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# ANALYSING ENFORCEMENT OF FUNDAMENTAL RIGHTS AGAINST PRIVATE PERSONS/ENTITIES

## INTRODUCTION, MEANING & ORIGIN

Recently in the month of January, 2023 a Constitution Bench of the Hon'ble Supreme Court of India (SCI) by 4:1 majority held that Fundamental rights under Articles 19 and 21 can be enforced against private individuals and entities as well. A bench of Hon'ble Justice Mr. V. Ramasubramanian, who authored the judgment, and Hon'ble Justices Mr. S. Abdul Nazeer, Hon'ble Justice Mr. B.R. Gavai, and Hon'ble Justice Mr. A.S. Bopanna, held that the government had the responsibility of protecting citizens from both the state and non-state actions when it comes to Article 21, whereas Hon'ble Justice Ms. B.V. Nagarathna dissented. [*Refer Kaushal Kishore v. State of Uttar Pradesh & Ors.*, (2023) 4 SCC 1]

This is a major development as far as the enforcement of fundamental rights is concerned against persons other than the state or its instrumentalities. In this backdrop, this article briefly analyses the meaning, scope and limitation of enforcement of fundamental rights against private persons and entities.

## GENERAL RULE: THE VERTICAL APPLICATION

In order to limit unreasonable exercise of state power in a liberal democracy, Article 13(2) of the Constitution provided that the state shall not make any law, which takes away or abridges the fundamental rights conferred by Part III of the Constitution.

SCI in *P.D. Shamdasani v. Central Bank of India Ltd.*, AIR 1952 SC 59, has held that the Fundamental Rights provided under Part III of the Constitution of India are enforceable only against the state. [also refer *Vidya Verma v. Shiv Narain Verma*, AIR 1956 SC 108]

In the State of *W.B. v. Subodh Gopal Bose*, AIR 1954 SC 92, the SCI held: "*The whole object of Part III of the Constitution is to provide protection for the freedoms and rights mentioned therein against arbitrary invasion by the State.*"

The Fundamental Rights are enforceable by way of writs to the High Court and the Supreme Court under Articles 226 and 32 of the Constitution respectively

As per Article 12 of the Constitution where the state has been defined, the courts have restricted their application of fundamental rights to those state actions only. This is called vertical application of fundamental rights where the underlying classical theory of classical liberalism is applied and focus is on the preservation of the private sphere.

Though the use of the term 'other authorities' in the provision could be expanded to include authorities acting like the state, however, the state's functions are itself evolving and the meaning is not clear.

In *Zee Telefilms Ltd.* case, the SCI has held that BCCI is not a State under Article 12 of the Constitution on the ground that BCCI was not authorized by the state to do what it is doing. Rather, the state has deliberately chosen to leave the cricket to be regulated by the private bodies on their own volition.

## EXCEPTIONS: THE HORIZONTAL APPLICATION

There are fundamental rights which can be applied between individuals as well. For example, Article 15 of the Constitution provides for non-discrimination on the grounds of race, sex, caste, religion and place of birth between and among the individuals.

Further, practice of untouchability under Articles 17 has been held to be punishable in *Venkataramana Devaru v. State of Mysore*, AIR 1958 SC 255 and *State of Karnataka v. Appa Balu Ingale*, AIR 1993 SC 1126 by the SCI.

Similarly, Articles 23 and 24 of the Constitution which deal with prohibition of traffic in human beings and forced labour, and prohibition of employment of chil-



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dren in factories, etc. respectively have been applied to private persons and entities. [Sukhdev Singh v. Bhagatram, AIR 1975 SC 1331; P. U.D.R. v. Union of India, AIR 1982 SC 1485-6; Sanjit Roy v. State of Rajasthan, AIR 1983 SC 331-2]

Further, Article 21 of the Constitution has been applied in many cases between individuals as well, for an instance in the case of Consumer Education & Research Centre v. Union of India, (1995) 3 SCC 42.

In Bodhisattwa Gautam v, Subhra Chakraborty, (1996) 1 SCC 490, the SCI by way of a judicial creativity awarded damages to a rape victim.

In Mr. X v. Hospital Z, (1998) 8 SCC 296, where the case of an HIV patient claiming right to privacy on one hand and the right to life of his fiancée on the other hand was involved, the SCI held that in such cases the right to life prevails over right to privacy.

In the case of Vishaka & Ors v. State of Rajasthan & Ors., (1997) 6 SCC 241, the SCI applied the guidelines on prevention of sexual harassment at workplace be it public or private

In MC Mehta v. Union of India, (1987) 1 SCC 395, and other similar related cases, the SCI has made private entities pay for their activities in effecting the environment and violating fundamental rights of the individual.

These exceptional cases are not many and the principal position still remains that the fundamental rights are applicable only against the state.

In declaring that the rights were justiciable against persons other than the State or its instrumentalities, the majority view in the recent case of Kaushal Kishore highlighted that *“the original thinking of this Court that these rights can be enforced only against the State, changed over a period of time. The transformation was from ‘State’ to ‘Authorities’ to ‘instrumentalities of State’ to ‘agency of the Government’ to ‘impregnation with Governmental character’ to ‘enjoyment of monopoly status conferred by State’ to ‘deep and pervasive control’ to the ‘nature of the duties/functions performed’.”*

## CHALLENGES

1. In the Kaushal Kishore case, Hon’ble Justice Ms. B V Nagarathna assumed a dissenting tone while underscoring the practical difficulties in allowing these constitutionally guaranteed rights to operate against private individuals. Justice Ms. Nagarathna observed that the rights in the realm of common law, which may be similar or identical in their content to the Fundamental Rights under Article 19/21, operate horizontally. However, the Fundamental Rights under Articles 19 and 21, may not be justiciable horizontally before the Constitutional Courts except those rights which have been statutorily recognized and in accordance with the applicable law.” Justice Ms. Nagarathna further emphasized the logistical nightmare that such a decision might entail for the court since there is a high likelihood of petitioners filing a connected series of writs under Article 32.

## CONCLUSION

In the words of Chemerinsky in the article ‘Rethinking State Action’ - “It is time to again ask why the infringement of the most basic values-speech, privacy and equality should be tolerated just because the violator is a private entity rather than the government.”

On the other hand, in the words of Zephania Swift written in ‘The State Action Doctrine, the Public- Private Distinction, and the Independence of Constitutional Law’, bringing all private actions within constitutional adjudication would turn it into “one great arbitration that would engulf the courts of law, and sovereign discretion would be the only rule of decision.”

Further, it is to be noted that with the change in circumstances and situation of the overall polity and economy of India over a long period of time, it is now common for many private bodies to be able to infringe the fundamental rights of the people. That’s why, gradually, as has been the trend of the Indian courts, the private persons and entities will be brought under the ambit of being held responsible for violation of fundamental rights. The Constitution being a living document cannot allow private persons and entities to violate fundamental rights of the people. Expanding the scope of enforcing the fundamental rights against private parties may have its challenges which will be seen and addressed as and when the situation arises.