
EXPANDING ARTICLE 226 – PUBLIC FUNCTIONS TEST: ZEE TELEFILMS V. UNION OF INDIA AND AFTERMATH

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ABSTRACT

Article 226 of the Constitution of India (“Constitution”) confers upon the High Courts of India expansive powers to issue writs. This power can be invoked not only for enforcement of Fundamental Rights but also for any other purpose. In Zee Telefilms v. Union of India, while holding that Board of Control for Cricket in India (“BCCI”) is not State under Article 12 of the Constitution (and hence not amenable to Article 32 jurisdiction), the Supreme Court of India (“Court”) introduced a new conundrum with respect to Article 226 of the Constitution. The Court held that BCCI conducts activities that are “akin to the public duties or State functions” and hence, aggrieved persons can approach the High Courts under Article 226 of the Constitution to claim remedies for violation of fundamental rights or any other rights. This interpretation was made possible by relying on the words “any person or authority” for the “enforcement of the rights conferred by Part III, and for other purposes” given under Article 226 of the Constitution. It enables the High Courts to issue writs to non-State entities as well. This interpretation has come to be known as ‘private body exercising public functions test’ used in determining the extent of applicability of Article 226 of the Constitution. In this paper, the author seeks to study the subsequent application and interpretation of the Zee Telefilms’ ratio (post-2005) by the Court in various cases. Further, an effort is made to understand whether this interpretation has been successful in granting citizens a remedy for the violation of their rights by private bodies existing in the public domain and exercising public functions. The public functions test becomes pertinent in the context of the recent WhatsApp privacy policy case where the question arose whether writs can be issued against WhatsApp, a private entity. Hence, the author endeavors to conclude by offering comments on whether this interpretation is pragmatic and intellectually defensible.

INTRODUCTION

A writ petition by way of public interest litigation (‘PIL’) was filed in the Delhi High Court against WhatsApp demanding the issuance of writs mandating the mobile messaging service company to protect user details and other data of its subscribers, and prohibiting user data sharing with outsider entities, including its parent company Facebook.¹

WhatsApp being a private entity, the pertinent question was the maintainability of a writ petition against the company. However, owing to factual reasons, the Delhi High Court did not delve into the aspect of maintainability but simply brushed it off by observing that since the terms of service (agreement between users and WhatsApp) cannot be traced back to any statutory

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¹Karmanya Singh Sareen v. Union of India and Ors., 233 (2016) DLT 436, ¶2 (India).

provision, WhatsApp is not amenable to writ jurisdiction under Article 226 of the Constitution.² The matter went on appeal to the Supreme Court of India which in turn constituted a constitutional bench to hear the matter.³ The verdict is yet to be pronounced, and it is to be seen whether the Supreme Court holds a private entity such as WhatsApp to fall within the ambit of Article 226 of the Constitution.

It is well known that Article 226 of the Constitution empowers every High Court in the country to issue orders or writs to any person or authority including Government for the enforcement of the fundamental rights guaranteed under Part III of the Constitution or for any other purpose.⁴ This power resting with the High Courts is notwithstanding the power of the Supreme Court to issue writs under Article 32 of the Constitution.⁵ Also, the power of the Supreme Court under Article 32 of the Constitution is restricted in the sense that writs can be issued only for enforcing fundamental rights while the jurisdiction of the High Courts extends to protecting any legal right as is manifest from the words “any other purpose” used in Article 226 of the Constitution.⁶ Another key difference between the two provisions is that right to constitutional remedies under Article 32 of the Constitution is a fundamental right in itself whereas Article 226 is in the nature of a discretionary remedy provided under the Constitution.⁷

Article 226 of the Constitution is considered sacrosanct to the Constitution as evidenced by the Supreme Court ruling in *L. Chandra Kumar v. Union of India*⁸ that held that the power of judicial review accorded to High Courts by Article 226 is a part of the basic structure of the Constitution. This is indicative of the importance of the role that High Courts play in upholding rights of individuals under the Indian constitutional scheme.

²*Id.*, ¶18.

³Krishnadas Rajagopal, *SC Refers WhatsApp Privacy Policy Matter to Constitution Bench*, THE HINDU (Apr. 5, 2017, 01:17 p.m.), <http://www.thehindu.com/news/national/sc-refers-whatsapp-privacy-policy-matter-to-constitution-bench/article17822724.ece>.

⁴INDIA CONST. art. 226: “Power of High Courts to issue certain writs —(1) *Notwithstanding anything in Article 32 every High Court shall have powers, throughout the territories in relation to which it exercise jurisdiction, to issue to any person or authority, including in appropriate cases, any Government, within those territories directions, orders or writs, including writs in the nature of habeas corpus, mandamus, prohibitions, quo warrant and certiorari, or any of them, for the enforcement of any of the rights conferred by Part III and for any other purpose*” (emphasis added).

⁵*Id.* (Article 226 begins with the words “notwithstanding anything in Article 32”).

⁶*Id.*; see *Dwarkanath v. Income Tax Officer*, 1965 (3) SCR 536 (India).

⁷Article 32 is a Fundamental Right guaranteed by the Part III of the Constitution of India while Article 226 is an extraordinary remedy.

⁸*L. Chandra Kumar v. Union of India*, AIR 1997 SC 1125 (India).

A related discussion relevant to this paper pertains to Article 12 of the Constitution and the definition of State under it.⁹ After a long debate stretching over decades as to what entity constitutes *State* for the purposes of Article 12 of the Constitution, a seven-judge bench of the Supreme Court in *Pradeep Kumar Biswas v. Indian Institute of Chemical Biology*¹⁰ (‘Pradeep Kumar Biswas’) laid down the test of ‘functional, administrative and financial’ control. In simple terms, an entity functionally, administratively and financially under deep and pervasive control of the government is said to be State under Article 12.¹¹ Following this, in *Zee Telefilms v. Union of India*¹² (‘Zee Telefilms’), it was contested by the petitioners that Board of Control for Cricket in India (‘BCCI’) falls within the ambit of State under Article 12 of the Constitution.

The Supreme Court speaking through Justice Santosh Hegde rejected this argument. However, the Court made an important breakthrough with respect to Article 226 of the Constitution by holding that private bodies like BCCI can be subjected to Article 226 of the Constitution since it conducts activities that are “akin to the public duties or State functions”.¹³ The Court interpreted the word “authority” in Article 226 of the Constitution to mean an authority discharging public functions. This test for determining Article 226 jurisdiction is popularly known as ‘private body exercising public functions test’. Thus, claims against private bodies by citizens can be entertained under Article 226 of the Constitution for violating their rights if the private entity in question satisfies the public functions test.

The scope of this paper pertains to understanding and analyzing the ‘private bodies exercising public functions’ test for the purposes of determining whether non-governmental or private entities are amenable to Article 226 jurisdiction of the High Courts. It follows the case-law development in this field, centered on *Zee Telefilms*, over the past decade and up till the latest WhatsApp case being contested before the Supreme Court. The question of whether any modification to the approach of the Court could be considered needful is also sought to be answered.

This paper is divided into four parts. In the *first* part of this paper, I shall be outlining the manner in which the public functions test came into being with special focus on the Supreme Court’s

⁹INDIA CONST. art.12: “In this part, unless the context otherwise requires, the State includes the Government and Parliament of India and the Government and the Legislature of each of the States and *all local or other authorities within the territory of India or under the control of the Government of India*” (Emphasis added).

¹⁰*Pradeep Kumar Biswas v. Indian Institute of Chemical Biology*, (2002) 5 SCC 111 (India).

¹¹For a detailed description of the test given by *Pradeep Kumar Biswas*, see Part III of this paper.

¹²*Zee Telefilms v. Union of India*, (2005) 4 SCC 649 (India) (majority opinion).

¹³*Id.*, ¶31.

decision in *Zee Telefilms*. In the *second* part, a study of the subsequent interpretation and application of the *Zee Telefilms*' ratio (post-2005) by the Supreme Court with reference to several case laws shall be undertaken. The *third* part contains critical analysis of the Court's approach. The *fourth* part deals with the latest WhatsApp challenge and discusses necessary modifications, if any, required in the Court's use of public functions test. The *fifth* part contains concluding remarks.

PUBLIC FUNCTIONS TEST FOR PRIVATE BODIES

As pointed out earlier, the original and primary issue before the Supreme Court in *Zee Telefilms* was whether BCCI is State for the purposes of Article 12 of the Constitution. The five-judge constitutional bench led by Justice Santosh Hegde, by a majority, following the decision in *Pradeep Kumar Biswas* held that the BCCI did not fall under the definition of 'State' because it was not functionally, administratively and financially under the control of any government and there was no *deep and pervasive state control*, but only minimal regulatory control.¹⁴ The Court noted that although there is an "element of public duty" in the functions performed by BCCI, this alone would not automatically render it State.¹⁵

However, implicitly noting the fact that holding powerful private bodies which perform essential public functions unaccountable might be problematic, the Court in *Zee Telefilms* attempted to work out a solution. It noted that BCCI discharges duties like selecting the cricket team to represent India, controls the activities of players and all other aspects of the game in the country. These functions, the Court said, are "akin to public duties or State functions".¹⁶ Merely because aggrieved citizens cannot challenge the actions of BCCI does not mean the violation of rights shall go unaddressed. The Court held that remedies for violation of rights shall be available under Article 226 of the Constitution which is wider in scope than Article 32.¹⁷

The constitutional bench in *Zee Telefilms* relied on the ruling in *Andi Mukta Sadguru Shree Muktajee Vandas Swami Suvarna Jayanti Mahotsav Smarak Trust v. V.R. Rudani*¹⁸ ('Smarak Trust') which held that the term "authority" found in Article 226 of the Constitution must receive a 'liberal

¹⁴*Id.*, ¶30.

¹⁵*Id.*, ¶25.

¹⁶*Id.*, ¶31.

¹⁷*Id.*, ¶33.

¹⁸*Andi Mukta Sadguru Shree Muktajee Vandas Swami Suvarna Jayanti Mahotsav Smarak Trust v. V. R. Rudani*, (1989) 2 SCC 691 (India).

meaning’ unlike the same term in Article 12. It had consequently held that High Courts can issue writs to enforce both fundamental and non-fundamental rights and ‘authority’ under Article 226 of the Constitution is not limited to State and State instrumentalities. The Court in *Smarak Trust* had proceeded to issue a writ of mandamus against a private college because of two reasons, namely, the rights in question of an employee (petitioner in the case) were not purely of private character and the college was not purely a private entity without any concomitant public duty.¹⁹ The following observation of the Court in *Smarak Trust* relating to what may come under “authority” under Article 226 of the Constitution were reaffirmed by the *Zee Telefilms* bench:

*“They may cover any other person or body performing public duty. The form of the body concerned is not very much relevant. What is relevant is the nature of the duty imposed on the body. The duty must be judged in the light of positive obligation owed by the person or authority to the affected party, no matter by what means the duty is imposed.”*²⁰

It is also pertinent to note that Justice Mohan’s concurring opinion in the popular case of *J. P. Unnikrishnan v. State of Andhra Pradesh*²¹ (‘Unnikrishnan’) echoed similar sentiments. He relied on the decision in *Smarak Trust* while deciding the question that whether a student can proceed against a medical college under the writ jurisdiction for violation of rights.²² After looking at the ‘nature of functions’ that are carried on by the institution, Hon’ble Justice held that the educational institute in question discharged a public duty and consequently, it is required to “act fairly”.²³ Hon’ble Justice went on to hold that the medical college will be subject to Article 14 of the Constitution and thus, the duty to act fairly was imposed upon a medical college since it was duly discharging public functions.²⁴

Thus, after the decision in *Zee Telefilms*, the position of law is that whenever a private entity exercises public functions or discharges public obligations and duties, aggrieved persons have a remedy under Article 226 of the Constitution in addition to ordinary law remedies. Further, for the purpose of deciding what body can be considered as ‘authority’ for the purpose of Article 226, as held in *Smarak Trust* and reaffirmed subsequently, the *nature* of its duties is relevant and

¹⁹*Id.*, ¶16.

²⁰*Id.*, ¶20.

²¹*J.P. Unnikrishnan v. State of Andhra Pradesh*, 1993 AIR 2178 (India) (Mohan, J., concurring).

²²*Id.*, ¶82.

²³*Id.*, ¶81-83.

²⁴*Id.*

not its form.²⁵ Apart from these brief principles outlined here as to what constitutes public functions, the Court has proceeded with a case-specific approach and it is argued that the same has led to several inconsistencies.

INTERPRETATION OF PUBLIC FUNCTIONS TEST BY SUBSEQUENT CASES

The ratio of the decision in *Zee Telefilms* has come handy to several aggrieved petitioners who approached the High Courts against private entities. In a series of cases, the Supreme Court has applied the public functions test to private bodies to determine their amenability to Article 226 of the Constitution, albeit with few inconsistencies in doctrinal approach. The following discussion illustrates the same.

In *Ramesh Ahluwalia v. State of Punjab*²⁶ ('Ramesh Ahluwalia'), the petitioner challenged the termination of his service by DAV Public School, Amritsar on the basis of a Disciplinary Committee report. The respondent school was a private, unaided school managed by a Society.²⁷ The High Court dismissed his petition by stating that the school being private, unaided and not under the management of the State was not an instrumentality of the State.²⁸ Subsequently, according to the High Court, the extraordinary jurisdiction of Article 226 of the Constitution was not available to the petitioner.

In the Supreme Court, the petitioner-appellant relied on *Zee Telefilms* and contended that even if the respondent school did not qualify as State under Article 12 of the Constitution, the writ petition is valid as the Managing Committee of the school is running other schools all over India and hence is performing public function.²⁹ The Court upheld this contention by stating that the respondents perform public functions by running and managing schools throughout the country.³⁰ Moreover, the fact that they are private unaided educational institutions will not hinder the jurisdiction of High Court under Article 226 of the Constitution to hear the matter.³¹ It noted a key observation that an increase in private entities affecting the rights of people in recent

²⁵*Zee Telefilms v. Union of India*, (2005) 4 SCC 649 (India); *Binny Ltd. & Anr. v. V. Sadasivan & Ors.*, AIR 2005 SC 3202 (India).

²⁶*Ramesh Ahluwalia v. State of Punjab*, (2012) 12 SCC 331 (India).

²⁷*Id.*, ¶8.

²⁸*Id.*

²⁹*Id.*, ¶13.

³⁰*Id.*

³¹*Id.*, ¶11.

times demands timely judicial intervention. Technicalities in law must not come in the way of granting Article 226 remedies.³²

In the case of *Dr. Janet Jeyapaul v. SRM University*³³ ('Dr. Janet Jeyapaul'), the maintainability of writ petition filed against the respondent University was in question. The High Court of Madras denied the petitioner remedy under Article 226 of the Constitution.³⁴ The Supreme Court overturned the verdict of the High Court and held that SRM University is a private body exercising public functions and falls under the writ jurisdiction of Article 226 of the Constitution.³⁵ It gave the following reasons: the University imparted higher education to large number of students; it discharges public functions via imparting education; it is recognised as a 'Deemed University' by the Central Government; and is subject to UGC Act and Rules which delineates how the public function of imparting education is to be carried out.³⁶ In fact, it went on to hold that the status of deemed University granted to SRM University brings it within the ambit of Article 12 of the Constitution and thus, is subjected to Article 226 jurisdiction.³⁷

The last prong of reasoning given by Justice A. M. Sapre in *Dr. Janet Jeyapaul* suffers from incorrect application of settled law on this point. The Court used the public functions doctrine to bring SRM University within the meaning of 'State' under Article 12 of the Constitution.³⁸ However, the correct test for authorities under Article 12 is functional, financial and administrative control as given by the seven-judge bench decision in *Pradeep Kumar Biswas*, and not the public functions doctrine. In fact, *Pradeep Kumar Biswas* had reaffirmed the tests for Article 12 formulated by *Ajay Hasia v. Khalid Mujib Sehravard*,³⁹ which are, namely, whether the State owns a substantial or whole of share capital of the entity; existence of state-conferred monopoly status; functions discharged by the entity being governmental or related in nature; transfer of a governmental department(s) to the entity; extent of financial assistance by the State;

³²*Id.*

³³*Dr. Janet Jeyapaul v. SRM University*, AIR 2016 SC 73 (India).

³⁴*Id.*, ¶2.

³⁵*Id.*, ¶22.

³⁶*Id.*

³⁷*Id.*

³⁸*Id.*

³⁹*Ajay Hasia v. Khalid Mujib Sehravard*, 1981 AIR SC 487 (India).

extent of State control; and imposition of statutory duties.⁴⁰ Cumulative satisfaction of these tests must indicate that the entity is financially, functionally and administratively under deep and pervasive control of the State in order to hold it as ‘State’ for the purposes of Article 12 of the Constitution.⁴¹

Without testing SRM University against this standard, the Court in *Dr. Janet Jeyapaul* erred in holding it to fall within the definition of ‘State’ under Article 12. Moreover as far as the present issue before the Court was concerned, it could have simply held SRM University to be a private body exercising public functions and brought it under Article 226 jurisdiction by following the dicta given in *Zee Telefilms*. The position in *Ramesh Ahluwalia* that educational institutions discharge public functions would have also supported such a conclusion. Instead, the Court in its zealous attempt to subject SRM University to writ jurisdiction under Article 226 conflated it to come under the definition of ‘State’ under Article 12, in the process ignoring the direct and perhaps more legally sound route available before it.

In another case, *Ivy C. da. Conceicao v. State Of Goa*,⁴² decided in 2017, the issue before the Supreme Court was whether courts can exercise judicial review over the manner of appointment of the principal in a minority institution and if yes, on what grounds. The Court made it clear that autonomy given to minority institution under Article 30⁴³ does not preclude judicial review of its actions. The autonomy of a minority institution does not take away the obligation to act fairly, non-discriminatorily and reasonably. Hence, the Court concluded that “exercise of power by a minority institution discharging public functions is open to judicial review”⁴⁴ and “violation of right of an individual eligible candidate by the minority institution by not adopting fair procedure, is liable to be tested in exercise of power of judicial review under Article 226”.⁴⁵

In this case, the Court did not expressly rely on the public functions test as given by *Zee Telefilms*. However, on a closer reading, the application of the same standard is implicit in the judgment. The Court recorded the nature of the minority institutions as entities which discharge public functions and hence, the doors of Article 226 are open to challenge actions of such institutions

⁴⁰*Id.*

⁴¹*Pradeep Kumar Biswas v. Indian Institute of Chemical Biology*, (2002) 5 SCC 111, ¶90 (India).

⁴²*Ivy C. Da. Conceicao v. State of Goa*, AIR 2017 SC 1834 (India).

⁴³INDIA CONST. art. 30(1): “All minorities, whether based on religion or language, shall have the right to establish and administer educational institutions of their choice.”

⁴⁴*Mrs. Ivy C. Da. Conceicao v. State Of Goa*, AIR 2017 SC 1834, ¶11 (India).

⁴⁵*Id.*, ¶15.

on the grounds of violating the rights of individuals. A direct application of public functions test would result in a similar outcome.

From the discussion so far, it can be inferred that as far as schools, universities or other educational institutes are concerned, the Supreme Court has been liberal in recognizing the public function of providing education as the element that satisfies the private bodies exercising public functions test, thus, bringing them within the folds of Article 226. The primary duty of providing education in India falls upon the welfare State and by definition is a public function.⁴⁶ As a result, we see Courts often holding private educational institutes as performing public functions and the principles laid down in *Zee Telefilms* being satisfyingly applied, directly or indirectly. However, with regard to other private entities, the line taken by the Court has not been so linear and this is depicted by the ensuing discussion.

The Supreme Court in *K. K. Saksena v. International Commission on Irrigation and Drainage*⁴⁷ ('K. K. Saksena') was tasked with determining whether writ petitions against the respondents, i.e. International Commission on Irrigation and Drainage ('ICID') are maintainable. Referring to *Zee Telefilms*, a plea was made before the Court that authority under Article 226 of the Constitution is of wider connotation and would include authorities discharging public functions or such duties of great magnitude.⁴⁸ However, the Court rejected this contention and upheld the High Court decision to dismiss the writ petition. It noted that ICID was not funded by the government, did not discharge any obligation under any statute and did not carry out functions which are similar or related to State's functions in its sovereign capacity.⁴⁹

The Court further observed that "[e]ven if a body performing public duty is amenable to writ jurisdiction, all its decisions are not subject to judicial review... [o]nly those decisions which have public element therein can be judicially reviewed under writ jurisdiction."⁵⁰ It added that writs can be issued for enforcing only those rights which are found in the public law domain and strictly private rights of individuals will not be amenable to Article 226 jurisdiction.⁵¹ These observations are particularly relevant for our later discussion in the next part of the paper relating to understanding the scope of public functions.

⁴⁶For instance, see INDIA CONST. art. 21A.

⁴⁷ *K.K. Saksena v. International Commission on Irrigation and Drainage*, (2015) 2 SCC (LS) 119 (India).

⁴⁸*Id.*, ¶30.

⁴⁹*Id.*, ¶41, 42.

⁵⁰*Id.*, 43.

⁵¹*Id.*, 38.

The decision of the Supreme Court in *Jatya Pal Singh v. Union of India*⁵² ('Jatya Pal Singh') is relevant for understanding instances where courts have applied the public functions test to hold entities unamenable to Article 226 jurisdiction. One of the primary questions before the Court was whether Videsh Sanchar Nigam Limited ('VSNL') can be an authority under Article 226. Pursuant to the filing of the case, the majority stakes in VSNL were bought by Tata companies and it was rechristened as Tata Communications Limited ('TCL').⁵³ It was contended that if the Government divests its functions in favour of a private body or transfers a public body to private company, the functions performed by the Government earlier to such transfer cannot become 'private functions'.⁵⁴ The much contentious dichotomy between sovereign and non-sovereign functions was also contested as non-existent.⁵⁵

The Court answered the question of whether TCL is performing public functions in the negative. The Court relied on *R.D. Shetty v. The International Airport Authority of India*⁵⁶ ('R.D. Shetty') to hold that TCL cannot be said to perform a public function merely because the function was earlier performed by the Government unless it shows that the functions are of public importance. However, this reliance is misplaced as *R.D. Shetty's* stricter standard which requires functions exercised by the entity in question to be of public importance applies only to authorities under Article 12 because that was the context in which *R.D. Shetty* was decided.⁵⁷ The standard under Article 226 is a lower one, as given by *Zee Telefilms*.

The Court in *Jatya Pal Singh* further reasoned that "the appellant would have to prove that the body seeks to achieve some collective benefit for the public or a section of public and accepted by the public as having authority to do so"⁵⁸ for holding the body as one discharging public functions. It is later argued in this paper that this judgment fails to consider the impact of mixed economies as well as the role of private enterprises while deciding the scope of authority for the purposes of Article 226.

⁵²*Jatya Pal Singh v. Union of India*, (2013) 6 SCC 452 (India).

⁵³*Id.*, 12.

⁵⁴*Id.*, ¶39.

⁵⁵*Id.*, ¶27, 52.

⁵⁶*R.D. Shetty v. The International Airport Authority of India*, 1979 AIR 1628 (India).

⁵⁷*Id.*

⁵⁸*Jatya Pal Singh v. Union of India*, (2013) 6 SCC 452, ¶52 (India).

Finally, we return once again to the story of BCCI. The verdict of the Supreme Court in *Board of Control for Cricket in India v. Cricket Association of Bihar*⁵⁹ (“Cricket Association of Bihar”) culminates the discussion surrounding private bodies carrying out public duties or functions. The then Chief Justice of India, Justice T.S. Thakur delivering the judgment noted that BCCI exercised full control over the game of cricket in India including careers of cricketers; the activities of BCCI incurred significant financial expenses and the State had not taken any step to dilute the monopoly enjoyed by BCCI but in fact provided necessary assistance to the Board.⁶⁰ Based on these factors, Hon’ble Justice concluded that this amounts to BCCI discharging public functions and BCCI is therefore, “answerable on the standards generally applicable to judicial review of State action”.⁶¹ The story scripted by *Zee Telefilms* metamorphosed into *Cricket Association of Bihar* wherein the Court finally brought the powerful cricketing body under judicial purview. The contribution of this judgement to our discussion on public functions test is outlined in the next part.

CRITIQUING THE PUBLIC FUNCTIONS TEST AND ITS INTERPRETATION BY COURTS

The *first* point of critique relates to enforcement of Fundamental Rights against non-state entities via the public functions test under Article 226 of the Constitution. In *Zee Telefilms* it was held that although Article 32 remedies are not available against entities which do not classify as State under Article 12 of the Constitution, Article 226 remedies can be claimed against private bodies exercising public functions. Article 226 of the Constitution empowers High Courts to issue writs for enforcement of fundamental rights. This implies that writs for enforcement of fundamental rights can also be issued against private entities. This, in terms of constitutional law, is called direct horizontality – enforcing fundamental rights against non-State entities.⁶²

However, this interpretation creates a dichotomy. It would mean that the Supreme Court can issue writs for enforcing fundamental rights against the State alone (under Article 32 of the Constitution) while the High Courts can carry out direct horizontal application of fundamental rights against private bodies also. Hence, it indicates that horizontal application differs on the basis of which Court the petitioner is before. Further, it is against our Constitutional provisions

⁵⁹Board of Control for Cricket in India v. Cricket Association of Bihar, AIR 2015 SC 3194 (India).

⁶⁰*Id.*, ¶30.

⁶¹*Id.*

⁶²See Gautam Bhatia, *Horizontality under the Indian Constitution: A Schema*, INDIAN CONSTITUTIONAL LAW AND PHILOSOPHY BLOG (2015), <https://indconlawphil.wordpress.com/2015/05/24/horizontality-under-the-indian-constitution-a-schema/>.

which do not provide for such direct horizontal application, except for certain specific Fundamental Rights.⁶³ Such a reading will lead to illogical outcomes.

An alternative way to interpret the *Zee Telefilms* ratio is by arguing that judgment holds private bodies exercising public functions accountable to general public law standards of fairness, equality, non-arbitrariness etc. instead of holding them directly accountable to fundamental rights obligations.⁶⁴ Even the Court seems to have taken a similar position initially in the *Unnikrishnan* case, where it held that the school has a ‘duty to act fairly’ only to later add that the school is also subject to Article 14. Even if fundamental rights cannot be directly enforced against private bodies, courts can hold private bodies accountable to general standards of public law, the contents of which may at times overlap with fundamental rights.⁶⁵ For instance, *Unnikrishnan* can be read to mean that duty to act fairly (which is concomitantly found in Article 14) can be enforced against a private body as far as its performance of a public duty is concerned.⁶⁶ It is possible that these standards might overlap in content with fundamental rights but this sort of interpretation does not give rise to the dichotomy explained previously.⁶⁷ A limited application in this manner should mean that only those rights should be enforceable which are connected to the functions of the entities and the duties arising out of such functions. The *second* point of critique against the public functions test is with respect to the interpretation of ‘public functions’ itself. A combined reading of the Supreme Court judgments leaves us with very little clarity as to what functions of a private body can be termed as public functions. As depicted by the cases discussed so far, the Court seems to follow quite an *ad-hoc* system of deciding the question without laying down a consistent public function standard. Additionally, as mentioned earlier, the Court has found it easy when the function of the private entity being contested against is *de facto* public, such as education. However, in other cases, such as *K.K. Saksena* and *Jatya Pal Singh*, the Court ultimately relied on the analogy for divestment of erstwhile

⁶³The Part III containing Fundamental Rights under the Indian Constitution are available only against the State with specific exceptions like Articles 15(2), 17 and 23 which are available against individuals as well.

⁶⁴Gautam Bhatia, *What is the State – V: Zee Telefilms, the Death of the Functional Approach, and an Alternative*, INDIAN CONSTITUTIONAL LAW AND PHILOSOPHY BLOG (2014), <https://indconlawphil.wordpress.com/2014/08/19/what-is-the-state-v-zee-telefilms-the-death-of-the-functional-approach-and-an-alternative/>.

⁶⁵Gautam Bhatia, *The BCCI Controversy, Public Functions and Cultural Goods, and the Return (?) of the Functional Test*, INDIAN CONSTITUTIONAL LAW AND PHILOSOPHY BLOG (2016), <https://indconlawphil.wordpress.com/2016/08/25/the-bcci-controversy-public-functions-and-cultural-goods-and-the-return-of-the-functional-test/>,

⁶⁶*Id.*

⁶⁷*Id.*

State sovereign functions and similarity to State functions. This is a rather vague determinant because, *one*, the State is increasingly divesting all kinds of functions thanks to privatization and *two*, there could be new public functions which may not have been performed by State but are of a considerable degree of public importance in present times.

The Courts have also opted to use Article 12 of the Constitution time and again to enforce rights against entities under Article 226. Although this is constitutionally permitted, what is suspected is the manner in which the Court has held some of the entities as State under Article 12 of the Constitution while in effect they satisfied only elements of authority exercising public functions under Article 226 of the Constitution. To illustrate this further, in the context of stock exchanges, the Supreme Court simply affirmed the position taken by the Delhi High Court that the Delhi Stock Exchange is State under Article 12 of the Constitution and hence, is amenable to writ jurisdiction.⁶⁸ This is despite the fact that a series of rulings by different High Courts had held stock exchanges to be 'authority' for the purposes of Article 226 of the Constitution owing to the important public functions discharged by them, instead of taking the Article 12 route.⁶⁹ The contention here is that the Supreme Court did not adequately delve into the question or analyse conflicting case laws before affirming the position taken by the Delhi High Court. Also as pointed out earlier, the Court did something similar in *Dr. Janet Jeyapaul* in questionably holding SRM University to be State under Article 12 of the Constitution while it could have simply subjected it to Article 226 of the Constitution by relying on public functions test. This action of the Court to jump the gun and hold entities as State under Article 12 of the Constitution instead of taking the public functions route under Article 226 can perhaps be explained by the lack of clarity as to what constitutes the latter thereby making the former an attractive route.

Moreover, in the case of *Cricket Association of Bihar*, referred to earlier, the Court listed three reasons for holding BCCI accountable under Article 226 – control over cricket, the large scale of finances and State's concurrence in allowing BCCI carry out its functions as a virtual monopoly. This analysis of the Court is incomplete as far as understanding of public functions is concerned as it pertains only to facts at hand and not a determinative public functions standard. Despite the three pronged reasoning, few questions still remain unanswered. For instance, if there is any other unregulated sphere where State has not interfered, would it amount to tacit concurrence on part of State? How it is that BCCI's financial transactions alone contain a public character? And

⁶⁸Delhi Stock Exchange v. K. C. Sharma, 98 (2002) DLT 234 (India); K.C. Sharma v. Delhi Stock Exchange AIR 2005 SC 2884 (India).

⁶⁹A. Vaidyanathan v. Union of India, AIR 1999 Mad 11 (India); Sejal Rikeen Dalal v. Stock Exchange, Bombay, AIR 1999 Bom 30 (India); Rajendra Rahtore v. M.P. Stock Exchange, 2000 (3) MPLJ 207 (India); Rakesh Gupta v. Hyderabad Stock Exchange Ltd., AIR 1996 AP 413 (India).

moreover, what is the degree of control over an activity which is sufficient to qualify as performing a public function vis-à-vis the activity? The Court missed out on the opportunity to unambiguously clarify the doctrinal standards for application of public functions against private bodies such as BCCI.

PUBLIC FUNCTIONS MIX-UP: SEARCHING FOR ANSWERS

In the previous part, the application and use of public functions test by the Supreme Court was critiqued on two grounds. Primarily, the content of the standards or the nature of rights that can be enforced against private entities exercising public functions is unclear with the only guiding factor being the domain in which the right exists read with the particular function of the entity. Secondly, what constitutes public functions itself is doctrinally indeterminate post analyzing major case laws, and the Court seems to rely on an ad-hoc case-by-case approach for deciding upon questions of public function. The reasoning given in *Cricket Association of Bihar* also, as shown later in this part, is inadequate as far as laying down standards is concerned.

As discussed briefly in the beginning of this paper, the question regarding what constitutes public functions is highly relevant when viewed from the lens of latest challenge against WhatsApp currently pending before a five-judge constitution bench.⁷⁰ The privacy policy of WhatsApp which enables user data sharing with its parent company Facebook is under challenge on the grounds of violation of users' right to privacy and other constitutional guarantees. However, a key ancillary question in the case that is needed to be answered is whether the High Court can exercise jurisdiction under Article 226 of the Constitution against WhatsApp.

The High Court had decided the issue in negative and it is under consideration in the Supreme Court. However, the manner in which the High Court decided this question is devoid of any substantial reasoning. It merely noted that any statute does not back the agreement between WhatsApp and its users and thus, WhatsApp is not amenable to Article 226 jurisdiction.⁷¹ Despite acknowledging that it does not have jurisdiction to pronounce upon the writ petition, the High Court went ahead to issue specific directions to WhatsApp,⁷² which were eventually complied with by the latter.⁷³ The moot question is how the High Court could even issue directions when as per its own decision it lacks jurisdiction. Thus, elsewhere this decision of the

⁷⁰Karmanya Singh Sareen v. Union of India, SLP(C) No. 0804 of 2017 (India) (pending).

⁷¹Karmanya Singh Sareen v. Union of India and Ors., 233 (2016) DLT 436, ¶18 (India).

⁷²*Id.*, ¶20.

⁷³Sourav Dan, *Privacy Matters!! The Case of WhatsApp's New Privacy Policy*, THE SCC ONLINE BLOG (2016), <http://blog.scconline.com/post/2016/12/02/privacy-matters-the-case-of-whatsapps-new-privacy-policy/>.

High Court has been described as self-contradictory since the Court had lost powers to make orders after conceding jurisdiction.⁷⁴

Here, undoubtedly the nature of the right claimed, i.e. the right to privacy falls within the domain of public law rights.⁷⁵ As far as the core question of public functions is concerned and as per the decisions in *Cricket Association of Bengal* and its predecessor *Zee Telefilms*, it is to be determined whether the nature of communication services delivered by WhatsApp is a public good and whether WhatsApp exercises significant control over the good for it to be regarded as performing a public function. There is no doubt that in today's world, communication services have public utility and are indispensable public goods. WhatsApp has argued that it is not the sole provider of this service and users are free to not enter into contract with WhatsApp. The question of whether WhatsApp exercises control over this public good of instant communication service is debatable. Further, the proceedings before the constitution bench has come to a halt owing to the Government's promise of bringing in a data protection law which covers all aspects of data collection, retention and sharing.⁷⁶ Thus, the jury is out on whether we will witness a judicial pronouncement on the question of writ maintainability against WhatsApp anytime soon.

Regardless, it is felt that this sort of determination of what constitutes public goods on the basis of control is highly contextual. It is argued elsewhere that if tomorrow the government decides to outsource entire water supply to private companies,⁷⁷ can an argument be made that citizens are free to change water suppliers and hence no company exercises control over the public good of water? We cannot allow that because it is imperative that the private body supplying water adheres to standards of non-discrimination and fair access. Similar examples could be the State deciding to leave the functions of policing or prison maintenance to private parties.⁷⁸

⁷⁴*Id.*; Prashant Reddy, *Whatsapp with Privacy and How Not to Deal with Frivolous PILs*, SPICYIP BLOG (2016), <https://spicyip.com/2016/10/whatsapp-with-privacy-and-how-not-to-deal-with-frivolous-pils.html>.

⁷⁵See Justice K. S. Puttuswamy (ret'd.) v. Union of India, AIR 2017 SC 4161(India).

⁷⁶ LIVE LAW, *SC's Privacy Judgment Casts Its Shadow Over WhatsApp's Data Sharing Policy Case*, (Sept. 6, 2017, 9:01 p.m.), <http://www.livelaw.in/scs-privacy-judgment-casts-shadow-whatsapps-data-sharing-policy-case/>.

⁷⁷See Gautam Bhatia, *What is the State – V: Zee Telefilms, the Death of the Functional Approach, and an Alternative*, INDIAN CONSTITUTIONAL LAW AND PHILOSOPHY BLOG (2014), <https://indconlawphil.wordpress.com/2014/08/19/what-is-the-state-v-zee-telefilms-the-death-of-the-functional-approach-and-an-alternative/>.

⁷⁸*Id.*

A likely solution can perhaps be found in the judgment of *Jatya Pal Singh* discussed earlier. Here the Court had dealt with an argument made by the petitioner who relied on the proposed meaning of ‘public functions’ given in the United Kingdom’s Human Rights Act, 1998 (Meaning of Public Function) Bill, 2008.⁷⁹ This Bill, although has not seen the light of the day, is helpful in understanding what functions are public in nature. Section 1 of the Bill gives a list of factors which can be taken into account while determining whether an authority carries out public functions. These are, chiefly, the role and responsibility assumed by the State in discharging that particular function; nature and extent of public interest as well as statutory duty or power involved in the exercise of the function; the extent of State supervision and regulation over the performance of function; and the *extent of risk improper performance of the function in question will have upon certain rights of individuals* enumerated in the Convention on Human Rights.⁸⁰

The striking importance of this indicative yet comprehensive list is that it inculcates the risk that ‘improper performance’ of the function might cause to an individual’s right protected under the statute and convention. This is a strong basis of determining public nature of functions contemplated by private bodies. If we are to go by this interpretation of public functions, it is necessary for the judiciary to shift tracks. This in effect would also imply a direct horizontality against private bodies as any violation of specified citizens’ rights, under Constitution or otherwise, by private bodies would be open to challenge before the High Courts of India.

Therefore, a shift from defining public functions by looking at the nature of functions of the organization to defining it by taking into account the manner in which it can affect constitutional, statutory or public rights of individuals is desirable. For example, WhatsApp can be subject to writ jurisdiction under Article 226 on the basis of the impact it bears on the right to privacy of its users, regardless of whether it is performing a public function as per the traditional tests or not. This also gives scope for severability between actions of entities affecting public rights of individuals and private rights within the entity itself.

Evolving principles of writ jurisdiction which strongly accounts for rights violation by private bodies is needful in the modern mixed economy where the role of State is shrinking to a mere governance agent and the State is shedding the performance of important functions which used to fall within the sovereign domain. Courts continuing to hold on to a descriptive baseline of what constitutes public functions will result in the domain of fundamental rights becoming smaller and smaller in face of a gradual movement towards privatization of government

⁷⁹*Jatya Pal Singh v. Union of India*, (2013) 6 SCC 452, ¶48 (India).

⁸⁰Human Rights Act, 1998 (Meaning of Public Function) Bill, 2008, §1 (UK.).

functions wherein rights of individuals are held hostage by private bodies. Hence, the suggested interpretation of public functions will enable the Courts to expand their jurisdiction and consequently expand the protection of rights. This will in turn strengthen rights enforcement of individuals that are currently threatened in a landscape characterized by impunity of private bodies having significant bearing on the rights.

CONCLUSION

Courts have grappled with interpreting private bodies exercising public functions test for determining Article 226 jurisdiction. *Zee Telefilms* breathed life into the test and reaffirmed its stature in Indian constitutional jurisprudence. The test has gained relevance and recognition as evidenced by later decisions of the Supreme Court. To answer the initial question on the effectiveness of this test, the interpretation of ‘authority’ under Article 226 has partly been successful in securing citizens’ rights against private entities. The test is not devoid of shortcomings. There exists confusion in the nature of obligations that befall upon a private body held to be exercising public functions. This can be overcome by not enforcing rights given under Constitution directly against private bodies, rather by locating the substance of these rights under general public law standards and enforcing the same. The second problem relates to the meaning of the phrase ‘public functions’ itself. It is argued that a rights-based approach for determining public functions is necessary in today’s times as State functions increasingly get transferred to private entities in modern economies. Such an approach will prevent loss and slow degradation of individual rights by according them with constitutional writ remedies under Article 226 of the Constitution. It is felt that this interpretation given to public functions will complement and solidify the Court’s liberal approach of granting Article 226 remedies. It is also the most pragmatic approach which is defensible in terms of protecting individual rights.