Rs. 6 lakh crores as presented in the Union Budget 2021-22.[66] It is interesting to compare the sectors which will be monetized and disinvested. Sectors like coal, minerals, railways and energy were excluded from the disinvestment policy in the Rangarajan Committee Report.

In contrast to the Rangarajan Committee Report, the NMP policy encapsulates all these sectors and is proposed to be monetized in a staggered manner till 2025. The policy includes monetisation of road assets to the tune of Rs. 1.60 Lakh crores in over four years by NHAI, railway assets to the tune of Rs. 1.52 Lakh crores by FY 2022-25 including 400 railway stations, 90 passenger trains, 1 route of 1400 km railway track, 14 railway stadiums, etc., 25 airports and other airport assets, power transmission assets aggregate to 28,608 circuit kilometers (ckt), shipping assets, monetisation of real estate assets including housing colonies in Delhi and 8 ITDC hotels under NMP. The most

[65] NITI Aayog, 'National Monetisation Pipeline, National Portal of India', *NITI Aayog*, <https://www.india.gov.in/spotlight/national-monetisation-pipeline-nmp> accessed 10 June 2022

[66] Editorial, 'National Monetisation Pipeline: Here's the breakup of the government's big private push' (*The Hindu*, 24 August 2021) <https://www.thehindu.com/news/national/national-monetisation-pipeline-heres-the-breakup-of-the-govts-big-privatisation-push/article36075874.ece> accessed 28 July 2022

recent has been the acquisition of Air India by Tata Sons under the bid of Rs. 18,000 crores.[67]

3.5 Sector-wise privatisation and liberalisation

There are various public sectors such as education, health, banking, infrastructure, railways, aviation, and telecom wherein the private companies was grown significantly. With their rise in the market, they have also developed a tendency to give employment, sometimes even more than the state.

3.5.1 Education Sector

The LPG policy had its impact on the education sector as well. There has been tremendous growth in the educational sector, and private colleges are almost twice the government ones.[68] Some of the famous private colleges which have evolved over the last decades are Amity University, Symbiosis College, Sharda University, Bennett University, Galogotias University, Lloyd College, Sikkim Manipal University, ICFAI University, so on and so forth.

According to the latest update by the University Grants Commission (UGC) on 24th June 2022, there are 412 Private Universities in India.[69] A partial lassez faire setup in 1991 has given incentive to the private players to set up educational institutions. However, the same has also been criticized on the ground that the education sector will

[67] Jagriti Chandra, 'After 68 years, Tatas win back Air India with ₹18,000-crore bid', (*The Hindu*, 11 October 2021) <https://www.thehindu.com/business/Industry/after-68-years-tatas-win-back-air-india-with-18000-crore-bid/article36895747.ece> accessed 3 July 2022

[68] Jandhyala B Tilak, "Private Higher Education in India", [2014] EPW 32

[69] Report by University Grants Commission, 'State-wise List of Private Universities as on 24.06.2022,' (*University Grants Commission*, 24 June 2022) <https://www.ugc.ac.in/oldpdf/Private%20University/Consolidated_List_Private_Universities.pdf> accessed 30 June 2022

become a profit-making machine. However, this issue has been resolved to some extent in various Supreme Court judgments.

3.5.2 Health Sector

Since 1950, professional education in medical studies has grown significantly. Between 1980 and 1990, private medical colleges grew by 16%.[70] In 2014, 6.17 lakh students appeared for the All India Pre-Medical Test (AIPMT).[71] From 1990 till 2014, private medical colleges grew by 405% i.e., from 41 private colleges it increased to 209.[72] Whereas the government-run medical colleges grew only by 71%. From these data, it can be concluded that liberalisation in 1991 led to the significant growth of private medical colleges in India.

Apart from the rise in private medical colleges, private hospitals have also grown significantly. Private hospitals have offered better infrastructure, and facilities at a hefty cost. There are an ample number of private hospitals such as Apollo, Fortis, Aakash, etc.

3.5.3 Banking Sector

The new economic policy or the LPG policy of 1991 has played a major role in privatising the public sector banks into a private ones. There are few important reasons for the privatisation of public sector banks into a private ones. The government's consistent capital injections have failed to make the conditions of public sector banks better. The issue of bad management in the public sector banks has also been one of the

[70] Mahal and M Mohanan, 'Growth of Private Medical Education in India' [2006] EPW 1009
[71] Pradeep Kumar Chaudhary, 'Role of Private Sector in Medical Education and Human Resource Development for Health in India' [2013] 71 EPW
[72] cf Mahal (n 70)

reasons for privatising banks.[73] The banks like HDFC, Axis Bank, Citi Bank, and Yes Bank are a few prime examples of rising of private banks in India.

3.5.4 Energy Sector

The energy sector majorly includes electricity, coal, and natural gas. Privatisation in the energy sector has been a subject of debate and challenge. However, a few companies like Tata Power Company Ltd. and BSES Rajdhani and BSES Yamuna are one of the biggest private ventures in electricity. BSES is, however, a joint venture of Reliance and the Delhi Government. In May 2002, Delhi's Vidyut Board has been privatised.[74] Under the National Monetisation Policy, the government aims to realise Rs. 45, 200 crore by monetising the power sector.[75]

3.5.5 Infrastructure Sector

National Monetisation Pipeline is one of the significant examples of privatisation in infrastructure. The Indian Government's National Monetisation Pipeline (NMP)[76] policy is by far the largest disinvestment so far. NMP was launched in 2021. Road assets to the tune of Rs. 1.60 lakh crores are required to be monetized as per the scheme.

3.5.6 Aviation and Railways Sector

Railways assets to the tune of Rs. 1.51 lakh rupees have been set out to be monetised till the Financial Year 2025. This will include "400 railway stations, 90 passenger trains, 1 route of 1,400 km railway track, 741 km of Konkan Railway, 15 railway

[73] TT Ram Mohan, 'Bank Privatisation by the Backdoor' [2013] EPW 12
[74] K. Ashok Rao, 'Diving Into the Privatisation Push in India's Power Sector' (*The Wire*, 5 November 2020) <https://thewire.in/energy/india-power-sector-privatisation> accessed 10 June 2020
[75] Editorial, 'National Monetisation Pipeline: Here's the breakup of the government's big private push' (*The Hindu*, 24 August 2021) <https://www.thehindu.com/news/national/national-monetisation-pipeline-heres-the-breakup-of-the-govts-big-privatisation-push/article36075874.ece> accessed 28 July 2022
[76]NITI Aayog, 'National Monetisation Pipeline, National Portal of India', *NITI Aayog*, <https://www.india.gov.in/spotlight/national-monetisation-pipeline-nmp> accessed 10 June 2022

stadiums and selected railway colonies, 265 railway-owned goods-sheds, and 4 hill railways."[77]

Apart from the railways, the government also intends to monetise around 25 airports which are managed by the Airport Authority of India. The government expects to realise Rs. 20,782 crores from this sector.

3.5.7 Telecom Sector

The Telecom sector also saw new private players after the 1991 policy. Companies like Airtel, Reliance, Vodafone and Idea were established and started giving competition to the government's BSNL and MTNL. As per the NMP, the government aims to realise Rs. 35,100 crores from the assets of BSNL and BBNL till Financial Year 2024.[78]

A brief overview of the government's policies on public asset management would entail that with the passage of time, there has been no distinction drawn to exclude a sector from disinvestment. Even though a few sectors like coal, railways, minerals, etc. were kept out of the disinvestment policies, however, as the private entities became capable of investing in natural resources, the government hasn't hesitated to disinvest in them. The Courts have also shown utmost circumspection, judicial deference and caution while adjudicating upon an economic policy. It is debated that the government's privatisation policies stand antithesis to the idea of socialism and constitutionalism on the ground that the government inadvertently closes its doors of accountability and responsibility once a public sector enterprise is disinvested or privatised. In essence, it appears that it would not be feasible to challenge all the economic policies of the

[77] Editorial, 'National Monetisation Pipeline: Here's the breakup of the government's big private push' (*The Hindu*, 24 August 2021) <https://www.thehindu.com/news/national/national-monetisation-pipeline-heres-the-breakup-of-the-govts-big-privatisation-push/article36075874.ece> accessed 28 July 2022
[78] ibid

government merely on the ground that a capitalistic policy is antithesis to socialism and constitutionalism. It will also not be practical to restrict the government from managing its public assets. Therefore, it becomes pertinent to analyse the scope and applicability of constitutionalism to private entities. Various sectors like defence, minerals, coal, energy, etc. also raise the issue of national security as far as their privatisation is concerned. The issue of national security vis-à-vis privatisation was considered in Thressiamma Jacob, and Delhi Science Forum's case. However, this question still requires deliberation, and because of this reason constitutionalism.

3.6 Legal implications of privatisation policies of the government and the role of judiciary

BALCO's disinvestment of 51% of the shares received huge criticism and as a result was challenged in the Supreme Court.[79] Similarly, government's liberalised policy on telecom sector was also challenged.[80] In Delhi Science Forum's case, the Supreme Court again upheld the government's decision to grant licence to private entities and observed that courts should exercise judicial deference in economic policies of the government as they involve complex and technical expertise, and only in exceptional circumstances, where a policy is unreasonable or arbitrary, or violates any law, it should not be struck down. On a similar note, in BALCO, the Supreme Court upheld the government's policy and held that in economic policy matters, the courts should show utmost circumspection and reluctance to impugn the judgment of experts involved in formulating such policy.

The 2G spectrum case was another example of allocation of licences and radio spectrum to various companies on a first-come-first-serve basis. While quashing the said licences,

[79] *BALCO Employees' Union v Union of India* [2001] SCC SC 1437
[80] *Delhi Science Forum v Union of India* 1996 SCC (2) 405

the Supreme Court, applied the public trust doctrine[81] and held that there was a fundamental flaw in the first-come-first-serve policy, and that fresh licences be granted by way of an auction. While allowing this PIL, the Court was mindful of the Delhi Science Forum's case where it was held that in such economic policies of the government, the court cannot sit in the wisdom of the policy framers. However, since the 2-G spectrum case was patently flouted with misallocation, the Court had to draw an exception to the Delhi Science Forum case.

In Gotan Limestone case[82], transfer of mining rights by one company to a private firm or company was declared void on the ground that mining rights vests only with the government and that transfer of entire share holding and change of directors was in circumvention of the law. This case turned out to be a classic example where the court had shown sensitivity as regards the natural resources. The Court couldn't have adjudicated upon this issue by showing judicial deference as it involved a flagrant violation of Registration Act, 1908, and Transfer of Property Act, 1882. Thressiamma Jacob's case[83] also dealt with the mining rights, however, the same wasn't referred to in the Gotan Limestone case.

[81] *M.C. Mehta v Kamal Nath* [1997] 1 SCC 388
[82] *State of Rajasthan v Gotan Limestone Khanji Udyog* [2016] 4 SCC 469
[83] *Thressiamma Jacob v Deptt. of Mining & Geology* [2013] 9 SCC 725

CHAPTER 4

HORIZONTAL APPLICATION OF FUNDAMENTAL RIGHTS AND AFFIRMATIVE ACTION IN PRIVATE SECTORS IN INDIA

In in the Indian Constitution, few provisions like Articles 17, 21, 23 and 24 do not use the word "State". Many authors and courts have implied that they are enforceable against non-state actors also. This has been termed as the horizontal effect. As a corollary to horizontal effect, the affirmative action in private sector is often argued. Therefore, a critical analysis of the existing regime with respect to horizontal effect and affirmative action has been done.

4.1 Meaning and Scope of "Horizontal Application of fundamental rights"

The view that only states have the constitutional obligation to protect and ensure fundamental rights is a traditional view. This view is referred to as the vertical application of fundamental rights and the same is changing gradually.[84] Horizontal application of fundamental right refers to a case where a right has been violated by a non-state actor or has been violated with the aid of a non-state actor, therefore, accrual of a right to approach the constitutional court for redressal against such non-state actor. In essence, there are some duties on the private sector as well.[85] This is a highly vexed and debatable issue in India, given the vertical constitutional scheme.

As far as Part III of Indian Constitution is concerned, it is primarily enforceable against the State[86] and in some cases against 'other authorities' if it is established that they fall

[84] Danwood M. Chirwa and Christopher Mbazira, 'Constitutional rights, horizontality, and the Ugandan Constitution: An example of emerging norms and practices in Africa' [2020] 18 International Journal of Constitutional Law
[85] Mark Tushnet, 'The issue of State action/horizontal effect in comparative constitutional law', [2003] 1 International Journal of Constitutional Law
[86] Constitution of India 1950, art 32

within the meaning of 'state' as provided under Article 12 of the Constitution.[87] There are few Fundamental Rights which make an express declaration that they are enforceable expressly against the state, and in contrast to them, there are few provisions that do not expressly use the word 'state'. This classification has been called the 'vertical application' and 'horizontal application' of Fundamental Rights.

A 'vertical application or vertical effect' applies only against the state and it includes provisions such as Articles 14, 15, and 16. On the other hand, 'horizontal application or horizontal effect' would include provisions like Articles 17, 18, 23, and 24. These provisions are "plainly and indubitably enforceable against everyone" including the state.[88] To widen the scope of Article 21, a three judges bench of the Supreme Court held that Article 21 can be invoked against private employers also as far as occupational health hazards caused by asbestos industries are concerned.[89]

4.2 Jurisprudential Debates on Affirmative Action in Private Sector and justifications for horizontal effect

Usually, affirmative actions are less controversial when applied in the public sector, however, the same becomes highly debatable when applied in the private sector. There exists sufficient jurisprudence both in favour against affirmative actions. Jurists like John Rawls, Robert Nozick, Amartya Sen and Michael Sandel belong to the modern era when affirmative actions started becoming a realisation. However, during the period of Bentham, Kant and Aristotle, the concept of affirmative action as it is studied today did not exist.

[87] *Zoroastrian Cooperative Housing Society v District Registrar* [2005] 5 SCC 632
[88] *People's Union for Democratic Rights v Union of India* AIR 1982 SC 1473.
[89] *Consumer Education & Research Centre v Union of India & Others* 1995 SCC (3) 42.

4.2.1 John Rawls' Justice as Fairness

Rawls has explained the idea of 'Justice as Fairness' in his book "A Theory of Justice"[90]. He explains Justice as Fairness by way of two principles. The first principle provides for "equal basic liberties". The second principle provides for "social and economic inequalities" and the same must satisfy the following two conditions:

i. There must be '*fair equality of opportunity'*; and
ii. Greatest benefit must be given to the least advantaged persons of the society. This is called the '*Difference Principle'*.

According to the first principle, everyone must have equal basic rights and liberties. The rationale behind having equal basic liberties is that if unequal rights are allowed to exist then it will not benefit the disadvantaged members of the society. Under this principle, Rawls propagates for having all such rights and liberties such as liberty of thought and expression, conscience, freedom of speech, the right to vote, right to hold public office, etc. While this principle provides for equal basic liberty, however, if affirmative action policies are adopted, then something more than 'equal basic liberty' is required. Therefore, by applying the first principle *instricto sensu,* affirmative action policies could not be justified. At this juncture, the second principle becomes of utmost significance.

Rawls' second principle has been categorised into two parts, *viz.*, fair equality of opportunity, and difference principle. As far as fair equality of opportunity is concerned, Rawls says that persons with similar talents and willingness must be given the same educational and economic opportunities. This should be done irrespective of

[90] John Rawls, *A Theory of Justice* (first published 1971, Harvard University Press, Cambridge)

whether a person is born rich or poor. He states that treating citizens based on rich and poor would be morally arbitrary. Therefore, the essence of first limb of the second principle is that all equals should be treated equally. This principle manifests the idea of affirmative action. However, when it comes to equal or equitable distribution of resources, the second limb of the second principle becomes important.

Difference principle relates to the distribution of wealth and resources in the society. However, this principle allows inequalities to exist if the distribution of resources is done in such a manner where the least-advantaged are given the most benefit. Affirmative action policies also reflect the same character. Therefore, by applying Rawls' theory of 'Justice as Fairness', one may justify the affirmative action policies. Rawls' view has been criticised by Robert Nozick.

4.2.2 Robert Nozick's Libertarianism

In the book titled "Anarchy, State, and Utopia", Robert Nozick[91] has adopted a libertarian approach and has criticised Rawls' work. According to Nozick, individuals are self-owned and any creation of wealth or property would be the result of their labour. If an individual has acquired the natural resources fairly, then such a person has an absolute ownership over the acquired property. The state shall have minimum interference in a person's personal affairs. He propagates for a lessez-faire state.

According to Nozick, if the state acquires the property from the "well-off" and distributes them to "worst-off" then this would eventually amount to slavery. The only solution to this issue would be charity by the well-off. Such charity would be voluntary and the state cannot compel the well-off to distribute wealth among the least

[91] Robert Nozick, *Anarchy, State, and Utopia* (Blackwell Publishers Ltd., 1974)

advantaged. Therefore, affirmative actions would not be possible if Nozick's views are applied. Nozick's views are inclined towards individual's rights where state has no role to play to uplift the least advantaged. In essence, he propagates for meritocracy, and this would be in conflict with the idea of affirmative action.

4.2.3 Bentham's Utilitarianism

Jeremy Bentham in his book "The Principles of Morals and Legislation" has given his idea of utilitarianism. He is a consequentialist. He states that greatest pleasure must be given to the majority of the society. The term "utility" in his theory means that a political or an economic decision may be judged on the basis of righteousness and such decisions or policies should provide benefit to a larger section of the society.

On a preliminary understanding of utilitarianism, it appears that it favours affirmative actions on the ground that it seeks to give benefit to a larger section of the society. However, the major criticism of utilitarianism is that it ignores the interest of the minority. The theory only intends to provide benefit to a "majority section" of the society, meaning thereby, it is the "minority" whose interests would be compromised or unaddressed. Therefore, on this premise, utilitarianism falls flat to justify affirmative actions in real sense.

Bentham's utilitarianism has been criticised by Robert Nozick on two grounds. Firstly, he states that Bentham's utilitarianism ignores the interest of minorities. Secondly, he states that the amount of resources required to maximise pleasure would always be more every subsequent time. This is called the "law of diminishing marginal utility".

4.2.4 Immanuel Kant's Categorical Imperative

Immanuel Kant is a German philosopher who hails from the 18th century and is known for his critical philosophy. He has written several books such as "The Groundwork of Metaphysics of Morals", "The critique of practical reason", and "The Metaphysics of Morals". He has also propounded a theory of Categorical Imperative. It is *imperative* because "it is a command addressed to agents who could follow it but might not. It is *categorical* in virtue of applying to us unconditionally, or simply because we possess rational wills, without reference to any ends that we might or might not have. It does not, in other words, apply to us on the condition that we have antecedently adopted some goal for ourselves." Therefore, the rules for the society are unconditional and is not based on desire or ends of the society, unlike the utilitarian theory.

It is difficult to justify affirmative action through Kant's Categorical Imperative for a variety of reasons. Affirmative action is the means to achieve social equality which requires treating people as means to achieve an end. This runs contrary to Kant's theory on the ground that it is immoral to treat people as a means to achieve an end. Another reason is that it is wrong to discriminate the present to correct the past discriminations.

4.2.5 Amartya Sen's Capability Approach

Amartya Sen developed gave two normative claims to justify his capability approach.[92] The first claim is that "the claim that the freedom to achieve well-being is of primary moral importance and, second, that well-being should be understood in terms of people's capabilities and functionings." The rationale behind this approach is that different individuals have different capacities. The capacities of individuals are affected

[92] Amartya Sen, *Development as Freedom* (Oxford University Press, 2001).

for ample reasons such as disability, societal factors, environmental factors, political factors, etc.

The capability approach supports affirmative actions and does not see merit as a hard and fast rule to justify any decision.

4.2.6 Michael J. Sandel's Morality Arguments

Michael J. Sandel, in his book "Justice: What is the right thing to do?"[93] has emphasised on the arguments on affirmative action. While setting aside the constitutional and legal arguments, he focuses on the moral arguments. In chapter 7 of his book, he gives three moral arguments which are usually advanced to justify affirmative action. While giving arguments in favour of affirmative action, he relies upon the judgment given in the case of *Cheryl Hopwood v. University of Texas*[94] wherein the Circuit Court held that "race" cannot be the basis for providing affirmative action in admissions in the Universities. Cheryl Hopwood was a white but did not come from an affluent family. She was denied admission due to affirmative action policy in the Texas University despite her grade point of 3.8. This case was overruled by the US Supreme Court in *Grutter v. Bollinger*[95] by a majority of 5:4 and held that race-based affirmative action programmes can be allowed to promote diversity.

According to Sandel, the first reason is "correcting the testing gaps". The second reason is "compensating for the past wrongs" and the third reason is "promoting diversity".

[93] Micheal J. Sandel, *Justice: What's the Right thing to do* (Penguin UK, 2010)

[94] *Cheryl Hopwood v University of Texas* 78 F.3d 932 (5th Cir. 1996).
[95] *Grutter v Bollinger* 539 U.S. 306 (2003)

In the first reason, Sandel compares marks scored in a SAT exam by two different individuals belonging to different background. He states that 700 marks in SAT scored by a Black who has completed his education from a small-town community school would mean more than the score of students who has completed his education from a private school in Manhattan. Therefore, he argues that such gaps should be recognised and more accurate measures should be devised to fulfil each individual's academic promise.

As far as second reason is concerned, it is often advanced as jurists and philosophers to justify affirmative action. Preference should be given to make up for the historical discrimination which has eventually placed them at a disadvantaged position. But critiques argue that students Hopwood, who had no role to play in the historical discrimination and rather belong to a less affluent family should not be compelled to make up for the historical wrongs. The critiques also state that doing so would be immoral. Sandel states that it is the "collective and moral responsibility" of the society to redress the wrongs of the past.

The third reason is "promoting diversity". This is the most frequently advanced argument in favour of affirmative action. There is no need to show collective and moral responsibility of the society or to that by giving preference we want to make up for the historical discrimination. All what is required to show is that by giving preference to weaker section or minority would increase diversity.

Apart from these three arguments, Sandel also emphasise upon the affirmative action policies in private housing projects. He states that if diversity serves common good then by giving racial preferences, rights of others are not violated. Therefore, affirmative

policies, whether in public or private sector, should be adopted because it serves the common good.

4.2.7 Ronald Dworkin's Merit Approach

Ronald Dworkin has given his own concept of "merit"[96]. According to him, merit is nothing but the mission of the university and the object which the university seeks to achieve. He states that once the university has defined a mission, one can have a legitimate expectation to be considered for admission if the candidate meets the standards in a better manner than other candidates. He states that "justice in admissions is not a matter of rewarding merit or virtue, the mission defines the relevant merit and not the other way around".

Dworkin's approach of merit has been criticised on the ground that what if the university adopts a discriminatory mission. Critics refer to antisemitic policies of Ivy League universities in the 1920s and 1930s.[97] Dworkin responds by drawing a difference between the use of race for exclusion in the segregationist era and use of race for inclusion in the affirmative action in the inclusive era. He states that exclusion in the segregationist era was based on the preposterous idea that one is inferior than other. Whereas the affirmative action is based on the idea of inclusivity and does not carry any such prejudice against those who fail to get admissions. Therefore, if students like Hopwood fail to get admission today, then, it does not mean that she was less worthy or inferior.

The above-mentioned jurisprudential debates do not expressly reflect upon affirmative action in private sector. The approach taken by Rawls, Sandel, and Sen justify

[96] Ronald Dworkin, 'Why Bakke Has No Case' [1977] 24 New York Review of Books
[97] Lowell, 'Lowell Tells Jews Limit at Colleges Might Help Them' *New York Times* (17 June 1922)

affirmative action by taking into consideration the existing gaps, inequalities, and capacities of individuals. Therefore, these issues may be recognised by a private entity capable of discharging public functions.

4.3 Understanding the Horizontal Application from foreign jurisdictions

In most jurisdictions, the constitution does not explicitly state that the rights shall be enforced against non-state actors also. However, the constitutional courts have interpreted the provisions in such a way that a private dispute has been decided on the touchstone of constitutional provisions.

4.3.1 USA's Shelley v. Kraemer

In the United States of America, the Fourteenth Amendment was adopted in 1868[98] in order to abolish the Black Codes[99] and Jim Crow Laws[100]. The Black Code were used to prevent the Blacks and African Americans to take up better employments, and forced them to continue menial labour. On the other hand, the Jim Crow Laws segregated the Blacks from Whites, and as such they were required to live in separate neighbourhood, separate public facilities were made such as in schools, parks, transportations, church, and restaurants. Stigma was also attached to such segregation.

Section 1 of the Fourteenth Amendment provided for citizenship rights and equality protection clause.[101] It explicitly states that no state shall make any law which shall deny the equal protection of the laws, or deprives any person of life, liberty, or property. A bare perusal of this provision would entail that a primarily it is the state's duty to

[98] US Constitution 1868, 14th Amendment
[99] Teri A. McMurtry-Chubb, 'The Codification of Racism: Blacks, Criminal Sentencing, and the Legacy of Slavery in Georgia' [2009] 31 Thurgood Marshall L. Rev.
[100] ibid
[101] US Constitution 1868, 14th Amendment.

provide equal treatment and protection, and it does not caste any duty on non-state entities or private entities.

In *Shelley v. Kraemer*[102], the Appellant, Shelly who belonged to an African American family purchased a property from the Respondent without the knowledge of a restrictive covenant. The covenant restricted the non-whites to sell the property to Whites only. The respondent sued the appellant to enforce the restrictive and sought an injunction from the court. The Supreme Court of Missouri enjoined the appellant from taking ownership and ultimately upheld the racial restrictive covenant.

When this case was brought before the US Supreme Court, then the Court reversed the decision. The Court granted a writ of certiorari and held that the racially restrictive covenant was in derogation with the Fourteenth Amendment thereby violating the equality clause. Chief Justice Vinson explained the basis of striking down a racially restrictive covenant by applying the constitutional provision. He stated that the 14th Amendment applied to judicial enforcement of covenants of an agreement also, and therefore, the court can enforce or strike down a covenant on the touchstone of the constitution and such would be a state action. When the Shelley's case was decided, the ruling given in *Plessy v. Fergusan*[103] which upheld the "separate but equal" doctrine was still in practice. Therefore, Shelley's case is a significant deviation from the Plessy's case.

Shelley's case has been subject to controversies and debates among scholars and jurists. It is pertinent to note that the restrictive practices on transferring the ownership of a property in the US was carried out individuals and property owners. Such practices

[102] *Shelley v Kraemer* 334 U.S. 1 (1948)
[103] *Plessy v Fergusan* 163 U.S. 537 (1896)

were not a result of a state action or a legislation, rather they were being practised through agreements with restrictive covenants. This judgement had, inadvertently, imposed a duty on private parties to ensure equality and non-discrimination. However, the standard interpretation of the US Constitution would be that it does not expressly imbibe doctrine of horizontal effect.

4.3.2 Canada's RWDSU v. Dolphin Delivery Ltd.

Similar to the United States' fourteenth amendment, the Canadian constitution also provides for an equality clause[104] in the First Part, *inter alia*, Canadian Charter of Rights and Freedoms of the Constitution Act, 1982[105]. Paragraph 1 of Article 15 of the Charter states that every individual shall be equal before the law and shall get equal protection of the laws without any discrimination based on religion, race, sex, colour, national or ethnic origin, age, or mental or physical disability. However, paragraph 2 of Article 15 provides for affirmative action policies, and such policies shall be valid which ameliorate the conditions of those groups who are disadvantaged due to race, religion, colour, sex, national or ethnic origin, age, or mental or physical disability.

It is pertinent to note that the provisions of Article 15 do not use the word "state" and further, does not explicitly cast a duty upon the state to guarantee such rights. Moreover, other provisions which guarantee rights and freedoms such as fundamental freedom of religion, conscience, peaceful assembly and association[106], the right to vote[107], right to livelihood[108], protection from arbitrary detention[109] and cruel treatment[110], and right

[104] Canadian Charter of Rights and Freedoms, Part 1 of the Constitution Act, 1982, enacted as Schedule B to the Canada Act, 1982 (U.K.), 1982, c.11.
[105] ibid
[106] Ibid, art 2
[107] ibid, art 3
[108] ibid, art 6(2)
[109] ibid, art 9
[110] ibid, art 12

against self-incrimination[111] do not use the word "State". As a result, the Charter does caste a duty on State to protect these rights, however, a purposive interpretation would entail that they could be enforced against a non-state actor as well.

In contrast to the US Supreme Court's decision in *Shelley v. Kraemer*[112], the Canadian Supreme Court has given a different judgment. In Retail, Wholesale and Department Store Union, Local 580 v. Dolphin Delivery Ltd.[113] (hereinafter referred to as "RWDSU v. Dolphin Delivery Ltd."), the issue with respect to secondary picketing. In this case, the Union which was conducting a strike against one employer threatened to picket the employees of the other employer which provided services to the first employer. Dolphin applied for an injunction against the Union. The trial court held that "secondary picketing" is not protected under the existing laws of Canada. The trial court applied the common law principle and treated secondary picketing as a tort of inducing or causing a breach of contract.

The defendant challenged the trial court's judgment on the ground that it violated their freedom of expression under S. 2(b) and freedom to form association under S. 2(d) of the Charter of Freedoms and Rights[114]. Chief Justice McIntyre held that a Charter does not apply to a court's decision because Section 32 includes all branches of the government but does not mention courts. Because of this reason, the Charter would not apply to litigation between "private individuals". However, he also observed that the courts must apply the common law in such a manner which is not in derogation with

[111] ibid, art 13
[112] *Shelley v Kraemer*, 334 U.S. 1 (1948) (US)
[113] *Retail, Wholesale and Department Store Union, Local 580 v Dolphin Delivery Ltd.* (1986) 2 S.C.R. 573 (Can.)
[114] Canadian Charter of Rights and Freedoms, Part 1 of the Constitution Act, 1982, enacted as Schedule B to the Canada Act, 1982 (U.K.), 1982, c.11.

the fundamental principles of the Charter. This observation paves way to indirect horizontal application of the charter to private individuals.

The ratio of *RWDSU v. Dolphin Delivery Ltd.* is not as strong as the decision of *Shelly v. Kraemer* as far as horizontal effect is concerned. On the one hand, provisions of the Canadian Constitution are wide enough to apply the Charter of freedoms and rights to non-state actors, however, the Canadian Supreme Court had adopted a narrow approach. On the other hand, the US Constitution and the fourteenth amendment explicitly mentions that it is the State's paramount duty to protect rights and freedoms, however, the US Supreme Court gave broader interpretation to its provisions and have extended their application to non-state actors as well.

4.3.3 South Africa's Du Plessy v. De Klerk

On 27th April 1994, the Interim Constitution of South Africa was enacted and the Black South Africans lead by Nelson Mandela got the right to vote in the first free and fair elections.[115] The Interim Constitution[116] did not explicitly mention about the application of Chapter 3, *inter alia,* Fundamental Rights Chapter, to private entities. S. 7(1) stated that Chapter 3 binds all legislative and executive organs of the State.[117] Therefore, no "direct horizontal application" of Chapter 3 would be allowed from a bare perusal of this provision.

The issue of "horizontal application" of Chapter 3 arose before the Courts of South Africa time and again. The Courts in South Africa have given contradicting opinions. Therefore, this issue was referred to the Constitutional Court of South Africa in *Du*

[115] Delisa Futch, 'Du Plessis v. De Klerk: South Africa's Bill of Rights and the Issue of Horizontal Application' [1996] 22 North Carolina Journal of International Law
[116] Constitution of the Republic South Africa Act 200 of 1993.
[117] ibid, s 7

Plessy v. De Klerk.[118] Two issues were raised in this case. First was whether the Interim Constitution applied retrospectively to the facts of this case. Second was whether Chapter 3 of the Interim Constitution applies horizontally to private entities also?

While this case was pending before the Constitutional Courts, several lower courts in five different cases held that the parties can invoke Bill of Rights even in a private litigation, thereby, allowing the horizontal application. In *Mandela v. Falat,*[119] the Supreme Court's Witwatersrand Division was tasked to decide a defamation case and the same was countered by the opposite party by invoking the freedom of speech guaranteed under Article 15 of the Interim Constitution. The Court applied the horizontal effect doctrine and held that it will apply to litigation between private litigants also. The same Court delivered a similar verdict in *Holomisa v. Argus Newspapers.*[120]

The Eastern Cape Division of the Supreme Court in *Gardener v. Whitaker*[121] was tasked with a similar case of defamation and the horizontal application of freedom of expression. The Court held that S. 15 applied even to the private acts falling under common law or public law. The above mentioned three cases, *viz.*, Mandela, Holomisa and Gardener were all concerned with defamation suit in contrast to the freedom of expression.

In contrast to the above three cases, the Durban and Coast Local Division of the Supreme Court in *Motala v. University of Natal*[122] was hearing a challenge to an affirmative action policy of Natal University which provided for quota for Indian

[118] *Du Plessy v De Klerk* 1996 (3) S.A. 850
[119] *Mandela v Falat* 1994 (4) BCLR I (W)
[120] *Holomisa v Argus Newspapers* 1996 (2) S.A. 588.
[121] *Gardener v Whitaker* 1994 BCLR 19 (E).
[122] *Motala v University of Natal* 1995 (3) BCLR 374 (D)

students in admission. The plaintiff argued that this policy violated equality clause under S. 8 of the Interim Constitution. The Court held that the equality clause under S.8 can be horizontally applied and as a result refused to apply the principle laid down in the maxim, *expressio unius exclusio alterius.*

Another case was decided by the Bophuthatswana Supreme Court in South Africa in the case of *Baloro v. University of Bophuthatswana*[123] wherein an employment policy was challenged on the ground of violation of right to equality as enshrined under S.8 of the Interim Constitution. After relying upon United States' "state action" doctrine, the Court held that fundamental rights apply to private entities also. However, the court circumscribed the horizontal effect by applying state action doctrine and held that the "organ of state" should be "integrated int the structures of authority of State".

By the time these five cases were decided by various courts in South Africa, the Constitutional Court was still hearing the case in *Du Plessy v. De Klerk.*[124] The Constitutional Court deviated from the decisions of the lower courts and held that the constitutional provisions cannot be invoked in ordinary litigations under the private law. After this judgment, in 1996, the South Africa's final Constitution was enacted[125]. This diluted the effect of the Du Plessy's judgment. The new constitution provided for direct horizontal application.[126] S. 8(2) of the new Constitution states that the Bill of Rights shall apply to a natural as well as a juristic person and while giving effect to these rights, the court can apply the common law principles or must develop a common law principle if the legislation fails to give effect to such a right.[127]

---

[123] *Baloro v University of Bophuthatswana* 1995 (4) S.A. 197
[124] *Du Plessy v De Klerk* 1996 (3) S.A. 850
[125] Constitution of the Republic of South Africa Act, No. 108 of 1996
[126] Ibid, s 8(2)
[127] Ibid, S. 8(3)

4.3.4 Germany's Luth Case[128]

In this case, a director, during the Nazi regime, made an antisemitic notorious film, Jud Suss. A Senator in Hamburg called for a boycott against this film and requested everyone not to watch it. He also gave a speech in his private capacity and said that such films would affect Germany's film industry. The director applied for an injunction in the Hamburg Regional Court which was ultimately granted. Against such injunction, the Senator filed a constitutional complaint before the Federal Constitutional Court on the ground that such injunction violated freedom of expression. The Federal Court reversed the lower court's judgment and held that fundamental rights apply in a private litigation also and as such they entail indirect horizontal effect.

This case has been considered a landmark as far as the horizontal application of fundamental rights is concerned. However, this case has been criticized on the ground that a decision of the court should not be considered a 'state action'. If the decision of the court would be considered as state action, then there would be no sanctity left to the judicial process.

Upon analyzing the above-mentioned judgments from various jurisdictions, for some countries, it has been easier for them to adopt horizontal application and for some, it has been difficult. However, the essence of extending such application is to apply and enforce fundamental rights in private relations as well.

[128] *Luth*, 7 BVerfGe 198 (1958)

4.4 Role of Judiciary in applying the fundamental rights horizontally in various cases

In a significant case of *Anuj Garg v. Hotel Association of India and Ors.,*[129] the constitutional validity of Section 30 of the Punjab Excise Act, 1914 was challenged on the ground that it discriminated between men and women in employment in places where liquor in public places was served. This law didn't regulate the government premises, however, all such private hotels, restaurants, pubs, etc. which served liquor were regulated. The Supreme Court struck down the said provision. Further in Uphaar Tragedy's case[130], the Delhi High Court held that the state was duty bound to effectively regulate private property owners.

Moreover, as far as horizontal application of fundamental rights is concerned, the Right of Children to Free and Compulsory Education Act 2009 becomes significant as it mandated 25% quota in private institutions for children of economically weaker sections, which was also upheld by the Supreme Court.[131]

Justice Ravindra Bhatt in the Maratha Reservation case[132] observes that even private sector is can profess affirmative actions and alleviate discrimination and inequality. He observed, "*68. A method by which the private sector can substantively contribute to alleviate discrimination and inequality, is through its corporate social responsibility programmes… private sector managements need to show sensitivity to societal patterns of exclusion and must consciously make an attempt not to fall prey to dominant social*

[129] *Anuj Garg v. Hotel Association of India and Ors.* [2008] 3 SCC 1
[130] *Association of Victims of Uphaar Tragedy v Union of India and Ors.* [2000] 86 DLT 246 (DB).
[131] *Society for Unaided Private Schools of Rajasthan v Union of India and Another,* [2012] 6 SCC 1
[132] *Jaishri Laxmanrao Patil v State of Maharashtra* [2021] 8 SCC 1

stereotypes, which penalise people due to their birth into stigmatising jobs, even if they might be individually qualified and competent."

In sum and substance, the aforesaid analysis of various judgments and definition of constitutionalism would take us to a conclusion that Part III of the Constitution must apply to private entities capable of discharging public functions also with the same vigour and enormity.

4.5 The United States' Model of Affirmative Action in the Private Sector

The American Constitution did not originally have the equality clause unlike the Indian Constitution. Therefore, the America's struggle can be classified in two phases. In the first phase, it took almost hundred years in America to evolve substantive equality. In the second phase, once the concept of substantive equality was established, affirmative action policies were adopted in public and private sector. These phases can be understood by analysing the US Supreme Court judgments and the legislations made therein.

After the controversial judgment in *Dread Scott v. Sandford*[133]. The majority by 7:2 held that persons who migrated to the US such as negros, and were treated as slaves, and have now been freed, are not eligible to be considered as American citizens. Because of this reason, they had no *locus standi* before the Federal Court. On the ground of maintainability, Justice Taney refused to adjudicate upon the issue on merits. This judgment has received huge criticism for taking a staunch approach against the life and liberty of a person.

[133] *Dread Scott v Sandford* 60 U.S. 393 (1856)

Another precedent which backed the oppressive Jim Crow laws in the US was established in *"Plessy v. Ferguson"*,[134] despite the enactment of 13th and 14th amendments. The US SC held that separate facilities in public places for the Blacks was not in contravention with 13th and 14th amendment. The rationale behind this observation was that even Blacks are provided with separate facilities, however, all races were considered as equals only. The Court neglected the substantial evidence in this case which proved that Blacks lived in bad conditions. The stark reality was that Blacks did not have access to public places which was stigma free and without any discrimination.

Thereafter, *Brown v. Board of Education of Topeka*[135], came and is still considered as one of the landmark judgments on equality. This even led to the foundation of affirmative action in the US. The US SC overruled the "separate but equal doctrine" as was followed in *Plessy's Case.* The Court also cited certain sociological studies and found that such separate treatments were not equal and created inferiority among Blacks.

Civil Rights Act, 1964 was enacted after this judgment in order to give effect to the 14th Amendment substantively. Title VII of this Act was one of the major highlights. The 1964 Act was enacted to eliminate and protect persons from all forms of discrimination including the race-based discrimination in employment places. This also included private employment. Title VII is criticised because it allows "benign preferences" for minorities in an unjust manner. This eventually results in reverse discrimination against the majority who are whites.

[134] *Plessy v Ferguson* 163 U.S. 537 (1896)
[135] *Brown v Board of Education of Topeka* 347 U.S. 483 (1954)

This Act marked the origin of affirmative action in true sense. The key feature of this Act was that it also allowed affirmative action by private entities, although the same was voluntary. In 1979, for the first time, the US Supreme Court in "*United Steelworkers of America, AFL-CIO v. Weber"*[136], upheld affirmative action in private sector.

In this case, the private company along with the union, adopted a voluntary affirmative action in order to increase the representation of Blacks in "skilled craft positions" in equal ratio to the available labour force. Therefore, the company started training programs wherein 50% slots were dedicated to the Blacks. Justice Brennan, who was part of the majority (5:2) upheld the affirmative action under Title VII.

In "*Johnson v. Transportation Agency, Santa Clara County, California"*[137], the company adopted an affirmative action policy based on sex of the person. The Court held that affirmative action was justified in taking sex as a consideration in promotion.

In "*Adarand Constructors, Inc. v. Peña"*[138], the Supreme Court evolved a "strict scrutiny doctrine". The Court held that any affirmative action formulated either by the government or by a private entity would be subject to a strict scrutiny. This is seen as a restrictive decision.

The US model serves as a good example for India to adopt affirmative action for the private sector. Although it can be voluntary, even a voluntary affirmative action would benefit the inadequately represented in such sectors. The observations like that of

[136] *United Steelworkers of America, AFL-CIO v Weber* 443 U.S. 193 (1979)
[137] *Johnson v Transportation Agency, Santa Clara County, California* 480 U.S. 616 (1987)
[138] *Adarand Constructors, Inc. v Peña,* 515 U.S. 200 (1995)

Justice Bhatt in the Maratha came is a welcome step, and if the same can be implemented, then it would ultimately serve the socialistic goals of the Constitution.

CHAPTER 5

UNADDRESSED ISSUES IN PRIVATE SECTOR LEADING TO LACK OF ACCOUNTABILITY

There are various aspects which still need to be regulated either through new legislation or by way of an amendment. Issues like enforcement of disability laws in the private sector, providing social and economic security to gig workers, the liability of the private company for breach of data or privacy, procedural and constitutional hurdles in enforcing the right to be forgotten against a private entity, and making a private entity which is capable of discharging public functions amenable to writ jurisdiction.

5.1 Implementation of disability laws in private sector

"The Rights of Persons with Disabilities Act 2016" (hereinafter referred to as "RPD Act") ensures safety and prohibition of discrimination and guarantees protection to persons with disability. It replaces the "Persons with Disabilities (Equal Opportunity Protection of Rights and Full Participation) Act 1995", which was not in full compliance with the "United Nations Convention on the Rights of Persons with Disability Act 2006". The Indian Parliament has been empowered to give effect to international conventions and treaties under Article 253.

The RPD Act's peculiar feature is that it also applies to the private sector. A private entity or a private employer is bound to conform to the provisions of the RPD Act. The same can be inferred from various provisions of the Act. For instance, S. 21[139] of the Act states that "every establishment shall notify equal opportunity policy detailing

[139] The Rights of Persons with Disabilities Act, 2016

measures proposed to be taken by it in pursuance of the provisions of this Chapter in the manner as may be prescribed by the Central Government."[140]

In the above definition, the expression "establishment" has been used. This word has been defined under S. 2(i) of the Act. An establishment for the purpose of the RPD Act would mean a government and a private establishment. Thus, the definition includes a private entity as well, which means that even a private entity has to notify the equal opportunities provided for the disabled and the measures which have been taken under the RPD Act. However, implementing the RPD Act in the private sector is still an unaddressed issue.

There have been various cases before the enactment of the RPD Act which pertains to the non-application of disability laws in the private sector. In *Daalco Engineering Private Limited v. Satish Prabhakar Padhye and Ors.*[141] the Supreme Court was dealing with the issue of wrongful termination of an employee on the ground that he was disabled and the company did find him fit for the job. To address this issue, the court analysed two things. Firstly, the court held that the word "establishment" only included a government establishment. Secondly, even after giving a liberal interpretation to this provision, the Court cannot add a new term by extending the scope of the legislation. Therefore, the Supreme Court held that the 1995 Act[142] did not apply to a private company and the same cannot be enforced against them.

This case is a classic example of the non-application of disability laws in the private sector. Although the present RPD Act has done away with this issue, the problem of

[140] Ibid, s 21
[141] *Daalco Engineering Private Limited v Satish Prabhakar Padhye and Ors.* [2010] 4 SCC 378
[142] Persons with Disabilities (Equal Opportunity Protection of Rights and Full Participation) Act, 1995

implementation still exists.[143] Presently, a private employer is required to comply with the following as per the RPD Act-

i. Frame "Equal Opportunity Policy" and display them on their website.[144] The same shall be required to be registered with the "Chief Commissioner" or the "State Commissioner".[145]

ii. A "Liaison Officer" shall be appointed by a private establishment having 20 or more employees in order to scrutinise the recruitment process of disabled persons and also make necessary arrangements and facilities.[146]

iii. Vacancies and Posts for the disabled must be identified by a private establishment and the same shall be included in the "Equal Opportunity Policy".[147]

iv. The head of the private establishment is required to ensure protection from any form of discrimination.[148]

v. Other benefits such as training, assistive devices, barrier free environment[149], medical benefits, and special leave[150] should be provided by the employer.

vi. Accessibility and infrastructure must be provided which shall include building a physical environment, providing transportation, etc.[151]

vii. Private employers having 20 or more employees shall be required to maintain records of disabled persons.[152]

---

[143] K Sumanth Gowda, Obligations of private companies towards persons with disabilities, Times of India, (19th June 2021) <https://timesofindia.indiatimes.com/readersblog/k-sumanth-gowda/obligations-of-private-companies-towards-persons-with-disabilities-33860/> accessed 4 July 2022
[144] Rights of Persons with Disabilities Rules 2017, r 8(2)
[145] The Rights of Persons with Disabilities Act 2016, s 21(2)
[146] Rights of Persons with Disabilities Rules, 2017, r 8(3)(e)
[147] Rights of Persons with Disabilities Rules, 2017, r 8(3)(b)
[148] Rights of Persons with Disabilities Rules 2017, r 3(1)
[149] The Rights of Persons with Disabilities Act 2016, s 2(c)
[150] Rights of Persons with Disabilities Rules 2017, r 8(3)(c) and (d)
[151] ibid
[152] Rights of Persons with Disabilities Act 2016, s 22

While the RPD Act is comprehensive legislation which guarantees and ensures the protection of disabled persons in employment. However, the Act is still silent on the issue of wrongful termination merely on the basis of disability by a private employer. The Act also does not expressly mention that promotion and raise in the salary shall not be affected due to the disability of such an employee.

The RPD Act does not make it mandatory for private entities to provide employment to persons with disability. The affirmative action which the RPD Act intends to provide is purely voluntary and the private sector can choose not to provide employment to disabled persons at all. On one hand, the Supreme Court[153] has widened the scope of affirmative action[154] for the disabled to such an extent that such persons shall have the right to reservation in promotion in public employment.[155] On the other hand, the provisions of the RPD Act turn out to be a toothless tiger when it comes down to implementing them in the private sector.

5.2 Social and economic security for gig workers

The expression "gig worker" or "gig economy" usually refers to a situation where a person takes up a temporary position or works under a short-term contract in a private sector. Such a person would be remunerated on a day-to-day basis or upon fulfilment of a job in a specified manner. Presently, India has over 15 million gig workers on various platforms like Swiggy, Zomato, Uber, Ola, etc.[156]

[153] *Siddaraju v State of Karnataka* [2020] 19 SCC 572
[154] *Vikas Kumar v Union Public Service Commission and Ors.* [2021] 5 SCC 370
[155] *State of Kerela and Ors. v. Leesamma Joseph* [2021] 9 SCC 208
[156] ASSCHOM Report, 'Gig Economy, Aligning Consumer Preferences: The Way Forward' (*The Associated Chambers of Commerce and Industry of India*, 24 January 2020) <https://www.assocham.org/uploads/files/1628143386.pdf> accessed 4 July 2022

5.2.1 Who is a "gig-worker"

The Social Security Code, 2020 defines who is a gig worker. S. 2(35)[157] states that "a person who performs work or participates in a work arrangement and earns from such activities outside of the traditional employer-employee relationship" would be a gig-worker. The Code does not define what amounts to an "employer-employee relationship". The Supreme Court has however explained the difference between the concepts of the "employer-employee relationship" and "independent contractor".

In *Dharangadhara Chemical Works v. State of Saurashtra*[158] (hereinafter referred to as "Dharangadhara"), the Apex Court was tasked to analyse the characteristics of a "workman". The Court that a workman agrees to work himself and an independent contractor hire workforce to get the work done. This definition was based on the interpretation of an old law.

In *DC Dewan Mohideen Sahib v. The Industrial Tribunal, Madras*[159], the Supreme Court held that while distinguishing between an "independent contractor" and an "employee" it should not be done on face value. An element of autonomy must be established whenever a party is required to establish the characteristics of an "independent contractor".[160]

Balwant Rai Saluja v. Air India Ltd.[161], the Supreme Court, after reviewing a string of authorities, held that "the relevant factors to be taken into consideration to establish an employer-employee relationship would include the following -

i. who appoints the workers;

---

[157] The Social Security Code, 2020
[158] *Dharangadhara Chemical Works v State of Saurashtra* AIR 1957 SC 264
[159] *DC Dewan Mohideen Sahib v The Industrial Tribunal, Madras* AIR 1966 SC 370
[160] ibid
[161] *Balwant Rai Saluja v Air India Ltd*. [2014] 9 SCC 407

ii. who pays the salary/remuneration;

iii. who has the authority to dismiss;

iv. who can take disciplinary action;

v. whether there is continuity of service; and

vi. extent of control and supervision, *i.e.*, whether there exists complete control and supervision.

An evaluation of the working conditions of the drivers under the six-factor test laid down by the Supreme Court in Balwant Rai Saluja will throw light on the extremely ambivalent position of workers in the sharing economy, as the drivers do not meet three out of the six enumerated conditions. Uber is only entitled to receive a commission out of the fare earned by the driver. There is also no continuity of service, as the drivers have the option to provide their services at will and opt-out of the platform." Therefore, Ola and Uber have limited control over the drivers, and it would be wrong to say that they exercise complete supervision.

5.2.2 Issues with the new Code

The App-based companies like Uber, Ola, Zomato, and Swiggy, claim that they are not employers because they are merely intermediaries or are structured as aggregators. The labour laws of India require one to establish an employer-employee relationship in order to seek the benefits provided therein. Because of this reason, other provisions like dispute settlement and collective bargaining becomes almost impossible whenever a dispute arises. Justice DY Chandrachud has pointed out in a lecture about the vulnerable conditions of gig workers.[162]

[162] Justice DY Chandrachud, 'Urgent Legal Measures Needed To Improve App-Based Workers' Conditions; Laws Must Evolve To Address Privacy Concerns' (*Live Law*, 10 April 2022)

Secondly, there are ample number of overlapping definitions where one definition overlaps with the general layout of the Code. Thus, it becomes difficult to figure out which scheme applies to which category of workers. For instance, the Code defines a "gig worker"[163], a "home based worker"[164], "platform worker"[165] and "unorganised workers"[166]. On a bare perusal of Chapter IX, it appears that the entire Chapter shall apply to these workers, however, only Sections 112 to 114 provide for schemes for these workers. These provisions do not specify a timeline or period within which such schemes may be formulated by the government.

This issue was highlighted in public interest litigation filed before the Supreme Court in the case of *The Indian Federation of App Based Transport Workers (IFAT) v. Union of India.*[167] The petitioners stated that companies like Swiggy, Zomato, Uber, and Ola cannot call themselves mere "aggregators". Despite the fact that there may be an agreement, but still, there is a jural relationship between them and the company. The petitioners also stated that these companies use these contracts to "disguise the nature of the relationship". However, these relationships are de-jure and de-facto relationships, and therefore, gig workers are entitled to social security. In this petition, the petitioners highlighted that they are not concerned about the long-term benefits, rather they are concerned about the short-term daily remuneration which they need due to the extreme circumstances posed by the pandemic.

<https://www.livelaw.in/top-stories/justice-chandrachud-calls-for-laws-to-improve-conditions-of-app-based-workers-address-privacy-concerns-196311> accessed 9 June 2022

[163] The Social Security Code 2020, s 2(35)

[164] S. 2(36), The Social Security Code, 2020, s 2(36)

[165] ibid, s 2(61)

[166] ibid, s 2(86)

[167] *The Indian Federation of App Based Transport Workers (IFAT) v. Union of India*, Writ Petition (Civil) No. 1068/2021

Another confusion remains with the overlapping nature of these definitions. Platform workers are often gig workers; thus, all gig workers are platform workers. Therefore, the suggestion of the "Standing Committee on Labour 2020" was more rational wherein it was suggested that gig workers and platform workers should have been included within the ambit of unorganised workers and all such benefits could have been given to them without any confusion.

Thirdly, another issue remains unaddressed with respect to fluctuating income of workers. The Code makes it mandatory to establish an employee's provident fund. While this fund gives long-term security and has been beneficial in dealing with emergency situations like COVID-19 pandemic, but there is nothing in the Code which provide the workers with short-term benefits.

Fourthly, the provisions of the Code do not prescribe a proper timeline for the formulation of schemes. For instance, S. 114 states that the government shall notify schemes for gig workers and platform-based workers "from time to time". The expression "from time to time" is a vague provision and leaves it up to the government to formulate policies and schemes for such workers. Therefore, it appears that these provisions are merely recommendations and do not have a substantive force.

5.2.3 Collective bargaining

Collective Bargaining has been one of the dispute resolution mechanisms in labour law in various countries. It is a system which brings workers and their employers on an equal footing for a bargain or dispute settlement. This system has not received legal sanctity in India. Collective bargaining is often seen as a tool to empower weak workers to bargain against their dominant employers. This is also allowed to fight forced labour.

Forced labour is prohibited under Article 23 of the Constitution. However, this practice still exists especially in the unorganised sector.

Collective bargaining is a tool which is often used by trade unions to fight for the cause of workers and their members.[168] The rationale behind collective bargaining is that it promotes equality in bargaining power and promotes harmonisation in labour relations. According to International Labour Organisation, collective bargaining means "negotiations about working conditions and terms of employment between an employer, a group of employers or one or more organizations of employers on the one hand and one or more representative organizations of workers on the other, with a view to concluding agreements."[169] Apart from this definition, the "International Labour Office" in its 32nd Session held on 8th June 1949 adopted the "Right to Organise and Collective Bargaining Convention, 1949". This Convention provides for the protection to workers against acts of discrimination in relation to their employment.[170]

In India, the new Labour Codes do not provide for collective bargaining. It is pertinent to note that trade unions function properly in the formal sector, but in an unorganised sector especially a private one, trade unions usually fail to voice for their members whenever a cause arises. In an unorganised private sector, the position of the worker is deplorable and weak. They lack the courage to raise their concerns and disputes with their employer merely because there is a constant threat of losing their jobs.[171]

[168] George Meany, 'What American Labour Want' *Reader Digest* (July 1955)
[169] International Labour Organisation, 'Collective Bargain: A Workers Education Manual' 3 (Geneva, 1960)
[170] The Right to Organise and Collective Bargaining Convention 1949, art 1
[171] Zafar Hussain and M. Fazal Wani, 'Application and Enforcement of International Labour Standards in India: A Critique' [2011] 53 JILI 577

Mediation along with collective bargaining can serve a long way in the dispensation of justice.[172]

5.3 Liability of private company for breach of data

With the significant rise in information technology, almost every sector nowadays uses technology to collect, process, store, and use such data to provide and get services. Individuals are usually required to upload their personal and sensitive data such as name, age, mobile numbers, address, fingerprint, face, retina, etc. Apart from this, there are many e-commerce websites which provide the facility of saving card details in their database. In the present digital era, everyone is creating an enormous amount of data which is now being stored and used by non-state actors for various purposes.[173] The Information Technology Act, 2000 was enacted to regulate and protect sharing, storing, and collection of data. However, this legislation falls short in many aspects due to the growing technology in the market. Few of them have been discussed here.

5.3.1 Liability under the Information Technology Act, 2000

As far as civil liability is concerned, S. 43A provides for compensation in case any entity fails to process data.[174] S. 66E also provides for liability of a body corporate if there is a violation of privacy. S. 43A states that "where a body corporate, possessing, dealing or handling any sensitive personal data or information in a computer resource which it owns, controls or operates, is negligent in implementing and maintaining reasonable security practices and procedures and thereby causes wrongful loss or

[172] Debasis Poddar, 'Collective Bargain at Workplace: A Genesis of Alternative Dispute Resolution', [2021] 1 NMIMS L Rev 90
[173] Michael L. Rustad and Sanna Kulevska, 'Reconceptualizing the right to be forgotten to enable transatlantic data flow' [2015] 28 Harv JL & Tech 349
[174] Information Technology Act 2000, s 43A

wrongful gain to any person, such body corporate shall be liable to pay damages by way of compensation, to the person so affected." A bare perusal of this provision would entail that it intends to address the issue of data protection in India. However, this provision has a few unaddressed issues. In order to make an entity liable for a breach of data, the following essentials must be satisfied-

i. There must have been some negligence on part of the company in handling or processing the data; and
ii. The entity must have failed to maintain reasonable security; and
iii. Wrongful loss must have occurred to the victim or wrongful gain must have occurred to someone.

If all the three essentials are fulfilled, such a body corporate shall be liable to pay compensation. The first condition is that one must establish that there was some "negligence" on part of the body corporate. However, it does not cover those aspects where there has been an intentional breach of data and does not amount to negligence. There is a difference between "negligence to implement" and "intentional breach". In case of an intentional breach, no excuse shall be allowed, but in case of negligence, the body corporate can evade liability by proving even though they followed the necessary procedures, such breach still took place. In this case, it has to be established that not only procedures were not followed properly but also negligence also took place.

Moreover, the "Information Technology (Reasonable security practices and procedures and sensitive personal data or information) Rules, 2011" have been enacted pursuant to

Section 43A. Rule 3 defines "sensitive personal data or information". It includes the following[175]:

i. Password;
ii. Biometric information;
iii. Any detail related to bank account, credit card or debit card which is usually saved or taken by the IT Company;
iv. Medical records or medical history of a person;
v. Any data related to the mental or psychological or physical condition of a person;
vi. Any data related to the sexual orientation of a person.
vii. Any above-mentioned data collected by a body corporate under a service contract.

Rule 7 allows for the transfer of the above sensitive personal data from the body corporate to another only if it is necessary for the performance of a lawful contract.[176] Therefore, these rules once read with S. 43A of the Act would give a conclusion that a violation of the above-mentioned personal sensitive data would only attract civil liability.

5.3.2 Excessive Delegated Legislation

The issue herein is that these rules are a result of delegated legislation. S. 43A empowers the government to frame rules and define what constitutes sensitive personal information. While the Parent Act allows for such delegated legislation, the same

[175] Information Technology (Reasonable security practices and procedures and sensitive personal data or information) Rules 2011, r 3
[176] Information Technology (Reasonable security practices and procedures and sensitive personal data or information) Rules, 2011

should not be allowed as "data protection is the core of the Parent Act". S. 43A gives excessive power of delegated legislation and allows the executive to make rules on a sensitive and essential subject without passing it through both Houses of Parliament. This means that the executive can alter or tinker with the list anytime as per its whims and fancies without tabling it before the Parliament.

To understand the scope of delegated legislation and what powers can be delegated, reliance can be placed on a landmark judgment delivered by a seven-judge bench of the Supreme Court in *In Re: Delhi Laws Act 1912 Case*[177]. Each judge gave their own opinion, but the overall conclusion of the ratio was that essential powers cannot be delegated. Justice Kania and Justice Das made it expressly clear that any essential power of the parent legislation cannot be delegated to an executive. Moreover, in a recent case, the Supreme Court in *Franklin Templeton Trustee Services Private Limited vs. Amruta Garg*[178] the Supreme Court held in para 63 that if delegated legislation is excessive or disproportionate then the same can be called manifestly arbitrary.

It is due to the above-mentioned reasons, that comprehensive legislation should be enacted by the Parliament. For instance, Personal Data Protection Bill 2019 should be enacted to regulate such issues. This Bill would prevent the delegation of such essential powers to the executive. The presence of a statutory sanctity to the sensitive and personal data, which will not be available to the government to alter without a parliamentary amendment, would ensure the body corporate, especially the private companies take the laws seriously.

[177] *In Re: Delhi Laws Act 1912 Case,* AIR 1951 SC 332
[178] *Franklin Templeton Trustee Services Private Limited v Amruta Garg,* [2021] 6 SCC 736

5.4 Enforcing the right to be forgotten against a private IT-company

The right to be forgotten is considered an offshoot of the right to privacy. The right to be forgotten, in common parlance, means the right to get the data deleted or erased when the disclosure of such data becomes illegal or futile. There have been a plethora of cases in India where petitioners have claimed it as a fundamental right under Article 21 of the Constitution. However, Supreme Court has not considered it a fundamental right yet.

5.4.1 The Right to be forgotten in the European Union legal framework

This right is provided under Article 17 of the General Data Protection Regulation (GDPR).[179] This provision provides for the right to erasure or the right to be forgotten. Earlier the "Data Protection Directive"[180], which got replaced by the GDPR did not contain this right. Article 17 of GDPR includes the following grounds for the erasure of data:

i. When personal data becomes futile and is not required for processing;
ii. When the person who has given the consent earlier has withdrawn the consent for storing and processing of such data;
iii. When the processing of data is being done for an unlawful purpose;
iv. When the domestic laws make it necessary for the erasure or deletion of such data;
v. This right can be invoked on the ground of freedom of speech and expression;
vi. Erasure of data is warranted by public health or public interest;

[179] EU General Data Protection Regulation (GDPR): Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016
[180] Directive 95/46/EC (General Data Protection Regulation), OJ 2016 L 119/1

European Union has adopted this right substantively in their jurisprudence. In a landmark case of *Google v. Spain*[181], the Court of Justice of the European Union ("CJEU") in 2014 held that the right to be forgotten is an implicit part of Articles 12 and 14 of the Data Protection Directive[182]. The Court held that Google was responsible for storing, collecting, and publishing data to the public. Therefore, the Court directed Google to delist the search results which displayed the Petitioner's house auctioning details which took place ten years ago. It is pertinent to note that this decision came before the adoption of GDPR as the previous regulation did not expressly recognise the right to be forgotten.

A similar decision was given in *Google LLC v. Equustek Solutions Inc.*[183] by the Canadian Supreme Court. A majority by 7:2 of the Canadian Supreme Court upheld the lower court's order to delist the domains and websites of Datalink. In another case, Google was again involved in litigation pertaining to the de-listing of search results and the right to be forgotten. In *Google, Inc v. Commission nationale de l'informatique et des libertés (CNIL)*[184] the Grand Chamber of CJEU gave a mixed verdict and held that it was up to the courts to decide whether the right to be forgotten can be exercised to de-list a search result.

These judgments have sparked another debate with respect to the challenges posed by exercising the right to be forgotten. The right to be forgotten is seen in contrast with the right to information. Google and all other private companies often submit that the company has a legal duty to protect the right to information of people and the same cannot be curtailed by merely exercising the right to be forgotten. Therefore, for

[181] *Google Spain SL v Agencia Española de Protección de Datos* C-131/12
[182] Directive 95/46/EC (General Data Protection Regulation), OJ 2016 L 119/1
[183] *Google LLC v. Equustek Solutions Inc.* 2017 SCC 34
[184] *Google, Inc v. Commission nationale de l'informatique et des libertés (CNIL),* C-507/17

policymakers, it has become a tough task to reconcile the right to be forgotten with the right to information.

5.4.2 The right to be forgotten in the Indian legal framework

In India, the Personal Data Protection Bill, 2019 ("PDPB") provides for the right to be forgotten under S. 20. There are three grounds under this provision for the erasure of the data. Firstly, when the data so disclosed has served its purpose and has now become futile, such data can be deleted. Secondly, the data principal who gave consent to share such data has now withdrawn their consent. Thirdly, the disclosure was made in contravention of any provisions of PDPB or any other law for the time being in force.

Upon a bare perusal of the above provisions, the GDPR is more comprehensive. However, as far as enforcing this right against a private entity is concerned, the petitioner is usually required to file a writ under Article 226 or under Article 32 before a High Court or Supreme Court respectively. However, the difficulty lies in the fact that a private entity, as per the existing constitutional scheme, is not amenable to the writ jurisdiction of the Supreme Court or a High Court. Therefore, the litigants have to arraign the government as a primary party and then arraign the private entity as a secondary party in order to enforce the right to be forgotten. Moreover, when the High Courts are inclined to grant reliefs, in most cases, the directions are primarily given to the Ministry of Electronics and Information Technology ("MeITY").

There are a plethora of cases in which the High Courts of various states have enforced the right to be forgotten. In *ABC v. Union of India and Ors.*[185], the Bombay High Court directed the Court's registry to remove an acquittal order passed earlier. The petitioner,

[185] *ABC v Union of India and Ors.* Writ Petition No. 3499 of 2021 (Delhi High Court).

in this case, was facing difficulty in getting jobs because of an online acquittal order posted on the court's website. In 2017, in *Sri Vasunathan v. The Registrar General,*[186] the Kerela High Court recognised the right to be forgotten in sensitive matters involving women.

In *Zulfiqar Ahman Khan v. Quintillion Business Media Pvt. Ltd. and Ors.,*[187] Justice Pratibha M. Singh recognised the right to be forgotten and directed the media platform to remove certain articles which were detrimental to the petitioner's personal life. The Court held that the "right to be forgotten" and the "right to be left alone" are inherent parts of the right to privacy.

In *X v. Youtube.com*[188], the respondent relied upon the ratio given by the Madras High Court and Orissa High Court[189], wherein both these courts have held that the right to be forgotten is not a protected right under the statute or the constitution. However, the Delhi High Court relied upon *Zulfiqar Ahman Khan's case* and directed youtube.com to remove all the videos and clips pertaining to the petitioner. It is pertinent to note that in this case, the defendants were private entities and an application for grant of temporary injunction was filed by the Petitioners under Order XXXIX Rules 1 and 2 of the Code of Civil Procedure, 1908. Since the nature of the relief sought under the right to be forgotten has a restraining effect on the opposite party, the relief having the highest proximity with this right in a statute was the relief of temporary injunction.[190] Had it been a writ petition, the petitioners would have been required to arraign the state as a party. Therefore, the law on this issue needs to be redressed.

---

[186] *Sri Vasunathan v The Registrar General* [2017] SCC OnLine Kar 424
[187] *Zulfiqar Ahman Khan v Quintillion Business Media Pvt. Ltd. and Ors.* [2019] SCC OnLine Del 8494.
[188] *X v. Youtube.com* [2021] SCC OnLine Del 4193
[189] *Subhranshu Rout v State of Odisha* [2020] SCC OnLine Ori 878
[190] Code of Civil Procedure 1908, O. XXXIX R. 1 and 2

In *Jorawer Singh Mundy* v. *Union of India and Ors.*,[191] the Delhi High Court directed the private entities such as indiankanoon, Google and Yahoo to block the publication of a judgment in which the petitioner was acquitted. It is pertinent to note here that these private entities were arraigned as respondents along with the Union of India. If the state would not be arraigned as a party, then it would have been difficult for the petitioners to claim such a right against these private entities alone.

5.4.3 Issues in enforcing the right to be forgotten against private entities in India

A cursory look at S. 20(3) of the PDPB would entail that an Adjudicating Officer shall be required to try such cases. If the PDPB is enacted as legislation, a more effective hearing would be carried out against a private entity in an appropriate manner.

Invoking the writ jurisdiction under the Constitution creates hurdles because the petitioner has to establish that primarily he has a protected right to be forgotten under the constitution, and then the petitioner is required to satisfy the court on the merits of his case. In such cases, the private entity which is arraigned as a party holding the data takes the defence that private entities are not amenable to the writ jurisdiction of the High Court or Supreme Court. On the procedural nitty-gritty, the private entities try to evade their liability to remove data which has become detrimental to an individual's freedoms and rights.

Enforcement of the right to be forgotten was disallowed by the Gujarat High Court on similar grounds. In *Dharamraj Bhanushankar Dave v. State of Gujarat and Others*[192] the court observed that the petitioner has failed to point out any specific provision or legislation under which the court restrain the respondents from publishing the

[191] *Jorawer Singh Mundy* v. *Union of India and Ors.* [2021] SCC OnLine Del 2306
[192] *Dharamraj Bhanushankar Dave v State of Gujarat and Others,* [2017] SCC OnLine Guj 2493

judgments. The Court ultimately held that the prayer sought by the petitioners is liable to be declined as it does not amount to any violation of Article 21 of the Constitution.

Therefore, by enacting the PDPB as an Act, all persons will have a guaranteed statutory right, and the petitioner will only have to establish his case based on the facts and evidence. This process will eventually save the time of courts as well as the litigants.

The other alternative could be to declare the right to be forgotten as an implicit part of the right to privacy, and a judgment to this effect by the Supreme Court will make it easier for the aggrieved party to redress his rights efficaciously. In the landmark judgment of the Supreme Court in *KS Puttaswamy and Anr. v. Union of India and Ors.*[193] held that the right to privacy is an implicit part of fundamental rights under Part III of the Constitution. Justice Kaul's opinion reflects some aspects of the right to be forgotten.

5.5 "Private entities discharging public functions" and writ jurisdictions of Supreme Court and High Courts

The recent trends show that the government is reducing its burden of commercial activities and is focusing more on governance.[194] The State is distancing itself from business activities as well.[195] There are state actors and non-state actors, and the court should not erase the line which differentiates them. However, the same can be done if compelling circumstances arise.[196] The Supreme Court has gradually widened the scope of Article 12 by including more entities within its fore. Whenever a writ petition is filed against a non-state entity before the Supreme Court or a High Court, the petitioner is

[193] *KS Puttaswamy and Anr. v Union of India and Ors.* [2017] 10 SCC 1
[194] *BALCO Employees' Union (Regd.) v. Union of India* [2002] 2 SCC 333
[195] Zee Telefilms Ltd. and Anr. v. Union of India [2005] 4 SCC 649
[196] ibid

required to prove two things. Firstly, the petitioner will have to establish the "government agency" or "state-instrumentality" test. Secondly, the petitioner will have to establish the ingredients of "public functions" discharged by such an entity. If the petitioner successfully establishes these tests, only then the fundamental rights can be enforced against such an entity.

5.5.1 Judicial interpretation of 'public functions' and the test for determining 'government agency' or 'state-instrumentality' under Article 12

'Public function' is a subject concept, and it may differ from one country to the other. In general parlance, it means any function which is done for the benefit of the public, and the same is acceptable by them. Any entity, body or authority which falls within the meaning of 'state' under Article 12 is amenable to writ jurisdiction. However, as far as private entities are concerned, as a general rule, they would not fall within the meaning of 'state', therefore, the implication is that such private entities will not be amenable to the writ jurisdiction of the Court. In order to fill this vacuum, the Supreme Court in *Ajay Hasia's case*[197] and *International Airports Authority Case*[198] has evolved the following parameters to adjudge if an entity or a corporation is an instrumentality of State, *viz., firstly,* the government must be holding the entire share caption of the company; *Secondly,* the financial contribution of the government meets the major chunk of the corporation's expenditure; *Thirdly,* it must be ascertained whether the corporation enjoys a monopoly which may be either state-protected or state conferred; *Fourthly,* there must be a "deep and pervasive control of the state"; *Fifthly,* the functions of the corporation have proximity with the governmental functions. *Sixthly,*

[197] *Ajay Hasia v Khalid Mujib Sehravardi* [1981] 1 SCC 722
[198] *Ramana Dayaram Shetty v. International Airport Authority of India* [1979] 3 SCC 489

when a corporation is created or transferred a governmental department. *Pradeep Kumar Biswas*[199] case affirms the tests laid down in Ajay Hasia.

In *Jatya Pal Singh v Union of India*,[200] the Supreme Court defined 'public function' by way of a few tests. The Court held that *firstly*, it must be ascertained what is the degree and extent of responsibility that the entity has assumed. *Secondly*, the role and functions that are carried out by the state with respect to the subject matter of the dispute. *Thirdly*, it must be ascertained as to what degree of "public interest" is involved in the discharge of such function in question. *Fourthly*, it must be ascertained whether such duty arises out of a statute with respect to the "function" in question. *Fifthly*, it must be ascertained as to what degree and extent the entity can regulate, control or supervise the function so involved. *Sixthly*, the amount of financial investment borne by the entity in relation to the function so involved. *Seventhly*, whether the functions in question are obligated by the statute. *Eight*, the tendency and extent to which the functions are likely to be affected due to improper performance, thereby, leading to a violation of fundamental rights.

Further dE Smith, Woolf and Jowell defines public functions as, "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 function when they intervene or participate in social or economic affairs in the public interest. Public function need not be the exclusive domain of the State."[201]

[199] *Pradeep Kumar Biswas v Indian Institute of Chemical Biology and Ors.* [2002] 5 SCC 111
[200] *Jatya Pal Singh v Union of India* [2013] 6 SCC 452
[201] De Smith, Woolf and Jowell, *Commentary on Judicial Review of Administrative Action*, (5th edn, 1995)

Smith's definition of 'public function' appears to be wider as he states public functions should not be the exclusive domain of the state. It would be fallacious to say that a public function can only be derived from a responsibility enshrined under a law on a particular body. Thus, it would include task which is supposed to be carried out in the interest of people.

The scope of writ jurisdiction under Article 226 is wider than Article 32. After the enactment of the Constitution, the traditional view was that a body which did not have sovereign powers like "State" or a body which was not a creation of a statute cannot be considered a state within the meaning of Article 12. In *Rajasthan State Electricity Board v. Mohan Lal and Ors.*[202], a five judge bench adopted this traditional view and held that the Rajasthan State Electricity Board was the creation of a statute and was conferred with several powers. Thus, it is a state within the meaning of Article 12.

While relying on this case, the Court in *Sukhdev Singh and Ors. v. Bhagatram Sardar Singh and Ors.,*[203] the Court held that Oil and Natural Gas Commission, Life Insurance Corporation and Industrial Financial Corporation are "authorities" within the meaning of Article 12. Justice Matthew, who was part of the majority, adopted a different approach to this issue. In paragraph no. 80, Justice Matthew observes that the concept of "state has undergone a drastic change in the recent years."[204] Moreover, it would be wrong to say that say is only machinery which possesses authority. It must be viewed as a service corporation.

[202] *Rajasthan State Electricity Board v Mohan Lal and Ors.* [1967] 3 SCR 377
[203] *Sukhdev Singh and Ors. v Bhagatram Sardar Singh and Ors.* [1975] 1 SCC 421
[204] ibid

In *Zee Telefilms Case*[205], Justice N. Santosh Hegde who formed the majority (3:2) and wrote a concurring opinion along with Justice B.P. Singh and Justice H.K. Sema, observed in paragraph no. 35 that there is a line which differentiates state and non-state enterprises. The Courts cannot erase this line but the same can be done if the circumstances arise in future. However, the majority held that BCCI was not a state within the meaning of Article 12. Justice Hegde's opinion leaves the scope narrowly open for the courts to dilute and be flexible while applying these tests under Article 12.

In sum and substance, an entity will not be called as a state if any one of the tests is satisfied. According to the decision in *Ajay Hasia* and *Pradeep Kumar Biswas,* it must be shown that there is "deep and pervasive" control of the state over that entity. Such control can be with regard to finances, functioning, or administration.

In aforesaid tests, the first and the second tests as laid down in *Ajay Hasia* and *Pradeep Kumar Biswas* pose a unique problem in the present times. As discussed before, the corporations and private companies became wealthy enough that they were capable of investing in the infrastructure and natural resources of India, and therefore, with the passage of time, they didn't require financial assistance from the government. A recent example is Tata's acquisition of Air India completely. Presently, there are many private companies where neither the government holds the majority shares nor do they get any financial assistance from the state. However, such companies still tend to discharge public functions. Therefore, the tests laid down in Ajay Hasia and International Airport Authority case would lead us to an anomalous situation.

[205] *Zee Telefilms Ltd. and Anr. v Union of India* [2005] 4 SCC 649

5.5.2 Discharge of 'public functions' by private entities or non-state actors

The Supreme Court has been applying the tests laid down in Ajay Hasia and Pradeep Kumar Biswas in ample cases pertaining to the scope of Article 226. A mandamus can lie only if the person or the entity discharges public functions or is obliged to fulfil a statutory duty.[206]

In *Ramkrishna Mission and Anr. v. Kago Kunya and Ors.*[207], the petitioner wanted to continue his service till the date of his retirement in the Ramkrishna Mission's hospital. The petitioner filed a writ petition before the High Court and sought a writ of mandamus against the hospital to allow him to continue his tenure. The hospital submitted it was a private entity and therefore, was not amenable to the writ jurisdiction of the High Court. The case went to the Supreme Court wherein the court was required to decide upon the issue of whether the hospital in this case carries out public functions or not?

The Supreme Court answered in negative and dismissed the appeal. In para 37 of the judgment, the Court held that the hospital and the Ramkrishna Mission were not "State" within the meaning of Article 12 of the Constitution. The Court also held that service matters are contractual in nature, and to enforce a right under a contract, a writ petition cannot be filed. The effect of this case is that hospitals which appear to serve the people were held not to discharge public functions. The Supreme Court could have decided this case in a much more flexible manner. On one hand, the Court could have held that the hospital involved in this case discharged public function, and on the other hand, the

[206] *Andi Mukta Sadguru Shree Muktajee Vandas Swami Suvarna Jayanti Mahotsav Smarak Trust and Ors. v V.R. Rudani and Ors.* [1989] 2 SCC 691
[207] *Ramkrishna Mission and Anr. v Kago Kunya and Ors.* [2019] SCC 303

court could have rejected the claims of the petitioner on merits on the same ground that contractual disputes cannot be decided in writ jurisdiction.

There have been various judgments of the Supreme Court in which the court has widened the scope of "public function" and has declared many non-state entities as authorities for the purpose of Article 12. For instance, The Council for the Indian School Certificate Examinations, which is a registered society under the Societies Registration Act was declared as an authority.[208] Sainik School Society[209], Children's Aid Society[210], National Agricultural Cooperative Federation of India (NAFED)[211], Delhi Stock Exchange[212], and Project and Equipment Corporation of India[213] were all considered as authorities under Article 12 of the Constitution. Council of Scientific and Industrial Research (CSIR) was also considered as authorities in the landmark case of *Pradeep Kumar Biswas.*

5.5.3 Should private entities which are capable of discharging public functions be covered within the sweep of Article 12 for enforcing certain fundamental rights?

If a private right is protected under the statute or if other local remedies are available, then ordinarily a writ petition should not be filed. However, despite the existence of local remedies, if the appropriate forum is not available to seek that remedy, then a writ should lie against a private entity discharging public functions.

Recently, with the enactment of Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021, the intermediaries and digital platforms are

[208] *Vibhu Kapoor v Council of I.S.C. Examination* AIR 1985 Del 142
[209] *All India Sainik Schools Employees Ass. v. Defence Minister-cum-Chairman, Board of Governors, Sainik School Society* AIR 1989 SC 88
[210] *Sheela Barse v Secretary, Children Aid Society* [1987] 3 SCC 50
[211] *Ajoomal v Lilaram* [1983] 1 SCC 119
[212] *K. C. Sharma v Delhi Stock Exchange* [2005] 4 SCC 4
[213] *A.L. Kalra v P & E Corp. of India* AIR 1984 SC 1361

required to adopt a self-regulatory mechanism. While doing so, the compliance officers and redressal bodies constituted under these rules insinuate the fact that these entities are capable of affecting the rights of people at large. Moreover, these rules make certain statutory obligations to be fulfilled by these entities. Because of this reason, such private entities should be made amenable to the writ jurisdiction of the Court. Another reason is that almost all intermediaries, app-based companies providing services, search engines like google, yahoo, bing, etc. collect personal and sensitive data of their customers. This data includes the location of the person, keywords which he uses to search, eating preferences, biometrics, addresses, contact details, photographs, etc. Therefore, they are capable of affecting the right to privacy and other fundamental rights of a person.

Contrary to the above suggestion, Meta has submitted its affidavit and has contended multiple times that it is not a state within the meaning of Article 12 and freedom of speech and expression enshrined under Article 19(1)(a) cannot be enforced against them. The affidavit was submitted in *Wokeflix Through Mega Choubey v. Union of India and Ors.*[214] by meta before the Delhi High Court.

In a different case, the Calcutta High Court in *Bineeta Patnaik Padhi v. Union of India*[215], the Calcutta High Court held that private unaided educational institutes will be considered "State". Reliance was placed on the Supreme Court's judgment in *Marwari Balika Vidyalaya v. Asha Srivastava & Ors.*[216] The Court held that a writ petition shall be maintainable against a private unaided educational institute. In this case, the termination of a school teacher was restored. It is pertinent to note that in this

[214] *Wokeflix Through Mega Choubey v Union of India and Ors.* Writ Petition (Civil) 3899/2022
[215] *Bineeta Patnaik Padhi v Union of India* Writ Petition 5544 of 2021
[216] *Marwari Balika Vidyalaya v Asha Srivastava & Ors.* [2020] 14 SCC 449

case, the court did not give it a colour of "service matter" governed by an employment contract unlike the decision in *Ramkrishna Mission and Anr. v. Kago Kunya and Ors.*[217] In the *Ramkrishna case*, the court termed the termination of an employee as a service law contractual dispute and directed him to approach the appropriate forum.

The question is where do we draw a line and to what extent can we make it accountable? In sectors like education, banking, telecom, information technology, etc., all such entities, small or large are capable of performing those functions which the state used to perform. Therefore, the private entities forming part of these sectors should be considered as discharging public functions. In addition to this, if an entity is capable of affecting the fundamental rights of citizens, then the same should be amenable to the writ jurisdiction.

[217] *Ramkrishna Mission and Anr. v Kago Kunya and Ors.* [2019] SCC 303

CHAPTER 6

CONCLUSION, FINDINGS AND SUGGESTIONS

After carrying out in-depth research, and analysing the existing legislations and judicial pronouncements, the author gives conclusion, findings and suggestions on the questions and issues existing on this topic.

6.1 Conclusion

Accountability of an individual, a private entity, or of the State is *sine qua non* for good governance. Accountability lies at the heart of democracy, and the same cannot be diminished, erased, or tinkered with by any means. With the rise of private entities and privatisation of public sectors, the government cannot close the doors of its accountability. While it is not feasible to challenge every policy decision of the government, it is better to emphasise more on the accountability and liability of private entities which discharge public functions.

Accountability is considered as one of the major tenets of constitutionalism. The works of Hilarie Barnett and Henekin on constitutionalism emphasise on the importance of accountability in a democratic setup. Taking a cue from their scholarly works, it would be apposite realise the significance of accountability of a government entity. However, very little is spoken about the accountability of private entities, especially the ones which discharge public functions.

Indian Supreme Court has also evolved the idea of transformative constitutionalism and has vehemently applied to social issues such as adultery[218], LGBT rights[219],

[218] *Joseph Shine v Union of India* [2018] 2 SCC 189
[219] *Navtej Singh Johar v Union of India* [2018] 10 SCC 1

reservation[220], rights of women[221] in worship places and affirmative actions. However, the concept of constitutionalism hasn't been expounded yet to include economic issues as well. In cases like BALCO and Delhi Science Forum, the court has stated that economic policies cannot be challenged as a general rule and the constitutional courts will refrain from stepping into the economic wisdom of the government to undo or tinker with the economic policies of the government.

A challenge to the liberalisation and disinvestment policies of the government is not feasible merely because it stands diametrically opposed to the socialistic ideals of the constitution. India has surpassed such a stage and it will be futile to challenge the economic policies of the government. Post-liberalisation trends show that even the Supreme Court and the High Courts of several states have not found it feasible to interfere in the economic policies of the government. The need of the hour is to subsume the private entities capable of discharging public functions to the threshold of the constitution.

One of the major conclusions is that the government and the judiciary have taken various steps to create accountability of private entities in some aspects such as Corporate Social Responsibility, enforcing reservation and affirmative action policies in private unaided schools and colleges, enforcing the Vishakha guidelines in private companies, and the liability of intermediaries by regulating them under the IT Rules 2021, creating liability of Directors of a private company under the Prevention of Corruption Act, 1988 by removing the corporate veil, etc.

The application and enforcement of fundamental rights against non-state actors is an unexplored issue in India. Very less emphasis has been laid down on the horizontal

[220] *BK Pavitra (II) v Union of India and Ors*. [2020] SCC OnLine SC 822
[221] *Indian Young Lawyers Association v State of Kerela* [2018] SCC OnLine SC 1690

effect. The United States model serves as a good example of horizontal effect and affirmative action in the private sector. While it is argued that the private sector is hell-bound to make profits and maintain efficiency, affirmative action policies would impede the same. However, to say that inducting the less advantaged into the private sector would be stereotypical. Inclusivity is an inalienable part of a democratic society. If the selection process is based on exclusion, then we will have a society which will be skewed against the marginalized or the less advantaged. Therefore, affirmative action is the means to achieve the socialistic goals of the Constitution.

In George Orwell's Nineteen Eighty-Four, a "fictional state" which is marred by continuous surveillance and historical negation has been exhibited. It has now become a reality, where big corporations and private entities function neck to neck with the state.

Justice as an end and accountability as a means to this end acts as the spirit of the Constitution. In various constitutional jurisprudence this spirit may lie in the "brooding spirit of the law", or "the collective conscience of the society", or "the intelligence of a future day", or "the heaven of freedom", but what truly matters is "Justice" and accountability is one of its manifestations.

6.2 Findings

The researcher formulated a few research questions for the purpose of this dissertation. Upon an in-depth research and critical analysis of the existing laws and judicial pronouncements, the researcher has concluded with the following findings on each question so formulated.

Whether affirmative actions in private sector, voluntary or involuntary, should be regulated in India?

- Affirmative Action exist in private educational sector in India. For instance, Article 15(5) empowers the government to make special provisions for SCs, STs and OBCs.
- S. 12(1)(c) of The Right of Children to Free and Compulsory Education Act, 2009 requires the private school to admit at least 25% of the total strength of the class those children who belong to a weaker and disadvantaged group.
- No affirmative action exists in private employment sector in India.
- Based on the USA's model, and India's existing affirmative action in education sector, it can be regulated for private employment sector also.

What is the scope of horizontal application of fundamental rights in India and should it be applied to private entities capable of discharging public functions?

- Few provisions in Part III of the Constitution such as Article 17, 21, 23, 24 do not use the term "State". This means that they are enforceable against non-state actors as well. This is called horizontal application of fundamental rights.
- In a few judgments, the Supreme Court has analysed the horizontal application, but it is not applied to a great extent.
- The Indian Constitution does not recognise the US's "state action doctrine". Thus, the orders of the court cannot violate a person's rights.
- If a private entity discriminates any person on grounds of religion, race, caste, sex, or place of birth, then no action can lie before a constitutional court in India under the writ jurisdiction.

Whether the private sector in India failed to implement disability laws, and provide social security for gig-workers?

- After the enactment of The Rights of Persons with Disabilities Act 2016, disability laws now apply to private entities also. However, research shows that private entities do not implement them.
- The rights of gig-workers have been recognised the Social Security Code, 2020.
- The Social Security Code, 2020 does not provide for proper timelines in order to make it mandatory for the government to make policies for gig-workers.
- The Social Security Code, 2020 does not provide for short-term social and economic benefits to the gig-workers.

Whether the 'private entities which are capable of discharging public functions' be amenable to writ jurisdiction of the Supreme Court?

- Presently, the High Courts have writ jurisdiction to adjudicate matters against a private entity, but this is subject to fulfilment of certain conditions as laid down in *Ajay Hasia's Case and Pradeep Kumar Biswas' Case.*
- The Supreme Court's writ jurisdiction is narrower when a matter involving a private entity is concerned.
- Justice Matthew in *Sukhdev Singh's case* has kept the scope of Article 12 wide open so that it can be applied to a private entity capable of discharging public functions, as and when a compelling situation arise.

6.3 Suggestions

After identifying various shortcomings in the exiting laws, the author has formulated a few suggestions can widen the scope of accountability of private entities capable of discharging public functions. The suggestions have been illustrated as follows-

i. The main thrust of accountability of a private entity is based on the horizontal application of fundamental rights. The horizontal application of fundamental rights is seen as an impediment to privatisation policies. However, by implementing the horizontal effect it will maintain checks and balances between the fundamental rights and privatisation policies. The brooding spirit of the constitution is the diminishing accountability of the government and other authorities. It is because of this reason, the horizontal effect must be given paramount importance when deciding cases pertaining to violation of fundamental rights.

ii. With the increase of more jobs in the private sector nowadays, the need of the hour is to adopt affirmative action in the private sector also. As discussed in the third chapter, almost all public sectors now have private companies which are as big as a state's authority. While it will be difficult for the state to make it mandatory, however, it can be made voluntary. The United States model is the perfect example of affirmative action in the private sector. Title VII of the Civil Rights Act, 1964 explicitly allows for affirmative action even in private sectors. Justice Ravindra Bhatt's observations in the Maratha judgment should be given heed by the government to frame legislation to that effect.

iii. Private entities which discharge public functions and have the tendency to affect the fundamental rights of persons should be amenable to the writ jurisdiction of High Courts and Supreme Courts. While doing this, the tests laid down in *Pradeep Kumar Biswas, Ajay Hasia and RD Shetty's case* be given liberal and flexible interpretation. In this respect, the observation of Justice Matthew in *Sukhdev Singh's case* was a visionary one in 1975. According to his observation, the courts can still widen the scope of Article 12 if compelling circumstances

arise. Therefore, the need of the hour is that a dynamic, pragmatic and flexible approach be adopted while dealing with cases pertaining to the violation of fundamental rights of a person against a private entity.

iv. In sectors like education, banking, telecom, information technology, etc., all such entities, small or large are capable of performing those functions which the state used to perform. Therefore, the private entities forming part of these sectors should be considered as discharging public functions. In addition to this, if an entity is capable of affecting the fundamental rights of citizens, then the same should be amenable to the writ jurisdiction.

v. The right to be forgotten should be considered as part and parcel of the right to privacy. Enforcing the right to be forgotten against a private entity is a challenging task in India because it has not been declared a fundamental right under Part III of the Constitution. However, in the internet era, it has become necessary to enforce such a right. Usually, in a writ petition, on the procedural nitty-gritty, the private entities try to evade their liability to remove data which has become detrimental to an individual's freedoms and rights. In the alternative, the Personal Data Protection Bill, 2019 can be enacted and establish a separate Adjudicating Authority to deal with such matters against private entities.

vi. The implementation of disability laws in the private sector is one of the major issues which needs to be addressed. The new RPD Act applies to the private sector also. However, due to the lack of infrastructure and sensitivity towards the plight of the disabled, the Act cannot be implemented.

vii. Social and economic security must be guaranteed to gig workers. The Social Security Code makes it mandatory to establish an employee's provident fund. While this fund gives long-term security and has been beneficial in dealing with emergency situations like COVID-19 pandemic, there is nothing in the Code which provide the workers with short-term benefits. Another issue is that the Code does not prescribe a proper timeline for the formulation of schemes. For instance, S. 114 states that the government shall notify schemes for gig workers and platform-based workers "from time to time". The expression "from time to time" is a vague provision and leaves it up to the government to formulate policies and schemes for such workers. Therefore, it appears that these provisions are merely recommendations and do not have a substantive force. In light of these shortcomings, the proper amendments must be brought.

viii. The Personal Data Protection Bill, 2019 must be enacted in order to widen the accountability of private entities which handle and collect enormous amounts of data from their consumers. S. 43A of the IT Act gives excessive powers to the executive to define what amounts to personal sensitive data. After the *Puttaswamy Case,* since the right to privacy is considered a fundamental right, it would be arbitrary to delegate the power to executive on such issue. This Bill would prevent the delegation of such essential powers to the executive. The presence of a statutory sanctity to the sensitive and personal data, which will not be available to the government to alter without a parliamentary amendment, would ensure the body corporate, especially the private companies take the laws seriously.

BIBLIOGRAPHY

Articles

Anagha Sarpotdar, ‘Sexual Harassment of Women: Reflections on the Private Sector’ [2013] EPW 18

Anil K Makhija, ‘Privatisation in India’ [2006] EPW.

Ashwini Deshpande and Rajesh Ramachandran, ‘Traditional hierarchies and affirmative action in Globalising economy: Evidence from India’ [2019] Elsevier Journal World Development 63

Clarence J. Dias, ‘Corporate Human Rights Accountability and The Human Right to Development: The Relevance and Role of Corporate Social Responsibility’ [2011] NUJS Law Review 495

Danwood M. Chirwa and Christopher Mbazira, ‘Constitutional rights, horizontality, and the Ugandan Constitution: An example of emerging norms and practices in Africa’ [2020] 18 International Journal of Constitutional Law

Debasis Poddar, ‘Collective Bargain at Workplace: A Genesis of Alternative Dispute Resolution’, [2021] 1 NMIMS L Rev 90

Delisa Futch, ‘Du Plessis v. De Klerk: South Africa's Bill of Rights and the Issue of Horizontal Application’ [1996] 22 North Carolina Journal of International Law

Deshpande, Vinaya, ‘At MNCs, Sexual Harassment Complainants Face Uphill Battle’ *The Hindu* (8 March 2013)

George Meany, ‘What American Labour Want’ *Reader Digest* (July 1955)

Jandhyala B Tilak, “Private Higher Education in India”, [2014] EPW 32

Kalpana Sharma, ‘Corporate Social Responsibility (CSR): An Overview of the Indian Perspective’ [2016] IJLPP 1

Lowell, ‘Lowell Tells Jews Limit at Colleges Might Help Them’ *New York Times* (17 June 1922)

Mahal and M Mohanan, ‘Growth of Private Medical Education in India’ [2006] EPW 1009

Mark Tushnet, ‘The issue of State action/horizontal effect in comparative constitutional law’ [2003] International Journal of Constitutional Law 1

Michael L. Rustad and Sanna Kulevska, ‘Reconceptualizing the right to be forgotten to enable transatlantic data flow’ [2015] 28 Harv JL & Tech 349

Prachi Srivastava, ‘Public-private partnerships or privatisation? Questioning the state's role in education in India’, [2010] Taylor and Francis Routledge 540

Pradeep Kumar Chaudhary, ‘Role of Private Sector in Medical Education and Human Resource Development for Health in India’ [2013] 71 EPW

Pradip Baijal, ‘Compulsions and Options for Economic Reform’ [2002] EPW 4189

Professor Karl Klaire, ‘Legal Culture and Transformative Constitutionalism’ [1998] SAJHR 146

Ronald Dworkin, ‘Why Bakke Has No Case’ [1977] 24 New York Review of Books

Teri A. McMurtry-Chubb, ‘The Codification of Racism: Blacks, Criminal Sentencing, and the Legacy of Slavery in Georgia’ [2009] 31 Thurgood Marshall L. Rev.

TT Ram Mohan, 'Bank Privatisation by the Backdoor' [2013] EPW 12

Uma Rani and M. Sarala, 'A Study on Corporate Social Responsibility in Singareni Colleries Company Limited, [2013] International Journal of Research in Management' 31

Zafar Hussain and M. Fazal Wani, 'Application and Enforcement of International Labour Standards in India: A Critique' [2011] 53 JILI 577

Books

Amartya Sen, *Development as Freedom* (Oxford University Press, 2001).

Ashwini Deshpande, *Affirmative Action in India*, (1st edn, Oxford University Press, 2013)

C. Gopala Krishna, *Corporate Social Responsibility in India: A Study of Management Attitudes* (Mittal Publications, 1992)

De Smith, Woolf and Jowell, *Commentary on Judicial Review of Administrative Action*, (5th edn, 1995)

Durga Das Basu, *Commentary on the Constitution of India,* (9th edn, Lexis Nexis)

Hilaire Barnett, *Constitutional and Administrative Law*, (4th edn, 2002)

Hilaire Barnett, *Constitutional and Administrative Law*, (4th edn, Cavendish Publishing Limited, London, 2002)

John Rawls, *A Theory of Justice*, (first published 1971, Harvard University Press, Cambridge)

Katherine G. Young, *Constituting Economic and Social Rights*, (1st edn, Oxford University Press, 2012)

Micheal J. Sandel, *Justice: What's the Right thing to do* (Penguin UK, 2010)

O. Chinappa Reddy, *The Court and the Constitution of India*, (6th edn, Oxford University Press, 2013)

Robert Alexy, *A Theory of Constitutional Rights*, (1st edn, Oxford University Press, 2010)

Robert Nozick, *Anarchy, State, and Utopia* (Blackwell Publishers Ltd., 1974)

Samaraditya Pal, *India's Constitution- Origins and Evolution*, (1st edn, 2015)

Documents

Planning Commission, *Towards Faster and More Inclusive Growth: An Approach to the 11th Five Year Plan* (2006)

International Labour Organisation, 'Collective Bargain: A Workers Education Manual' 3 (Geneva, 1960)

UNODC, 'India: Countering Corruption in private sector: a shared responsibility' <https://www.unodc.org/southasia/frontpage/2013/may/india-countering-corruption-in-the-private-sector-a-shared-responsibility.html> accessed 3 July 2022

International Conventions, Treaties and Declaration

1930- Forced Labour Convention

1957- Abolition of Forced Labour Convention

1948- Freedom of Association and Protection of the Right to Organise Convention

1949- The Right to Organise and Collective Bargaining Convention

1951- Equal Remuneration Convention

Journals

Economic and Political Weekly

Harvard Journal of Law and Technology

International Journal of Constitutional Law

Journal of Indian Law Institute

NMIMS Law Review

North Carolina Journal of International Law

NUJS Law Review

South African Journal on Human Rights

Taylor and Francis Routledge

Thurgood Marshall Law Review

Web Sources

'Department of Investment and Public Asset Management', Ministry of Finance, Government of India, <https://dipam.gov.in/vision-mission> accessed 30 June 2022

ASSOCHOM Report, 'Gig Economy, Aligning Consumer Preferences: The Way Forward' (*The Associated Chambers of Commerce and Industry of India*, 24 January

2020) <https://www.assocham.org/uploads/files/1628143386.pdf> accessed 4 July 2022

Editorial, 'National Monetisation Pipeline: Here's the breakup of the government's big private push' (*The Hindu*, 24 August 2021) <https://www.thehindu.com/news/national/national-monetisation-pipeline-heres-the-breakup-of-the-govts-big-privatisation-push/article36075874.ece> accessed 28 July 2022

Editorial, 'National Monetisation Pipeline: Here's the breakup of the government's big private push' (*The Hindu*, 24 August 2021) <https://www.thehindu.com/news/national/national-monetisation-pipeline-heres-the-breakup-of-the-govts-big-privatisation-push/article36075874.ece> accessed 28 July 2022

Jagriti Chandra, 'After 68 years, Tatas win back Air India with ₹18,000-crore bid', (*The Hindu,* 11 October 2021) <https://www.thehindu.com/business/Industry/after-68-years-tatas-win-back-air-india-with-18000-crore-bid/article36895747.ece> accessed 3 July 2022

Justice DY Chandrachud, 'Urgent Legal Measures Needed To Improve App-Based Workers' Conditions; Laws Must Evolve To Address Privacy Concerns' (*Live Law*, 10 April 2022) <https://www.livelaw.in/top-stories/justice-chandrachud-calls-for-laws-to-improve-conditions-of-app-based-workers-address-privacy-concerns-196311> accessed 9 June 2022

K Sumanth Gowda, Obligations of private companies towards persons with disabilities, Times of India, (19th June 2021) <https://timesofindia.indiatimes.com/readersblog/k-

sumanth-gowda/obligations-of-private-companies-towards-persons-with-disabilities-33860/> accessed 4 July 2022

K. Ashok Rao, 'Diving Into the Privatisation Push in India's Power Sector' (*The Wire*, 5 November 2020) <https://thewire.in/energy/india-power-sector-privatisation> accessed 10 June 2020

NITI Aayog, 'National Monetisation Pipeline, National Portal of India', <https://www.india.gov.in/spotlight/national-monetisation-pipeline-nmp> accessed 29 June 2022

Report by University Grants Commission, 'State-wise List of Private Universities as on 24.06.2022,' (*University Grants Commission*, 24 June 2022) <https://www.ugc.ac.in/oldpdf/Private%20University/Consolidated_List_Private_Universities.pdf> accessed 30 June 2022

Reporting Bribery & Corruption in Private Sector in India', IntelLaw Consulting, (13 December 2021), <https://www.intelawconsulting.com/post/reporting-bribery-corruption-in-private-sector-in-india> accessed 3 July 2022

Sudipto Banerjee, Renuka Sane, Srishti Sharma, and Karthik Suresh, 'History of Disinvestment in India: 1991-2020' (2022) NIPFP Working Paper Series No. 373 < https://nipfp.org.in/media/medialibrary/2022/03/WP_373_2022.pdf> accessed 2 July 2022