CASE NO.:
Writ Petition (civil) 541 of 2004

PETITIONER:
Zee Telefilms Ltd. & Anr.

RESPONDENT:
Union of India & Ors.

DATE OF JUDGMENT: 02/02/2005

BENCH:
N.Santosh Hegde & S.N. Variava & B.P.Singh & H.K.Sema & S.B. Sinha

JUDGMENT:
JUDGMENT

With
SPECIAL LEAVE PETITION (CIVIL) NO.20186 OF 2004

Delivered by
Santosh Hegde,J
S.B. Sinha,J

Santosh Hegde, J.

I have had the benefit of reading the judgment of Sinha, J. I regret I cannot persuade myself to agree with the conclusions recorded in the said judgment, hence this separate opinion. The Judgment of Sinha, J. has elaborately dealt with the facts, relevant rules and bye-laws of the Board of Control for Cricket in India (the Board). Hence, I consider it not necessary for me to reproduce the same including the lengthy arguments advanced on behalf of the parties except to make reference to the same to the extent necessary in the course of this judgment.
Mr. K.K. Venugopal, learned senior counsel appearing for the Board has raised the preliminary issue in regard to the maintainability of this petition on the ground that under Article 32, a petition is not maintainable against the Board since the same is not "State" within the meaning of Article 12 of the Constitution of India. It is this issue which is being considered in this judgment.

In support of his argument Mr. K.K. Venugopal has contended the Board is not created by any statute and is only registered under the Societies Registration Act 1860 and that it is an autonomous body, administration of which is not controlled by any other authority including Union of India, (U.O.I.) the first respondent herein. He further submitted that it also does not take any financial assistance from the Government nor is it subjected to any financial control by the Government or its accounts are subject to the scrutiny of the Government. It is his submission that though in the field of Cricket it enjoys a monopoly status the same is not conferred on the Board by any statute or by any order of the Government. It enjoys that monopoly status only by virtue of its first mover advantage and its continuance as the solitary player in the field of cricket control. He also submitted that there is no law which prohibits the coming into existence of any other parallel organisation. The learned counsel further submitted that as per the parameters laid down by this Court in Pradeep Kumar Biswas vs. Indian Institute of Chemical Biology & Ors. (2002 5 SCC 111), the Board cannot be construed as a State for the purpose of Article 12 and the said judgment being a judgment of Seven Judge Bench of this Court is binding on this Bench. The argument of Mr. K.K. Venugopal is supplemented and supported by the arguments of Dr. A.M. Singhvi and Soli J. Sorabjee

appearing for the other contesting respondents.

Mr. Harish N. Salve, learned senior counsel appearing on behalf of the petitioners opposing the preliminary objections submitted that the perusal of the Memorandum and Articles of the Association of the Board as also the rules and regulations framed by the Board indicate that the Board has extensive powers in selecting players for the Indian National team representing India in test matches domestically and internationally. He also pointed out that the Board has the authority of inviting foreign teams to play in India. He also further contended that the Board is the sole authority for organising major cricketing events in India and has the disciplinary power over the players/umpires and other officials involved in the game and sports being a subject under the control of the States, in substance the Board exercises governmental functions in the area of Cricket. He submitted that this absolute authority of the Board is because of the recognition granted by the Government of India, hence in effect even though it is as an autonomous body the same comes under "other authorities" for the purpose of Article 12. He also contended that the Board has the authority to determine whether a player would represent the country or not. Further, since playing cricket is a profession the Board controls the fundamental right of a citizen under Article 19 (1) (g) of the Constitution. It is his further contention that many of the vital activities of the Board like sending a team outside India or inviting foreign teams to India is subject to the prior approval of the Government of India. Hence, the first respondent Union of India has pervasive control over the activities of the Board. For all these reasons, he submitted that the Board is "other authorities" within the meaning of Article 12.

Respondent No. 1-Union of India has filed a counter affidavit which is subsequently supplemented by an additional affidavit in which it is stated that the Board was always subjected to de-facto control of the Ministry of Youth Affairs and Sports in regard to international matches played domestically and internationally. In the said affidavit, it is also stated that the Government of India has granted de-facto recognition to the Board and continues to so recognise the Board as the Apex National Body for regulating the game of Cricket in India. In the said affidavit it is also stated that it is because of such recognition granted by the Government of India that the team selected by the Board is able to represent itself as the Indian cricket team and if there had not been such recognition the team could not have represented the country as the Indian cricket team in the international cricket arena. It is also stated that Board has to seek prior permission and approval from the Government of India whenever it has to travel outside the country to represent the country. Even in regard to Board’s invitation to the foreign teams to visit India the Board has to take prior permission of the Government of India and the Board is bound by any decision taken by the Government of India in this regard. It is further stated that in the year 2002 the Government had refused permission to the Board to play cricket in Pakistan. It is also submitted that the Government of India accepts the recommendation of the Board in regard to awarding "Arjuna Awards" as the National Sports Federation representing cricket. In the said affidavit the Government of India has stated before this Court that the activities of the Board are like that of a public body and not that of a private club. It also asserted that it had once granted an amount of Rs. 1,35,000/- to the Board for the payment of air fares for nine members of the Indian cricket team which went to Kuala Lumpur (Malaysia) to participate in the 16th Commonwealth Games in September 1998. It is further stated that some of the State Cricket Associations which are members of the Board have also taken financial assistance of land lease from the respective State Governments. It is also stated that though the Government does not interfere with the day to day autonomous functioning of the Board, if it is required the Board has to answer all clarifications sought by the Government and the Board is responsible and accountable to the people of India and the Government of India which in turn is accountable to Parliament in regard to team’s performance.

Mr. K.K. Venugopal, learned senior counsel has taken serious objections to the stand taken by the Government of India in its additional affidavit before this Court on the ground that the Government of India has been taking contrary positions in regard to the status of the Board in different writ petitions pending before the different High Courts and now even in the Supreme Court, depending upon the writ petitioners involved. He pointed out that in the stand taken by the Government of India in a writ petition filed before the Delhi High Court and before the Bombay High Court as also in the first affidavit filed before this Court it had categorically stated that Government of India does not control the Board and that it is not a State under Article 12 of the Constitution of India. He pointed out from the said affidavits that the first respondent had taken a stand in those petitions that the Government plays no role in the affairs of any member association and it does not provide any financial assistance to the Board for any purpose. It had also taken the stand before the Delhi High Court that the Board is an autonomous body and that the government had no control over the Board. The learned counsel has also relied upon an affidavit filed by the Board in this Court wherein the Board has specifically denied that the first respondent has ever granted any recognition to the Board.

Hence the question for consideration in this petition is whether the Board falls within the definition of "the State" as contemplated under Article 12 of the Constitution. Article 12 reads thus :-

"12. Definition\027In 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."

A perusal of the above Article shows that the definition of State in the said Article includes the Government of India, Parliament of India, Government of the State, Legislatures of the States, local authorities as also "other authorities". It is the argument of the Board that it does not come under the term "other authorities", hence is not a State for the purpose of Article 12. While the petitioner contends to the contrary on the ground that the various activities of the Board are in the nature of public duties. A literal reading of the definition of State under Article 12 would not bring the Board under the term "other authorities" for the purpose of Article 12. However, the process of judicial interpretation has expanded the scope of the term "other authorities" in its various judgments. It is on this basis that the petitioners contend that the Board would come under the expanded meaning of the term "other authorities" in Article 12 because of its activities which is that of a public body discharging public function.

Therefore, to understand the expanded meaning of the term "other authorities" in Article 12, it is necessary to trace the origin and scope of Article 12 in the Indian Constitution. Present Article 12 was introduced in the Draft Constitution as Article 7. While initiating a debate on this Article in the Draft Constitution in the Constituent Assembly, Dr. Ambedkar described the scope of this Article and the reasons why this Article was placed in the Chapter on fundamental rights as follows :-

"The object of the fundamental rights is twofold. First, that every citizen must be in a position to claim those rights. Secondly, they must be binding upon every authority \026 I shall presently explain what the word 'authority' means \026 upon every authority which has got either the power to make laws or the power to have discretion vested in it. Therefore, it is quite clear that if the fundamental rights are to be clear, then they must be binding not only upon the Central Government, they must not only be binding upon the Provincial

Government, they must not only be binding upon the Governments established in the Indian States, they must also be binding upon District Local Boards, Municipalities, even village panchayats and taluk boards, in fact, every authority which has been created by law and which has got certain power to make laws, to make rules, or make bye-laws.

If that proposition is accepted \026 and I do not see anyone who cares for Fundamental Rights can object to such a universal obligation being imposed upon every authority created by law \026 then, what are we to do to make our intention clear ? There are two ways of doing it. One way is to use a composite phrase such as 'the State', as we have done in Article 7; or, to keep on repeating every time, 'the Central Government, the Provincial Government, the State Government, the Municipality, the Local Board, the Port Trust, or any other authority'. It seems to me not only most cumbersome but stupid to keep on repeating this phraseology every time we have to make a reference to some authority. The wisest course is to have this comprehensive phrase and to economise in words." (1948 (Vol. VII) CAD 610]

(Emphasis supplied)

From the above, it is seen that the intention of the Constitution framers in incorporating this Article was to treat such authority which has been created by law and which has got certain powers to make laws to make rules and regulations to be included in the term "other authorities" as found presently in Article 12.

Till about the year 1967 the courts in India had taken the view that even statutory bodies like Universities, Selection Committee for admission to Government Colleges were not "other authorities" for the purpose of Article 12 (See The University of Madras vs. Shantha Bai & Anr. (AIR 1954 Madras, 67), B.W. Devadas Vs. The Selection Committee for Admission of Students to the Karnatak Engineering College and Ors. (AIR 1964 Mysore 6). In the year 1967 the case of Rajasthan State Electricity Board Vs. Mohan Lal & Ors. (AIR 1967 SC 1857) a Constitution Bench of this Court held that the expression "other authorities" is wide enough to include within it every authority created by a Statute on which powers are conferred to carry out governmental or quasi-governmental functions and functioning within the territory of India or under the control of the Government of India.(Emphasis supplied) Even while holding so Shah, J. in a separate but concurring judgment observed that every constitutional or, statutory authority on whom powers are conferred by law is not "other authority" within the meaning of Article 12. He also observed further that it is only those authorities which are invested with sovereign powers, that is, power to make rules or regulations and to administer or enforce them to the detriment of citizens and others that fall within the definition of "State" in Article 12 : but constitutional or statutory bodies invested with power but not sharing the sovereign power of the State are not "State" within the meaning of that Article. (Emphasis supplied)

Almost a decade later another Constitution Bench of this Court somewhat expanded this concept of "other authority" in the case of Sukhdev Singh & Ors. Vs. Bhagatram Sardar Singh Raghuvanshi & Anr. (1975 3 SCR 619), in this case the Court held the bodies like Oil and Natural Gas Commission, Industrial Finance Corporation and Life Insurance

Corporation which were created by statutes because of the nature of their activities do come within the term "other authorities" in Article 12. Even though in reality they were really constituted for commercial purposes while so holding Mathew J. gave the following reasons for necessitating to expand the definition of the term "other authorities" in the following words:-

"The concept of State has undergone drastic changes in recent years. Today State cannot be conceived of simply as a coercive machinery wielding the thunderbolt of authority. It has to be viewed mainly as a service Corporation. A State is an abstract entity. It can only act through the instrumentality or agency or natural or juridical persons. There is nothing strange in the notion of the State acting through a Corporation and making it an agency or instrumentality of the State. With the advent of a welfare State the framework of civil service administration became increasingly insufficient for handling the new tasks which were often of a specialised and highly technical character. The distrust of Government by civil service was a powerful factor in the development of a policy of public administration through separate Corporations which would operate largely according to business principles and be separately accountable. The Public Corporation, therefore, became a third arm of the Government. The employees of public Corporation are not civil servants. In so far as public corporations fulfil public tasks on behalf of government they are public authorities and as such subject to control by Government. The public Corporation being a creation of the State is subject to the constitutional limitation as the State itself. The governing power wherever located must be subject to the fundamental constitutional limitations. The ultimate question which is relevant for our purpose is whether the Corporation is an agency of instrumentality of the Government for carrying on a business for the benefit of the public."

From the above, it is to be noticed that because of the change in the socio-economic policies of the Government this Court considered it necessary by judicial interpretation to give a wider meaning to the term "other authorities" in Article 12 so as to include such bodies which were created by Act of Legislature to be included in the said term "other authorities".

This judicial expansion of the term "other authorities" came about primarily with a view to prevent the Government from by-passing its constitutional obligations by creating companies, corporations etc. to perform its duties.

At this stage it is necessary to refer to the judgment of Sabhajit Tewary vs U.O.I. & Ors. [(1975) 3 SCR 616] which was delivered by the very same Constitution Bench which delivered the judgment in Sukhdev Singh & Ors. on the very same day. In this judgment this court noticing its judgment in Sukhdev Singh & Ors (supra), rejected the contention of the petitioner therein that council for Scientific and Industrial Research the respondent body in the said writ petition which was only registered under

the Societies Registration Act would come under the term "other authorities" in Article 12.

The distinction to be noticed between the two judgments referred to hereinabove namely Sukhdev Singh & Ors and Sabhajit Tewary (supra), is that in the former the Court held that bodies which were creatures of the statues having important State functions and where State had pervasive control of activities of those bodies would be State for the purpose of Article 12. While in Sabhajit Tewary's case the Court held a body which was registered under a statute and not performing important State functions and not functioning under the pervasive control of the Government would not be a State for the purpose of Article 12.

Subsequent to the above judgments of the Constitution Bench a Three Judge Bench of this Court in the case of Ramana Dayaram Shetty Vs. The International Airport Authority of India & Ors. (1979 3 SCR 1014) placing reliance on the judgment of this Court in Sukhdev Singh (supra) held that the International Airport Authority which was an authority created by the International Airport Authority Act, 1971 was an instrumentality of the State, hence, came within the term "other authorities" in Article 12, while doing so this Court held :-

"To-day the Government, in a welfare State, is the regulator and dispenser of special services and provider of a large number of benefits. The valuables dispensed by Government take many forms, but they all share one characteristic. They are steadily taking the place of traditional forms of wealth. These valuables which derive from relationships to Government are of many kind : leases, licenses, contracts and so forth. With the increasing magnitude and range of governmental functions as we move closer to a welfare State, more and more of our wealth consists of these new forms. Some of these forms of wealth may be in the nature of legal rights but the large majority of them are in the nature of privileges. But on that account, it cannot be said that they do not enjoy any legal protection nor can they be regarded as that they do not enjoy any legal protection nor can they be regard as gratuity furnished by the State so that the State may withhold, grant or revoke it at its pleasure.

The law has not be slow to recognize the importance of this new kind of wealth and the need to protect individual interest in it and with that end in view, it has developed new forms of protection. Some interest in Government largess, formerly regarded as privileges, have been recognised as rights while others have been given legal protection not only by forging procedural safeguards but also by confining/structuring and checking Government discretion in the matter of grant of such largess. The discretion of the Government has been held to be not unlimited in that the Government cannot give or withhold largess in its arbitrary discretion or at its sweet will.

It is in the above context that the Bench in Ramana Dayaram Shetty's case laid down the parameters or the guidelines for identifying a body as coming within the definition of "other authorities" in Article 12. They are as follows :-

"(1) One thing is clear that if the entire share capital of the corporation is held by Government, it would go a long way towards indicating that the corporation is an instrumentality or agency of Government.
(SCC p. 507, para 14)

(2) Where the financial assistance of the State is so much as to meet almost entire expenditure of the corporation, it would afford some indication of the corporation being impregnated with governmental character. (SCC p.508, para 15)

(3) It may also be a relevant factor \005 whether the corporation enjoys monopoly status which is State-conferred or State-protected. (SCC p. 508, para 15)

(4) Existence of deep and pervasive State control may afford an indication that the corporation is a State agency or instrumentality. (SCC p. 508, para 15)

(5) If the functions of the corporation are of public importance and closely related to governmental functions, it would be a relevant factor in classifying the corporation as an instrumentality or agency of Government. (SCC p.509, para 16)

(6) 'Specifically, if a department of Government is transferred to a corporation, it would be a strong factor supportive of this inference' of the corporation being an instrumentality or agency of Government. (SCC p.510, para 18)" (extracted from Pradeep Kumar Biswas's case (supra)

The above tests propounded for determining as to when a corporation can be said to be an instrumentality or agency of the Government was subsequently accepted by a Constitution Bench of this Court in the case of Ajay Hasia & Ors. Vs. Khalid Mujib Sehravardi & Ors. (1981 1 SCC 722). But in the said case of Ajay Hasia (supra) the court went one step further and held that a society registered under the Societies Registration Act could also be an instrument of State for the purpose of the term "other authorities" in Article 12. This part of the judgment of the Constitution Bench Ajay Hasia (supra) was in direct conflict or was seen as being in direct conflict with the earlier Constitution Bench of this Court in Sabhajit Tewary's case (supra) which had held that a body registered under a statute and which was not performing important State function or which was not under the pervasive control of the State cannot be considered as an instrumentality of the State for the purpose of Article 12.

The above conflict in the judgments of Sabhajit Tewary (supra) and Ajay Hasia (supra) of two coordinate Benches was noticed by this Court in the case of Pradeep Kumar Biswas and hence the said case of Pradeep Kumar Biswas (supra) came to be referred to a larger Bench of seven Judges and the said Bench, speaking through Ruma Pal, J. held that the judgment in Sabhajit Tewary (supra) was delivered on the facts of that case, hence could not be considered as having laid down any principle in law. The said larger Bench while accepting the ratio laid down in Ajay Hasia's case (supra) though cautiously had to say the following in regard to the said judgment of this Court in Ajay Hasia :-
"Perhaps this rather overenthusiastic application of the broad limits set by Ajay Hasia may have persuaded this Court to curb the tendency in Chander Mohan Khanna vs.

National Council of Educational Research and Training. The court referred to the tests formulated in Sukhdev Singh, Ramana, Ajay Hasia and Som Prakash Rekhi but striking a note of caution said that (at SCC p.580, para 2) "these are merely indicative indicia and are by no means conclusive or clinching in any case".

In that case, the question arose whether the National Council of Educational Research (NCERT) was a "State" as defined under Article 12 of the Constitution. NCERT is a society registered under the Societies Registration Act. After considering the provisions of its memorandum of association as well as the rules of NCERT, this Court came to the conclusion that since NCERT was largely an autonomous body and the activities of NCERT were not wholly related to governmental functions and that the governmental control was confined only to the proper utilisation of the grant and since its funding was not entirely from government resources, the case did not satisfy the requirements of the State under Article 12 of the Constitution. The Court relied principally on the decision in Tekraj Vasandi v. Union of India. However, as far as the decision in Sabhajit Tewary v. Union of India was concerned, it was noted (at SCC p.583 para 8) that the "decision has been distinguished and watered down in the subsequent decisions."

(para38)

Thereafter the larger Bench of this Court in Pradeep Kumar Biswas (supra) after discussing the various case laws laid down the following parameters for gauging whether a particular body could be termed as State for the purpose of Article 12 :-

"The picture that ultimately emerges is that the tests formulated in Ajay Hasia are not a rigid set of principles so that if a body falls within any one of them it must, ex hypothesi, be considered to be a State within the meaning of Article 12. The question in each case would be \026 whether in the light of the cumulative facts as established, the body is financially, functionally and administratively dominated by or under the control of the Government. Such control must be particular to the body in question and must be pervasive. If this is found then the body is a State within Article 12. On the other hand, when the control is merely regulatory whether under statute or otherwise, it would not serve to make the body a State." (para 40)

Above is the ratio decidendi laid down by a seven Judge Bench of this Court which is binding on this Bench. The facts of the case in hand will have to be tested on the touch stone of the parameters laid down in Pradeep Kumar Biswas's case (supra). Before doing so it would be worthwhile once again to recapitulate what are the guidelines laid down in Pradeep Kumar Biswas's case (supra) for a body to be a State under Article 12. They are :-

(1) Principles laid down in Ajay Hasia are not a rigid set of principles so that if a body falls within any one of them it must ex hypothesi, be considered to be a

State within the meaning of Article 12.

(2) The Question in each case will have to be considered on the bases of facts available as to whether in the light of the cumulative facts as established, the body is financially, functionally, administratively dominated, by or under the control of the Government.

(3) Such control must be particular to the body in question and must be pervasive.

(4) Mere regulatory control whether under statute or otherwise would not serve to make a body a State.

The facts established in this case shows the following :-

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

To these facts if we apply the principles laid down by seven Judge Bench in Pradeep Kumar Biswas (supra), it would be clear that the facts established do not cumulatively show that the Board is financially, functionally or administratively dominated by or is under the control of the Government. Thus the little control that the Government may be said to have on the Board is not pervasive in nature. Such limited control is purely regulatory control and nothing more.

Assuming for argument sake that some of the functions do partake the nature of public duties or State actions they being in a very limited area of the activities of the Board would not fall within the parameters laid down by this Court in Pradeep Kumar Biswas's case. Even otherwise assuming that there is some element of public duty involved in the discharge of the Board's functions even then as per the judgment of this Court in Pradeep Kumar Biswas (supra) that by itself would not suffice for bringing the Board within the net of "other authorities" for the purpose of Article 12.

The learned counsel appearing for the petitioners, however, contended that there are certain facets of the activities of the Board which really did not come up for consideration in any one of the earlier cases including in Pradeep Kumar Biswas case (supra) and those facts if considered would clearly go on to show that the Board is an instrumentality of the State. In support of this argument, he contended that in the present day context cricket has become a profession and that the cricketers have a fundamental right under Article 19 (1) (g) to pursue their professional career as cricketers. It was also submitted that the Board controls the said rights of a citizen by its rules and regulations and since such a regulation can be done only by the State the Board of necessity must be regarded as an instrumentality of the State. It was also

pointed out that under its Memorandum of Association and the rules and regulations and due to its monopolistic control over the game of Cricket the Board has all pervasive powers to control a person's cricketing career as it has the sole authority to decide on his membership and affiliation to any particular Cricketing Association, which in turn would affect his right to play cricket at any level in India as well as abroad.

Assuming that these facts are correct the question then is, would it be sufficient to hold the Board to be a State for the purpose of Article 12?

There is no doubt that Article 19(1)(g) guarantees to all citizens the fundamental right to practise any profession or to carry on any trade occupation or business and that such a right can only be regulated by the State by virtue of Article 19(6). Hence, it follows as a logical corollary that any violation of this right will have to be claimed only against the State and unlike the rights under Articles 17 or 21 which can be claimed against non state actors including individuals the right under Article 19(1)(g) cannot be claimed against an individual or a non State entity. Thus, to argue that every entity, which validly or invalidly arrogates to itself the right to regulate or for that matter even starts regulating the fundamental right of the citizen under Article 19(1)(g), is a State within the meaning of Article 12 is to put the cart before the horse. If such logic were to be applied every employer who regulates the manner in which his employee works would also have to be treated as State. The pre-requisite for invoking the enforcement of a fundamental right under Article 32 is that the violator of that right should be a State first. Therefore, if the argument of the learned counsel for the petitioner is to be accepted then the petitioner will have to first establish that the Board is a State under Article 12 and it is violating the fundamental rights of the petitioner. Unless this is done the petitioner cannot allege that the Board violates fundamental rights and is therefore State within Article 12. In this petition under Article 32 we have already held that the petitioner has failed to establish that the Board is State within the meaning of Article 12. Therefore assuming there is violation of any fundamental right by the Board that will not make the Board a "State" for the purpose of Article 12.

It was then argued that the Board discharges public duties which are in the nature of State functions. Elaborating on this argument it was pointed out that the Board selects a team to represent India in international matches. The Board makes rules that govern the activities of the cricket players, umpires and other persons involved in the activities of cricket. These, according to the petitioner, are all in the nature of State functions and an entity which discharges such functions can only be an instrumentality of State, therefore, the Board falls within the definition of State for the purpose of Article 12. Assuming that the abovementioned functions of the Board do amount to public duties or State functions, the question for our consideration is: would this be sufficient to hold the Board to be a State for the purpose of Article 12. While considering this aspect of the argument of the petitioner, it should be borne in mind that the State/Union has not chosen the Board to perform these duties nor has it legally authorised the Board to carry out these functions under any law or agreement. It has chosen to leave the activities of cricket to be controlled by private bodies out of such bodies' own volition (self-arrogated). In such circumstances when the actions of the Board are not actions as an authorised representative of the State, can it be said that the Board is discharging State functions? The answer should be no. In the absence of any authorisation, if a private body chooses to discharge any such function which is not prohibited by law then it would be incorrect to hold that such action of the body would make it an instrumentality of the State. The Union of India has tried to make out a case that the Board discharges these functions because of the de facto recognition granted by it to the Board under the guidelines framed by it but the Board has denied the same. In this regard we must hold that the Union of India has failed to prove that there is any recognition by the Union of India under the guidelines framed by it and that the Board is discharging these functions

on its own as an autonomous body.

However, it is true that the Union of India has been exercising certain control over the activities of the Board in regard to organising cricket matches and travel of the Indian team abroad as also granting of permission to allow the foreign teams to come to India. But this control over the activities of the Board cannot be construed as an administrative control. At best this is purely regulatory in nature and the same according to this Court in Pradeep Kumar Biswas's case (supra) is not a factor indicating a pervasive State control of the Board.

Be that as it may, it cannot be denied that the Board does discharge some duties like the selection of an Indian cricket team, controlling the activities of the players and others involved in the game of cricket. These activities can be said to be akin to public duties or State functions and if there is any violation of any constitutional or statutory obligation or rights of other citizens, the aggrieved party may not have a relief by way of a petition under Article 32. But that does not mean that the violator of such right would go scot-free merely because it or he is not a State. Under the Indian jurisprudence there is always a just remedy for violation of a right of a citizen. Though the remedy under Article 32 is not available, an aggrieved party can always seek a remedy under the ordinary course of law or by way of a writ petition under Article 226 of the Constitution which is much wider than Article 32.

This Court in the case of Andi Mukta Sadguru Shree Muktajee Vandas Swami Suvarna Jayanti Mahotsav Smarak Trust & Ors. vs. V.R. Rudani & Ors. (1989 2 SCC 691) has held :

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

Thus, it is clear that when a private body exercises its public functions even if it is not a State, the aggrieved person has a remedy not only under the ordinary law but also under the Constitution, by way of a writ petition under Article 226. Therefore, merely because a non-governmental body exercises some public duty that by itself would not suffice to make such body a State for the purpose of Article 12. In the instant case the activities of the Board do not come under the guidelines

laid down by this Court in Pradeep Kumar Biswas case (supra), hence there is force in the contention of Mr. Venugopal that this petition under Article 32 of the Constitution is not maintainable.

At this stage, it is relevant to note another contention of Mr. Venugopal that the effect of treating the Board as State will have far reaching consequences in as much as nearly 64 other national sports federations as well as some other bodies which represent India in the international forum in the field of art, culture, beauty pageants, cultural activities, music and dance, science and technology or other such competitions will also have to be treated as a "State" within the meaning of Article 12, opening the flood gates of litigation under Article 32. We do find sufficient force in this argument. Many of the above mentioned federations or bodies do discharge functions and/ or exercise powers which if not identical are at least similar to the functions discharged by the Board. Many of the sport persons and others who represent their respective bodies make a livelihood out of it (for e.g. football, tennis, golf, beauty pageants etc.). Therefore, if the Board which controls the game of Cricket is to be held to be a State for the purpose of Article 12, there is absolutely no reason why other similarly placed bodies should not be treated as State. The fact that game of Cricket is very popular in India also cannot be a ground to differentiate these bodies from the Board. Any such differentiation dependent upon popularity, finances and public opinion of the body concerned would definitely violate Article 14 of the Constitution, as any discrimination to be valid must be based on hard facts and not mere surmises (See State of Kerala v. T.P. Roshana, (1979) 1 SCC 572) Therefore, the Board in this case cannot be singly identified as "other authority" for the purpose of Article 12. In our opinion, for the reasons stated above none of the other federations or bodies referred to hereinabove including the Board can be considered as a "State" for the purpose of Article 12.

In conclusion, it should be noted that there can be no two views about the fact that the Constitution of this country is a living organism and it is the duty of Courts to interpret the same to fulfil the needs and aspirations of the people depending on the needs of the time. It is noticed earlier in this judgment that in Article 12 the term "other authorities" was introduced at the time of framing of the Constitution with a limited objective of granting judicial review of actions of such authorities which are created under the Statute and which discharge State functions. However, because of the need of the day this Court in Rajasthan State Electricity Board (supra) and Sukhdev Singh (supra) noticing the socio-economic policy of the country thought it fit to expand the definition of the term "other authorities" to include bodies other than statutory bodies. This development of law by judicial interpretation culminated in the judgment of the 7-Judge Bench in the case of Pradeep Kumar Biswas (supra). It is to be noted that in the meantime the socio-economic policy of the Government of India has changed [See Balco Employees' Union (Regd.) v. Union of India & Ors. (2002 2 SCC 333)] and the State is today distancing itself from commercial activities and concentrating on governance rather than on business. Therefore, the situation prevailing at the time of Sukhdev Singh (supra) is not in existence at least for the time being, hence, there seems to be no need to further expand the scope of "other authorities" in Article 12 by judicial interpretation at least for the time being. It should also be borne in mind that as noticed above, in a democracy there is a dividing line between a State enterprise and a non-State enterprise, which is distinct and the judiciary should not be an instrument to erase the said dividing line unless, of course, the circumstances of the day require it to do so.

In the above view of the matter, the second respondent-Board cannot be held to be a State for the purpose of Article 12. Consequently, this writ petition filed under Article 32 of the Constitution is not maintainable and the same is dismissed.

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S.B. SINHA, J :

The matter calls for an authoritative pronouncement as to whether the Board of Control for Cricket in India (Board) which is a cricket controlling authority in terms of the ICC Rules answers the description of "Other Authorities" within the meaning of Article 12 of the Constitution of India.

BACKGROUND FACTS:

The First Petitioner is one of the largest vertically integrated media entertainment groups in India. The Board, the second Respondent herein, is a Society registered under the Tamil Nadu Societies Registration Act which is said to be recognized by the Union of India, Ministry of Youth Affairs and Sports. The Third and Fourth Respondents are President and Secretary respectively of the Second Respondent. The Fifth Respondent, "ESPN Star Sports", known as "ESS" is a partnership firm of the United States of America having a branch office in Singapore. The Sixth Respondent is a firm of Chartered Accountants which was engaged by Board in relation to the tender floated on 07.08.2004. Pursuant to or in furtherance of a notice inviting tender for grant of exclusive television rights for a period of four years, several entertainment groups including the Petitioners and the Fifth Respondent herein gave their offers. For the purpose of this matter, we would presume that both the Petitioners and the said Respondent were found eligible therefor. The First Petitioner gave an offer for an amount of US $ 260,756,756.76 (INR equivalent to Rs.12,060,000,000/- (Rupees twelve thousand sixty million only - @ INR 46.25/US $) Or US $ 281,189,189.19 (INR equivalent to Rs.13,005,000,000/- (Rupees thirteen thousand five million only - @ INR 46.25/US $).

Upon holding negotiations with the First Petitioner as also the Fifth Respondent, the Board decided to accept the offer of the former; pursuant to and in furtherance whereof a sum of Rs. 92.50 crores equivalent to US $ 20 millions was deposited in the State Bank of Travancore. In response to a draft letter of intent sent by the Board, the First Petitioner agreed to abide by the terms and conditions of offer subject to the conditions mentioned therein.

The Fifth Respondent in the meanwhile filed a writ petition before the Bombay High Court which was marked as Writ Petition (L) No. 2462 of 2004. The parties thereto filed their affidavits in the said proceeding. In its affidavit, the Board justified its action in granting the contract in favour of the First Petitioner. The matter was taken up for hearing on day to day basis. Arguments of the Fifth Respondent as also the First Petitioner had been advanced. On 21.9.2004, however, the Board before commencing its argument stated that it purported to have cancelled the entire tender process on the premise that no concluded contract was reached between the parties as no letter of intent had therefor been issued. The First Petitioner, however, raised a contention that such a concluded contract in fact had been arrived at. The Fifth Respondent, in view of the statements made by the counsel for the Board, prayed for withdrawal of the writ petition, which was permitted. On the same day i.e. on 21.9.2004 itself, the Board terminated the contract of the First Petitioner stating :

"In the larger interest of the game of cricket and due to the stalemate that has been created in the grant of Television Rights for the ensuing Test Series owing to litigation and as informed before the Hon’ble High Court at Bombay this day, the Board of Control for Cricket in India (BCCI) hereby cancels the entire process of tender by invoking Clause 5.3, 5.4 (c) and 5.4 (d) of the invitation to tender (ITT) dated 7 August, 2004, the terms

of which were accepted and acknowledged by you.

The Security in the form of Bank Guarantee and/or money deposited by you is being returned immediately."

WRIT PETITION:

The order of the Board dated 21.9.2004 terminating the contract is in question in this writ petition contending that the action on the part of the Board in terminating the contract is arbitrary and, thus, violative of Article 14 of the Constitution of India.

In the writ petition, the Petitioners have, inter alia, prayed for setting aside the said communication as also for issuance of a writ of or in the nature of mandamus commanding upon the Board to act in tems of the decision arrived on 5.9.2004.

REFERENCE:

By an order dated 27.9.2004, a three-Judge Bench of this Court referred the matter to a Constitution Bench stating :

"These petitions involve a question related to the interpretation of the Constitution of India which will have to be heard by a Bench not less than 5 Judges as contemplated under Article 145(3) of the Constitution. Place this matter before Hon'ble the Chief Justice for further orders.

Since the matter involved requires urgent consideration, we request the Chief Justice to place this matter before the Constitution Bench for further orders on 28.9.2004.

We direct the Attorney General to take notice on behalf of first respondent. The petitioner shall take steps to serve respondent no.6 dasti. The same shall be served today indicating that the matter will be heard tomorrow."

PRELIMINARY ISSUE:

On commencement of hearing, Mr. K.K. Venugopal, learned Senior Counsel appearing on behalf of the Second Respondent raised an issue as regard maintainability of the writ petition on the premise that the Board is not a 'State' within the meaning of Article 12 of the Constitution of India. The said issue having been treated as a preliminary issue, the learned counsel were heard thereupon. This judgment is confined to the said issue alone.

PLEAS OF THE PARTIES :

Writ Petitioners :

The factors pleaded by the writ petitioners herein which would allegedly demonstrate that the Board is an authority that would be subject to the constitutional discipline of Part III of the Constitution of India, are as under :

"a. It undertakes all activities in relation to Cricket including entering into the contracts for awarding telecast and broadcasting rights, for advertisement revenues in the Stadium etc.

b. The team fielded by the BCCI plays as "Indian

Team" while playing One Day Internationals or Test Matches \026 it cannot be gainsaid that the team purports to represent India as a nation, and its wins are matters of national prestige. They wear uniform that carries the national flag, and are treated as sports ambassadors of India.

c. The sportsmen of today are professionals who devote their life to playing the game. They are paid a handsome remuneration by the BCCI for their participation in the team. Thus, they are not amateurs who participate on an honorary basis. Consequently they have a right under Article 19(1)(g) to be considered for participation in the game. The BCCI claims the power to debar players from playing cricket in exercise of its disciplinary powers. Obviously, it is submitted, a body that purports to exercise powers that impinge on the fundamental rights of citizens would constitute at least an "authority" within the meaning of Art. 12 of the Constitution \026 it can hardly contend that it has the power to arbitrarily deny players all rights to even be considered for participation in a tournament which they are included as a team from "India".

d. This Hon'ble Court has already, by its interim orders., directed a free to air telecast of the matches that were played in Pakistan in which a team selected by the Respondent BCCI participated. This was done, it is respectfully submitted, keeping in view the larger public interest involved in telecasting of such a sport. Surely, the regulatory body that controls solely and to the exclusion of all others, the power to organize such games, and to select a team that would participate in such games is performing a public function that must be discharged in a manner that complies with the constitutional discipline of Part III of the Constitution. If the events organized are public events, then it is submitted that the body that is the controlling authority of such public events would surely be subject to the discipline of Art. 14 and 19 of the Constitution.

e. It is also submitted that even domestically, all representative cricket can only be under its aegis. No representative tournament can be organized without the permission of BCCI or its affiliates at any level of cricket.

f. The BCCI and its affiliates are the recipients of State largesse, inter alia, in the form of nominal rent for stadia. It is submitted that the BCCI is performing one of the most important public functions for the country with the authorization and recognition by the Govt. of India, is amenable to the writ jurisdiction of this Hon'ble Court under the provisions of the Constitution of India."

Union of India:

Union of India contends that the Board is a State. In support of the said plea an affidavit affirmed by Deputy Secretary to the Government of India, Ministry of Youth Affairs and Sports has been filed. A large number

of documents have also been filed to show that the Board had all along been acting as a recognized body and as regard international matches has always been seeking its prior permission. The Board had also been under the administrative control of the Government of India.

Board :

In support of its plea that it is not a 'State', the Second Respondent in its Counter Affidavit asserted :

"(a) Board of Control of Cricket in India, the Respondent No.2 is an autonomous non-profit making Association limited and restricted to its Members only and registered under the Tamil Nadu Societies Registration Act. It is a private organization whose objects are to promote the game of Cricket. Its functions are regulated and governed by its own Rules and Regulations independent of any statute and are only related to its members. The Rules and Regulations of the Respondent no.2 have neither any statutory force nor it has any statutory powers to make rules or regulations having statutory force.

(b) The Working Committee elected from amongst its members in accordance with its own Rules controls the entire affairs and management of the Respondent No.2. There is no representation of the Government or any Statutory Body of whatsoever nature by whatever form in the Respondent No.2. There exists no control of the Government over the function, finance, administration, management and affairs of the Respondent No.2.

(c) \005The Respondent No.2 does not discharge or perform any public or statutory duty.

(d) The Respondent no.2 receives no grant of assistance in any form or manner from the Government in this context. It may be stated that in a writ petition in the case of Rahul Mehra vs. Union of India in the Hon'ble High Court at Delhi. "Union of India" filed Affidavits stating categorically that there is no Government control of any nature upon the Board of Control for Cricket in India and as it does not follow the Government Guidelines which have been consolidated and issued under the title "Sports India Operation Excellence" vide Circular No.F.1-27/86-DESK-1 (SP-IV) dated 16th February, 1988 issued by the Department of Youth Affairs and Sports, Government of India has neither extended any financial assistance to the Board of Control for Cricket in India nor has any relationship of whatsoever nature with it and no financial assistance is also extended for participation of any tournament, competition or otherwise organized by the Respondent No.2. Copies of the said Affidavits are annexed hereto as Exhibits "A" and "B" respectively.

(e) The Respondent no.2 organizes cricket matches and/or tournaments between the Teams of its Members and with the Teams of the members of International Cricket Council (ICC) which is also an autonomous Body dehors any Government control\005.Matches that are organized are played at places either belonging to Members in India or at the places of either belonging to its Members of ICC only. Only when for the purpose of organizing any match or tournament with foreign

participants, the Respondent no.2 requires normal and scheduled permissions from the Ministry of Sports for travel of foreign teams, it obtains the same like any other private organization, particularly in the subject matter of foreign exchange. The Respondent No.2 is the only autonomous sporting body which not only does not obtain any financial grants but on the contrary earns foreign exchange.

(f) Organizing Cricket Matches and/or Tournaments between the Teams of the Members of the Respondent No.2 and/or with the co-members of International Cricket Council cannot be said to be a facet of public function or government in character. No monopoly status has been conferred upon the Respondent No.2 either by Statute or by the Government. Any other body could organize any matches on its own and neither the Respondent no.2 nor the Government could oppose the same. As a matter of fact, number of cricket matches including International matches are played in the Country which have nothing to do with the Respondent No.2. Respondent No.2 has no monopoly over sending teams overseas for the game of cricket and to control the entire game of cricket in India. Matches which are sanctioned or recognized by the ICC are only known as Official Test matches or One day International Matches. Respondent no.2 is entitled to invite teams of other members of ICC or send teams to participate in such matches by virtue of its membership of ICC."

ESS :

Although, as noticed hereinbefore, ESS itself filed a writ petition before the Bombay High Court on the ground that the same was violative of Article 14 of the Constitution, it now contends that although a writ petition under Article 226 of the Constitution before the High Court would be maintainable but not one under Article 32 thereof as the Board is not a 'State'.

SUBMISSIONS OF THE LEARNED COUNSEL :

Mr. K.K. Venugopal, the learned senior counsel appearing in support of the preliminary issue would submit that as the Board does not come within the purview of any of the six legal tests laid down by this Court in Pradeep Kumar Biswas vs. Indian Institute of Chemical Biology and Others [(2002) 5 SCC 111], it would not be a 'State'. Our attention, in this behalf, has been drawn to paragraphs 25, 27, 30, 31, 38, 42 to 45, 48, 49, 50, 51, 52 to 55 of the said judgment . It was contended that the Board is an autonomous body and the Central Government does not have any control thereover either financially or administratively or functionally. It was urged that neither the Central Government gives any monetary grant nor nominates any member in the Governing Body of the Board nor has anything to do with its internal affairs. It was pointed out by the learned counsel that even the Union of India had agreed before the Bombay High Court that the Board had the exclusive telecasting rights as owner of the events. The Board furthermore does not exercise any sovereign or governmental functions; Mr. Venugopal would argue that furthermore the Board has not even been recognized by the Union of India nor has it any role to play as regard framing of its rules and regulations.

Dr. A.M. Singhvi, learned Senior Counsel appearing on behalf of the Third Respondent herein, would supplement the arguments of Mr. Venugopal contending that the activity of a body like Board does not involve any public duty or public function and although its action is public in nature, the same would not amount to a governmental action. Reliance, in this connection, has been placed on R. vs. Football Association Ltd, ex parte Football League Ltd. [1993 (2) AER 833] and R. vs. Disciplinary Committee of the Jockey Club, ex parte Aga Khan [1993 (2) AER 853].

The leaned counsel has also drawn our attention to a decision of this Court in Federal Bank Ltd. vs. Sagar Thomas and Others [(2003) 10 SCC 733]. According to Dr. Singhvi, there exists a distinction between Articles 32 and 226 of the Constitution of India. Reliance in this behalf has been placed on a decision of this Court in Andi Mukta Sadguru Shree Muktajee Vandas Swami Suvarna Jayanti Mahotsav Smarak Trust and Others vs. V.R. Rudani and Others [(1989) 2 SCC 691].

Mr. Soli J. Sorabjee, the learned Senior Counsel appearing on behalf the fifth Respondent, would contend that the nature of the function of the concerned authority plays an important role in determining the question and only where the function is governmental in nature or where the authority is vested under a statute, it would attract the definition of "other authorities" within the meaning of Article 12 of the Constitution and not otherwise. The learned counsel would, however, submit that in Aga Khan (supra), the Court of Appeal has accepted that there may be some cases where the judicial review would be maintainable. Drawing our attention to a decision of this Court in G. Bassi Reddy vs. International Crops Research Institute and Another [(2003) 4 SCC 225], the learned counsel would urge that Board does not fulfil the tests laid down therein.

Mr. Harish Salve, learned Senior Counsel appearing on behalf of the Writ Petitioners, on the other hand, would take us through the Memorandum and Articles of Association of the Board as also the rules and regulations framed by it and contend that from a perusal thereof it would be manifest that it exercises extensive power in selecting players for the Indian National team in the international events. The Board, also exercises stringent disciplinary powers over players, umpires, members of the team and other officers. It is the contention of Mr. Salve that the activities of the Board in effect and substance are governmental functions in the area of sports. An exclusive right has been granted to it to regulate the sport in the name of the country resulting in exercise of functions of larger dimension of public entertainment. When a body like the Board has received recognition from the Union of India to allow it to represent India as a country, its character must be held to have changed from private body to a public authority. It was submitted that the players put on colours of National Flag on their attire. Because of the nature of its actions the International Cricket Council has recognized the Board not in its capacity as a cricket playing club but as a representative of India, a cricket playing country. By its disciplinary action, Mr. Salve would argue, the Board may debar a player from representing the country as a result whereof his fundamental right under Article 19(1)(g) of the Constitution of India would be affected. He would submit that the Board, therefore, is not an autonomous body discharging a private function only and in fact it deals with sporting events of the country. The learned counsel would argue that the Board acts strictly in terms of the foreign policy of the country as it refused to recognize a player who played in South Africa, as apartheid was being practiced therein which was consistent with India's foreign policy. It was further submitted that the cricket match between India and Pakistan could be held only with the permission of the Union of India as and when the relationship between the two countries improved.

Mr. Salve, therefore, submits that the Board is a 'State' within the meaning of Article 12 of the Constitution of India as:

(i) it regulates cricket;
(ii) It has a virtual monopoly;
(iii) it seeks to put restrictions on the fundamental rights of the players and umpires to earn their livelihood as envisaged under Article 19(1)(g) of the Constitution of India;
(iv) The cricket events managed by the third Respondent have a definite concept, connotation and significance which have a bearing on the performance of individual players as also the team as a national team representing the country in the entire field of cricket.

Mr. Mohan Parasaran, learned counsel appearing on behalf of Union of India would contend that the functions of the Board are of public importance and closely related to governmental functions. Functions of the Board, the learned counsel would urge, also control free speech rights of citizens within a public forum which is essentially a governmental function. Reference in this connection has been made to Daniel Lee Vs. Vera Katz \026 276 F.3d 550.

CONSTITUTIONAL DEVELOPMENT :

Our Constitution is an ongoing document and, thus, should be interpreted liberally. Interpretation of Article 12, having regard to the exclusive control and management of sport of cricket by the Board and enormous power exercised by it calls for a new approach. The Constitution, it is trite, should be interpreted in the light of our whole experience and not merely in that of what was the state of law at the commencement of the Constitution.

[See Missouri vs. Holland (252 US 416 (433) and Kapila Hingorani vs. State of Bihar [(2003) 6 SCC 1].

Furthermore in John Vallamattom and Anr. Vs. Union of India [JT 2003 (6) SC 37] while referring to an amendment made in U.K. in relation to a provision which was in pari materia with Section 118 of the Indian Succession Act, 1925, this Court observed:

"...The constitutionality of a provision, it is trite, will have to be judged keeping in view the interpretive changes of the statute effected by passage of time."

Referring to the changing scenario of the law and having regard to the declaration on the right to development adopted by the World Conference on Human Rights and Article 18 of the United Nations Covenant on Civil and Political Rights, 1966, this Court held:

"It is trite that having regard to Article 13(1) of the Constitution, the constitutionality of the impugned legislation is required to be considered on the basis of laws existing on 26th January, 1950, but while doing so the court is not precluded from taking into consideration the subsequent events which have taken place thereafter. It is further trite that that the law although may be constitutional when enacted but with passage of time the same may be held to be unconstitutional in view of the changed situation.

Justice Cardoze said :

"The law has its epochs of ebb and flow, the flood tides are on us. The old order may change yielding place to new; but the transition is never an easy process".

Albert Campus stated :

"The wheel turns, history changes". Stability and change are the two sides of the same law-coin. In their pure form they are antagonistic poles; without stability the law becomes not a chart of conduct, but a gare of chance: with only stability the law is as the still waters in which there is only stagnation and death."

In any view of the matter even if a provision was not unconstitutional on the day on which it was enacted or the Constitution came into force, by reason of facts emerging out thereafter, the same may be rendered unconstitutional."

In Liverpool & London S.P. & I Association Ltd. vs. M.V. Sea Success I and Another, (2004) 9 SCC 512, this Court observed:

"Referring to Motor General Traders and Another vs. State of Andhra Pradesh and Others [(1984) 1 SCC 222], Rattan Arya and Others vs. State of Tamil Nadu and Another [(1986) 3 SCC 385] and Synthetics and Chemicals Ltd. and Others vs. State of U.P. and Others [(1990) 1 SCC 109], this Court held: (SCC p. 608, para 49)

"There cannot be any doubt whatsoever that a law which was at one point of time constitutional may be rendered unconstitutional because of passage of time. We may note that apart from the decisions cited by Mr. Sanghi, recently a similar view has been taken in Kapila Hingorani Vs. State of Bihar [JT 2003 (5) SC 1] and John Vallamattom and Anr. Vs. Union of India [JT 2003 (6) SC 37]."

Constitution of India is an ongoing document. It must be interpreted accordingly.

In Francis Bennion's 'Statutory Interpretation', Fourth Edition at page 762, it is stated :

"It is presumed that Parliament intends the court to apply to ongoing Act a construction that continuously updates its wording to allow for changes since the Act was initially framed (an updating construction). While it remains law, it is to be treated as always speaking. This means that in its application on any date, the language of the Act, though necessarily embedded in its own time, is nevertheless to be construed in accordance with the need to treat it as current law.

At page 764, it is commented :

"In construing an ongoing Act, the interpreter is to presume that Parliament intended the Act to be applied at any future time in such a way as to give effect to the true original intention. Accordingly, the interpreter is to make allowances for any relevant changes that have occurred, since the Act's passing, in law, social conditions, technology, the meaning of words, and other matters. Just as the US Constitution is regarded as 'a living Constitution', so an ongoing British Act is regarded as 'a living Act'. That today's construction involves the supposition that Parliament was catering long ago for a state of affairs that did not then exist is no argument against that construction. Parliament, in the wording of an enactment, is expected to anticipate temporal developments. The drafter will try to foresee the future, and allow for it in the wording."

LEGISLATIVE POWERS :

Although we will advert to various rival contentions raised at the Bar at some details a litter later but suffice it to notice at this stage that encouragement of games and sports is State function in terms of Entry 33 of List II of the Seventh Schedule of the Constitution of India which reads thus:

"33. Theaters and dramatic performances; cinemas subject to the provisions of entry 60 of List 1; sports, entertainments and amusements."

The State by reason of a legislative action cannot confer on it extra territorial jurisdiction in relation to sports, entertainment etc. Education, however, is in Concurrent List being Item No.25 of List III. Sport is considered to be a part of Education (within its expanded meaning). Sport has been included in the Human Resource Development as a larger part of education. The Ministry of Youth Affairs and Sports was earlier a department of the Ministry of Human Resource Development. Now a separate Ministry of Youth Affairs and Sports has come into being, in terms of the Allocation of Business Rules.

In Secretary, Ministry of Information & Broadcasting, Government of India and Others etc. vs. Cricket Association of Bengal and Others etc. [(1995) 2 SCC 161], this Court held :

"\005It may be true that what is protected by Article 19(1)(a) is an expression of thought and feeling and not of the physical or intellectual prowess or skill. It is also true that a person desiring to telecast sports events when he is not himself a participant in the game, does not seek to exercise his right of self-expression. However, the right to freedom of speech and expression also includes the right to educate, to inform and to entertain and also the right to be educated, informed and entertained. The former is the right of the telecaster and the latter that of the viewers. The right to telecast sporting event will therefore also include the right to educate and inform the present and the prospective sportsmen interested in the particular game and also to inform and entertain the lovers of the game. Hence, when a telecaster desires to telecast a sporting event, it is incorrect to say that free-speech element is absent from his right. The degree of the element will depend upon the character of the telecaster who claims the right. An organizer such as the BCCI or CAB in the present case which are indisputably devoted to the promotion of the game of cricket, cannot be placed in the same scale as the business organizations whose only intention is to make as large a profit as can be made by telecasting the game\005."

[Emphasis supplied]

It was held that sport is a form of expressive conduct.

We may notice at this juncture that the Union of India in exercise of its executive functions in terms of the Allocation of Business Rules framed under Article 77 of the Constitution of India created a separate Ministry of Youth Affairs and Sports for the said purpose. One of the objects of the Ministry is to work in close coordination with national federations that regulate sports. Keeping in view the fact that the Union of India is required to promote sports throughout India, it, as of necessity is required to coordinate between the activities of different States and furthermore having regard to the International arena, it is only the Union of India which can exercise such a power in terms of Entry 10, List I of the Seventh Schedule of the Constitution of India and it may also be held to have requisite legislative competence in terms of Entry 97, List I of the Seventh Schedule of the Constitution of India.

ARTICLE 12:

Before adverting to the core issues at some length we may take a look at Article 12 of the Constitution of India which reads as under :

"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."

In this Article, the 'State' has not been defined. It is merely an inclusive definition. It includes all other authorities within the territory of India or under the control of the Government of India. It does not say that such other authorities must be under the control of the Government of India. The word 'or' is disjunctive and not conjunctive.

The expression "Authority" has a definite connotation. It has different dimensions and, thus, must receive a liberal interpretation. To arrive at a conclusion, as to which "other authorities" could come within the purview of Article 12, we may notice the meaning of the word "authority".

The word "Other Authorities" contained in Article 12 is not to be treated as ejusdam generis.

In Concise Oxford English Dictionary, 10th Edition, the word 'authority' has been defined as under :

"1. the power or right to give orders and enforce obedience. 2. a person or organization exerting control in a particular political or administrative sphere. 3. the power to influence others based on recognized knowledge or expertise."

Broadly, there are three different concepts which exist for determining the question which fall within the expression "other authorities".
(i) The Corporations and the Societies created by the State for carrying on its trading activities in terms of Article 298 of the Constitution wherefor the capital, infrastructure, initial investment and financial aid etc. are provided by the State and it also exercises regulation and control thereover.
(ii) Bodies created for research and other developmental works which is otherwise a governmental function but may or may not be a part of the sovereign function.
(iii) A private body is allowed to discharge public duty or positive obligation of public nature and furthermore is allowed to perform regulatory and controlling functions and activities which were otherwise the job of the government.

There cannot be same standard or yardstick for judging different bodies for the purpose of ascertaining as to whether it fulfills the requirements of law therefor or not.

In Pradeep Kumar Biswas (supra), a Seven-Judge Bench held :
"That an "inclusive" definition is generally not exhaustive is a statement of the obvious and as far as Article 12 is concerned, has been so held by this Court (Ujjam Bai v. State of U.P., AIR 1962 SC 1621 : (1963) 1 SCR 778 at 968). The words "State" and "authority" used in Article 12 therefore remain, to use the words of Cardozo (Benjamin Cardozo : The Nature of the Judicial Process), among "the great generalities of the Constitution" the content of which has been and continues to be supplied by courts from time to time."

[See also Black Diamond Beverages and Another vs. Commercial Tax Officer, Central Section, Assessment Wing, Calcutta and Others \026 (1998) 1 SCC 458]

What is necessary is to notice the functions of the Body concerned. A 'State' has different meanings in different context. In a traditional sense, it can be a body politic but in modern international practice, a State is an organization which receives the general recognition accorded to it by the existing group of other States. Union of India recognizes the Board as its

representative. The expression "other authorities" in Article 12 of the Constitution of India is 'State' within the territory of India as contradistinguished from a State within the control of the Government of India. The concept of State under Article 12 is in relation to the fundamental rights guaranteed by Part-III of the Constitution and Directive Principles of the State Policy contained in Part-IV thereof. The contents of these two parts manifest that Article 12 is not confined to its ordinary or constitutional sense of an independent or sovereign meaning so as to include within its fold whatever comes within the purview thereof so as to instill the public confidence in it.

The feature that the Board has been allowed to exercise the powers enabling it to trespass across the fundamental rights of a citizen is of great significance. In terms of the Memorandum of Association even the States are required to approach the Board for its direction. If the Constitution Bench judgment of this Court in Sukhdev Singh & Ors. vs. Bhagatram Sardar Singh [(1975) 1 SCC 421] and development of law made therefrom is to be given full effect,. it is not only the functions of the Government alone which would enable a body to become a State but also when a body performs governmental functions or quasi-governmental functions as also when its business is of public importance and is fundamental for the life of the people. For the said purpose, we must notice that this Court in expanding the definition of State did not advisedly confine itself to the debates of Constitutional Assembly. It considered each case on its own merit. In Sukhdev Singh (supra), Mathew, J. stated that even big industrial houses and big trade unions would come in the purview thereof. While doing so the courts did not lose sight of the difference between the State activity and the individual activity. This Court took into consideration the fact that new rights in the citizens have been created and if any such right is violated, they must have access to justice which is a human right. No doubt, there is an ongoing debate as regard the effect of the globalization and/or opening up of market by reason of liberalization policy of the Government as to whether that the notion of sovereignty of the State is being thereby eroded or not but we are not concerned with the said question in this case. "Other authorities", inter-alia, would be there which inter alia function within the territory of India and the same need not necessarily be the Government of India, the Parliament of India, the Government of each of the States which constitute the Union of India or the legislation of the States.

Article 12 must receive a purposive interpretation as by reason of Part III of the Constitution a charter of liberties against oppression and arbitrariness of all kinds of repositories of power have been conferred \026 the object being to limit and control power wherever it is found. A body exercising significant functions of public importance would be an authority in respect of these functions. In those respects it would be same as is executive government established under the Constitution and the establishments of organizations funded or controlled by the Government. A traffic constable remains an authority even if his salary is paid from the parking charges inasmuch as he still would have the right to control the traffic and anybody violating the traffic rules may be prosecuted at his instance.

It is not that every body or association which is regulated in its private functions becomes a 'State'. What matters is the quality and character of functions discharged by the body and the State control flowing therefrom. In Daniel Lee (supra), it was held:

"The OAC's functionally exclusive regulation of free speech within\005.a public forum, is a traditional and exclusive function of the State"

DEVELOPMENT OF LAW:

The development of law in this field is well-known. At one point of time, the companies, societies etc. registered under the Indian Companies Act and Societies Registration Act were treated as separate corporate entities being governed by its own rules and regulations and, thus, held not to be 'States' although they were virtually run as department of the Government, but the situation has completely changed. Statutory authorities and local bodies were held to be States in Rajasthan State Electricity Board, Jaipur Vs.

Mohan Lal & Ors. - (1967) 3 SCR377.

This court, however, did not stop there and newer and newer principles were evolved as a result whereof different categories of bodies came to be held as State.

The concept that all public sector undertakings incorporated under the Indian Companies Act or Societies Registration Act or any other Act for answering the description of State must be financed by the Central Government and be under its deep and pervasive control has in the past three decades undergone a sea change. The thrust now is not upon the composition of the body but the duties and functions performed by it. The primary question which is required to be posed is whether the body in question exercises public function.

In Sukhdev Singh (supra), a Constitution Bench of this Court opined that the expression 'other authority' should not be read on the touchstone of the principle of 'ejusdem generis'.

Mathew, J. in his concurring but separate judgment raised a question as to for whose benefit the Corporations were carrying on the business and in answering the same came to the conclusion that the Respondents therein were 'States' within the meaning of Article 12 of the Constitution of India. [SCC para 109].

It was observed that even big companies and trade unions would answer the said description as they exercise enormous powers.

In UP State Cooperative Land Development Bank Ltd. v. Chandra Bhan Dubey & Ors. [AIR 1999 SC 753], the land development bank was held to be a State. This Court upon analyzing various provisions of Act and the rules framed thereunder observed:

"20\005It is not necessary for us to quote various other sections and rules but all these provisions unmistakably show that the affairs of the appellant are controlled by the State Government though it functions as a cooperative society and it is certainly an extended arm of the State and thus an instrumentality of the State or authority as mentioned under Article 12 of the Constitution."

However, when the law provides for a general control over a business in terms of a statute and not in respect of the body in question, it would not be a 'State'. [See Federal Bank Ltd. (supra) K.R. Anitha and Others vs. Regional Director, ESI Corporation and Another [(2003) 10 SCC 303] and Bassi Reddy (supra)].

Madon, J. in Central Inland Water Transport Corporation Limited and Another Vs. Brojo Nath Ganguly and Another [(1986) 3 SCC 156] questioned : -

"Should then our courts not advance with the times ? Should they still continue to cling to outmoded concepts and outworn ideologies ? Should we not adjust our thinking caps to match the fashion of the day? Should all jurisprudential development pass us by, leaving us floundering in the sloughs of 19th century theories ? Should the strong be permitted to push the weak to the wall ? Should they be allowed to ride roughshod over the weak? Should the courts sit back and watch supinely while the strong trample underfoot the rights of the weak ?

It was opined :

"26. The law exists to serve the needs of the society which is governed by it. If the law is to play its allotted role of serving the needs of the society, it must reflect the ideas and ideologies of that society. It must keep time with the heartbeats of the society and with the needs and aspirations of the people. As the society changes, the law cannot remain immutable. The early nineteenth century essayist and wit, Sydney Smith, said : 'When I hear any man talk of an unaltelrable law, I am convinced that he is an unalterable fool." The law must, therefore, in a changing society march in tune with the changed ideas and ideologies\005"

Pradeep Kumar Biswas (supra) and Bassi Reddy (supra) were recently considered in Gayatri De vs. Mousumi Cooperative Housing Society Ltd. and Others [(2004) 5 SCC 90], wherein a mandamus was issued against a Cooperative Society on the ground that the order impugned therein was issued by an "administrator" appointed by the High Court who had also no statutory role to perform.

In Chain Singh vs. Mata Vaishno Devi Shrine Board & Anr. [2004 (8) SCALE 348], it was contended that a religious board was a 'State'. Although Mata Vaishno Devi Shrine Board was constituted under a statute, it was per se not a State actor. It was observed that the decisions of this Court in Bhuri Nath and Others vs. State of J & K and Others [(1997) 2 SCC 745] requires reconsideration in the light of the principles laid down in Pradeep Kumar Biswas (supra).

In Virendra Kumar Srivastava vs. U.P. Rajya Karmachari Kal. Nigam and Another [2004 (9) SCALE 623], a Division Bench of this Court while applying the tests laid down in Pradeep Kumar Biswas (supra) observed that there exists a distinction between a 'State' based on its being a statutory body and a one based on the principles propounded in the case of Ajay Hasia & Ors. vs. Khalid Mujib Sehravardi & Ors. [(1981) 1 SCC 722]

Recently a Division Bench of the Rajasthan High Court in Santosh Mittal Vs. State of Rajasthan & Ors. (since reported in 2004 (10) SCALE J-39) issued a direction to Pepsi Company and Coca-Cola and other manufacturers of carbonated beverages or soft drinks to disclose the composition and contents of the product including the presence of the pesticides and chemicals on the bottle, package or container, as the case may be, observing :

"In view of the aforesaid discussion we hold that in consonance with the spirit and content of Article 19(1)(g) and 21 of the Constitution the manufacturers of beverages namely Pepsi-Cola & Coca-Cola and other manufacturers of beverages and soft drinks, are bound to clearly specify on the bottle or package containing the carbonated beverages or soft drink, as the case may be, or on a label or a wrapper wrapped around it, the details of its composition and nature and quantity of pesticides and chemicals, if any, present therein."

Pepsi Company and Coca-Cola are multinational companies. They are business concerns but despite the same this Court in Hindustan Coca-Cola Beverages (P) Ltd. vs. Santosh Mittal & Ors. [2004 (10) SCALE 360] by an order dated 6.12.2004 dismissed the Special Leave Petitions, stating:

"Mr. Harish N. Salve, learned senior counsel appearing for the petitioner in SLP(C) No. 24266-24268/2004 and Mr. Arun Jaitley, learned senior counsel appearing for the petitioners in SLP(C) Nos. 24413/2004 and 24661-24663/2004 state that the petitioners will be advised to approach the High Court to seek clarification of exactly what kind of disclosure the High Court requires them to make. We record the statement and dismiss the special leave petitions giving liberty to the petitioners to approach the High Court for that purpose. In case the

petitioners feel aggrieved by the order passed by the High Court on the clarification application, the dismissal of these special leave petitions will not come in their way in challenging the said order.

We may, however, place on record that the learned senior counsel for the petitioners intended to argue larger constitutional issues touching Articles 19 and 21 of the Constitution which have not been raised on a second thinking and we leave them open to be decided in some other appropriate case.

Though the special leave petitions are dismissed, but the operation of the order dated 3.11.2004 passed by the High Court suspending the operation of its judgment for six weeks, is extended by another two weeks from today."

The expansion in the definition of State is not to be kept confined only to business activities of Union of India or other State Governments in terms of Article 298 of the Constitution of India but must also take within its fold any other activity which has a direct influence on the citizens. The expression "education" must be given a broader meaning having regard to Article 21A of the Constitution of India as also Directive Principles of the State Policy. There is a need to look into the governing power subject to the fundamental Constitutional limitations which requires an expansion of the concept of State action.

Constitutions have to evolve the mode for welfare of their citizens. Flexibility is the hallmark of our Constitution. The growth of the Constitution shall be organic, the rate of change glacial. (See R. Stevens, the English Judges: Their Role in the Changing Constitution (Oxford 2002), p. xiii) [Quoted by Lord Woolf in 'The Rule of Law and a Change in the Constitution, 2004 Cambridge Law Journal 317]
A school would be a State if it is granted financial aid. (See Jiby P. Chacko Vs. Mediciti School of Nursing, Ghanpur, Ranga Reddy District and Anr. 2002 (2) ALD 827)

An association performing the function of Housing Board would be performing a public function and would be bound to comply with Human Rights Act, 1998. [See Poplar Housing and Regeneration Community Association Ltd. Vs. Donoghue [2002] Q.B. 48]. But an old age house run by a private body may not. [See R (on the application of Heather and others) v. Leonard Cheshire Foundation and another (2002) 2 All ER 936]
A school can be run by a private body without any State patronage. It is permissible in law because a citizen has fundamental right to do so as his occupation in terms of Articles 19(1)(g) and 26.
But once a school receives State patronage, its activities would be State activities and thus would be subject to judicial review. Even otherwise it is subjected to certain restrictions as regard its right to spend its money out of the profit earned. [See T.M.A. Pai Foundation and Others vs. State of Karnataka and Others \026 (2002) 8 SCC 481 and Islamic Academy of Education and Another Vs. State of Karnataka and Others, (2003) 6 SCC 697].
Tests or the nature thereof would vary depending upon the fact of each case.
We must, however, remember that only because another authority would be an agency or instrument of the State, the same would not mean that there exists a relationship of "Principal and Agent" between the Government of the State and the Corporation or the society. Only its actions of promoting the sport making a law of cricket for the entire country, representing the country in international forum, appointing India's representative and the all pervasive control over players, managers and umpires are State actions.
Thus, all autonomous bodies having some nexus with the Government by itself would not bring them within the sweep of the expression 'State'. Each case must be determined on its own merits.

Let us for determining the question have a look at the relevant decisions rendered in different jurisdictions.

INDIAN CASE LAW:

In K.S. Ramamurthi Reddiar Vs. The Chief Commissioner, Pondicherry & Anr. [(1964) 1 SCR 656], it was held that the expressions "under the control of the Government of India" do not qualify the word "territory" and the expressions "under the control of the Government of India" and "within the territory of India" are distinct.

Mathew, J. in Sukhdev Singh (supra) referring to various authorities observed:

"In so far as public corporations fulfill public tasks on behalf of government, they are public authorities and as such subject to control by government." (SCC Para 87)

The said principles were reiterated in Ramana Dayaram Shetty Vs. International Airport Authority of India and Others [(1979) 3 SCC 489] laying down the factors which would enable the Court to determine as to whether a company or a society would come within the purview of "other authorities". [SCC paras 16, 18, 19 & 20].

In Ajay Hasia (supra), Sukhdev Singh (supra) and Ramana Dayaram Shetty (supra) were noticed with approval. [SCC Paras 8, 14 & 15]. See also Som Prakash Rekhi vs. Union of India and another [(1981) 1 SCC 449]

The conflict between Ajay Hasia (supra) and Sabhajit Tewary vs. Union of India and Others [(1975) 1 SCC 485] has been resolved in Pradeep Kumar Biswas (supra) by overruling Sabhajit Tewary (supra) and, thus, there does not exist any conflict. The principles laid down in Ajay Hasia (supra) are not rigid ones and, thus, it is permissible to consider the question from altogether a different angle.

It is interesting to note that Bhagwati, J. in Ramana Dayaram Shetty (supra) followed the minority opinion of Douglas, J. in Jackson Vs. Metropolitan Edison Company [42 L.Ed. (2d) 477] as against the majority opinion of Rehnquist, J. which was specifically noticed in M.C. Mehta and Another vs. Union of India and Others [(1987) 1 SCC 395]. [SCC para 29]

In Air India Statutory Corporation and Others Vs. United Labour Union and Others [(1997) 9 SCC 377], (since overruled on another point) in Steel Authority of India Ltd. and Others Vs. National Union Waterfront Workers and Others [(2001) 7 SCC 1] this Court deliberated upon the distinction between the Private Law and Public Law. [SCC para 26].

FOREIGN CASE LAW:

UNITED KINGDOM

In Nagle Vs. Feilden and Others [1966 (2) QB 633], the Jockey Club was entitled to issue licence enabling the persons to train horses meant for races. The Respondent’s application for grant of licence was rejected on the ground that she was a woman. The action of the Club which was otherwise a private club was struck down holding that it exercises the function of licensing authority and controls the profession and, thus, its actions are required to be judged and viewed by higher standards. It was held that it cannot act arbitrarily.

In Greig & Others vs. Insole & Others [1978 (3) All ER 449], a Chancery Division considered in great details the rules framed by the ICC as also the Test and County Cricket Board of United Kingdom. The question which arose therein was as to whether the ICC and consequently the TCCB could debar a cricketer from playing official cricket as also county cricket only because the plaintiffs therein, who were well-known and talented professional cricketers and had played for English County Club for some years and tests matches, could take part in the World Series Cricket which promoted sporting events of various kinds.

In R. Vs. Panel on Take-overs and Mergers, ex parte Datafin plc and another [1987 (1) All ER 564] the Court exercised the power of the judicial review over a private body.

The grounds on which judicial review was given are:

(a) The Panel, although self-regulating, do not operate consensually or voluntary but had imposed a collective code on those within its ambit;
(b) The Panel had been performing a public duty as manifested by the government's willingness to limit legislation in the area and to use the Panel as a part of its regulatory machinery. There had been an "implied devolution of power" by the Government to the Panel in view of the fact that certain legislation presupposed its existence.
(c) Its source of power was partly moral persuasive. Such a power would be exercised under a statute by the Government and the Bank of England.

Lloyd LJ. in his separate speech opined :

"On the policy level, I find myself unpersuaded. Counsel for the panel made much of the word 'self-regulating'. No doubt self-regulation has many advantages. But I was unable to see why the mere fact that a body is self-regulating makes it less appropriate for judicial review. Of course there will be many self-regulating bodies which are wholly inappropriate for judicial review. The committee of an ordinary club affords an obvious example. But the reason why a club is not subject to judicial review is not just because it is self-regulating. The panel wields enormous power. It has a giant's strength. The fact that it is self regulation, which means, presumably, that it is not subject to regulation by others, and in particular the Department of Trade and Industry, makes it not less but more appropriate that it should be subject to judicial review by the courts."

(Emphasis supplied)

[See also Aston Cantlow, Wilmcote and Billesley Parochial Church Council Vs. Wallbank [2001] 3 W.L.R. 1323].

In Poplar Housing and Regeneration Community Association Ltd. Vs. Donoghue [2001] 4 All ER 604, a question arose as to whether eviction of the defendant therein by a housing association known as Poplar Housing and Regeneration Community Association from one of the premises violated the provisions of the Human Rights Act. Lord Woolf CJ upon considering the provisions thereof as also a large number of decisions held that the Association discharges public function stating:

"\005The emphasis on public functions reflects the approach adopted in judicial review by the courts and text books since the decision of the Court of Appeal (the judgment of Lloyd LJ) in R v Panel on Take-overs and Mergers, ex p Datafin plc (Norton Opax plc intervening) [1987] 1 All ER 564, [1987] QB 815. (ii) Tower Hamlets, in transferring its housing stock to Poplar, does not transfer its primary public duties to Poplar. Poplar is no more than the means by which it seeks to perform those duties\005"

[Emphasis supplied]

Donoghue (supra) was, however, distinguished in Leonard Cheshire Foundation (supra) holding that the respondent therein having regard to its activities did not perform any public function. [See also R (on the application of West) v. Lloyd's of London, (2004) 3 All ER 251]

Despite the same it was held that a judicial review cannot be refused at the threshold.

Tests evolved by the courts have, thus, been expanded from time to time and applied having regard to the factual matrix obtaining in each case. Development in this branch of law as in others has always found differences. Development of law had never been an easy task and probably would never be.

A different note, however, was struck in Football Association Ltd. (supra) and Aga Khan (supra).

In Football Association Ltd. (supra), the Football Association was the governing authority for football and all clubs had to be affiliated to it. With a view to facilitate the top clubs breaking away from the Football league, the Association declared void certain rules of the League and made it difficult for the clubs to terminate their relationship with it. The League sought judicial review wherein an argument of exercise of monopoly for the game by the Association was advanced but Rose, J. held that it was not susceptible to judicial review.

In Aga Khan (supra), the applicant was an owner of the racehorses and, thus, made himself bound to register with the Jockey Club. His horse was disqualified although it had won a major race whereafter he sought judicial review. The Court of Appeal opined that the Club could not be subjected to judicial review. It preferred to follow 'Law Vs. National Greyhound Racing Club Ltd.' [1983] 1 WLR 1302 in preference to Datafin (supra). The Court therein, however, acknowledged that the Club regulated a national activity. Sir Thomas Bingham M.R., however, opined therein that if it did not regulate the sport then the government would in all probability be bound to do so.

It was held that private power although may affect the public interest and livelihood of many individuals but a sporting body would not be subject to public law remedy. One of the factors which appears to have influenced the court in arriving at the said decision was that if these bodies are deemed to fall within the public law then "where should we stop"? It is interesting to note that despite the same it held that judicial review would lie in certain areas.

We with great respect to the learned Judges do not find ourselves in agreement with the aforementioned views for the reasons stated in the later part of this judgment. Chancery Division and Court of Appeal, in our opinion, were not correct in not applying the law laid down in Jockey Club (supra) and Datafin (supra) to the sporting bodies.

In Football Association (supra) and Aga Khan (supra) earlier decisions were not followed. We have noticed that when an action of such a body infringed the right of work of a citizen or was in restraint of trade, the same had been struck down by the English Courts. In England, there are statutory rights; but in India a right to carry on an occupation is a fundamental right. Right to work although is not a fundamental right but a right to livelihood is in terms of Article 21 of the Constitution of India. This Court, it may be recorded, need not follow the decisions of the English Courts. [See Liverpool & London S.P. & I Association Ltd. (supra)]

A CRITIQUE OF ENGLISH DECISION IN FOOTBALL ASSOCIATION (SUPRA) AND AGA KHAN (SUPRA)

Michael J. Beloff in his article 'Pitch, Pool, Rink, Court? Judicial Review in the Sporting World' reported in 1989 Public Law 95 while citing several instances as to when no relief was granted in case of arbitrary action on the part of such strong and essential sport bodies advocated for a judicial

review stating:

"\005As for the argument that the sports bodies know best, experience may perpetuate, not eliminate error; and Wilberforce J. indicated in Eastham that the rules of sporting bodies cannot be treated as the Mosaic or Medan law.

It is, I suspect, the floodgates argument that is the unspoken premise of the Vice-Chancellarial observations, the fear that limited court time will be absorbed by a new and elastic category of case with much scope for abusive or captious litigation. It is an argument which intellectually has little to commend it, and pragmatically is usually shown to be ill-founded. For it is often the case that, once the courts have shown the willingness to intervene, the standards of the bodies at risk of their intervention tend to improve. The threat of litigation averts its actuality.

There is therefore no reason why the field of sport cannot define law's new, or at any rate next, frontier; and if Britain can no longer head the world in sport itself, perhaps it can do so in sporting litigation. Members of the bar, on your marks!"

(Emphasis supplied)

P.P. Craig in his Administrative Law at page 817 noticing the aforementioned judgments and upon enumerating the reasons therefor, observed:
"There is no doubt that people will differ as to the cogency of these reasons. The line drawn by the cases considered within this section has, not surprisingly, been contested. Pannick has argued that the exercise of monopolistic power should serve to bring bodies within the ambit of judicial review. To speak of a consensual foundation for a body's power is largely beside the point where those who wish to partake in the activity will have no realistic choice but to accept that power. Black has argued that the emphasis given to the contractual foundations for a body's power as the reason for withholding review are misplaced. She contends that the courts are confusing contract as an instrument of economic exchange, with contract as a regulatory instrument. She argues further that the reliance placed on private law controls, such as restraint of trade and competition law, may also be misplaced here. Such controls are designed for the regulation of economic activity in the market place, and they may not be best suited to control potential abuse of regulatory power itself."

(Emphasis added)

SCOTLAND :
In St. Johnstone Football Club Limited Vs. Scottish Football Association Limited [1965 SLT 171], a Scottish Court held the Council with regard to its nature of function to the effect that it can impose fine or expel a member would be amenable to judicial review. If they attempt to exercise upon a member a power or authority which he by becoming a member did not give them, i.e., acting ultra vires or if by so acting they have done him injury, he will not be precluded from seeking redress, nor the Court of law hold themselves precluded from giving him redress. It was emphasized that in a case of this nature they are bound by the rules of natural justice.

NEW ZEALAND :

In Finnigan Vs. New Zealand Rugby Football Union Inc [1985] 2 NZLR 159, the Court noticed the factors which carry weight in entertaining judicial review, stating inter alia :

"2. As the wrong body argument fails, the sole issue is whether the New Zealand (179) Union has acted against its objects of promoting, fostering and developing the game. This cannot be dismissed as only a matter of internal management or administration; it goes to fundamentals.

3. In its bearing on the image, standing and future of rugby as a national sport, the decision challenged is probably at least as important as \026 if not more important than \026 any other in the history of the game in New Zealand.

4. The decision affects the New Zealand community as a whole and so relations between the community and those, like the plaintiffs, specifically and legally associated with the sport. Indeed judicial notice can be taken of the obvious fact that in the view of a significant number of people, but no doubt contrary to the view of another significant number, the decision affects the international relations or standing of New Zealand.

5. While technically a private and voluntary sporting association, the Rugby Union is in relation to this decision in a position of major national importance, for the reasons already outlined. In this particular case, therefore, we are not willing to apply to the question of standing the narrowest of criteria that might be drawn from private law fields. In truth the case has some analogy with public law issues. This is not to be pressed too far. We are not holding that, nor even discussing whether, the decision is the exercise of a statutory power \026 although that was argued. We are saying simply that it falls into a special area where, in the New Zealand context, a sharp boundary between public and private law cannot realistically be drawn."

It was opined that the petitioner therein had the necessary standing to seek judicial review. The Court observed that the floodgate argument advanced against entertaining judicial review could not be accepted as the case was so special that the argument carries even less conviction than it is usually apt to do when invoked against some moderate advance in the common law.

AUSTRALIA:

In Romeo Vs. Conservation Commission of the Northern Territory [(1998) 72 ALJR 208], Kirby J. noticed that in the arena of liability of public authority declaring the limits of the common law liability of the public authority has been criticized as unsatisfactory and unsettled, as lacking foreseeable and practical outcomes and as operating ineffectively and inefficiently.

Therein a question arose as to whether the public authorities have a duty to care envisaging reasonable possibility of damage. The learned Judge opined :

"Once again this Court has been asked to declare the limits of the common law liability of a public authority. This is an area of the law which has been much criticized as unsatisfactory and unsettled, as lacking foreseeable and practical outcomes and as operating ineffectively and inefficiently. Particular decisions, such as Nagle v. Rottnest Island Authority, have been said to have caused

"a degree of consternation in public authorities and their insurers". It is claimed that they have occasioned great uncertainty amongst the officers of such authorities as to the steps which they can take to reduce their potential liability for injuries to visitors, brought about largely by the visitors' own conduct. In response to what is described as "judicial paternalism" the Local Government Ministers of Australia and New Zealand have commissioned a report on policy options to provide statutory limitations on the liability of local authorities."

In Neat Domestic Trading Pty Ltd. Vs. AWB Ltd. and Another [77 ALJR 1263] the court was concerned with the Australian Wheat Board (International) Ltd. (AWBI) a private corporation established in terms of Wheat Marketing Act, 1989 which had the sole right to export wheat. It had also the responsibility for the commercial aspects of wheat marketing through operating wheat pools. The Appellant therein who was a competitor of AWBI applied for grant of permit for the bulk export of wheat but the same was declined whereupon it was contended that the AWBI was contravening the Trade Practices Act, 1974. The decision of AWBI was questioned contending that it involved an improper exercise of discretionary power in accordance with a rule or policy without regard to the merit of the case. The following interesting observation was made therein:

"67.This appeal presents an opportunity for this Court to reaffirm that principle in circumstances, now increasingly common, where the exercise of public power, contemplated by legislation, is "outsourced" to a body having the features of a private sector corporation. The question of principle presented is whether, in the performance of a function provided to it by federal legislation, a private corporation is accountable according to the norms and values of public law or is cut adrift from such mechanisms of accountability and is answerable only to its shareholders and to the requirements of corporations law or like rules."

[Emphasis supplied]

As regards monopoly, it was opined:

"134. It may be that the statutory conferral of monopoly status on AWBI as a private corporation, in itself (particularly when viewed with the added fact that it was formed from what was once a public body) could impose obligations to observe the norms and values of public law, adapted by analogy, in particular instances of its decision-making. In such circumstances, quite apart from administrative law, it has sometimes been viewed as appropriate to impose duties to the community upon such corporations out of recognition of the particular powers they enjoy\005."

In Datafin (supra) also, as was noticed, there did not exist ample statutory provisions relating to regulation of the trade. In Romeo (supra), the functioning of the corporation apart from grant of monopoly was also not controlled and regulated by any statute. It is in that sense, we presume, the expression "outsourcing" had been used by Kirby, J.

UNITED STATES OF AMERICA:

Brennan, J. in San Francisco Arts & Athletics, Inc. Vs. United States Olympic Committee and International Olympic Committee [483 US 522 : 97 L.Ed. 2d 427] stating that the USOC performs a distinctive traditional government function representing the nation to the International Olympic Committee observed:

"American athletes will go into these same [1980 Olympic] games as products of our way of life. I do not believe that it is the purpose of the games to set one way

of life against another. But it cannot be denied that spectators, both in Moscow and all over the world, certainly will have such a thought in mind when the events take place. So it would be good for our nation and for the athletes who represent us if the cooperation, spirit of individuality, and personal freedom that are the great virtues of our system are allowed to exert their full influence in the games. 124 Cong. Rec. 31662 (1978)."

In Brentwood Academy Vs. Tennessee Secondary School Athletic Association [531 US 288], the issue was as to whether the respondent "which was incorporated to regulate interscholastic athletic competition among public and private secondary schools" is engaged in state action when it enforced one of its rules against a member school. It was held that the pervasive entwinement of state school officials in the structure of the association would make it a state actor. The Court acknowledged that the analysis of whether state action existed was a "necessarily fact-bound inquiry" and noted that state action may be found only where there is "such a close nexus between the State and the challenged action that seemingly private behavior may be fairly treated as that of the State itself".

In Brentwood Academy (supra), it was held:

"Our cases have identified a host of fact that can bear on the fairness of such an attribution. We have, for example, held that a challenged activity may be state action when it results from the State's exercise of "coercive power," Blum, 457 US 1004, 73 L Ed 2d 534, 102 S Ct 2777 when the State provides "significant encouragement, either overt or covert," ibid., or when a private actor operates as a "willful participant in joint activity with the State or its agents," Lugar, supra, at 941, 73 L Ed 2d 482, 102 S Ct 2744 (internal quotation marks omitted). We have treated a nominally private entity as a state actor when it is controlled by an "agency of the State," Pennsylvania v Board of Directors of City Trusts of Philadelphia, 353 US 230, 231, 1 L Ed 2d 792, 77 S Ct 806 (1957) (per incuriam), when it has been delegated a public function by the State, cf., e.g., West v Atkins, supra at 56, 101 L Ed 2d 40, 108 S Ct 2250; Edmonson v Leesville Concrete Co., 500 US 614, 627-628, 114 L Ed 2d 660, 111 S Ct 2077 (1991), when it is "entwined with governmental policies," or when government is "entwined in [its] management or control," Evans v Newton, 382 US 296, 299, 301, 15 L Ed 2d 373, 86 S Ct 486 (1966).

Amidst such variety, examples may be the best teachers, and examples from our cases are unequivocal in showing that the character of a legal entity is determined neither by its expressly private characterization in statutory law, nor by the failure of the law to acknowledge the entity's inseparability from recognized government officials or agencies\005"

Thus, seven tests have been laid down for fulfilling the requirements of a public body in becoming a state actor. We, however, may notice that in United States of America a public body would answer the description of a state actor if one or the other tests laid down therein is satisfied on a factual consideration and therefor the cumulative effect of all or some of tests is not required to be taken into consideration. (See also Communities for Equity Vs. Michigan High School Athletic Association decided on 27th July, 2004)

SOME OTHER VIEWS:

We may notice that Wade in his Administrative Law at page 633 commented that while the English law creates a gap, the Scottish, New Zealand and other courts seeks to fill up the gap. Under the heading

'Realms Beyond the Law' at page 627, the learned Author states:

"The law has been driven from these familiar moorings by the impetus of expanding judicial review, which has been extended to two kinds of non-statutory action. One is where bodies which are unquestionably governmental do things for which no statutory power is necessary, such as issuing circulars or other forms of information\005"

Lord Woolf in an Article "Judicial Review: A Possible Programme for Reform" [1992] P.L. 221 at 235 advocated a broader approach by extending review to cover all bodies which exercise authority over another person or body in such a manner as to cause material prejudice to that person or body. These controls could, on principle, apply to bodies exercising power over sport and religion. (See also Craig's Administrative Law, (5th Edn. page 821)

In an instructive Article "Contracting Out, the Human Rights Act and the Scope of Judicial Review" published in 118 L.Q.R. 551, Paul Craig noticed a large number of decisions and considered the question from several angles. He opined at pages 567-568:

"It is not fortuitous that the public bodies have stood shoulder to shoulder with the private contractors in resisting the application of the HRA, and ordinary judicial review, to the contractors.

It will under the existing law, be difficult to maintain an action against the public body itself, either under the HRA, or via ordinary judicial review, where there has been contracting out. The public body will still be subject to the HRA and to judicial review. This should not mask the reality that contracting out will serve to preclude any meaningful action against the public body. Claims that could have been made against the public body if it had performed the service in house will no longer be possible where it has contracted this out.

It has been argued in this article that the judicial conclusions as to the applicability of the HRA and judicial review in cases of contracting out were neither legally inevitable, nor desirable in normative terms. The contractualisation of government is not a transient phenomenon. It is here to stay for the foreseeable future. The courts have in the past developed doctrinal tools to meet challenges posed by changing pattern of government. They should not forget this heritage."

Craig in his treatise 'Administrative Law' at page 821 also made an interesting observation as regards future prospects, stating :

"If the scope of review is extended thus far then careful attention will have to be given to whether the procedural and substantive norms applied against traditional public bodies should also be applied against private bodies. Many of the cases within this section are concerned with the application of procedural norms. If we were to follow Lord Woolf's suggestion then we would also have to consider whether substantive public law should be applied to such bodies. Would we insist that sporting bodies with monopoly power, or large companies with similar power, take account of all relevant considerations before deciding upon a course of action? Would we demand that their actions be subject to a principle of proportionality, assuming that it becomes an accepted part of our substantive control? If there is an affirmative answer, then the change would be significant to say the very least. It would have ramifications for other subjects, such as company law, commercial law and contract. It would increase the courts' judicial review case load. It

would involve difficult questions as to how such substantive public law principles fit with previously accepted doctrines of private law. This is not to deny that similar broad principles can operate within the public and private spheres. It is to argue that the broader the reach of "public law", the more nuanced we would have to be about the application of public law principles to those bodies brought within the ambit of judicial review."

In an interesting article 'Sports, Policy and Liability of Sporting Administrators' by Jeremy Kirk and Anton Trichardt published in 75 ALJ 504, the learned authors while analyzing a recent decision of the High Court of Australia in Agar Vs. Hyde [(2000) 74 ALJR 1219] involving right of Rugby players to ask for amendment of the rules of International Rugby Football Board (which was disallowed) opined:

"The High Court's decision in Agar is not without its difficulties, but it is well-founded in so far as it established that there is generally no liability in negligence for the creation or amendment of the rules of amateur sports played by adults. Even so, there is still room for argument that sporting administrators will be liable in negligence in relation to the nature and conduct of their sports. It is conceivable that there could be liability for employers in relation to the rules of professional sports. Any type of administrator could be liable for misrepresentations. And liability could potentially arise for failing to fulfil a duty to warn in situations where controllers become aware of new information pointing to a higher level of risk than was generally appreciated.

It may be that the judgments in Agar, to use the words of Gowans J in Carlton Cricket and Football Social Club v Joseph, "are not going to be very interesting to those who have more familiarity with the rules of [rugby] football than they have with the rules of law". Nevertheless, the decision is an important one for sporting administrators. What is more, the potential for legal liability to be imposed on sporting administrators has been but partially resolved by the High Court's decision. The ball is, one might say, still in play."

The opinion of the learned authors to say the least provides a new insight.

ANALYSIS OF CASE LAW:

We have noticed hereinbefore that the Courts of Scotland and New Zealand differ with the English and American majority approach.

The approach of the court as regard judicial review has undergone a sea change even in England after the Human Rights Act, 1998 came into force as doctrine of incompatibility is being applied more frequently even in determining the validity of legislations.

The English Courts despite their reluctance to exercise power of judicial review over the activities of sports association noticed in the context of Human Rights Act, 1998 that there are public bodies which are hybrid in nature who have functions of public and private nature but they would be public authorities. [See Donoghue (supra)]

However, in San Francisco Arts & Athletics, Inc.(supra) the minority view clearly states that the governmental function of the USOC in that they represent the nation. Justice Blackmun, J. had agreed with the said view. The minority view in Jackson (supra) was noticed in Ramana Dayaram Shetty (supra). We agree with the said view.

It is interesting to note that even English Courts have imposed high standard of fairness in conduct in relation to such bodies in sharp contrast to

purely private bodies. As noticed hereinbefore, availability of judicial review has been accepted by the English courts. [See M.C. Mehta (supra)]

The right of Indian players, having regard to the observations made in Greig & Ors. (supra) is comparable to their constitutional right contained in Article 19(1)(g) of the Constitution of India which would include a right to work and a right to pursue one's occupation.

The Board while enjoying monopoly in cricket exercises enormous power which is neither in doubt nor in dispute. Its action may disable a person from pursuing his vocation and in that process subject a citizen to hostile discrimination or impose an embargo which would make or mar a player's career as was in the case of Greig & Ors. (supra). The right to pursue an occupation or the right of equality are embedded in our Constitution whereby citizens of India are granted much higher right as compared to common law right in England. A body although self-regulating, if performs public duty by way of exercise of regulatory machinery, a judicial review would lie against it as was in the case of Datafin (supra). The question has since been considered from a slightly different angle, viz., when such action affects the human right of the person concerned holding that the same would be public function. [See Donoghue (supra)]. If the action of the Board impinges upon the fundamental or other constitutional rights of a citizen or if the same is ultra vires or by reason thereof an injury or material prejudice is caused to its member or a person connected with cricket, judicial review would lie. Such functions on the part of the Board being public function, any violation of or departure or deviation from abiding by the rules and regulation framed by it would be subject to judicial review. Time is not far off when having regard to globalization and privatization the rules of administrative law have to be extended to the private bodies whose functions affect the fundamental rights of a citizen and who wield a great deal of influence in public life.

PUBLIC FUNCTION AND PUBLIC DUTY:

Public law is a term of art with definite legal consequences. (See O'Reilly Vs. Mackman, (1982) 3 WLR 604).

The concept of public law function is yet to be crystalised. Concededly, however, the power of judicial review can be exercised by this Court under Article 32 and by the High Courts under Article 226 of the Constitution of India only in a case where the dispute involves a public law element as contradistinguished from a private law dispute. (See Dwarka Prasad Agarwal (D) by LRs. And Another Vs. B.D. Agarwal and Others, (2003) 6 SCC 230 at page 242)

General view, however, is that whenever a State or an instrumentality of a State is involved, it will be regarded as an issue within the meaning of public law but where individuals are at loggerheads, the remedy therefor has to be resorted in private law filed. Situation, however, changes with the advancement of the State function particularly when it enters in the fields of commerce, industry and business as a result whereof either private bodies take up public functions and duties or they are allowed to do so. The distinction has narrowed down but again concededly such a distinction still exists. Drawing an inspiration from the decisions of this Court as also other courts, it may be safely inferred that when essential governmental functions were placed or allowed to be performed by the private body; they must be held to have undertaken public duty or public functions.

What would be a public function has succinctly been stated in American Constitutional Law by Laurence H. Tribe at page 1705 in the following terms:

"18-5. The "Public Function" Cases:

When the state "merely" authorizes a given "private" action \026 imagine a green light at a street corner authorizing pedestrians to cross if they wish \026 that action cannot automatically become one taken under "state authority" in any sense that makes the Constitution applicable. Which authorizations have that Constitution \026 triggering effect will necessarily turn on the character of the decision-making responsibility thereby placed (or left) in private hands. However described, there must exist a category of responsibilities regarded at any given

time as so "public" or "governmental" that their discharge by private persons, pursuant to state authorization even though not necessarily in accord with state direction, is subject to the federal constitutional norms that would apply to pubic officials discharging those same responsibilities. For example, deciding to cross the street when a police officer says you may is not such a "public function;" but authoritatively deciding who is free to cross and who must stop is a "public function" whether or not the person entrusted under state law to perform that function wears a police uniform and is paid a salary from state revenues or wears civilian garb and serves as a volunteer crossing guard\005"

In the instant case, there does not exist any legislation made either by any State or by the Union of India regulating and controlling the cricketing activities in the country. The Board authorized itself to make law regulating cricket in India which it did and which it was allowed to do by the States either overtly or covertly. The States left the decision making responsibility in the hands of the Board, otherwise so-called private hands. They maintain silence despite the Board's proclamation of its authority to make law of sports for the entire country.

Performance of a public function in the context of the Constitution of India would be to allow an entity to perform the function as an authority within the meaning of Article 12 which makes it subject to the constitutional discipline of fundamental rights. Except in the case of disciplinary measures, the Board has not made any rule to act fairly or reasonably. In its function, the ICC does. Board as a member of ICC or otherwise also is bound to act in a reasonable manner. The duty to act fairly is inherent in body which exercises such enormous power. Such a duty can be envisioned only under Article 14 of the Constitution and not under the Administrative Law. The question of a duty to act fairly under administrative law apart from Article 14 of the Constitution of India, as has been noticed in Ramana Dayaram Shetty (supra) (page 503), would not, thus, arise in the instant case.

Governmental functions are multifacial. There cannot be a single test for defining public functions. Such functions are performed by variety of means.

Furthermore, even when public duties are conferred by statute, powers and duties do not thereunder limit the ambit of a statute as there are instances when the conferment of powers involves the imposition of duty to exercise it, or to perform some other incidental act, such as obedience to the principles of natural justice. Many public duties are implied by the courts rather than commanded by the legislature; some can even be said to be assumed voluntarily. Some statutory public duties are 'prescriptive patterns of conduct' in the sense that they are treated as duties to act reasonably so that the prescription in these cases is indeed provided by the courts, not merely recognized by them.

A.J. Harding in his book 'Public Duties and Public Law' summarized the said definition in the following terms:

"1. There is, for certain purposes (particularly for the remedy of mandamus or its equivalent), a distinct body of public law.
2. Certain bodies are regarded under that law as being amenable to it.
3. Certain functions of these bodies are regarded under that law as prescribing as opposed to merely permitting certain conduct.
4. These prescriptions are public duties."

In Donoghue (supra), it is stated:

"58. We agree with Mr. Luba's submissions that the definition of who is a public authority, and what is a public function, for the purposes of s 6 of the 1998 Act, should be given a generous interpretation\005"

There are, however, public duties which arise from sources other than a statute. These duties may be more important than they are often thought to be or perceived. Such public duties may arise by reason of (i) Prerogative, (ii) Franchise and (iii) Charter. All the duties in each of the categories are regarded as relevant in several cases. (See A.J. Harding's Public Duties and Public Law, Pages 6 to 14)

The functions of the Board, thus, having regard to its nature and character of functions would be public functions.

AUTHORITY:

All public and statutory authorities are authorities. But an authority in its etymological sense need not be a statutory or public authority. Public authorities have public duties to perform.

In Aston Cantlow and Wilmcote with Billesley Parochial Church Council Vs. Wallbank and another [2004] 1 AC 546 : [2003] 3 WLR 283 albeit in the context of Human Rights Act, 1998, it was held:

"\005This feature, that a core public authority is incapable of having Convention rights of its own, is a matter to be borne in mind when considering whether or not a particular body is a core public authority\005."

See also Hampshire County Council Vs. Graham Beer t/a Hammer Trout Farm [2003] EWCA Civ 1056 and Parochial Church Council of the Parish of Aston Cantlow Vs. Wallbank [(2003) UKHL 37], Para 52.

There, however, exists a distinction between a statutory authority and a public authority. A writ not only lies against a statutory authority, it will also be maintainable against any person and a body discharging public function who is performing duties under a statute. A body discharging public functions and exercising monopoly power would also be an authority and, thus, writ may also lie against it.

JUDICIAL REVIEW UDNER ARTICLES 32 & 226 OF THE CONSTITUTION OF INDIA :

Judicial Review forms basic structure of the Constitution.

It is inalienable. Public law remedy by way of judicial review is available both under Articles 32 and 226 of the Constitution. They do not operate in different fields. Article 226 operates only on a broader horizon.

The courts exercising the power of judicial review both under Articles 226, 32 and 136 of the Constitution of India act as a "sentinel on the qui vive." [See Padma Vs. Hiralal Motilal Desarda and Others (2002) 7 SCC 564 at 577)

A writ issues against a State, a body exercising monopoly, a statutory body, a legal authority, a body discharging public utility services or discharging some public function. A writ would also issue against a private person for the enforcement of some public duty or obligation, which ordinarily will have statutory flavour..

Judicial Review castes a long shadow and even regulating bodies that do not exercise statutory functions may be subject to it. (Constitutional and Administrative Law; by A.W. Bradley and K.D. Ewing (13th Edn) Page 303).

Having regard to the modern conditions when Government is entering into business like private sector and also undertaking public utility services, many of its actions may be a State action even if some of them may be non-governmental in the strict sense of the general rule. Although rule is that a writ cannot be issued against a private body but thereto the following exceptions have been introduced by judicial gloss:

(a) Where the institution is governed by a statute which imposes legal duties upon it;

(b) Where the institution is 'State' within the meaning of Article 12.

(c) Where even though the institution is not 'State' within the purview of

Article 12, it performs some public function, whether statutory or otherwise.

Some of the questions involved in this matter have recently been considered in an instructive judgment by High Court Delhi in Rahul Mehra and Another Vs. Union of India and Ors. (Civil Writ Petition No. 1680 of 2000) disposed of on 4th October, 2004. Having regard to the discussions made therein, probably it was not necessary for us to consider the question in depth but its reluctance to determine as to whether the Board is a State within the meaning of Article 12 of the Constitution necessitates further and deeper probe.

The power of the High Court to issue a writ begins with a non-obstante clause. It has jurisdiction to issue such writs to any person or authority including in appropriate cases any Government within its territorial jurisdiction, directions, orders or writs specified therein for the enforcement of any of the rights conferred by Part III and for any other purpose. Article 226 confers an extensive jurisdiction to the High Court vis-'-vis this Court under Article 32 in the sense that writs issued by it may run to any person and for purposes other than enforcement of any rights conferred by Part III but having regard to the term 'authority' which is used both under Article 226 and Article 12, we have our own doubts as to whether any distinction in relation thereto can be made. (See Rohtas Industries Ltd. and another Vs. Rohtas Industries Staff Union and others, AIR 1976 SC 425)

This aspect of the matter has been considered in Andi Mukta Sadguru (supra). It has clearly been stated that a writ petition would be maintainable against other persons or bodies who perform public duty. The nature of duty imposed on the body would be highly relevant for the said purpose. Such type of duty must be judged in the light of the positive obligation owed by a person or authority to be the affected party.

In Assembrook Exports Ltd. & Anr. v. Export Credit Guarantee Corpn. of India Ltd. & Ors., AIR 1998 Cal 1, it has been held that public law remedy would be available when determination of a dispute involving public law character is necessary. The said decision has been affirmed by this Court in ABL International Ltd. & Anr. Vs. Export Credit Guarantee Corporation of India Limited & Ors. [JT 2003 (10) SC 300]. [See also Tata Cellular vs. Union of India \026 AIR 1996 SC 1 \026 Paras 101 & 102] and State of U.P.and Another vs. Johri Mal [(2004) 4 SCC 714].

The recent development in the field of judicial review vis-'-vis human rights also deserves a mention, although in this case, we are not directly concerned therewith.

In Hatton and Others Vs. United Kingdom [15 BHRC 259] it was noticed that Article 13 of Convention for the Protection of Human Rights and Fundamental Freedoms envisages constitution of forums where complaint of violation of human rights can be adjudicated. No such forum was provided for before enactment of Human Rights Act, 1998. A policy decision adopted in the year 1993 by the British Government that more planes will land in Heathrow Airport during night led to filing of a complaint by the nearby residents alleging violation of their right of privacy but judicial review was denied to them on the ground that the same was a policy decision. The European Court of Human Rights, however, observed that prior to coming into force of the Human Rights Act, 1998 the Government failed to provide a forum for adjudication of violation of human rights. The petitioners therein were held entitled to compensation in view of Article 13 of Convention for the Protection of Human Rights and Fundamental Freedoms.

Yet recently in E. Vs. Secretary of State for the Home Department (2004) 2 W.L.R. 1351, the Court of Appeal held that judicial review in certain circumstances is maintainable even on facts. (See also Judicial Review, Appeal and Factual Error by Paul Craig Q.C., Public Law, Winter 2004, page 788)

HUMAN RIGHT:

Broadcasting in television have a role to play in terms of the statute of the City of Jerusalem, approved by the Trusteeship Council on 4th April, 1950 which provides for special protective measures for ethnic, religious, or linguistic groups in articles dealing with human rights and fundamental

freedoms but also the legislative council, the judicial system, official and working languages, the educational system and cultural and benevolent institutions, and broadcasting and television. Right to development in developing countries in all spheres is also human right. [See Kapila Hingorani (supra), para 62] and Islamic Academy of Education and Another (supra) Paras 211 to 215].

To achieve this, the promotion of human development and the preservation and protection of human rights proceed from a common platform. Both reflect the commitment of the people to promote freedom, the well-being and dignity of individuals in society. Human development as a human right has a direct nexus with the increase in capabilities of human beings as also the range of things they can do. Human development is eventually in the interest of society and on a larger canvas, it is in the national interest also. Progress and development in all fields will not only give a boost to the economy of the country but also result in better living conditions for the people of India.

Even a hybrid body is bound to protect human rights as it cannot be violated even by such a body. The Board which has the pervasive control over the entire sport of cricket including the participants as well as spectators cannot apparently act in violation of human rights.

APPLICATION OF TESTS:

The traditional tests which had impelled this Court to lay down the tests for determining the question as to whether a body comes within the purview of "Other Authorities" in Ajay Hasia (supra), inter alia are :

" (3) It may also be a relevant factor ... whether the corporation enjoys monopoly status which is State-conferred or State-protected.

(5) If the functions of the corporation are of public importance and closely related to governmental functions, it would be a relevant factor in classifying the corporation as an instrumentality or agency of Government.

The six tests laid down there are not exhaustive.

We in this case, moreover, are required to proceed on the premise that some other tests had also been propounded by Mathew, J. in Sukhdev Singh (supra), wherein it was observed:

"The growing power of the industrial giants, of the labour unions and of certain other organized groups, compels a reassessment of the relation between group power and the modern State on the one hand and the freedom of the individual on the other. The corporate organisations of business and labour have long ceased to be private phenomena."

(Emphasis supplied)

The learned Judge stated:

"The governing power wherever located must be subject to the fundamental constitutional limitations. The need to subject the power centers to the control of Constitution requires an expansion of the concept of State action."

Referring to Marsh Vs. Alabama [326 US 501], it was opined:

"Although private in the property sense, it was public in the functional sense. The substance of the doctrine there laid down is that where a corporation is privately performing a 'public function' it is held to the constitutional standards regarding civil rights and equal protection of the laws that apply to the State itself. The Court held that administration of private property of such a town, though privately carried on, was, nevertheless, in the nature of a 'public function', that the private rights of the corporation must therefore be exercised within constitutional limitations, and the conviction for trespass was reversed."

Referring to Article 13(2), it was held:
"In other words, it is against state action that fundamental rights are guaranteed. Wrongful individual acts unsupported by State authority in the shape of laws, customs, or judicial or executive proceedings are not prohibited."

As regards public function tests, it was held:
"Another factor which might be considered is whether the operation is an important public function. The combination of State aid and the furnishing of an important public service may result in a conclusion that the operation should be classified as a State agency. If a given function is of such public importance and so closely related to governmental functions as to be classified as a governmental agency, then even the presence or absence of State financial aid might be irrelevant in making a finding of State action. If the function does not fall within such a description, then mere addition of State money would not influence the conclusion."

Conversely put, if the functions of the body falls within the description of the public function, absence of State financial aid would not influence the conclusion to the contrary. As regards, governmental aid, it was noticed:
"The State may aid a private operation in various ways other than by direct financial assistance. It may give the organization the power of eminent domain, it may grant tax exemptions, or it may give it a monopolistic status for certain purposes."

The legal position in America in this behalf was also noticed in the following terms:
"In America, corporations or associations, private in character, but dealing with public rights, have already been held subject to constitutional standards. Political parties, for example, even though they are not statutory organisations, and are in form private clubs, are within this category. So also are labour unions on which statutes confer the right of collective bargaining."
(Emphasis supplied)

Drawing the contrast between the governmental activities which are private and private activities which are governmental, Mathew, J. noticed that besides the so-called traditional functions, the modern State operates a multitude of public enterprises. What is, therefore, relevant and material is the nature of the function.

In our view, the complex problem has to be resolved keeping in view the following further tests :

i) When the body acts as a public authority and has a public duty to perform;

(ii) When it is bound to protect human rights.

(iii) When it regulates a profession or vocation of a citizen which is otherwise a fundamental right under a statute or its own rule..

(iv) When it regulates the right of a citizen contained in Article 19(1)(a) of the Constitution of India available to the general public and viewers of the game of cricket in particular.

(v) When it exercises a de facto or a de jure monopoly;

(vi) When the State out-sources its legislative power in its favour;

(vii) When it has a positive obligation of public nature.

These tests as such had not been considered independently in any other decision of this Court.

We, thus, would have to proceed to determine the knotty issues involved therein on a clean slate.

These traditional tests of a body controlled financially, functionally and administratively by the Government as laid down in Pradeep Kumar Biswas (supra) would have application only when a body is created by the State itself for different purposes but incorporated under the Indian Companies Act or Societies Registration Act.

Those tests may not be applicable in a case where the body like the Board was established as a private body long time back. It was allowed by the State to represent the State or the country in international fora. It became a representative body of the international organizations as representing the country. When the nature of function of such a body becomes such that having regard to the enormity thereof it acquires the status of monopoly for all practical purposes; regulates and control the fundamental rights of a citizen as regard their right of speech or right of occupation, becomes representative of the country either overtly or covertly and has a final say in the matter of registration of players, umpires and other connecting with a very popular sport. The organizers of competitive test cricket between one association and another or representing different States or different organizations having the status of a state are allowed to make laws on the subject which is essentially a State function in terms of Entry 33 List II of the Seventh Schedule of the Constitution of India. In such a case, different tests have to be applied.

The question in such cases may, moreover, have to be considered as to whether it enjoys the State patronage as a national federation by the Central Government; whether in certain matters a joint action is taken by the body in question and the Central Government; its nexus with the Governments or its bodies, its functions vis-'-vis the citizens of the country, its activities vis-'-vis the government of the country and the national interest/ importance given to the sport of cricket in the country. The tests, thus, which would be applicable are coercion test, joint action test, public function test, entertainment test, nexus test, supplemental governmental activity test and the importance of the sport test.

An entity or organization constituting a State for the purpose of Part III of the Constitution would not necessarily continue to be so for all times to come. Converse is also true. A body or an organization although created for a private purpose by reason of extension of its activities may not only start performing governmental functions but also may become a hybrid body and continue to act both in its private capacity or as public capacity. What is necessary to answer the question would be to consider the host of factors and not just a single factor. The presence or absence of a particular element would not be determinative of the issue, if on an overall consideration it becomes apparent that functionally it is an authority within the meaning of Article 12 of the Constitution of India.

Similarly significant funding by the Government may not by itself make a body a State, if its functions are entirely private in character. Conversely absence of funding for the functioning of the body or the organization would not deny it from its status of a State; if its functions are public functions and if it otherwise answers the description of "Other Authorities". The Government aid may not be confined only by way of monetary grant. It may take various forms, e.g., tax exemptions, minimal rent for a stadia and recognition by the State, etc. An over emphasis of the absence of the funding by the State is not called for.

It is true that regulatory measures applicable to all the persons similarly situated, in terms of the provisions of a statute would by itself not make an organization a State in all circumstances. Conversely, in a case of this nature non-interference in the functioning of an autonomous body by the Government by itself may also not be a determinative factor as the Government may not consider any need therefor despite the fact that the body or organization had been discharging essentially a public function. Such non-interference would not make the public body a private body.

WHAT CRICKET MEANS TO INDIA:

We have laid down the tests aforesaid and the approach which needs to be adopted in determining the issue as to whether the Board is a State or not. Before we embark on this enquiry, it would be necessary to keep in

mind as to what cricket means to the citizens of this country.

Cricket in India is the most popular game. When India plays in international fora, it attracts the attention of millions of people. The win or loss of the game brings 'joy' or 'sorrow' to them. To some lovers of the game, it is a passion, to a lot more it is an obsession, nay a craze. For a large number of viewers, it is not enthusiasm alone but involvement.

MEMORANDUM OF ASSOCIATION OF BOARD:

The Board is a society under the Tamil Nadu Societies Registration Act, 1975. In terms of its Memorandum of Association, its objects, inter alia, are to control the game of Cricket in India and to resolve the disputes and to give its decision on matters referred to it by any State, Regional or other Association, to promote the game, to frame the laws of cricket in India, to select the teams to represent India in Test Matches and various others and to appoint India's representative or representatives on the International Cricket Conference and other Conferences, Seminars, connected with the game of cricket;

RULES AND REGULATIONS:

The Board has framed rules and regulations in exercise of its power under the Memorandum of Association. Such rules and regulations are also filed with the Registrar of Societies under the Tamil Nadu Societies Registration Act, 1975. The relevant rules and regulations are as under :

"1. INTERPRETATION :
\005. \005 \005 \005

(i) "REPRESENTATIVE" of a Member or an Associate Member means a person duly nominated as such by the Member or the Associate Member.

(l) "TOURNAMENT RULES" means the Rules governing the conduct of Tournaments such as Irani, Duleep, Ranji, Deodhar, CoochBehar, C.K. Nayudu, M.A. Chidambaram, Vijay Hazare, Vijay Merchant Trophy and Madhavrao Scindia Trophy-Tournaments and such other Tournaments conducted by the Board from time to time.

(q) DISCIPLINARY COMMITTEE : The Board shall at every Annual General Meeting appoint a Committee consisting of three persons of whom the President shall be one of them to inquire into and deal with the matter relating to any act of indiscipline or misconduct or violation of any of the Rules or Regulation by any Player, Umpire, Team Official, Administrator, Selector or any person appointed or employed by BCCI. The Committee shall have full power and authority to summon any person(s) and call for any evidence it may deem fit and necessary and make and publish its decision including imposing penalties if so required, as provided in the Memorandum and Rules and Regulations."

It has thirty full members including the State Cricket Associations representing the States. Apart from the said Associations, any direct affiliation therewith is prohibited. In terms of clause 3(iii) the Central controlling body for cricket in any State within the territory of India may be affiliated and shall be an Associate Member. Even the organization at the district level and the State level had to become its member for effective participation in the game. Rule 8 empowers the Board to nominate distinguished persons by invitation to be Patron in Chief or Patrons of the Board. The powers and duties of the Board have been referred to in Rule 9;

some of which are as under :

(a) To grant affiliations as provided in the Rules or to disaffiliate Members on disciplinary grounds.

(b) To arrange, control and regulate visits of foreign cricket teams to India and visits of Indian teams to foreign countries and to settle the terms on which such visits shall be conducted.

(c) To lay down conditions on which Indian players shall take part in a tour to any foreign country and by which such players shall be governed, including terms of payments to such players.

(d) To frame bye-laws and lay down conditions including those of travel, accommodation and allowances under which Indian players shall take part in Cricket Tournaments/Matches or Exhibition, Festival and Charity matches organized by the Board or by a Member under the authority of the Board in the course of a visit or tour of a foreign Cricket team to India.

(f) To permit under conditions laid down by the Board or refuse to permit any visit by a team of players to a foreign country or to India.

(g) To frame the Laws of Cricket in India and to make alteration, amendment or addition to the laws of Cricket in India whenever desirable or necessary.

(n) To take disciplinary action against a player or a Member of Board.

(o) To appoint Manager and/or other official of Indian teams.

Rule 10 provides for complete power and control over players within the jurisdiction of a member or an associate member.

Rule 12 provides that an inquiry into conduct of players shall be in the manner as specified in Rule 38 of the Rules. Rule 32 provides for Standing Committees which include an All India Selection Committee, All India Junior Selection Committee, Umpires Committee, Senior Tournament Committee, Vizzy Trophy Committee, Tour, Programme and Fixtures Committee, Technical Committee, Junior Cricket Committee and Finance Committee. Rule 32(A)(ii) provides for constitution of All India Selection Committee inter alia when Indian Team goes on a foreign tour.

Rule 33 provides that no tournaments by any club affiliated to a member or any other organization be held without permission of the Board.

Rule 34 imposes ban on participation in tournaments stating :

"No club or player shall participate in any tournament or a match for which the permission of the Board has not been previously obtained. A player contravening this Rule shall be dealt with in accordance with the procedure laid down in Rule 38."

Rule 35 provides for an exclusive right in the Board to organize

foreign tours and invite teams from abroad, in the following terms :

"No organization other than a Member or Associate Member, Clubs or Institutions affiliated to such members shall organize foreign tours to or invite teams from abroad. Members or Associate Members or such clubs or institutions, desirous of undertaking tours abroad or inviting foreign teams shall obtain the previous permission of the Board. Such permission may be given in accordance with the Rules framed by the Board."

The procedure for dealing with the misconduct on the part of players, umpires, team officials, administrators, referees and selector is contained in Rule 38 which also empowers it to frame Bye-laws regarding their discipline and conduct.

ICC RULES:

In the Articles of Association of the ICC, the words "Cricket Authority", Full Member Country(ies)" and "Member Country(ies)" have been defined as under:

"Cricket Authority" a body (whether incorporated or not) which is recognized by the Council as the governing body responsible for the administration, management and development of cricket in a Cricket Playing Country (being at the date of incorporation of the Council the bodies of that description shown in the names and addresses of subscribers to the Memorandum of Association);

"Full Member Country (ies)" any Member Country whose Cricket Authority is a Full Member and shall, when the context requires, include the Cricket Authority of that Member Country;

"Member Country (ies)" any country or countries associated for cricket purposes or geographical area, the governing body for cricket of which is a Full Member, an Associate Member or an Affiliate Member, as the context may require;"

GUIDELINE CRITERIA FOR FULL MEMBERSHIP OF ICC

"A country applying for admission as a Full Member of ICC should use the following criteria."

Paragraph 1 inter alia provides for playing. Paragraphs 1.2, 4 and 5 provide for Cricket Structure, Financial and Standing respectively.

The membership guidelines relating to one day international matches speaks of test playing nation and formation of national association.

Preamble to One Day International (ODI) Status reads as under:

"ODI status is not an ICC membership category, but rather a sub-category of Associate Membership. ODI status was created to provide a vehicle by which leading Associate Members could play official One Day International matches against Full Members in order to better equip them to apply for Full Membership at the appropriate time.

The Criteria for ODI status are extremely demanding and ODI status will only be conferred when the applicant country has a history of excellence in both playing and administration. As a precondition the applicant must be a leading Associate Member and meet all the criteria of Associate Membership.

Qualification Rules for International Cricket Council Matches, Series and Competitions read as under:

"(a) Definitions
\005 \005 \005
(b) Qualification Criteria
1. A cricketer is qualified to play Representative Cricket for a Member Country of which he is a national or, in cases of non-nationals, in which he was born\005
2. A player who has resided for a minimum of 183 days in a Member Country in each of the 4 immediately preceding years shall be a "deemed national" of that country for the purpose of these Rules.
*** *** ***
(c) Transfer of "Playing Nationality"
1. Cricketers qualified to play for a Member Country can continue to represent that country without negating their eligibility or interrupting their qualification period for another Member Country up until the stage that the cricketer has played for the first Member Country at under 19 level or above\005
(d) Applications
1. Each Member Country shall require each player to certify his eligibility to represent that Member Country.
\005
*** ***
(f) Register of Cricketers and Proof of Qualification
1. Each Member Country shall, prior to the Effective Date, establish and thereafter maintain a register of cricketers which shall record the name, address and nationality of those cricketers who shall in each year commencing at the beginning of that Member Country's domestic cricket season be seeking to play first-class cricket in that Member Country (or the equivalent national competition in those countries which do not have first-class cricket) for any local club or team including any State or Country Team.
2. Each Member Country shall from time to time provide to the Chief Executive ICC on request and at the expense of that Member Country details as to any entries made in its register of cricketers in respect of any year, including copies of the register or of the relevant extracts therefrom.
3. Each Member Country shall from time to time provide to the Chief Executive ICC on request and at the expense of that Member Country, any relevant information as to the fulfillment by a particular player or players of any one or more of the applicable qualification criteria (including as appropriate the Development Criteria) under these Rules."

As per ICC Rules and Guidelines for classification of official cricket, the definition of a Test Match in clause 1(a)(i) is as follows:
"Any cricket match of not more than 5 days scheduled duration played between two teams selected by full members as representatives of their member countries and accorded the status of test match by the Council."

GUIDELINES ISSUED BY UNION OF INDIA:
Indisputably, the Union of India had issued guidelines which had been reviewed from time to time. The Ministry of Youth Affairs and Sports issued the revised guidelines and forwarded the same to the Presidents/Secretary General, Indian Olympic Association and the Presidents/Hony. General Secretaries of all recognized Sports Federations incorporating therein the amended provisions. Cricket is included in Annexure-I within the category [Others (C)].
While issuing the Guidelines, it has been asserted that the Government attaches considerable importance to development of sports in

general and achieving excellence in the Olympics and other international events in particular, as also the unsatisfactory performance of the Indian Team(s) in important international sports events. It was recorded that over the years the Government had been actively supporting the National Sports Federations in the matter of development of specific games/sports discipline.

The objective of the said guidelines was to define the areas of responsibility of various agencies involved in the promotion and development of sports, to identify National Sports Federations eligible for coverage thereunder and to state the conditions for eligibility which the Government would insist upon while releasing grants to Sports Federations. Para III speaks of role and responsibility of the Ministry of Youth Affairs and Sports, National Sports Federations and the Sports Authority. Para IV provides for priority sports which have been categorized as : (a) 'Priority', (b) 'General Category' and (c) 'Other Category'. Para 8 refers to grants given to National Federations under different sub-heads. Clause 8.8 specifies the funds with which the National Sports Federations would be assisted for holding the international tournaments. Clause 8.9 provides for cultural exchange.

Para 9 provides for clubbing and dovetailing of schemes of SAI and the Ministry. Para XI provides for long term development plans. Para XII deals with miscellaneous matters.

Annexure-II appended to the said guidelines provides for recognition of National Sports Federations, inter alia, by laying down the eligibility therefor and the necessity of filing of applications in that behalf. Clause 3.12 reads as under :

"There would be only one recognized Federation for each discipline of sport, irrespective of the fact that the particular sport caters to youngsters, men, women or veterans. However, this condition shall not apply to Federations already recognized by the Department."

Clause 5 provides for grant of recognition. Annexure-III appended to the said guidelines provides for the procedure for suspension/withdrawal of recognition and consequences thereof. The said guidelines also prescribe forms required to be used by the federations for different purposes.

The Board for all intent and purport was a recognized body. Probably in that view of the matter, the Board did not think it necessary to apply for grant of such recognition of the Union of India asking it for passing a formal order. However, the Board had all along been obtaining the requisite permission for sending an Indian team abroad or for inviting a foreign team in India in the prescribed form.

EXPRESS RECOGNITION \026 ESSENTIAL?

Union of India has issued certain guidelines evidently in exercise of its power conferred on it under Article 73 of the Constitution of India for regulating sports in India. The said guidelines have been issued having regard to objects it sought to achieve including the poor performance of Indian Team abroad. The said guidelines have been moreover issued in exercise of its control over the National Sports Federations. The sport of Cricket was not included within the said guidelines. Both mens' and womens' cricket had been brought within the purview of the said guidelines in the year 2001. They provide for grant of recognition. The Board contends that it had never applied for recognition nor had it asked for financial aid or grant of any other benefit. Factually the Union of India has not been able to controvert this position although in its affidavit affirmed by a Deputy Secretary to the Government of India, Ministry of Youth Affairs and Sports, it has stated that Board is a recognized National Federation. It is true that no document has been produced establishing grant of such recognition; but in its additional affidavit affirmed by Mrs. Devpreet A. Singh, Deputy Secretary to the Government of India, Ministry of Youth Affairs and Sports, a number of documents have been annexed which clearly go to show that from the very beginning the Board had been asking for permission of the Ministry of Human Resource Development either to go abroad or to play or participate in other countries or for inviting the others to play in India. Such permission had been sought for in the form prescribed

in terms of the said regulations. The said documents leave no manner of doubt that the Board had asked for and the Union of India had granted de facto recognition.

In the affidavit dated 8th October, 2004 affirmed by a Deputy Secretary to the Government of India, Ministry of Youth Affairs and Sports, it is stated:

"1. I am informed that this Hon'ble Court required to be apprised as to whether it was mandatory for all sporting bodies including private entities or clubs to seek permission and to obtain the same for playing in tournaments abroad.

2. In response to the issue raised before this Hon'ble Court, it is respectfully submitted that only the recognized National Sports Federations are required to apply in the prescribed format for seeking permission to go abroad to play as a Team representing India. There have been instances where club teams, organizations engaged in sports activities etc. have applied for such permission but the Ministry has considered their request only when they were received through the National Sports Federation \026 BCCI in this case."

It is not disputed that the Union of India has not recognized any other national sports body for regulating the game of cricket in India. It is the categorical stand of the Union of India that only by such recognition granted by the Union of India, the team selected by the Board is the Indian cricket team which it could not do in absence thereof. We cannot accept the submission of Mr. Venugopal to the effect that even while playing abroad, the Board sends its own team. It is evident from the records which fact has also been noticed by the Delhi High Court in its judgment in Rahul Mehra (supra) that the Board fields its team as Indian Team and not as Board Eleven, which without having any authority from the Union of India, it will not be able to do. The stand that the cricket team selected by the Board only represents it and not the country is incorrect. Having regard to the rules of the ICC, its own rules as also various documents placed before this Court by the Union of India, the conduct of both the Board and the Union of India clearly go to show that sub silentio both the parties had been acting on the premise that the Board is recognized as the only recognized National Federation for the purpose of regulating the game of cricket in India.

BOARD A STATE?

The Board is a society registered under the Tamil Nadu Societies Act. It is not created under a Statute but it is an acknowledged fact that in terms of its Memorandum of Association and rules framed by it, it has not only the monopoly status as regard the regulation of the game of cricket but also can lay down the criteria for its membership and furthermore make the law of sport of cricket. The Board for all intent and purport is a recognized national federation recognized by the Union of India. By reason of said recognition only, an enormous power is exercised by the second Respondent which from selection and preparation of players at the grass root level to organize Daleep Trophy, Ranji Trophy etc. select teams and umpires for international events. The players selected by the second Respondent represent India as their citizen. They use the national colour in their attire. The team is known as Indian team. It is recognized as such by the ICC. For all intent and purport it exercises the monopoly.

The Board is in a position to expend crores of rupees from its own earnings. The tender in question would show that what sort of amount is involved in distributing its telecasting right for a period of four years, inasmuch as both the First Petitioner and the Fifth Respondent offered US $ 308 millions therefor.

A monopoly status need not always be created by a law within the meaning of clauses 2 to 6 of Article 19 of the Constitution of India.

A body which carries on the monopolistic function of selecting team to represent the nation and whose core function is to promote a sport that has

become a symbol of national identity and a medium of expression of national pride, must be held to be carrying out governmental functions. A highly arbitrary or capricious action on the part of such a powerful body would attract the wrath of Article 14 of the Constitution of India. The Board itself acted as a representative of the Government of India before the international community. It makes representations to the effect that it was entitled to select a team which represents the nation as a cricket playing country, and, thus, the same would, without anything more, make its action a State action. For the said purpose, actual control of the Board or issuing any direction in that behalf by the Government of India is not of much significance but the question as to whether the Government, considering the facts and circumstances, should control the actions of the Board as long as it purports to select a team to represent India would be a matter of great significance. The guidelines issued by the Union of India clearly demonstrate its concern with the fall in standard of Indian Team in sports in important international sports events. It would not be correct to draw a comparison between an event of international sport as significant as cricket with beauty pageants and other such events as the test necessary to be evolved in this behalf is the qualitative test and not the quantitative test. The quality and character of a sport recognized as a measure of education and nation building (as a facet of human resources development) cannot be confused with an event that may be a form of entertainment. Cricket, as noticed hereinbefore, has a special place in the hearts of citizens of India.

The monopoly status of the Board is undisputed. The monopoly enjoyed by the Board need not be a statutory one so as to conform to the tests contained in Clause (6) of Article 19 of the Constitution. It can be a de facto monopoly which has overtly or covertly received the blessings of Union of India. The de facto monopoly of the Board is manifest as it, as a member of ICC (even if it is technically possible to float any other association), can send an Indian Team abroad or invite a foreign team onto India. In absence of recognition from the ICC, it would not be possible for any other body including the Union of India to represent India in the international Cricket events featuring competitive cricket.
So would be the position in domestic cricket. The Board in view of enormity of powers is bound to follow "the doctrine of fairness and good faith in all its activities". [See Board of Control for Cricket, India & Anr. Vs. Netaji Cricket Club and Ors., JT 2005 (1) SC 235].

The object of Part III of our Constitution is to curtail abuse of power and if by reason of the Board's activities, fairness in action is expected, it would answer the description of "Other Authorities".

The decisions rendered in different jurisdictions including those of this Court clearly suggest that a body like the Board would come within the purview of the expression "Other Authorities" contained in Article 12 of the Constitution of India. For the said purpose, a complete new look must be bestowed on the functions and structures of the Board. A public authority, in my opinion, would be an authority which not only can regulate and control the entire sports activities in relation to cricket but also the decisive character it plays in formulating the game in all aspects. Even the Federations controlled by the State and other public bodies as also the State themselves, in view of the Board's Memorandum of Association and the Rules and Regulations framed by it, are under its complete control. Thus, it would be subject to a judicial review.

The history of ICC has been noticed by the Court of Appeal in Greig (supra) and, thus, it may not be necessary to retrace it over again.

It is not disputed that the Government in terms of its guidelines recognizes only the Board. Its recognition whether formal or informal is evident as both the Union of India and the Board proceeded on that basis. In international arena the regulated cricket is also known as official cricket. The rules of the ICC suggest that a domicile of one country can play in county clubs but only citizens or other persons who come within the purview of the said rules must play for their country in test or other official matches in terms of the ICC Rules. The tournaments are held between the countries and at the domestic level between States/regions and the other clubs over

which the Board has an exclusive and complete control. In the international level, the ICC recognizes the national federations only who are its members having regard to the fact that these federations either represent a country or a geographical area. The very fact that recognition of ICC has been extended to a geographical area (as for example, the West Indies comprising of so many countries), goes to show that for the said purpose the consensus amongst various bodies and several nations is necessary.

It is true that a country as such is not a member of ICC and in some places of the Rules for the purpose of election of the President, the country is represented through its national federation which is its full time member. It is furthermore true that the ICC Rules refer as a nation not only a 'country' but also a geographical area covering several countries but a bare perusal of the rules in its entirety would clearly go to show that only those national federations which represent the country can become its whole time or associate members. The expression "country" has been used at numerous places. It is one thing to say that legally it is permissible to make a Club a member but unless it has the national patronage, it is inconceivable that it can obtain membership of ICC in any capacity. Theoretically in the ICC, the Board is a member but it without State patronage directly or indirectly would reduce its activities. In case any other body is recognized by the Union of India, it would not be entitled to regulate the sport of cricket in India. Perforce it has to abandon its functions outside the country.

In the Rules framed by the ICC, the principles of natural justice containing elements (a) the right to a fair hearing; and (b) the rule against bias has been specifically provided for. These are in keeping with the function of public body and not private body. But, so far as the rules framed by the Board are concerned, the principles of natural justice are required to be followed only in the event a disciplinary action is contemplated and not otherwise.

The submission of Mr. Venugopal that Union of India having made a categorical statement before the Parliament as also in its affidavit in the case of Rahul Mehra (supra) before the High Court of Delhi wherein it is accepted that the Board is not under the control of the Union of India nor there exist any statutory rules to regulate its functioning and further the issues raised in the said writ petition relate to the internal functioning of the Board, which is autonomous in its function, having regard to the materials on record may not be of much significance. We must moreover notice that the Minister of Youth Affairs and Sports in an answer to the Parliament also stated:

"The promotion of the game of cricket in the country is the responsibility of the Board of Control for Cricket in India (BCCI) which is an autonomous organization."

Such responsibility on its part makes it a State actor.

When a query was made from the Board to give reply to a starred question dated 11.12.2001, the Board in its letter dated 13.05.2003 replied as follows:

"\005We would like to reiterate that the Annual Reports of BCCI are already available with your Ministry."

The tenor of the letter, thus, runs contrary to the assertion of the Board that it has never sent its accounts to the Government.

It is accepted by the Union of India that the Board is an autonomous organization and the Government of India does not hold any cricket match series as it is the function of the Board, but that is all the more reason as to why it has its own responsibilities towards officials, players, umpires, coaches, administrators and above all the cricket loving public.

However, we may place on record that there are a number of

documents filed by the Union of India which clearly go to show that either for sending Indian Team abroad or inviting a foreign team on the soil of India, the Board has invariably been taking permission from the Ministry of Youth Affairs and Sports. In the counter affidavit filed before the Bombay High Court, the Board raised a contention that it seeks permission of the Union of India for obtaining visas, foreign exchange and matters connected therewith; but the said contention cannot be accepted in view of the fact that had the same been the position, the Ministry of Human Resource Development (which has nothing to do in these matters), would not have been approached therefor and that too in the form prescribed in the guidelines.

The Board's activities representing the country is not confined to international forums only. The Board within the country organizes and conducts the Ranji Trophy, the Irani Trophy, the Duleep Singh Trophy, the Deodar Trophy and the NKP Salve Challenge Trophy. Although, there are domestic events, indisputably only those who are members of the Board and/or recognized by it can take part therein and none else. This also goes to show that the Board regulates the domestic competitive cricket to the fullest measure and exercises control over its members which represents the five zones in India. All the States Federations besides a few other clubs which are its members, two of which it will bear repetition to state, are governmental organizations.

Indisputably the Board is a regulator of cricket played at the country level both off and on the fields including selection of players and umpires. ICC possesses and exercises all the powers to regulate international competitive cricket. It exercises disciplinary power also as in case of violation of the rules, a country member or the player may be derecognized. The ICC exercises a monopoly over the sports at the international level whereas Board does so at the country level. It is the Board only, to the exclusion of all others, that can recognize bodies who are entitled to participate in the nominated tournaments. Players and umpires also must be registered with it. In the event of violation of its rules and regulations, which may include participation in an unauthorized tournaments without its permission, a player or umpire would forfeit his right to participate in all official cricket matches which for all intent and purport shall be the end of career of a professional cricketer or umpire.

In our constitutional scheme rule of law would, by all means, prevail over rule of cricket. A body regulating the game of cricket would be compelled by the court to abide by rule of law.
The hallowness of the claim of the Board that its players play for it and not for India is belied by the claim of the former players who categorically stated that they have played for India and not for the Board. Whenever players play for the Board, the Team is named as Board-Eleven. [See 'The Times of India' \026 October24, 2004 and 'Hindustan Times' \026 October 24, 2004]. It undertakes activities of entering into contracts for telecasting and broadcasting rights as also advertisements in the stadia.

While considering the status of the Board vis-'-vis Article 12 of the Constitution of India, the Central Government's reluctance to interfere with its day to day affairs or allowing it to work as an autonomous body, non-assistance in terms of money or the administrative control thereover may not be of much relevance as it was not only given de facto recognition but also it is aided, facilitated or supported in all other respects by it.

It would not be correct to contend that a monopoly status upon a body must be conferred either by way of statute or by the State by issuing an appropriate order in that behalf. The question as regard exercise of monopoly power by the Board of must be determined having regard to the ground realities i.e. it not only represents the country but also controls and regulates the entire field of competitive cricket.

Despite the fact that the relationship between the Board and the

players is not that of an employer and employee, but the players are within its complete control. Sports activities of the countries being not a commercial activity, as has been held in Cricket Association of Bengal (supra), the same must be considered from a larger spectrum of the Indian citizenary as a whole.

It is not disputed that as of now except the Board there is no other authority in the field. The rules framed by the Board do not spell out as to how without virtual recognition of the Union of India as also the patronage of States whether de facto or de jure it could become a national federation and how it could become a member of the ICC. It does not furthermore disclose as to how it could having regard to its professed function as a private club, could grant to itself enormous powers as are replete in its rules and regulations. Rules and regulations framed by the Board speak out for themselves as to how it represents Indian cricket team and regulates almost all the activities pertaining thereto. It also legislates law of sports in India in the field of competitive cricket. There is no area which is beyond of the control and regulation of the Board. Every young person who thinks of playing cricket either for a State or a Zone or India must as of necessity be a member of the Board or its members and if he intends to play with another organization, it must obtain its permission so as to enable him or continue to participate in the official matches. The professionals devote their life for playing cricket. The Board's activities may impinge on the fundamental rights of citizens.

There is no gainsaying that there is no organization in the world other than the ICC at the international level and the Board at the national level that control the game of first class cricket. It has, thus, enormous power and wields great influence over the entire field of cricket. Cricket when it comes to competitive matches no longer remains a mere entertainment \026 it commands such a wide public interest. It is now recognized that game of cricket as an activity gives a sense of identity and pride to a nation.

Legal meaning attributed to the wordings of the Article 12 would lead to the conclusion that the Board is a State. It is true that while developing the law operating in the field a strict meaning was not adhered to by this Court but it may not now be possible to put the clock back. We must remind ourselves that if Article 12 is subjected to strict constructions as was sought to be canvassed by Lahoti, J. in his minority opinion in Pradeep Kumar Biswas (supra), the same would give way to the majority opinion.

In sum, the control of the Board over the sport of competitive cricket is deep and pervasive, nay complete.

The word 'control' has been defined in Black's Law Dictionary in the following terms:

"Control-power or authority to manage, direct, superintend, restrict, regulate, govern, administer, oversee."

In Bank of New South Wales v. Common Wealth, [76 CLR 1], Dixon, J., observed that the word 'control' is 'an unfortunate word of such wide and ambiguous import that it has been taken to mean something weaker than 'restraint', something equivalent to 'regulation'. Having regard to the purport and object of activities of the Board, its control over 'cricket' must be held to be of wide amplitude.

It is not correct that the Board represents itself in international area. If it represents the country, indisputably it must have the implied sanction of the Government of India to do so. Its activities, thus, have so far-reaching effect .

The Union of India has since filed affidavits categorically stating that the Board is a 'State' within the meaning of Article 12 of the Constitution of India. It has further been stated that not only the Board is recognized de

facto but it had all along been seeking permission for going abroad from the Ministry of Human Resource Development (Ministry of Youth Affairs and Sports).

The players who participate in the competitive cricket whether domestic or international are not amateurs; but professionals. They play on receipt of remuneration therefor and furthermore make a lot of earnings by way of advertisements. They participate in the game for a purpose.

The Board's commands bind all who are connected with cricket. The rules and regulations framed by it for all intent and purport are "the code" which regulate an important aspect of national life. Such codes on the premise whereof the Board has been permitted by all concerned including the Union of India and the States to operate so as to regulate and control not only the sport of cricket as such but also all other intimately connected therewith and in particular the professionals.

It is not in dispute that the players wear national colours in their attires and it also appears from the correspondences that the Board drew the attention to the Government of India that the players to show their pride of being Indian also exhibit Ashok Chakra on their helmets.

We may notice that in Union of India Vs. Naveen Jindal and Another [(2004) 2 SCC 510] this Court as regard right of a citizen to fly the Indian National Flag observed:

"14. National Flags are intended to project the identity of the country. They represent and foster national spirit. Their distinctive designs and colours embody each nation's particular character and proclaim the country's separate existence. Thus it is veritably common to all nations that a national flag has a great amount of significance\005"

The State had been taking on more and more sports related activities and thus courts have examined the purport and ambit of activities of such bodies keeping in view wider and wider range of measures the executive and the Central Government adopt.

The Board, having regard to its functions and object, had also been granted exemption from payment of Income-tax. Such exemption has been granted with a view to fulfill its objectives to promote sports of cricket.

The Board, thus, in terms of ICC Rules, is representative of India. The membership although is in the name of the Board; it is the country which matters. It may be that when the Board and the ICC were constituted the concept was that the game of cricket would be played by clubs but with the passage of time, the concept has undergone a sea change. In any event, the ICC does not say that it does not recognize the country and merely recognizes the clubs.

The Board (although such a contention has not been raised in any affidavit but in the written submissions only) allegedly spends crores of rupees in providing funds to construction of stadia, running zonal cricket academies under national cricket academy, providing the State Associations with modern gymnasium equipments, medical expenses of the players, pension scheme and expenditure on coaches, physiotherapists, trainers, etc., but it is not disputed that it earns a lot of revenue through sale of tickets, advertisements in the stadia, selling of advertisement in the electronic media, giving out contracts by way of food stalls and installation of other stalls, selling of broadcasting and telecast rights, highlight programmes. The Board is admittedly not a charitable trust.

The State legislature as also the Parliament have the legislative competence to make legislation in respect of sports, but no such legislation has yet seen the light of the day. We have noticed hereinbefore that the Board in terms of its Memorandum of Association as also rules and regulations framed by it is entitled to make laws for Cricket in India. The States and the Union of India despite knowledge did not object thereto. They, thus, made themselves bound by the said Rules and Regulations. In that sense, exercise of law making power contemplated by legislation has

been outsourced to the Board.
The Board which represents a nation with or without a statutory flavour has duties to perform towards the players, coaches, umpires, administrators and other team officials. They have a duty to create safe rules for the sport, if by reason thereof a physical injury to the player is to be avoided and to keep safety aspect under ongoing review. A body may be autonomous but with autonomy comes responsibility. Sport is a "good thing" wherefor a societal end is to be provided. Sport must receive encouragement from the State and the general public or at least not discouraged. Health, sociability and play are considered to be important values to be recognized in a human.
Encouragement of games and sports in terms of Entry 33 of the State List and Entries 45 and 97 of the Union List is a State function. We have noticed the main objects of the Board which are to promote, control, regulate, make laws for the country and encourage the game of cricket. The Union of India or the respective Governments of the States in stead and place of making a legislation have thought it fit to allow the sports bodies to grow from its grass-root level by applying the reverse pyramid rules and by encouraging all associations and federations from village level to national level. We have seen that whereas in each State there is a State federation, they must as of practice or precedent become a member of the Board. State Federations and some other organizations essentially having regard to their respective nature of functions only are members of the Board. They include Association of Indian Universities, Railway Sports Control Board and Services Sports Control Board.

Furthermore, having regard to the nature of activities, viz., the Board represents a sovereign country while selecting and fielding a team for the country with another sovereign country promoting and aiming at good relations with the said country as also peace and prosperity for the people, even at the domestic level the citizens of the said country may be held to be entitled to the right to invoke the writ jurisdiction of this Court even if thereby no personal fundamental right is directly infringed.
With the opening up of economy and globalization, more and more governmental functions are being performed and allowed to be performed by private bodies. When the functions of a body are identifiable with the State functions, they would be State actors only in relation thereto.

An authority necessarily need not be a creature of the statute. The powers enjoyed and duties attached to the Board need not directly flow from a statute. The Board may not be subjected to a statutory control or enjoy any statutory power but the source of power exercised by them may be traced to the legislative entries and if the rules and regulations evolved by it are akin thereto, its actions would be State actions. For the said purpose, what is necessary is to find out as to whether by reason of its nature of activities, the functions of the Board are public functions. It regulates and controls the field of cricket to the exclusion of others. Its activities impinge upon the fundamental rights of the players and other persons as also the rights, hopes and aspirations of the cricket loving public. The right to see the game of cricket live or on television also forms an important facet of the Board. A body which makes a law for the sports in India (which otherwise is the function of the State), conferring upon itself not only enormous powers but also final say in the disciplinary matter and, thus, being responsible for making or marring a citizen’s sports career, it would be an authority which answers the description of "other authorities".

The Board, it appears, even nominates cricketers for the Arjuna Awards.

The game of cricket both in the domestic fora as also the international fora cannot reach the desired results unless the Board acts in terms of the governmental policies or the government is entwined in its management or control of the Board or any of its agencies \026 statutory or otherwise. Apart from the above, the other tests laid down in Brentwood Academy (supra), viz., "willful participant in joint activity with the State or its agents", in our opinion, would make the Board as a State actor.

The activities undertaken by the Board were taken note of in the case of Cricket Association of Bengal (supra). Therein this Court inter alia

rejected the contention of the Ministry of Information and Broadcasting that the activities of the Association was a commercial one and it had been claiming a commercial right to exploit the sporting event as they did not have the right to telecast the sporting event through an agency of their choice in the following terms:

"We have pointed out that that argument is not factually correct and what in fact the BCCI/CAB is asserting is a right under Article 19(1)(a). While asserting the said right, it is incidentally going to earn some revenue. In the circumstances, it has the right to choose the best method to earn the maximum revenue possible. In fact, it can be accused of negligence and may be attributed improper motives, if it fails to explore the most profitable avenue of telecasting the event, when in any case, in achieving the object of promoting and popularizing the sport, it has to endeavour to telecast the cricket matches."

The aforementioned findings pose a question. Could this Court arrive at such a finding, had it not been for the fact that the association exercises enormous power or it is a 'State' within the meaning of Article 12. If Cricket Association of Bengal (supra) was considered to be a pure private body where was the occasion for this Court to say that 'if it fails to explore the most profitable avenue of telecasting the event whereby it would achieve the object of promoting and popularizing the sport, it may be accused of negligence and may be attributed improper motives?'

Applying the tests laid down hereinbefore to the facts of the present case, the Board, in our considered opinion, said description. It discharges a public function. It has its duties towards the public. The public at large will look forward to the Board for selection of the best team to represent the country. It must manage its housekeeping in such a manner so as to fulfill the hopes and aspirations of millions. It has, thus, a duty to act fairly. It cannot act arbitrarily, whimsically or capriciously. Public interest is, thus, involved in the activities of the Board. It is, thus, a State actor. We, therefore, are of the opinion that law requires to be expanded in this field and it must be held that the Board answers the description of "Other Authorities" as contained in Article 12 of the Constitution of India and satisfies the requisite legal tests, as noticed hereinbefore. It would, therefore, be a 'State'.

PRECEDENT:

Are we bound hands and feet by Pradeep Kumar Biswas (supra)? The answer to the question must be found in the law of precedent. A decision, it is trite, should not be read as a statute. A decision is an authority for the questions of law determined by it. Such a question is determined having regard to the fact situation obtaining therein. While applying the ratio, the court may not pick out a word or a sentence from the judgment divorced from the context in which the said question arose for consideration. A judgment, as is well-known, must be read in its entirety and the observations made therein should receive consideration in the light of the questions raised before it. [See Punjab National Bank vs. R.L. Vaid and Others \026 (2004) 7 SCC 698]

Although, decisions are galore on this point, we may refer to a recent one in State of Gujarat and Others Vs. Akhil Gujarat Pravasi V.S. Mahamandal and Others [AIR 2004 SC 3894] wherein this Court held:

"\005It is trite that any observation made during the course of reasoning in a judgment should not be read divorced from the context in which they were used."

It is further well-settled that a decision is not an authority for the proposition which did not fall for its consideration.

It is also a trite law that a point not raised before a Court would not be an authority on the said question.

In A-One Granites v. State of U.P. and Others [(2001) 3 SCC 537], it is stated as follows :-

"11. This question was considered by the Court of Appeal in Lancaster Motor Co. (London) Ltd. v. Bremth Ltd. (1941) 1 KB 675, and it was laid down that when no consideration was given to the question, the decision cannot be said to be binding and precedents sub silentio and without arguments are of no moment.

[See also State of U.P. and Another Vs. Synthetics and Chemicals Ltd. and Another. (1991) 4 SCC 139, Arnit Das Vs. State of Bihar, (2000) 5 SCC 488 (Para 20), Bhavnagar University Vs. Palitana Sugar Mill (P) Ltd. and Others, (2003) 2 SCC 111, Cement Corporation of India Ltd. Vs. Purya and Others, (2004) 8 SCC 270, Bharat Forge Co. Ltd. Vs. Uttam Manohar Nakate, JT 2005 (1) SC 303], and Kalyan Chandra Sarkar vs. Rajesh Ranjan @ Pappu Yadav & Anr. \026 para 42 - (2005) 1 SCALE 385].

We have noticed, hereinbefore, that in Pradeep Kumar Biswas (supra) the only question which arose for consideration was as to whether the decision of the Constitution Bench in Sabhajit Tewary (supra) was correctly rendered by a Constitution Bench of 5-Judges. As the said decision centered around the activities of CSIR vis-'-vis the tests laid down therefor in Sabhajit Tewary (supra), the ratio must be understood to have been laid down in respect of the questions raised therein. The questions raised herein were neither canvassed nor was there any necessity therefor. Pradeep Kumar Biswas (supra), therefore, cannot be treated to be a binding precedent within the meaning of Article 141 of the Constitution of India having been rendered in a completely different situation.

The question has been considered by us on the touchstone of new tests and from a new angle.

ALLAYING THE APPREHENSION:

Only because a body answers the description of a public authority, discharges public law functions and have public duties, the same by itself would not lead to the conclusion that all its functions are public functions. They are not. (See Donoghue (supra)) Many duties in public law would not be public duties as, for example, duty to pay taxes.

By way of illustration, we may point out that whereas mandamus can issue directing a private body discharging public utility services in terms of a statute for supply of water and electricity energy, its other functions like flowing from a contract etc. would not generally be amenable to judicial review. (See Constitutional and Administrative Law By A.W. Bradley and K.D. Ewing \026 Page 303)

There are numerous decisions of this Court where such a distinction between public law function and private law function has been drawn by this Court. [See Life Insurance Corporation of India Vs. Escorts Ltd. and Others, (1986) 1 SCC 264 at 343 & 344, para 101, Kerala State Electricity Board and Another Vs. Kurien E. Kalathil and Others, 2000 (6) SCC 293 at 299, Johri Mal (supra) page 729 and State of Maharashtra and Others Vs. Raghunath Gajanan Waingankar, 2004 AIR SCW 4701]

In Johri Mal (supra) it is stated:

"The legal right of an individual may be founded upon a contract or a statute or an instrument having the force of law. For a public law remedy enforceable under Article 226 of the Constitution, the actions of the authority need to fall in the realm of public law \026be it a legislative act or the State, an executive act of the State or an instrumentality or a person or authority imbued with public law element. The question is required to be

determined in each case having regard to the nature of and extent of authority vested in the State. However, it may not be possible to generalize the nature of the action which would come either under public law remedy or private law field nor is it desirable to give exhaustive list of such actions.

(Emphasis supplied)

The submission of the learned counsel for the Board that once it is declared to be a 'State'; the consequences would be devastating inasmuch as all its activities would be subject to government control, with respect, cannot be accepted as in absence of any statute or statutory rules no such control can ordinarily be exercised by Union of India or State.

It is not necessary for us to consider as to whether for entering into a contract with the players or for their induction in a team, the provisions of Articles 14 and 16 are required to be complied with as no occasion threrefor has yet arisen. It is, however, necessary to mention that a question as to whether a function of the Board would be a public function or a private function would depend upon the nature and character thereof. This Court cannot be asked to give a hypothetical answer to a hypothetical question.

The contention of Mr. Venugopal to the effect that the consequences of treating the Board as State will be disastrous inasmuch as all the national sports federations as well as those bodies which represent India in the international fora in the field of art, culture, beauty competitions, cultural events, music and dance, science and other conferences or competitions relating to any subject would become a 'State' is one of the desperation.

We clarify that this judgment is rendered on the facts of this case. It does not lay down a law that all national sports federations would be State. Amongst other federations, one of the important factors which has been taken note of in rendering the decision is the fact that the game of cricket has a special place in India. No other game attracts so much attention or favour. Further, no other sport, in India, affords an opportunity to make a livelihood out of it. Of course, each case may have to be considered on its own merit not only having regard to its public functions but also the memorandum of association and the rules and regulations framed by it.

Only because it is a State within the meaning of Article 12, the same by itself would not mean that it is bound by rule of reservation as contained in Clause 4 of Article 15 and Clause 4 of the Article 16 of the Constitution of India.

In Ajit Singh and Others (II) Vs. State of Punjab and Others [(1999) 7 SCC 209], it has been held that Article 16(4) is an enabling provision and, thus, it is not mandatory. The State in its discretion may provide reservation or may not . [See also E.V. Chinnaiah vs. State of Andhra Pradesh & Ors. \026 2004 (9) SCALE 316]

Furthermore, only because a corporation or a society is a State, the same would not necessarily mean that all of its actions should be subject to judicial review. The court's jurisdiction in such matter is limited. [See Johrimal (supra).

It is furthermore well-settled that issuance of a writ is discretionary in nature. The Court may in a given case and in larger interest may not issue any writ at all.

Mr. Venugopal vehemently argued that if the Board is held to be a State within the meaning of Article 12 of the Constitution, the doors of this Court and the High Courts would be knocked at very frequently questioning all and single action of the Board which may include selection of players for Indian Team, day to day functioning et al. We do not agree.

Recently in Virendra Kumar Srivastava (supra), this Court held:

"Before parting with the case, it is necessary for us to clarify that even though a body, entity or Corporation is held to be a 'State' within the definition of Article 12 of the Constitution what relief to the aggrieved person or employee of such a body or entity is to be granted is a subject matter in each case for the court to determine on the basis of the structure of that society and also its financial capability and viability. The subject of denial or grant of relief partially or fully has to be decided in

each particular case by the court dealing with the grievances brought by an aggrieved person against the bodies covered by the definition of 'State' under Article 12 of the Constitution."

The "in terrorem" submission of Mr. Venugopal that a floodgate of litigation would open up if the Board is held to be a State within the meaning of Article 12 of the Constitution cannot also be accepted. Floodgate arguments about the claimed devastating effect of being declared a State must be taken with a grain of salt. The courts, firstly, while determining a constitutional question considers such a question to be more or less irrelevant. [See Guruvayoor Devaswom Managing Committee and Another Anr. Vs. C.. K. Rajan and Others [(2003) 7 SCC 546 \026 para 69]. Secondly, as would be noticed hereinafter that this Court has evolved principles of judicial restraint as regards interfering with the activities of a body in policy matters. It would further appear from the discussions made hereinbefore that as all actions of the Board would not be subject to judicial review. A writ would not lie where the lis involves only private law character.

We are not oblivious of the fact that one of the grounds why the English Courts refused to broaden the judicial review concept so far as the sporting associations are concerned, that the same would open floodgate. (See P.P. Craig's Administrative Law)

Unlike England, India has a written Constitution, and, thus, this Court cannot refuse to answer a question only because there may be some repercussions thereto. As indicated hereinbefore, even the decisions of this Court would take care of such apprehension.

It is interesting to note that Lord Denning M.R. in Bradbury and others vs. London Borough of Enfield (1967) 3 All ER 434] held :-

"It has been suggested by the Chief Education Officer that, if an injunction is granted, chaos will supervene. All the arrangements have been made for the next term, the teachers appointed to the new comprehensive schools, the pupils allotted their places, and so forth. It would be next to impossible, he says, to reverse all these arrangements without complete chaos and damage to teachers, pupils and public. I must say this: if a local authority does not fulfil the requirements of the law, this court will see that it does fulfil them. It will not listen readily to suggestions of "chaos". The department of education and the council are subject to the rule of law and must comply with it just like everyone else. Even if chaos should result still the law must be obeyed but I do not think that chaos will result. The evidence convinces me that the "chaos" is much over-stated\005..I see no reason why the position should not be restored, so that the eight school retain their previous character until the statutory requirements are fulfilled. I can well see that there may be a considerable upset for a number of people, but I think it far more important to uphold the rule of law. Parliament has laid down these requirements so as to ensure that the electors can make their objections and have them properly considered. We must see that their rights are upheld."

CONCLUSION :

For the reasons aforementioned, we are of the considered view that the writ petition under Article 32 of the Constitution of India is maintainable. It is ordered accordingly.