



HORIZONTAL APPLICATION OF FUNDAMENTAL RIGHTS UNDER THE TRANSFORMATIVE CONSTITUTIONALISM

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ABSTRACT:

Part III of the Indian Constitution that is Fundamental Rights chapter is one of the most significant chapter and has played a massive transformative role in the Indian society. Owing to a tacit acknowledgement of the centrality of the State, the enforcement of Fundamental Rights has been predominantly vertical. The inherent limitations of the 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. In this paper researcher trying to analyse the foundations of horizontality in the areas of fundamental rights, also trying to analyse and explore the possibility of such horizontal application 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.

Key words: - *Horizontal Application, Fundamental Rights, Transformative Constitutionalism*

INTRODUCTION :

The constitution of India is the basic law of the land which guarantees the fundamental rights to the citizen. Part III of the constitution imposes negative obligation on state to protect basic fundamental rights of the people of India and at the same time the constitution of India imposes positive obligation on the state under Part IV of the Constitution to realise certain socioeconomic rights when it is capable of doing so. The fundamental rights and directive principles together constitute the spirit of the Constitution. Fundamental Rights play a significant role in the life of a person because they are most essential for the attainment of the full intellectual, moral, and spiritual status of an individual. Therefore, the objective behind the inclusion of Fundamental Rights in the Constitution was to establish a government of Law to preserve individual liberty, building an equitable society, and establish a welfare state. The constitution of India plays a very important role in order to protect the basic right of the citizen it imposes restriction on the arbitrary use

of power and it is called constitutionalism. Freedom of individual and dignity of individual is the paramount importance and for the promotion of the basic rights the Supreme Court recognise the constitution is transformative rather than rigid. The constitution of India is a living document and living law of the land and is sufficiently flexible in nature to adopt new changes in the society. The constitution of India is having transformative vision. Transformative constitutionalism understand the law is dynamic in nature and it will change accordance with the needs of the society it means overruling the precedent and enacting new law for social, economic and political justice which is the basic principle enshrined in the constitution of India. Transformative constitutionalism plays a vital role in order to protect the constitutional ideas of Liberty, Equality and Fraternity with a new connotation of contemporary society. Over the course of the last few years of our constitutional existence, the Indian society has undergone substantial socio-political and economic transformations.

Various inter-personal relations between private actors also necessitate engagement with Constitutional principles, especially when they involve elements of discrimination and violation of Fundamental freedoms. This ever-demanding 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. Conventional constitutional interpretations need some serious reconsideration in the area of enforcement of Fundamental Rights. Traditionally, Fundamental Rights have been largely applied vertically, that is to say, against the state. There have been very limited scope 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. Horizontal application of fundamental rights needs transformative judicial interpretation of the constitutional provisions. In order to fulfil the constitutional visions of a transformed society requires to advocate positive duty-based approach.

Article 12 and Scope of Horizontal application of Fundamental Rights

The stand of the judiciary, since beginning was not to include private parties under the ambit of “state” and the reason is fundamental rights are guaranteed by the constitution to the citizens as a protection against the arbitrariness of the state and not against private individual. While looking at the approach of the judiciary we can see in certain cases where violation of fundamental rights by private individual or authority is found the judiciary has given a relief to a victim without going into analysing the fact that whether violator was State or not. Looking at the need of the times is that fundamental rights are to be made available against private entities also, otherwise persons aggrieved by

actions of large private corporations, will have no place to turn to, thereby defeating the very purpose of fundamental rights as envisaged by the framers of the Constitution.

The Article 12 of Part III of the Constitution containing Fundamental Rights gives an open-ended, inclusive definition of the term ‘State’. Due to expansion of the definition of State under Article 12 only vertical application of Fundamental rights is predominantly applied. Due to this initially up to certain limit scope of horizontal application of fundamental right was being curtailed. In *Pradeep Kumar Biswas v. Indian Institute of Chemical Biology* the Court by a majority 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*, 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. The minority opinion showed the necessity to further enhance the public functions test propounded by Mathew J. and opined that in times of privatisation and liberalisation wherein most of the governmental functions are being delegated to private bodies, the actions of private bodies would also be amenable to the writ jurisdiction of the court.

Direct Horizontal application

Although not expressly horizontal -- provisions of Articles 17 (abolishing 'untouchability'), 23 (prohibiting human traffic and forced labour) and 24 (prohibiting employment of children below fourteen years of age in factories, mines or other hazardous occupations) are plainly and directly enforceable against everyone. Article 15(2) prohibits certain types of private discrimination on the basis of religion, caste,

race, sex or place of birth; namely by licensed individuals regarding 'access to shops, public restaurants, hotels and places of public entertainment.' Higher judiciary has given direct horizontal effect to Art.21 going beyond the text. In *Consumer Education & Research Centre v. Union of India & Others*, Supreme Court held that Article 21 not only includes the right to health of employees but also applies against private employers in the context of the occupational health hazards caused by the asbestos industry. In *Parmanand Katara v. Union of India* the Court after holding that preservation of life by providing emergency healthcare facilities is protected by Article 21. 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.

In the decision of *Society of Unaided Private Schools of Rajasthan* upheld the constitutional validity of the Right of Children to Free and Compulsory Education Act 2009 (RTE), which in relevant part required every school, including unaided private schools, to admit twenty-five percent of its class from children belonging to disadvantaged groups and provide free education to them between the ages of 6 and 14. 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.

Indirect Horizontal application

The indirect horizontal effect of constitutional rights may result from imposing affirmative duties on the state to protect individuals from certain types of private conduct. Such protective duties are a subset of all positive constitutional

duties. 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.

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. Like in *Bodhisattwa Gautam v. Subhra Chakraborty*, the Court ordered for the payment of compensation to a rape victim, without requiring for any link with the State. The Indirect Horizontality becomes more prominent since *Vishaka v. State of Rajasthan*, 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.

In *R. Rajagopal v. State of Tamil Nadu*, 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*, 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 effective Data Protection regime to protect the rights of individual.

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*, 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.

CONCLUSION :

Changing time demands the interpretation of Fundamental Rights in the new global and social context making them enforceable against action of gross injustice by private players without trying to establish a connecting link with the State or any State agency. In the area of private law also it is highly demanded that private law need to read in consonance with Constitutional philosophy. Supreme Court under various jurisdictional capacities advocate the transformative constitutionalism as it is the need of the transforming society.

REFERENCES

- Bandhua Mukti Morcha v. Union of India, A.I.R. 1984 S.C. 802
- Bodhisatwa Gautam v. Subra Chakraborty, A.I.R. 1996 S.C. 1992
- Githa Hariharan v. Reserve Bank of India (1999) 2 SCC 228.
- Justice K.S. Puttuswamy (Retd.) v. Union of India (2017) 10 SCC 1.
- M.C. Mehta v. State of Tamil Nadu, (1996) 6 SCC 756.
- M.P. Jain, Indian Constitutional Law, 850(Lexis Nexis, Gurgaon,7th edn.,2014)
- Parmanand Katara v. Union of India, AIR 1989 SC 2039.
- People’s Union for Civil Liberties v. Union of India [(2005)2 SCC 3436]
- Pradeep Kumar Biswas v. Indian Institute of Chemical Biology, (2002) 5 SCC 111, paras 27 & 40.
- R. Rajagopal v State of Tamil Nadu AIR 1995 SC 264
- Sanu Rani Paul “The Need for Horizontal Application of Fundamental Rights in India with Reference to State Action Doctrine in the Context of Globalisation “, Christ University Law Journal, 2, 1(2013), 81-96 ISSN 2278-4322 | <http://dx.doi.org/10.12728/culj.2.5>
- Stephen Gardbaum ”The Indian Constitution and Horizontal Effect”,
- Unaided Private Schools of Rajasthan (2012) 6 SCC 1.
- Vishaka v. State of Rajasthan (1997) 6 SCC 241.
- Zee Telefilms v. Union of India, (2005) 4 SCC 649.