



EXIGENCY: THE HORIZONTAL APPLICATION OF FUNDAMENTAL RIGHTS

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ABSTRACT

Fundamental rights are the basic human rights that should be protected at all costs. Together with the Directive Principles of State Policy, they are known as the 'Conscience of the Constitution'. Thus, these rights must be protected at all costs. Article 12 defines the state and Article 13 prohibits it from making any law that takes away or abridges the fundamental rights of citizens and protects them through judicial activism. Even the former Chief Justice of India, Dipak Misra asseverated that the protection of Fundamental Rights is the "sacrosanct duty of the judiciary".

After the globalization of economy, the strong private actors also started to pose a major threat to the Fundamental Rights of the citizens. Now the question arises as to whether Fundamental Rights can be imposed against private entities? The answer is still indeterminate.

This lack of clarity has created a chaotic situation. At one hand, the Fundamental Rights of the citizens are being violated and on the other, the idea of socialism is also being slaughtered. Both these principles form a part of the basic structure of the Constitution.

Thus, it is high time to give these Fundamental Rights a horizontal application to enforce them against private entities as well. In this paper, we will analyse the aforesaid issues and the intent of the judiciary towards giving these Rights a horizontal effect. At the end of this paper, we will also try to find ways in which these rights can be horizontally applied with reference various countries of the world.

INTRODUCTION

"The aim of all political association is the preservation of the natural and imprescriptible rights of man"¹

The Fundamental Rights are considered as the Magna Carta of the Indian Constitution. They were inserted in our constitution with a view to protect certain elementary rights from the transient of political majorities². They are the limitations imposed upon the powers of the government to preserve the rights of an individual³. In the words of Justice Bhagwati "These fundamental rights represent the basic values cherished by the people of this country since the Vedic times and they are calculated to protect the dignity of the individual and create conditions in which every human being can develop his personality to the fullest extent. They weave a "pattern of guarantees on the basic-structure of human rights" and impose negative obligations on the State not to encroach on individual liberty in its various dimensions."⁴

The Supreme Court highlighted the objective behind having Fundamental Rights in the case of *Moti Lal Vs State of Uttar Pradesh*⁵. The court said, the object of these

¹ Declaration of the Rights of Man – 1789. Approved by the National Assembly of France, August 26, 1789

² A.K Gopalan vs State of Madras AIR 1950 SC 27

³ Hartado Vs People of California, 28 Led 232

⁴ Maneka Gandhi v. Union of India AIR 1978 SC 597

⁵ AIR 1951 All. 257.



fundamental rights is not merely to provide security and equality of citizenship to the people living in on land and thereby to help the process of nation-building, but also to provide certain standards of conduct, citizenship, justice, and fair play. The court further added to this by saying, in the background of the Indian Constitution, these rights intend to make all the citizens and persons appreciate the fact that the paramount law of the land has swept away the privileges and has laid down perfect equality between one section of the community with another in the matter of rights which are essential for the material and moral perfection of a man.

Hence, we can say that Fundamental Rights are necessary for an individual to attain his full intellectual, moral, and spiritual status. But now the question arises as to against whom these rights are enforceable? The Constitution of India confers a duty upon the state to shelter these rights. Article 12 defines the state and Article 13 prohibits from making any law that takes away or bridges the fundamental rights of citizens. Thus, natural inference is that these rights are enforceable against the state. However, after the Globalization, privatization and liberalization of India's economy in 1991, the factors affecting individual rights significantly changed. Now, the powerful private sectors pose a major threat to the rights of an individual⁶. In many developing countries, globalization has resulted in shrinking of public spaces, violation of

human rights and commoditisation of citizens⁷. This highlighted the need of having a check upon the powers of private corporations just like the one available against the state and the practice doing so, is popularly known as the Horizontal Application of Fundamental Rights.

As we have already seen, Fundamental Rights are specifically applicable against the state. However, there are still certain Fundamental Rights that have horizontal applicability e.g., Article 15(2), 15(5), 17, 23 24 are all directly enforceable against private individuals or bodies. Apart from these, there are certain provisions which are ambivalent about their enforceability, like Article 19 which can be enforced through judicial activism. However, in the early days of judiciary, the intent of court doesn't seem to be much in favour of applying these Fundamental Rights against the private bodies. For Example, in *A.K Gopalan vs State of Madras*⁸ the apex court negated all the possibilities of applying Fundamental rights against the private individuals by saying:

As for protection against individuals, it is a misconception to think that constitutional safeguards are directed against individuals. They are as a rule directed against the State and its organs. Protection against violation of the rights by individuals must be sought in the ordinary law.

⁶ V.N. Shukla. Constitution of India. Lucknow: Eastern Book Company, 2003, 10th ed. p.20

⁷ Dr. P. Ishwara bhat, a critical study of international-relationship among Fundamental Rights with special reference to Constitution of India (1993).

⁸ Supra note 2. at p1, supported by the court in *Shrimati Vidya Verma v. Shiv Narain Verma* 1956 AIR 108. The court has said, *as a rule, constitutional safeguards are against the State and the protection against violation of rights by individuals must be sought in the ordinary law.*



Again, in case of *P.D. Shamdasani v. Central Bank of India*⁹, the Supreme Court ruled out the applicability of fundamental rights under Article 19 (1)(f) and 31 against private individuals. The court held that, “the language and structure of Article 19 and its setting in Part III of the Constitution clearly show that the article was intended to protect those freedoms against the State action.”

However, at latter stages, the court in some cases involving the violation of fundamental rights by private individual/authority, gave the relief to the affected party without going into the question whether the violator was the state or not¹⁰. Under the modern outlook, we can classify the horizontal enforceability of Fundamental Rights under four heads depending upon the remedy available to the aggrieved party¹¹-

- Assimilation under Article 12
- Positive rights enforceable against the State
- Indirect horizontality
- Direct horizontality

But a remedy under the aforesaid principles is very difficult. So, even today, when our Democracy and Judiciary has mellowed so much, the fate of horizontal applicability of Fundamental Rights remains equivocal.

JUDICIAL INTERPRETATION

As we have noted earlier, the Judiciary in its earlier days was not inclined towards including private actors within the meaning of state under Article 12. Though tests were evolved to identify whether a body is an instrumentality of the state¹², they were hardly applied to private actors. The Apex Court, for the first time in case of *M.C. Mehta vs Union of India*¹³ gave favourable indications towards including private corporations within the meaning of ‘state’. The Court began by highlighting the need of protecting the Fundamental Rights at all costs and that too against anyone. It said, *...equal relevance to us today, especially considering the fact that the definition under Article 12 is an inclusive and not an exhaustive definition. That concern is the need to curb arbitrary and unregulated power wherever and howsoever reposed.* The Court also mentioned the judgements where the need for applying Article 12 against private parties was felt¹⁴. Answering to the argument that the inclusion of private entities within the definition of Article 12, would strike a death blow to the policy of private enterprise, his Lordship opined:

The purpose of expansion has not been to destroy the raison d’eter of creating

⁹ 1952 AIR 59

¹⁰ *Bandha Mukti Morcha v. Union of India*, A.I.R. 1984 S.C. 802; 1086; *M.C. Mehta v. Union of India*, A.I.R. 1987 S.C 1992; *Ashok v. Union of India*, A.I.R. 1997 S.C. 2298; *M.C. Mehta v. Kamal Nath*, A.I.R. 2000 S.C. 1997. *Bodhisatwa Gautam v. Subra Chakraborty*, A.I.R. 1996 S.C.

¹¹ [Gautam Bhatia, Indian Constitutional Law and Philosophy](https://indconlawphil.wordpress.com/2015/05/24/horizontality-under-the-indian-constitution-a-schema/), Horizontality under the Indian Constitution: A schema, <https://indconlawphil.wordpress.com/2015/05/24/horizontality-under-the-indian-constitution-a-schema/>

¹² *Ramana Dayaram Shetty vs The International Airport Authority* 1979 AIR 1628

¹³ 1987 SCR (1) 819

¹⁴ [Sukhdev v. Bhagat Ram](#) (“the emerging principle appears to be that a public corporation being an instrumentality or agency of the ‘State’ is subject to the same constitutional limitations as the ‘State’ itself”). [Ajay Hasia v. Khalid Mujib](#) AIR1981SC487, (“Where constitutional fundamentals vital to the maintenance of human rights are at stake, functional realism and not facial cosmetics must be the diagnostic tool for constitutional law must seek the substance and not the form”).)



corporations but to advance the human rights jurisprudence. Prima facie we are not inclined to accept the apprehensions of learned counsel for Shriram as well-founded when he says that our including within the ambit of Article 12 and thus subjecting to the discipline of Article 21, those private corporations whose activities have the potential of affecting the life and health of the people, would deal a death blow to the policy of encouraging and permitting private entrepreneurial activity.

However, the Court left this question unanswered because of laxity of time.

1) Private body assimilated to State under Article 12

From time to time, the court has laid tests to determine if a private body is an instrumentality of state¹⁵. For example, in *Zee Telefilms Ltd. Vs Union of India*¹⁶, the court upheld that if a private corporation discharges the functions of public nature, it will be considered state within the meaning of Article 12.

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 fulfil 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'.

In many other cases also, private entities were brought within the meaning of other authorities in Article 12, if they had close assimilation with the state.

2) Indirect horizontality

It is applied to cases where the offender is a private entity, acting within its capacity. However, if it is the laws, upon which it realises to justify its actions, is inapt. In such a situation, the Fundamental Rights surpass the Constitution, in a manner that they affect the private law and private adjudication. For example, the famous case of *R. Rajagopal vs State of T. N*¹⁷. In this case, the petitioners sought to prohibit the respondent state from interfering with the publication of an autobiography of a prisoner, Auto Shanker, in its magazine. The prisoner was convicted of six murders and was sentenced to death. While in jail, he wrote this auto-biography and expressed his wish that it be published in the petitioners' magazine. Before publishing the autobiography, the magazine announced

¹⁵ Supra note 11

¹⁶ AIR 2005 SC 2677

¹⁷ 1995 AIR 264



its publication. The Prison officials then forced the prisoner to write to the magazine requesting that the auto-biography not be published. Petitioners then brought an action to prevent the respondents from violating the magazine's and the prisoner's Freedom of Expression. Thus, the issues before the Court were:

- Whether the state can impose prior censorship on a material that may be defamatory to it.
- Whether the publication of prisoners' autobiography without his consent would infringe his right to life.

The Court found that the state and its officials does not have the right to impose prior restraints on the publications that may be defamatory to the state. Thus, no prior censorship can be imposed by the respondents on the autobiography of Auto-Shankar. However, this does not mean that the state cannot sue for defamation once an article is published.

With regard to the second issue, the court held that the petitioners have a right to publish the autobiography of Auto Shankar so far it appears from the public records, even without his consent or authorisation. But if they go beyond that and publish his life story, then it will be considered an invasion on his right to privacy¹⁸ and they will be liable for the consequences.

If we analyse this judgement, in the first part, we will find that the Court has modified the law of defamation (private law) to bring it in line with Article 19(1)(a) of the Constitution. Although the respondent was the state, yet

the approach adopted was that of indirect horizontal application. In the second part of the judgement also, the 'Right to Privacy' of the prisoner was protected against a private corporation. Thus, the Court again extended the scope of the Constitutional rights.

3) Direct horizontality

Till now, we have seen the court applying Fundamental Rights against the private entities either indirectly i.e. by establishing a nexus between the Constitutional rights and private laws or by including them within the ambit of Article 12. But now, we shall look upon the cases where the private acts were challenged directly at the touchstone of the constitution.

In *Consumer Education and Research Centre v Union of India*¹⁹, the Apex Court ruled that the right of the employees to health lies against the private employer also and these private actors are bound by the directions under Article 32 of the Indian Constitution.

The Court said:

The State, be it Union or State government or an industry, public or private, is enjoined to take all such action which will promote health, strength and vigour of the workman during the period of employment and leisure and health even after retirement as basic essentials to live the life with health and happiness. The health and strength of the worker is an integral facet of right to life. Denial thereof denudes the workman the finer facets of life violating Art.21.

¹⁸ In this case, the court held that Right to Privacy is guaranteed by Article 21 of the constitution.

¹⁹ 1995 AIR 922



In *Bodhisatwa Gowtham v. Subhra Chakraborty*²⁰, the court said, *Under Article 32 of the Constitution, it has the jurisdiction to enforce the Fundamental Rights guaranteed by the Constitution by issuing writs in the nature of Habeas Corpus, Mandamus, Prohibition, Quo-Warranto and Certiorari. Fundamental Rights can be enforced even against private bodies and individuals.*

In *Indian Medical Association v. Union of India*²¹, the Court said, Article 15(2)²² of the constitution has horizontal application that compels all the public and private entities to abstain from discriminating only on the grounds of sex, caste, race or place of birth. Thus, it prohibits the license holder of the hospitals, restaurant etc to disallow anyone on the above grounds. For this, the Court referred to D.R. Ambedkar's speech in the Constituent Assembly in which he said²³:

To define the word 'shop' in the most generic term one can think of is to state that 'shop' is a place where the owner is prepared to offer his service to anybody who is prepared to go there seeking his service. Certainly, it will include anybody who offers his services. I am using it in a generic sense. I should like to point out therefore that the word 'shop' used here is not used in the limited sense of permitting entry. It is

used in the larger sense of requiring the services if the terms of service are agreed to.

On this basis, the court ruled that the word "shops" has a very wide import, and is referred not only to a physical "shop", but to all the provisions of goods or services in the market. Thus, the Court held that schools came within the meaning of shops for the purposes of Article 15(2), and that consequently, private schools were subject to the non-discrimination guaranteed under the Constitution. At the heart of the Court's reasoning was the understanding that the most pervasive forms of discrimination in Indian society had been horizontal, and took the form of excluding a section of society from the economic and social mainstream through boycotts and denial of access²⁴.

With regard to the applicability of reservation under Article 15(5) in private non- minority unaided medical colleges, the Apex Court held that the Article, has a clear nexus with the objective of the Constitution and hence is not violative. The Court said:

In this respect, the placement of clause (5) of Article 15 in the equality code, by the 93rd Constitutional Amendment is of great significance. It clearly situates itself within the broad egalitarian objectives of the Constitution. In this sense, what it does is that it enlarges as opposed to

²⁰ AIR 1996 SC 1992

²¹ (2011) 7 SCC 179

²² The Constitution of India, 1949. Article 15 (2) (No citizen shall, on grounds only of religion, race, caste, sex, place of birth or any of them, be subject to any disability, liability, restriction or condition with regard to

(a) access to shops, public restaurants, hotels and palaces of public entertainment; or

(b) the use of wells, tanks, bathing ghats, roads and places of public resort maintained wholly or partly out of State funds or dedicated to the use of the general public)

²³ Constituent Assembly Debates (proceeding), Vol. VII, Dec. 9, 1948

²⁴ Supra note 11, at page 3.



truncating, an essential and indeed a primordial feature of the equality code.

In *PUDR vs Union of India*²⁵, the Supreme Court held that Article 17, 23 and 24 are also directly enforceable against private individuals.

Now many of the fundamental rights enacted in Part III operate as limitations on the power of the State and impose negative obligations on the State not to encroach on individual liberty and they are enforceable only against the State. But there are certain fundamental rights conferred by the Constitution which are enforceable against the whole world and they are to be found inter alia in Articles 17, 23 and 24.

4) Positive Rights enforceable against the State

Usually, fundamental rights are negative covenants i.e., they prohibit the state from infringing upon certain rights of an individual. However, they do not impose any *positive* obligation upon the State to act in a definite manner. This practice is widely criticized by legal scholars as well as judges. That's why the Indian Courts, in a number of cases, imposed an obligation upon the state (issued directions) to make laws on the issues which involve infringement of Fundamental Rights. Sometimes, in the absence of said laws, the court even went on to issue temporary guidelines or grant relief. The case of *Bharat Kumar K. Palicha and Anr. v. State of Kerala and Ors*²⁶ is one such example where the Kerala High Court directly applied the Fundamental Rights against the political parties in the absence of

a regulatory measure. The reason behind enforcing the said rights were given by the court as:

Section 24-A(5) compels the association or body seeking registration, to produce a memorandum or rules and regulations of the Association with a provision therein "that the association or body shall bear true faith and allegiance to the Constitution of India as by law established, and to the principles of socialism, secularism and democracy and would uphold the sovereignty, unity and integrity of India". This would compel the political party to respect the fundamental rights of the citizens embodied in Part III of the Constitution and to recognise the fundamental duties enunciated in Article 51 A of the Constitution. In such a situation, we find that the jurisdiction of this Court under Article 226 of the Constitution should be exercised at least to the extent of considering the grant of declaratory relief to the petitioners regarding the right of the political parties to call for a bundh and to enforce it if they deem fit.

Many believe that the court directly enforced the Fundamental Rights against the political parties and so this case should fall within the category of direct horizontal application. However, it is submitted that the said orders were issued only because there was an absence of a regulatory provision and since the court views the breach of Fundamental Rights as a serious issue, it went on to give declaratory relief to the petitioners.

²⁵ 1982 AIR 1473

²⁶ AIR 1997 Ker 291



Another interesting thing that the Court pointed out was that it is not necessary that a criminal offence is made out when a Fundamental Right is violated. The Court said: *We do not think it necessary or proper to consider whether the enforcing of a bundh results in any offence under the Indian Penal Code being made out.*

Again, in the case of *Vishaka v. State of Rajasthan*²⁷, The Apex Court held that the State's failure to pass a sexual harassment legislation for regulating public and private workplaces amounted to the violation of Petitioner's constitutional rights under Articles 14, 19 and 21. The court gave three pointers that proved sexual harassment at workplace amounted to constitutional wrong. Firstly, as per the positive obligation on various organs of the state to protect woman under Article 14 and 15, under right to life under Article 21 and her right to practice any profession under Article 19 (1) (g) and this sense of responsibility from the part of state is clear when the state was included as a party in the writ petition, Secondly, as per the Fundamental Duty under Article 51-A. Thirdly, under the obligations of the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW)²⁸.

The Court then issued a set of guidelines, known as the *Vishaka Guidelines*, which were to act as temporary rules in the absence of any law in that regard. What is to be noted here is that it was the state which was the respondent. The Court, thus imposed an

obligation upon it to protect the Fundamental Rights guaranteed under Article 14, 19 and 21 against the private actors.

The most recent judgement involving the enforcement of the positive rights against the state is the famous case of *K.S. Puttuswami vs Union of India*²⁹. In this case, the court has held that 'Right to Privacy' (against both state and private entities) is a Fundamental Right under Article 21 of the Constitution. Here also, the Court imposed a positive obligation upon the state to establish a legal framework for the free exercise of the right to privacy, which would again act as an additional layer of protection for the individual's right. The Court said:

Rights such as informational privacy and data protection mandate that the state must bring into being a viable legal regime which recognizes, respects, protects and enforces informational privacy. Informational privacy requires the state to protect it by adopting positive steps to safeguard its cluster of entitlements. The right to informational privacy is not only vertical (asserted and protected against state actors) but horizontal as well.

The Court also justified the reason behind making 'Right to Privacy', enforceable against private entities and said:

Common law rights are horizontal³⁰ in their operation when they are violated by one's fellow man, he can be named and proceeded against in an ordinary

²⁷ AIR 1997 SC. 3011

²⁸ State action and Private actors, https://shodhganga.inflibnet.ac.in/bitstream/10603/91999/13/13_chapter%205.pdf

²⁹ 2017 10 S.C.C. 1

³⁰ [Unaided Private Schools v. Union of India](#) (2012) 6 SCC 1 & [Civil Liberties v. Union of India](#) (2005) 2 SCC 436



court of law. Constitutional and fundamental rights, on the other hand, provide remedy against the violation of a valued interest by the 'state', as an abstract entity, whether through legislation or otherwise, as well as by identifiable public officials, being individuals clothed with the powers of the state. It is perfectly possible for an interest to simultaneously be recognized as a common law right and a fundamental right. Where the interference with a recognized interest is by the state or any other like entity recognized by Article 12, a claim for the violation of a fundamental right would lie. Where the author of an identical interference is a non-state actor, an action at common law would lie in an ordinary court.

Privacy has the nature of being both a common law right as well as a fundamental right. Its content, in both forms, is identical. All that differs is the incidence of burden and the forum for enforcement for each form.

Another interesting fact about this Judgement was that it opened a discussion about the horizontal applicability of Article 19. During the suit, Justice Chandrachud asked *if the state is under an obligation to legislate to protect privacy, seeing how Article 14 is a direct injunction against the state and Article 19 has a horizontal element, which*

*Mr. Subramaniam answered in the affirmative*³¹.

CONCLUSION

So far, we have seen that the Horizontal Application of Fundamental Rights, ejects a public-private division in the Constitutional law. In the modern era, Constitutional rights are threatened by the powerful private actors and institutions along with the governmental ones. Especially, the Globalization of a nation's economy results in an increment in the role of private actors and a decrease in the role of state. So fundamental rights are violated more by the private enterprises than by the state³². A reference in this regard can be made to India's current economy.

Since independence, India's economy has been a mixed economy where the role of the state has been that of a regulator. However, after the Globalization in 1991, the role of private corporations increased by leaps and bounds. Now, the state acts as a mere facilitator and the corporations are in the main control. This has virtually slaughtered the socialistic principles, which formed a part of basic structure doctrine.

Socialism talks about equal distribution of resources, and its demise has resulted in class difference in India. Thus, in our Globalised economy, "The rich get richer and the poor get poorer"³³.

While the Courts in India have still understood the gravity of the situation, the Parliament seems to be insouciant. Many scholars allege that the Parliament has deliberately chosen this doctrine of inaction

³¹ [Nine-judge constitution bench of Supreme Court hears arguments on right to privacy: updates from day 6, sflc.in \(7th July, 2019\) https://sflc.in/ninejudge-constitution-bench-supreme-court-hears-arguments-right-privacy-updates-day-6.](https://sflc.in/ninejudge-constitution-bench-supreme-court-hears-arguments-right-privacy-updates-day-6)

³² Rajiv Mabeshwaram, Perspective of the Judiciary to Economic Reforms vis-à-vis Rights of the Poor, ALL INDIA REP. J. 71-83 (2012).

³³ [Percy Bysshe Shelley, A Defence of Poetry](#), Letters from Abroad (1840)



so that it can help Corporate houses to grow profusely. There allegation appears to be correct. Now-a-days, big Corporate entities finance the political parties to contest elections. After coming into power, these political parties, in-turn help these corporations to boost profits. In this process, individual rights are often dishonoured. For example, the Labour laws have been relaxed to a great extent in order to provide cheap labour forces to these corporations. Moreover, they have been greatly excluded from the ambit of RTI. Relaxation of Land laws, taking over of media houses by Corporates in order to decide the nature and content of the information to the people, privatization of PSU's (which are considered as social assets), etc are some other ways in which Corporate Houses are given unholy favouritism which has resulted in the horizontal violation of Fundamental Rights. Thus, a mere vertical application of Fundamental Rights may imperil the democracy in India.

This problem has been globally recognised and many countries have also successfully unravelled it. For example, the Irish Constitution recognises the concept of constitutional torts. According to this theory, if a person's fundamental rights has been violated by the other, then that person (victim) has a right to directly seek redress against the violator. Hence direct horizontality is achieved and it is expressly protected under the constitution.

Another case can be that of South Africa. The South African Constitution takes a middle way between the direct and indirect horizontality. Here, an invocation of law by one individual in a suit against the other, cause the enactment of Fundamental Rights

on that law. This is because all the laws, whether regulating the relation between the individual and the state or among the individuals, is directly subjected to the Constitution.

Also, in Canada, the concept of indirect horizontality is prevalent. But, the position in United Kingdom is still ambivalent like India.

India, too, should incorporate this principle like these countries have done. The Parliament should come up with a law that can enforce Fundamental Rights against the private entities also. If not direct enforceability, then some law that can protect the Fundamental Rights against them. Because keeping in view the current violations, it is high time that these rights are protected.
