Transformative Constitution and the Horizontality Approach: An Exploratory Study

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Abstract

The Constitution of India, especially the Fundamental Rights chapter, has played a massive transformative role in the Indian society. To quote Ananth Padmanabhan, Fundamental Rights mark "a tectonic shift in constitutional philosophy", a fact that is universally recognised. However, the enforcement of Fundamental Rights has been predominantly vertical, owing to a tacit acknowledgement of the centrality of the State, largely because of our adherence to westernised notions of unitary sovereignty. Apart from obvious scopes for direct horizontality like in Articles 15(2), 17 and 23, the Indian judiciary has been quite reluctant to effectuate the real layered nature of the Indian sovereign model and make Fundamental Rights horizontally enforceable in general. This paper seeks to acknowledge the inherent limitations of the peremptory vision of Fundamental Rights as a negative right imposing constraints on the state; and aims to advocate a positive duty-based approach in order to fulfil the constitutional visions of a transformed society.

Developing on recent works by scholars like Gautam Bhatia who have primarily tried to analyse the foundations of horizontality in the areas of non-discrimination etc., this paper seeks to also explore the possibility of such horizontality in areas like free speech, spaces where the private non-state players play a significant role in imposing regulations, which are, more often than not, extra-legal in nature. The concomitant challenges to the centrality of the State in a vertical vision of Fundamental Rights forms the centrepiece of this paper, which seeks to put forward an alternative vision of Fundamental Rights enforcement through an explicit recognition of the horizontality approach in constitutional adjudication.

Keywords: *Horizontal Application, Fundamental Rights, Transformative Constitution, Comparative Law, Free Speech*

1. Introduction

The Constitution of India, apart from being a sentinel of the fundamental democratic ethos of the Indian nation state, plays a hugely significant transformative role. Over the course of the last sixty nine years of our constitutional existence, the Indian society has undergone substantial socio-political and economic transformations. However, the strong constitutional foundations have ensured that the fundamental values that underline the Indian society have remained intact, and our basic rights and constitutional guarantees have not been withered away in the face of rampant modernisation.

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One of the more defining features of the societal evolution in the last sixty nine years has been the increasing importance of non-state actors, not just in the socio-economic sphere, but in the political sphere as well. Sometimes, their subterranean presence is felt in the spheres of governance as well. Moreover, different aspects of inter-personal relations between private actors also necessitate engagement with Constitutional principles, especially when they involve elements of discrimination and abridgement of fundamental freedoms. This ever-burgeoning importance of the *private* often poses regulatory challenges for the *public*, especially when doctrinaire adherence to traditional notions of constitutional interpretation is found deficient and unsustainable.

One such area where the conventional constitutional precincts need some serious reconsideration is in the area of enforcement of Fundamental Rights. Traditionally, Fundamental Rights have been largely applied vertically, that is to say, against the state.[2] There have been very limited scopes for horizontal application of Fundamental Rights against non-state entities, while enforcing provisions of the Constitution that do not specifically mention the State, for example, Articles 15(2), 17, 23 and 24. The idea of indirect horizontal application is yet to find firm grounding through a consistent trend of juristic interpretations, predominantly owing to a tacit acknowledgement of the centrality of the State largely because of our adherence to westernised notions of unitary sovereignty.[3] This paper seeks to acknowledge the inherent limitations of the peremptory vision of Fundamental Rights as a negative right imposing constraints on the state; and aims to advocate a positive duty-based approach in order to fulfil the constitutional visions of a transformed society.[4]

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[2] *See e.g. P.D. Shamsadani v. Union of India,* AIR 1952 SC 59, *Vidya Verma v. Shiv Narayan Verma,* AIR 1956 SC 108.

[3] For example, Martin Laughlin writes: "*the modern system of government exists to protect the interests of the right-bearing individuals…through the constitutional arrangements of the modern state.*"(emphasis added). *See* Martin Laughlin, *Foundations of Public Law*, (Oxford University Press, Oxford, 2010), pp. 342-343. *See also*, Carl Schmitt, *Constitutional Theory*, Transl. and Ed. by Jeffrey Seitzer (Duke University Press, Durham & London, 2008) pp. 197-219.

[4] *See* Stephen Gardbaum, 'Horizontal Effects', in Sujit Choudhury, Madhav Khosla, and Pratap Bhanu Mehta (eds.), *The Oxford Handbook of The Indian Constitution* (OUP, New Delhi, 2016), p. 600. *See also,* Sudhir Krishnaswamy, "Horizontal Application of Fundamental Rights and State Action in India", in C. Rajkumar and K. Chockalingam (eds.), *Human Rights, Justice, & Constitutional Empowerment* (Oxford University Press, New Delhi, 2007); Ashish Chugh, "Fundamental Rights - Vertical or Horizontal?" *(2005) 7 SCC (J) 9.*

Developing on recent works by scholars like Gautam Bhatia[5] who have primarily sought to analyse the foundations of horizontality in the areas of non-discrimination etc., this paper also seeks to explore the possibility of such horizontality in areas like free speech, spaces where the private non-state players play a significant role in imposing regulations, which are, more often than not, extra-legal in nature. The concomitant challenges to the centrality of the State in a vertical vision of Fundamental Rights forms the centrepiece of this paper, which seeks to put forward an alternative vision of Fundamental Rights enforcement through an explicit recognition of the horizontality approach in constitutional adjudication. After the Introduction in Part I and Part II, it seeks to trace the concept of Horizontality as it exists in the Indian Constitutional scheme of things right now. Part III deals with how the issue of Horizontality is dealt with by Constitutions around the world. Part IV seeks to look at what holds in future for India, and whether the global practices can be of any assistance for building a template for the future. Part V summarises and concludes the discussion.

2. Tracing Horizantality in the Indian Constitution

This part seeks to locate the seeds of horizontality within the framework of Part III of the Constitution. It looks at the issue from three different perspectives. First, it looks at how the clear mention of 'State' in Article 12, ostensibly acting as a deterrent towards making Fundamental Rights enforceable against private players, has been jurisprudentially surpassed by reading many non-state bodies performing functions of public importance into the ambit of Article 12 by making use of the flexible "other authorities" category. Subsequently, it seeks to look into the Direct and Indirect Horizontal Application of Fundamental Rights, and explore means and mechanisms by which the Court has been making more and more private infractions of Fundamental Rights constitutionally actionable.

2.1 Expanding the Scope of "Other Authorities" in Article 12

Part III of the Constitution that deals with Fundamental Rights starts with Article 12, which gives an open-ended, inclusive definition of the term 'State'. In a way, this clear positioning of Article 12, and the clear enunciation of the centrality of the 'State' often serves as the basis of the argument that denies any claim for horizontality. Even though there may be some merit in this argument, a deeper look into the provision unerringly points towards an alternative narrative.

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[5] *See generally,* Gautam Bhatia, *The Transformative Constitution: A Radical Biography in Nine Acts* (Harper Collins, Noida, 2019). *See also* Gautam Bhatia, "Horizontality under the Indian Constitution: A Schema", *Indian Constitutional Law and Philosophy*, available at < https://indconlawphil.wordpress.com/2015/05/24/horizontality-under-the-indian-constitution-a-schema/> (last visited on 10.10.2019).

Article 12 defines State as "*the Government and Parliament of India and the Government and the Legislature of each of the States and all local or other authorities within the territory of India or under the control of the Government of India*" (emphasis added). While there is a virtual certainty about the interpretation of the other phrases in the Article, one cannot state with an absolute certainty that the interpretational position with respect to the phrase "other authorities" is absolutely settled.

In *Pradeep Kumar Biswas v. Indian Institute of Chemical Biology*[6] the Court by a majority of 5:2 held that a body would be considered as "the State" only if it is *financially, functionally and administratively* dominated by or under the control of the Government, and such control must be pervasive. In *Zee Telefilms v. Union of India,*[7] the Court held that the Board of Control for Cricket in India (BCCI)**,** a society registered under the Tamil Nadu Societies Registration Act, 1975 and enjoying extensive powers in relation to the sport of cricket in India was not "the State" under Article 12. Deciding on the lines of *Pradeep Kumar Biswas,*[8] the majority concluded that the BCCI did not fulfil the criteria of being '*financially, functionally and administratively*' under the governmental control. However, Sinha, J., in his dissenting opinion stressed on the functions performed by the BCCI and pointed that meaning of "the State" under Article 12 was not confined to entities controlled by the government.[9]

This approach adopted by Sinha, J., found partial resonance with the Supreme Court in the case of *BCCI vs. Cricket Assn. of Bihar*[10] where the Court, although staying firm with the *Zee Telefilms*[11] dictum, acknowledged in no uncertain terms that Sports Federations, although private bodies, can violate sportspersons' Fundamental Rights, and therefore, can be amenable to the writ jurisdiction of the High Courts under Article 226 of the Constitution.

In clear reference to the functions performed by the BCCI, the Court observed:

> "*The rationale underlying the view [that decision of BCCI is amenable to writ jurisdiction of the High Courts under Article 226 even when it is not "the State" within the*

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[6] (2002) 5 SCC 111, paras 27 & 40.
[7] (2005) 4 SCC 649.
[8] Supra note 5.
[9] Supra note 6. See also, M.P. Singh, "Fundamental Rights, State Action and Cricket in India" 13 *Asia Pacific Law Review* 203 (2005).
[10] (2015) 3 SCC 251, paras 22, 33, 34, 35, 74, and 84.
[11] Supra note 6.

meaning of Article 12] lies in the nature of duties and functions which BCCI performs".[12]

The court went on to say:

> "*Any organization or entity that has such pervasive control over the game and its affairs and such powers… cannot be said to be undertaking private functions…if the Government not only allows an autonomous/private body to discharge functions which it could in law take over or regulate but even lends its assistance to such non-government body to undertake such functions which by their very nature are public functions, it cannot be said that the functions are not public functions or that entity discharging the same is not answerable on the standards generally applicable to judicial review of State action.*"[13] (emphasis added).

Even if one may argue that this judgement does not bring the BCCI (or for that matter, private bodies as such) within the definition of 'State' under Article 12, it cannot be denied that it significantly paves the way for enforcing Fundamental Rights horizontally against mighty and powerful non-state actors. One hopes that this is just the first step towards revisiting the narrow, structuralist formulation of the definition of 'State' that was laid down in *Pradeep Kumar Biswas*.[14]

2.2 Direct Horizantality

In the direct horizontality model, an act by a non-state actor can be scrutinised directly on the touchstone of Fundamental Rights, without there being any necessity to build a bridge between such non-state actor and the State, either by bringing it within the definition of 'other authorities' under Article 12, or by making the State responsible in any other manner.[15] Taking this approach is especially plausible in case of Fundamental Rights that do not mention the requirement of the State in its body. For example, Under Article 15(2), no citizen may be restricted from access to shops, public restaurants, hotels, places of public entertainment and public resort dedicated to the use of the general public, on grounds only of religion, race, caste, sex, place of birth, or any of them. Similarly, Article 17 prohibits the practice of untouchability and Article 23 prohibits traffic in human beings,

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[12] Supra note 9, para 33.
[13] *Ibid*, paras 33, 34 & 35.
[14] Supra note 5.
[15] *See generally,* M.P. Singh, "Protection of Human Rights against State and Non-State Action" in Dawn Oliver and Jörg Fedtke (eds.), *Human Rights and the Private Sphere: A Comparative Study* (Routledge-Cavendish, UK, 2007). *See also,* Gardbaum, supra note 3.

as well as bonded labour. In all these cases, it can be noticed that the wordings of the Articles in question do not mention the fact that the deprivation has to be necessarily attributable to the State, or any State agency.

At this point, it is pertinent to mention that although the said Rights do not express the requirement of the State as a violator of the Fundamental Rights, they do not absolve the State of its positive obligations to ensure that such violations do not take place. For example, in the case of *People's Union of Democratic Rights v. Union of India,*[16] the Supreme Court observed:

> *"...whenever any fundamental right which is enforceable against private individuals such as, for example, a fundamental right enacted in Article 17 or 23 or 24 is being violated, it is the constitutional obligation of the State to take the necessary steps for the purpose of interdicting such violation and ensuring observance of the fundamental right by the private individual who is transgressing the same. Of course, the person whose fundamental right has been violated can always approach the court for the purpose of the enforcement of his fundamental right, but that cannot absolve the State from its constitutional obligation to see that there is no violation of fundamental right..."*[17]

Similarly, the Supreme Court has been immensely effective in giving expansive and purposive interpretations to the provisions that provide for horizontal application. For example, in the case of *Indian Medical Association v. Union of India,*[18] the Supreme Court gave a plenary interpretation of the word 'shops' in Article 15(2) and brought within its ambit all kinds of establishments that provide goods or services.[19] Thus, the constitutional mandate of providing non-discriminatory treatment was extended to private schools as well.

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[16] (1982) 3 SCC 235.

[17] *Ibid*, para 15.

[18] (2011) 7 SCC 179.

[19] In doing so, the Court majorly relied on the following statement by Dr. B.R. Ambedkar in the Constituent Assembly: "*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.*" *See* Constituent Assembly Debates on November 29, 1948, *available at*: <https://www.constitutionofindia.net/constitution_assembly_debates/volume/7/1948-11-29> (last visited on 10.10.2019).

The reach of Direct Horizontal Application has been occasionally extended also to provisions like Article 21 which, in addition to constitutionalising a positive duty to safeguard an individual's life and personal liberty, has made private bodies equally amenable as the State. In *Parmanand Katara v. Union of India*[20] the Court after holding that preservation of life by providing emergency healthcare facilities is protected by Article 21 said:

> "*Every doctor whether at a Government hospital or otherwise has the professional obligation to extend his services with due expertise for protecting life.*" (emphasis added)

Similarly, in *Consumer Education and Research Centre v. Union of India*,[21] while expanding the scope of right to life and including within its expanded ambit the right to health and environment, the Court observed:

> *"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".*

Thus, it can be noticed that the Supreme Court has not only confined the ambit of Direct Horizontal Application to the more obvious provisions. It has in fact gone one step ahead and has made sure that private bodies, just like the State, are made accountable to take positive steps in the direction of safeguarding certain basic rights.

2.3 Indirect Horizantality

Unlike Direct Horizontality, the Indirect Horizontality approach has necessarily required juristic innovations whereby the State was held responsible for an individual's deprivation of Fundamental Rights resulting from the acts of a non-state player. This approach also encompasses situations where the Court has underlined a positive mandate upon the State to ensure that no instance of violation, either owing to its own functionaries and agencies, or to private players, arises. In doing so, it has often read private covenants and arrangements in light of constitutional principles.

The initial trend of Indirect Horizontality can be noticed in cases where the Court has held the State accountable for an individual's acts of malfeasance resulting in the violation of Fundamental Rights of individuals

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[20] AIR 1989 SC 2039.
[21] (1995) 3 SCC 42.

or groups. For example, in *Bodhisattwa Gautam v. Subhra Chakraborty*,[22] the Court ordered for the payment of compensation to a rape victim, without requiring for the construction of a causal link with the State. Again, in environmental cases, the Court did not hesitate to award compensations against polluting industries and establishments, also enjoining them the task of environmental restitution, while regarding Right to Clean Environment as an integral component of Right to Life under Article 21.[23]

Though Indirect Horizontality had strenuous beginnings, the trend gradually stepped up. In *Vishaka v. State of Rajasthan,*[24] the Court looked at the State's failure to enact a Sexual Harassment law to regulate both private and public workplaces as an instance of a violation of an individual's Articles 14, 19(1)(g) and 21 rights. Similarly, in *Medha Kotwal Lele v. Union of India*,[25] the Court directed those states which had till then not enacted a workplace sexual harassment law, to positively do so within a period of two months. It can be noted here that in both the cases, although the respondent was the State, obligation was cast upon it to regulate both public and private workplaces.

In *R. Rajagopal v. State of Tamil Nadu,*[26] the Court, while bringing the Common Law on Defamation at par with the standards of expressional freedoms as required by Article 19(1)(a), also referred to Article 21 in making possible as enforcement of a privacy breach claim against another individual. The landmark case of *Justice K.S. Puttuswamy (Retd.) v. Union of India*[27] only takes this imprimatur to its logical extension, when two of the nine Judges categorically recognised the threats to privacy posed by non-state actors and therefore enjoined State to safeguard this Fundamental Right not only against itself, but also against transgressions by non-state players.

D.Y. Chandrachud, J., acknowledging the threat to privacy posed by both State and non-state actors, enjoined upon the State to put together an

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[22] (1996) 1 SCC 490. One can observe similar observations in the case of *Jeeja Ghosh v. Union of India,* (2016) 7 SCC 761, where the Court, in a writ petition filed under Article 32 challenging an act of disability-based discrimination meted out to the petitioner by Spicejet, a Private Airlines, directed that the Private Airlines should pay damages to the petitioner.

[23] *See M.C. Mehta v. Kamal Nath,* (1997) 1 SCC 388. *See also, Indian Council for Enviro-Legal Action v. Union of India,* (1996) 3 SCC 212.

[24] (1997) 6 SCC 241.

[25] (2013) 1 SCC 297.

[26] (1994) 6 SCC 632. The Court largely relied on the landmark U.S. Supreme Court decision in the case of *New York Times v. Sullivan,* 376 U.S. 274 (1964), where the Court brought the common law on defamation, as applied by the State of Alabama against the New York Times, in line with the First Amendment Right to Free Speech, in a private defamation proceeding between the two parties.

[27] (2017) 10 SCC 1.

effective Data Protection regime to ward off such onslaughts.[28] Kaul, J., made a more specific argument in support of horizontal application of the Right to Privacy. He opined:

> "*The right of privacy is a fundamental right. It is a right which protects the inner sphere of the individual from interference from both State, and non-State actors and allows the individuals to make autonomous life choices*."[29] (emphasis added)

The other way through which the SC has engaged with Indirect Horizontal Application of Fundamental Rights is by applying them to interpret provisions of private law in accordance with Constitutional principles. In *Githa Hariharan v. Reserve Bank of India*,[30] the Court held that Section 6 of the Hindu Minority and Guardianship Act 1956, which states that "the natural guardians of a Hindu minor… are - (a) in the case of a boy or unmarried girl- the father, and after him, the mother…", could be interpreted to mean that the mother could become the guardian not only after the death of the father, but also in his absence or because he was indifferent towards the child, or due to lack of understanding between the mother and father. Therefore, rather than invalidating the relevant section on the basis of sexual discrimination prohibited under Article 15(1), the Court interpreted the Hindu Minority and Guardianship Act, 1956 - a private law statute - consistently with the right to equality. In doing so, it applied Article 15 (1) to a private law case, thereby not only impacting and regulating the action of private individuals but also recognizing the Indirect Horizontality of Fundamental Rights.[31] Similarly, in *Central Inland Water Transport Corporation v. Brojo Nath Ganguly,*[32] the Court used the concept of arbitrariness to interpret Rule 9(i) of the Service Rules of the Corporation and strike it down on finding it to be arbitrary and discriminatory, and thus violative of Article 14. Although the appellant in this case, the Central Inland Water Transport Corporation, is a Government Company and hence, 'State' within the meaning of Article 12, the point to be noted in this context is that the Court showed no reluctance in interpreting a private employer-employee service contract in consonance with the Constitution. Hence, in the larger picture, one can easily posit a proposition that in similar disputes involving non-state employers also, the Court's line of interpretation would not be very different.

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[28] *Ibid.*
[29] *Ibid.*
[30] (1999) 2 SCC 228.
[31] See, Gardbaum, supra note 3, pp. 608-9.
[32] (1986) 3 SCC 156.

However, one cannot overlook to glaringly inconsistent position taken by the Supreme Court in the case of *Zoroastrian Cooperative Housing Society Limited v. District Registrar Cooperative Societies (Urban),*[33] where the Court adopted a strict verticalist approach in refusing to read a restrictive covenant of a co-operative society in consonance with the Constitutional requirement of public policy in religious non-discrimination, with an argument arduously premised on the voluntary nature of the compact and the need to locate public policy within the four corners of the local act and the bye-laws, rather than looking for an engagement with the Constitution.

In *Charu Khurana v. Union of India*,[34] the Court struck down a blatantly discriminatory provision of the Cine Costume Make-up Artists and Hair Dressers Association bye-laws, not on the basis of a Fundamental Rights scrutiny, but for being violative of Section 21 of the Trade Unions Act, 1926. Although the Court goes on to make certain perfunctory observations about the requirement of Trade Unions and Associations which are accepted by the statutory authorities to not violate the mandates of Article 21, it is argued that this decision can be looked at a golden opportunity of firmly reinforcing the Horizontality discourse in the Indian constitutional paradigm which was squandered by the Supreme Court. [35]

Inconsistencies aside, one can clearly discern a pattern in the Court's interplay with Horizontality. It has tried to locate Horizontality primarily in provisions which allow for direct enforcement against private players, or has tried to conjure up an interpretation premised on the paternalistic role of the State and its deficiencies in safeguarding individual interests, largely stemming out of Article 21. In the process, Fundamental Rights have been looked at not just negative rights – imposing restrictions upon the State from unjustifiably encroaching individual rights, but also as positive ones – imposing obligations upon the State to safeguard them, and in the process, make private players also conform to similar requirements.

3. Horizantality in Other Jurisdictions : A Comparative Critique

In this part, the issue of horizontal application of Constitutional Rights in five other jurisdictions – namely United States, Canada, Germany, United Kingdom and South Africa have been looked at. This comparative

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[33] (2005) 5 SCC 632.

[34] (2015) 1 SCC 192.

[35] *Ibid.* One can look at a similar instance of glorious opportunity missed where the Supreme Court, instead of making a decisive observation about the horizontal application of Right to Education, sought to justify certain restrictions imposed by the Right to Education Act, 2012 on the non-minority Unaided Private Educational Institutions as reasonable restrictions on their Article 19(1)(g) Rights primarily under Article 19(6). *See Society for Unaided Private Schools, Rajasthan v. Union of India,* (2012) 6 SCC 1.

critique not only provides a perspective into the schemes of Rights enforcement in the respective jurisdictions, they also provide models for India to follow in future.

3.1 United States

The United States of America, in its Constitutional text, makes it absolutely certain that except in case of the Thirteenth Amendment,[36] the individual rights only bind the State and not individuals. Even the much-talked about Doctrine of State Action[37] seeks to derive its legitimacy from the second clause of the Fourteenth Amendment, which starts with "No state shall..."[38]

However, when it comes to regulating the *inter-se* relationship between individuals, the American Courts have not hesitated to take resort to constitutional precincts to resolve the disputes.[39] For example, in the famous case of *Shelley v. Kraemer,*[40] the Supreme Court had the occasion to look into a racially exclusionary covenant. Although the Court refused to look into the validity of the covenant *per se* insofar as it regulated the relations between parties, it made sure that it would render the covenant judicially unenforceable, since doing so would violate the equal protections clause.[41]

Thus, it can be clearly seen that although private players are themselves not bound by constitutional rights themselves, they are definitely indirectly subject to them, since the laws they would like to implement against one another are subject to the constitutional rights themselves, and the judiciary would do nothing by way of enforcement of an unconstitutional rule, even if it would govern the relations between parties.

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[36] The Constitution of the United States of America, 1789. Amendment XIII, § 1 ("Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.").

[37] For a more detailed description and analysis of the State Action Doctrine, *See generally* Lawrence H. Tribe, *Constitutional Choices* (Harvard University Press, Cambridge, 1986). *See also,* Stephen Gardbaum, The "Horizontal Effect" of Constitutional Rights, *102 Michigan Law Review* 387 (2003).

[38] *See also, Civil Rights Cases,* 109 U.S. 3 (1883), *DeShaney v. Winnebago,* 489 U.S. 189 (1989).

[39] *See* Harold W. Horowitz, The Misleading Search for "State Action"' Under the Fourteenth Amendment, 30 *South California Law Review* 208, 210 (1957). The author argues: *"[T]here is no inconsistency between the 'private'-'state' action distinction of the Civil Rights Cases and the often-applied principle that the Fourteenth Amendment imposes limits on the way in which a state can balance legal relations between private persons.*"

[40] 334 U.S. 1 (1948). *See also, New York Times v. Sullivan,* supra 25.

[41] *Ibid.*

3.2 Canada

The Canadian Supreme Court got an opportunity to engage with the issue of Horizontality in the *Dolphin Delivery* Case.[42] The Court clearly pointed out that although an action by any of the branches of the State should act as a prerequisite for invoking the Charter provisions, "*[t]he Charter is far from irrelevant to the private litigants whose disputes fall to be decided at common law*". Similarly, the Court has subjected private relationships and common law to the enshrined Charter Values,[43] with the necessary caveat that the distinction between the 'Charter Rights' and the 'Charter Values' is not completely obliterated.[44]

3.3 Germany

According to the German Basic Law, there can be no direct application of the Fundamental Rights in settling private law disputes.[45] However, it is recognised that "*basic right norms contain not only defensive subjective rights for the individual*" but also embody "*an objective value system which, as a fundamental constitutional value for all areas of the law, acts as a guiding principle and stimulus for the legislature, executive and judiciary*".[46] This 'radiating effect' of the Basic Law over private law can be best articulated by the *Luth* case[47] where the Court firmly embedded indirect horizontality in the German constitutional context thus:[48]

> *"…the Basic Law is not a value-neutral document...Its section on basic rights establishes an objective order of values, and this order strongly reinforces the effective power of basic rights…Thus it is clear that basic rights also influence the development of] private law. Every provision of private law must be compatible with this system of values, and every such provision must be interpreted in its spirit."*

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[42] *Retail, Wholesale & Department Store Union v. Dolphin Delivery Ltd.* (1986) 2 SCR 573.

[43] *R. v. Salituro,* (1991) 3 SCR 654; *Dagenais v. Canadian Broadcasting Co.,* (1994) 3 SCR 835; *Hill v. Church of Scientology,* (1995) 2 SCR 1130.

[44] *See Hill,* supra note 42. In this case, it was pointed out that even though Charter Rights impose obligations on the government, Charter Values are relevant for the entire legal system. *See also, M (A) v. Ryan,* (1997) 1 SCR 157.

[45] *See* P.E. Quint, Free Speech and Private Law in German Constitutional Theory, 48 *Maryland Law Review* 247-346 (1989).

[46] *See* Chugh, supra note 3.

[47] Liith, BVerfGE 7, 198 (205). *See also,* Bhatia, supra note 4, Ralf Brinktrine, The Horizontal Effect of Human Rights in German Constitutional Law, *6 European Human Rights Law Review* 421, 423 (2001).

[48] *Ibid.*

The German Federal Constitutional Court has, through a series of decisions, developed the horizontality jurisprudence, broadly referred to as *'Drittwirkung'*[49] whereby although the Constitution directly applies only to the public functionaries, they are, much like Canada, used to resolve disputes involving private law. Moreover, a private law norm that is not in conformity with the higher Basic Law is declared to be invalid for such inconsistency.

3.4 **United Kingdom**

The United Kingdom Human Rights Act, 1998 that was enacted to incorporate the European Convention on Human Rights (ECHR) into the domestic legal system,[50] categorically rules out the possibility of any direct horizontal application.[51] However, it makes sure that if any parliamentary legislation is found to be in violation of the provisions of the ECHR, then the Courts can make a declaration of incompatibility, which can fast track a parliamentary amendment or repeal exercise to bring the said law in conformity with the Convention.[52] This may be looked at as a harbinger of indirect horizontality, as the State is thus enjoined to apply the Convention Rights even in the context of private law. Moreover, the definition of 'public authorities' that includes courts and tribunals[53] as well as persons whose functions are of a public nature are necessarily obligated to act in accordance with the Convention Rights, thus reaffirming the case in support of an indirect horizontal application.

3.5 South Africa

The South African Constitution, arguably the most advanced of the modern Constitutions, has witnessed a very chequered and interesting journey of the horizontality discourse, both in the constitutional text and in its juristic interpretations.

In the landmark *Du Plessis v. De Clarke*[54] case, the majority held that although the Interim Constitution of 1994 did not provide for "general direct horizontal application" nor applied to private disputes revolving around interpretations of common law, it should still be kept in mind that the "*values embodied in Chapter 3 (fundamental rights) will permeate the common law in all its aspects, including private litigation*".[55] In saying so,

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[49] *See* Brinktrine, supra note 46.
[50] The United Kingdom Human Rights Act, Section 1.
[51] For example, Section 3(1) requires that Convention Rights be made applicable only to legislations, and thus leaves out Common Law from its ambit.
[52] *Ibid,* Section 4(2).
[53] *Ibid,* Section 6(3).
[54] 1996 (3) SA 850 (CC).
[55] *Ibid.*

the majority placed reliance on Article 7 of the Interim Constitution which stated that:

> *"7 (1) This Chapter shall bind all legislative and executive organs of state at all levels of government; (2) This Chapter shall apply to all law in force and all administrative decisions taken and acts performed during the period of operation of this Constitution".*

The dissenting Judge, Justice Kriegler, took a more radical approach to the issue. He opined:[56]

> *"Unless and until there is a resort to law, private individuals are at liberty to conduct their private affairs exactly as they please as far as the fundamental rights and freedoms are concerned. As far as the chapter is concerned, a landlord is free to refuse to let a flat to someone because of race, gender or whatever; a white bigot may refuse to sell property to a person of colour; a social club may blackball Jews, Catholics or Afrikaners if it so wishes. An employer is at liberty to discriminate on racial grounds in the engagement of staff; a hotelier may refuse to let a room to a homosexual; a church may close its doors to mourners of a particular colour or class. But none of them can invoke the law to enforce or protect their bigotry."*

This position, seemingly taking the position of the *Shelley v. Kraemer*[57] position to its logical extension, suggests that whenever one individual invokes a provision of law against another, it automatically triggers the application of constitutional rights to the law in question. This is because all law – irrespective of whether it is statutory or common law, no matter whether it regulates relationship between individuals and the State or between individuals *inter se* – is directly subject to the Constitution.[58]

Quite fascinatingly, the final South African Constitution, in Section 8(2), does provide the scope for Horizontal Application within the constitutional framework. It states:[59]

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[56] Supra note 53.
[57] Supra note 39.
[58] *See* Gardbaum, supra note 3.
[59] The Constitution of the Republic of South Africa, Section 8. Similarly, there are other provisions also that seek to make certain socio-cultural rights horizontally enforceable. For example, right not to be evicted [Section 26(3)]; not to be refused emergency medical treatment [Section 27(3)]; the rights of prisoners to adequate nutrition and medical treatment [Section 35(2)] and rights of Children (defined as those under 18 years) to basic nutrition, shelter, basic health care and social services [Section 28].

"8. Application

1. The Bill of Rights applies to all law, and binds the legislature, the executive, the judiciary and all organs of state.

2. A provision of the Bill of Rights binds a natural or a juristic person if, and to the extent that, it is applicable, taking into account the nature of the right and the nature of any duty imposed by the right.

3. When applying a provision of the Bill of Rights to a natural or juristic person in terms of subsection (2), a court

a. in order to give effect to a right in the Bill, must apply, or if necessary develop, the common law to the extent that legislation does not give effect to that right; and

b. may develop rules of the common law to limit the right, provided that the limitation is in accordance with section 36(1).

4. A juristic person is entitled to the rights in the Bill of Rights to the extent required by the nature of the rights and the nature of that juristic person". (emphasis added).

Thus, apart from juristic interpretations that are noticed across jurisdictions, the South African Constitution contains specific provisions which binds the conduct of natural and juristic persons by the constitutional standards. This is an interesting breakthrough which, if looked at with ample seriousness, can go a long way in making rights, both civil-political and socio-economic, enforceable against deprivations by individuals.

4. Implications for India and the Way Ahead: A Case of Free Speech

It is clear from the discussion in the previous part that in different jurisdictions, the Courts are making positive, definitive efforts to bring private arrangements between individual in consonance with Constitutional principles and values, albeit in different forms. If we turn our eyes towards India, we find that although such efforts have been initiated, they have been sporadic and still lack a degree of tangible certainty. Moreover, unless we bring more bodies within the definition of 'State' under Article 12 by paying more importance to the functional aspect, most Fundamental Rights will naturally leave out acts of private deprivations from their enforceability ambit. For example, if one looks at the Free Speech jurisprudence, the constitutional challenges have always been against unreasonable restrictions imposed on an individual's Article 19(1)(a) rights by the State by means of

law. Of course, the language of Article 19(2)[60] which necessarily requires a law to be the means by which such deprivation occurs can be considered to be primarily responsible for this course of action. Thus, a lot of deprivations of Free Speech which result out of individuals or groups creating an atmosphere of threat and coercion get completely left out of the scope of the operation of Fundamental Rights enforcement.

It is often seen that a person is made wilfully shrink his territories of expression, consciously or unconsciously, owing to the fear of exclusion and repression. This can lead to creating a *chilling effect*[61] where one gets psychologically traumatised into not expressing himself to the extent he would have wished to. This kind of psychological self-censorship poses a significant regulatory challenge because such withdrawal from expression without a formal State authority ordering such withdrawal cannot even be made subject to any formal judicial scrutiny.[62]

In this backdrop, the obvious question that demands an answer is whether the Courts can remain mute spectators to such blatant acts of coercive disfiguration of individual liberties, staying firm to the demands of verticality of Article 19(2)? Or, should they proactively interpret Article 19(1)(a) to import a positive duty on the State to preserve an individual's Free Speech against such unwarranted onslaughts by private individuals and groups?

One finds few attempts made by the Courts in the last ten years where some degree of Indirect Horizontality has been sought to be infused

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[60] "Article 19(2): *Nothing in sub clause (a) of clause (1) shall affect the operation of any existing law, or prevent the State from making any law, in so far as such law imposes reasonable restrictions on the exercise of the right conferred by the said sub clause in the interests of the sovereignty and integrity of India, the security of the State, friendly relations with foreign States, public order, decency or morality or in relation to contempt of court, defamation or incitement to an offence*". (emphasis added)

[61] The term 'Chilling Effect' was first referred to in the case of *Wieman v. Updegraff* 342 US 183 (1952). It became the primary basis of Brennan, J.'s concurring opinion in *Lamont v. Postmaster General*, 381 US 301 (1965). For further analysis of this doctrine, *See* Frederick Schauer, Fear, Risk and the First Amendment: Unravelling the Chilling Effect, 58 *Boston University Law Review* 685 (1978), Monica Youn, The Chilling Effect and the Problem of Private Action, 66 *Vanderbilt Law Review* 1473 (2013).

[62] One can refer to the controversy surrounding the book 'The Hindus: An Alternative History' written by Wendy Doniger where pressure upon the publishers, Penguin India Ltd. from certain right wing groups forced the withdrawal of all copies from India. The book allegedly distorted facts and portrayed Hindu gods and goddesses in a negative light. *See generally,* Anonymous, "Penguin to withdraw Wendy Doniger's controversial book, The Hindus", *Firstpost*, available at <http://www.firstpost.com/living/penguin-to-withdraw-wendy-donigers-controversial-book-the-hindus-1383581.html> (last visited 10.10.2019).

into the domain of Free Speech. In *Maqbool Fida Hussain v. Raj Kumar Pandey,*[63] the Court opined:

> "*Democracy has wider moral implications than mere majoritarianism. A crude view of democracy gives a distorted picture. A real democracy is one in which the exercise of the power of the many is conditional on respect for the rights of the few. Pluralism is the soul of democracy. The right to dissent is the hallmark of a democracy. In real democracy the dissenter must feel at home and ought not to be nervously looking over his shoulder fearing captivity or bodily harm or economic and social sanctions for his unconventional or critical views. Freedom of speech has no meaning if there is no freedom after speech. The reality of democracy is to be measured by the extent of freedom and accommodation it extends. There should be freedom for the thought we hate.*"[64] (emphasis added)[65]

The Court unambiguously criticised the practice of harassment and innumerable legal and extra-legal challenges that any counter-majoritarian expressional form has to face, and observed:

> "*There are very few people with a gift to think out of the box and seize opportunities, and therefore such people's thoughts should not be curtailed by the age-old moral sanctions of a particular section of society having oblique or collateral motives who express their dissent at every drop of a hat*."[66] (emphasis added)

Thus, even though the case arose out of obscenity charges brought against Hussain, the Court implored upon the State the need to preserve the expressional liberties against unwarranted private onslaughts as well.

In the infamous case involving controversial Tamil author Perumal Murugan whose novel "*Mathorubagan*" (One-part Woman) dealt with travails of a childless couple and the wife's consensual sexual promiscuousness with a young man to get pregnant during the historical temple chariot festival at Tiruchengode, an ancient Hindu temple, where rules of sexual conduct are relaxed for a night, he was pressurised to render an unconditional apology and proscribe the circulation of the book by the local authorities. Riled by the turn of events, Murugan decided to commit a

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[63] (2008) CrLJ 4107 (Del).
[64] *Ibid.*
[65] *Ibid.*
[66] *Ibid*.

'literary suicide', by refusing to take up his pen again.[67] He also filed a Writ Petition in the Madras High Court challenging the terms of the settlement.[68]

In a path breaking judgement, Sanjay Kishan Kaul, C.J., (coincidentally, he had also delivered the judgement in the *Hussain* case in the Delhi High Court) declared that the agreement entered into under duress from hypersensitive caste groups was totally invalid in law. The Court also exhorted upon the State to take "*positive measures of protection...against sufferance as a consequence of holding that view*".[69] The Court went on to say:[70]

> *"We do believe that a clear distinction has to be carved out between situations involving the right to expression of an individual or a body of individuals as opposed to a routine law and order tension. Even in matters of this nature, the State may endeavour to diffuse the situation, but not permit proponents of free speech, authors and artistes, as the case may be, to be put under pressure by surrounding circumstances. On the other hand, the endeavour should be to preserve the rights of expression through other modes. There is thus a requirement of mixing care with caution so that such endeavours do not result in malicious proceedings merely based on a perspective of another set of people, who may have different mores".* (emphasis added)

The Court issued guidelines to the State, requiring the State to take proactive steps towards diffusing situations which involve such hecklers' veto is imposed by fringe groups upon authors' creative liberties. The concluding paragraph of the judgement is poignant and instructive, where the Court observes:

> *"The author Prof. Perumal Murugan should not be under fear. He should be able to write and advance the canvass of his writings. His writings would be a literary contribution, even if there were others who may differ with the material and style of his expression. The answer cannot be that it was his own decision to call himself dead as a writer. If was not a free decision, but a result of a situation which was created. Time is a great healer and we are sure, that would hold true for Perumal Murugan as well as his opponents; both would*

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[67] *See* B. Kolappan, Perumal Murugan gives up writing, *The Hindu,* 13.01.2015, available at < https://www.thehindu.com/news/national/tamil-nadu/perumal-murugan-gives-up-writing/article10625555.ece1?ref=relatedNews> (last visited 10.10.2019)

[68] *S. Tamilselvan v. Government of Tamil Nadu*, (2016) SCC OnLine Mad 5960.

[69] *Ibid.*

[70] *Ibid.*

> *have learnt to get along with their lives, we hope by now, in their own fields, and bury this issue in the hatchet as citizens of an advancing and vibrant democracy. We hope our judgement gives a quietus to the issue with introspection on all sides. Time also teaches us to forget and forgive and see beyond the damage. If we give time its space to work itself out, it would take us to beautiful avenues. We conclude by observing this: Let the author be resurrected to what he is best at. Write."(emphasis added)*

This judgement, it is submitted, is a very important step towards the direction of bringing in Indirect Horizontality to the realm of Free Speech because it brings in a positive mandate for the State to ensure that the fundamental individual freedoms are to be given protection against onslaught by fringe groups.

Similarly, in a case involving the Bengali Film '*Bhobishyoter Bhoot*' which was quite dubiously taken off the theatres, presumably upon instructions from senior Police officials, even after it was certified for public viewing, the Supreme Court pulled up the State for use of "*extra constitutional means to prevent the lawful screening*" of the film, and ordered the State to pay compensation and costs to the producers. D.Y. Chandrachud, J., emphatically observed:[71]

> *"The wielding of extra constitutional authority is destructive of legitimate expectations. Under the constitutional scheme, restrictions can only be imposed by or under a law which is made by the State. [...] In the present case, the West Bengal police have overreached their statutory powers and have become instruments in a concerted attempt to silence speech, suborn views critical of prevailing cultures and threaten law abiding citizens into submission*".

Clearly outlining the need for a positive mandate upon the State to protect Free Speech, the Court asserted:[72]

> "*Political freedoms impose a restraining influence on the state by carving out an area in which the state shall not interfere. Hence, these freedoms are perceived to impose obligations of restraint on the state. But, apart from imposing 'negative' restraints on the state these freedoms impose a*

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[71] *Indibly Creative Pvt. Ltd. v. Govt. Of West Bengal,* WP (C) 306/2019. On similar lines, *See also, Prakash Jha Productions v. Union of India,* (2011) 8 SCC 372, *Manohar Lal Sharma v. Sanjay Leela Bhansali,* (2018) 1 SCC 770, *Viacom 18 Media Pvt. Ltd. v. Union of India,* (2018) 1 SCC 761.

[72] *Ibid.*

positive mandate as well. In its capacity as a public authority enforcing the rule of law, the state must ensure that conditions in which these freedoms flourish are maintained. In the space reserved for the free exercise of speech and expression, the state cannot look askance when organized interests threaten the existence of freedom. The state is duty bound to ensure the prevalence of conditions in which of those freedoms can be exercised. The instruments of the state must be utilized to effectuate the exercise of freedom. When organized interests threaten the properties of theatre owners or the viewing audience with reprisals, it is the plain duty of the state to ensure that speech is not silenced by the fear of the mob. Unless we were to read a positive obligation on the state to create and maintain conditions in which the freedoms guaranteed by the Constitution can be exercised, there is a real danger that art and literature would become victims of intolerance." (emphasis added)

In the *Index of Censorship*, Ronald Dworkin had remarked:[73]

> *"...freedom of speech, along with the allied freedoms of conscience and religion, are fundamental human rights that the world community has a responsibility to guard. But that strong conviction is suddenly challenged not only by freedom's oldest enemies — the despots and ruling thieves who fear it – but also by new enemies who claim to speak for justice not tyranny, and who point to other values we respect, including self-determination, equality, and freedom from racial hatred and prejudice, as reasons why the right of free speech should now be demoted to a much lower grade of urgency and importance*."

He went on to articulate his views thus:[74]

> "*The temptation may be near overwhelming to make exceptions to that principle – to declare that people have no right to pour the filth of pornography or race-hatred into the culture in which we all must live. But we cannot do that without forfeiting our moral title to force such people to bow to the collective judgements that do make their way into the statute books. We may and must protect women and homosexuals and members of minority groups from specific*

[73] *See* Ronald Dworkin, A New Map of Censorship*, Index of Censorship*, Vol. 23, 1994, available at <https://www.indexoncensorship.org/2013/02/ronal-dworkin-free-speech-censorship/> (last visited on 10.10.2019).
[74] *Ibid*.

> *and damaging consequences of sexism, intolerance, and racism. We must protect them against unfairness and inequality in employment or education or housing or the criminal process, for example, and we may adopt laws to achieve that protection. But we must not try to intervene further upstream, by forbidding any expression of the attitudes or prejudices that we think nourish such unfairness or inequality, because if we intervene too soon in the process through which collective opinion is formed, we spoil the only democratic justification we have for insisting that everyone obey these laws, even those who hate and resent them*."

It is axiomatic that in any liberal democratic society, the State has to appreciate the fact that the legitimacy of the legal machinery and judicial processes is also premised on that democratic justification which tolerates and respects dissident voices from all forms of encroachment and intimidation. And that would necessarily imply that the province of enforcement of the Fundamental Right to Freedom of Speech and Expression cannot be allowed to be confined to pedantic boundaries of protection against State-authorised deprivations alone. Instead, the legal system should endeavour to ensure horizontal enforceability against acts of deprivation attributable to non-state actors.

5. Conclusion

In conclusion of the discussion, it can be said that in the liberalised world where private players play a much more critical role than ever before, the Indian legal system has to show enough progressiveness and innovation to ensure that the doctrinaire adherence to the premise of Verticality does not lead to gross miscarriage of justice. We need to understand that just as the incorporation of the Chapter on Fundamental Rights represented "*a tectonic shift in constitutional philosophy,*"[75] time has come to take the interpretation of Fundamental Rights to their next logical destination – making them enforceable against acts of gross injustice by private players, without trying to establish a strenuous connecting link with the State, or any State agency. Similarly, time has come to ensure that private law and arrangements made in the private domain are read in consonance with the Constitutional standards. Finally, it is an absolute imperative that the approach of looking at Fundamental Rights as negative rights be revisited, with positive mandates being cast on the State to ensure that the constitutional promises are truly and certainly fructified.

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[75] *See* Bhatia, supra 4.