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CRITICAL ANALYSIS OF IMPACT OF HORIZONTAL APPLICATION OF FUNDAMENTAL RIGHTS ON THE CONCEPT OF STATE UNDER ARTICLE 12 -WITH REFERENCE TO ARTICLES 14, 19 AND 21 OF THE CONSTITUTION

Under the Guidance and Supervision of Dr. NANDITA NARAYAN

The National University of Advanced Legal Studies, Kochi

Submitted by:

ELIZABETH K J

Register No: LM0123007

LLM (Constitutional and Administrative Law)

CERTIFICATE

This is to certify that Ms. **ELIZABETH K J,** Reg. No. **LM0123007** has submitted her dissertation titled, "**CRITICAL ANALYSIS OF IMPACT OF HORIZONTAL APPLICATION OF FUNDAMENTAL RIGHTS ON THE CONCEPT OF STATE UNDER ARTICLE 12 -WITH REFERENCE TO ARTICLES 14, 19 AND 21 OF THE CONSTITUTION**" in partial fulfillment of the requirement for the award of Degree of Master of Law in Constitutional and Administrative Law to the National University of Advanced Legal Studies, Kochi under my guidance and supervision. It is also affirmed that, the dissertation submitted by her is original, bona-fide and genuine.

Date: 24.06.2024
Place: Ernakulam

Dr. NANDITA NARAYAN
Guide & Supervisor
Assistant Professor NUALS, Kochi

DECLARATION

I do hereby declare that the dissertation titled, "**CRITICAL ANALYSIS OF IMPACT OF HORIZONTAL APPLICATION OF FUNDAMENTAL RIGHTS ON THE CONCEPT OF STATE UNDER ARTICLE 12 -WITH REFERENCE TO ARTICLES 14, 19 AND 21 OF THE CONSTITUTION**" researched and submitted by me to the National University of Advanced Legal Studies, Kochi in partial fulfilment of the requirement for the award of Degree of Master of Law in International Trade Law, under the guidance and supervision of **Dr. NANDITA NARAYAN**, is an original, bonafide and legitimate work and it has been pursued for academic interest. This work or any type thereof has not been submitted by me or anyone else for the award of another degree from either this University or any other University.

Date: 24.06.2024

Place: Ernakulam

Elizabeth K J

Reg. No. LM0123007

LLM., Constitution and Administrative Law

NUALS, Kochi

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TABLE OF ABBREVIATIONS

FULL NAME	ABBREVIATIONS
Association	Assn.
Board of Control for Cricket in India	BCCI
Corporation	Corp.
Edition	Ed.
Government	Govt.
High Court	HC
Indian Council of Agricultural Research	ICAR
Institute of Constitutional and Parliamentary Studies	ICPS
International Crop Research Institute for the Semi-Arid Tropics	ICRISAT
Life Insurance Corporation	LIC
Limited	Ltd.
Municipality	Mncp.
National Council of Educational Research	NCERT
Others	Ors.
Supreme Court	SC
United States of America	U.S.A

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42) Kaushal Kishor v. State of Uttar Pradesh, 2023 4 SCC 1.
43) Khumalo vs. Holomisa. 2002 (5) SA 401 (CC)
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45) K.S. Ramamurthi Reddiar v. Chief Commissioner, Pondicherry, (1964) 1 SCR 656
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108) Unnikrishnan v. State of Andhra Pradesh (1992) 3 SCC 666

109) *United States v. Reese,* 92 U. S. 214

110) Vidya Varma v. Dr. Shiv Narain Varma, AIR 1956 SC 108

111) Virginia v Rives, 100U.S. 313(1879).

112) Vishaka v. State of Rajasthan (1997) 6 SCC 241.

113) Workmen of Food Corporation of India v. M/s. Food Corporation of India, (1985) 2 SCC 136.

114) Zee Telefilms Ltd. v. Union of India, (2005) 4 SCC 649

115) Zoroastrian Cooperative Housing Society Ltd v. District Registrar Cooperative Societies and others, 2005 (5) SCC 632

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CHAPTER 1

1.1 INTRODUCTION

Civil liberties of an individual have an epitome value in any country. These civil liberties and individual rights are provided under Part III of the Indian Constitution. The Constitution is not merely a superior norm or charter of rights, but it should be viewed as the protector of the rights of the people and a correlative institutional arrangement that would restrict arbitrary power over the people.[1] However, all powers are not limited or restricted by the Constitution. The object of the Constitution is to limit the state interventions over these rights, thereby upholding Constitutionalism and ensuring a "limited government.[2] Thus, fundamental rights under Part III are enforceable against state action. This approach is called verticality. However, there are constitutions that recognize the enforcement of fundamental rights against State and private actions. This approach is called horizontality.

Part III of the Constitution is structured in such a way as to limit state action. Part III of the Constitution comprises three main components, i.e., Article 12 provides the definition of "State," Article 13 defines "law," and Articles 14 to 32 enumerates various fundamental rights. Articles 12 and 13 have great significance in the enforcement of fundamental rights. They answer the question of who has fundamental rights and against whom they can be addressed. The definition of State is given under Article 12 of the Constitution for the application of provisions contained in part III. The constitutional assembly debates clearly narrated that Article 12 was incorporated to fix the boundary of Part III rights and to inscribe the state action doctrine in Part III enforcement.[3]India has been following a vertical approach to fundamental rights enforcement from the inception of the concept of "state" under Article 12.

Going by the definition of State under Article 12, Government and the Parliament of India, the Government and the Legislature of each of the states, along with all local or other

[1] Robert P. Kraynak, *Tocqueville's Constitutionalism,* 81(4) The American Political Science Review 1175 (Dec., 1987)
[2] Giovanni Sartori, *Constitutionalism: A Preliminary Discussion,* 56(4) The American Political Science 853(1962)
[3] Constituent Assembly Debates, Vol. VII, 610-611 (25-11-48).

authorities functioning within the territory of India or under the control of the Government, are explicitly within the ambit of the State. However, the definition of State is not exhaustive, and it has been ever-growing. The term "other authorities" widened through various tests and interpretations propounded by the Judiciary, from the test of instrumentalities, test of agency of government, impregnation with Govt character, test of enjoyment of monopoly status conferred by state, deep and pervasive control test to the test of nature of duties/ functions performed by an authority/person. Thus, enforceability criteria shifted from "Who the respondent was" to "Nature of duties/ functions performed."

With the advent of time, the traditional state power centers have lost power, and new private actors have acquired power. This gave rise to the question of whether constitutional mandate should be applied to private actors. To deal with the question, the scope of fundamental rights in India widened in such a way that even private parties doing public functions were covered under the state action doctrine. In exceptional cases, the Judiciary has applied horizontality on certain fundamental rights, including Articles 15, 17, 23, and 24, where the right was not explicitly addressed to the State as such. However, if we track the cases dealing with fundamental rights violations under Articles 32 and 226, it is visible that the Judiciary has absorbed horizontality in varying degrees in a case-to-case fashion.

The Judiciary tried to enforce fundamental rights against private actors in different ways. In certain cases, private actors are bound by the constitutional mandate as they are entities incorporated within the wide ambit of state definition under Article 12. In certain cases, fundamental rights are enforced on private actors through the State's positive obligation to regulate these actors, and in certain cases, the common law or statutory law is read in adherence to the constitutional norms. This is the indirect application of horizontality. In certain cases, the Judiciary doesn't even look into the identity of the actor and bluntly invokes writ jurisdiction. Thus, the trend has shifted in such a way that direct horizontality is cast on private actors violating core fundamental rights, including Article 19(1)(a) and Article 21 in the recent judgment of ***Kaushal Kishor v. State of Uttar Pradesh***,[4] whose authority and sanctity the researcher doubts and criticizes in this work.

[4]Kaushal Kishor v. State of Uttar Pradesh, 2023 4 SCC 1.

Though horizontality was initially used in limited situations, the recent decision has marked a different trajectory that is alien to the established state action doctrine in India. The entire jurisprudence of fundamental rights in India has turned topsy-turvy, with a drastic shift from one extreme position (no enforceability of Articles 19 and 21 against private actors) to another (Articles 19 and 21 enforceable against private actors). This is a direct threat to the "state doctrine" enshrined under Article 12 of the Constitution.

This research aims to see the effect of the new track of horizontal application of Articles 14, 19, and 21 on the state action doctrine enshrined in Article 12. The study also attempts to compare the same with other countries like South Africa and the U.S., where horizontality is applied to varying degrees.

1.2 STATEMENT OF RESEARCH PROBLEM

There is a significant lack of clarity in the way in which the Indian Supreme Court has invoked horizontality. Part III of the Constitution is enforceable against the State, enshrined under Article 12, and it is of great significance. India has incorporated Article 12 to clearly define the boundary of the State against which Part III can be enforced. The Judiciary has widened its boundary to recognize even private actors in exceptional circumstances. But lately, the Judiciary has pronounced that Articles 14, 19 and 21 can be applied horizontally against pure private actions. This is against the established structure and jurisprudence of Part III. Judicial assumptions like the one in Kaushal Kishore puts the very purpose and essence of Article 12 into question.

1.3 SCOPE AND LIMITATIONS OF THE STUDY

This study focuses purely on how the Judiciary deals with cases of fundamental rights violations and against whom these rights are enforced. The study also focuses on ascertaining the significance and scope of Article 12 of the Constitution and to what extent private actions can be enforced under Part III. For the purpose of analyzing the trend of the Judiciary with respect to enforcement of Part III, Articles 14, 19 and 21 are only focused. A comparative analysis is also made with respect to the U.S. and South Africa, which represent the two edges of the spectrum in the horizontality and verticality debate. The

study also attempts to suggest the best approach suitable for India, especially from a comparative perspective.

1.4 OBJECTIVES

1. To understand and analyze the growth of the horizontal application of fundamental rights in India.

2. To analyze its impact on the idea of State Action Doctrine.

3. To see if it is a tectonic shift from the established system of jurisprudence and indicate whether it is a positive or negative shift.

4. To study how the horizontal application of fundamental rights affects Constitutionalism.

5. To study whether horizontality is applied when it comes to fundamental rights violations coming under Article 226 of the Constitution.

6. To suggest the way ahead.

1.5 RESEARCH QUESTIONS

1. Can horizontality be applied to Articles 14, 19 and 21 of the Constitution?

2. What is the impact of horizontality on the State Action doctrine enshrined in Article 12 of the Constitution?

3. Is horizontality applicable to writ petitions on fundamental rights violations covered under Article 226 of the Constitution?

4. What would be the impact of horizontality on private disputes?

1.6 HYPOTHESIS

Horizontality cannot be applied to fundamental rights under Articles 14, 19 and 21 as it has a negative impact on the State Action Doctrine and is against the principles of limited state action and Constitutionalism instilled in Indian jurisprudence.

1.7 RESEARCH METHODOLOGY

The Research methodology incorporated is Doctrinal, Analytical, critical and comparative in nature. The primary sources of data would include statutes and case laws, and secondary sources would include books, journals, committee reports, newspaper articles, online resources, etc., which are available relating to the concerned study.

1.8 CHAPTERIZATION

CHAPTER 1 – INTRODUCTION

The first chapter gives a brief picture of the topic under study, the statement of the problem, the scope and limitations of the study, research questions, objectives of the study, hypothesis, Research methodology adopted for the study and literature review.

CHAPTER 2 - IDEA OF CONSTITUTIONALISM, LIMITED STATES ACTION AND THE STRUCTURE OF FUNDAMENTAL RIGHTS IN INDIA

This chapter delves into the true meaning of the Constitution and Constitutionalism. It also explores the concept of limited state action, the structure of fundamental rights and the jurisprudence behind Part III of the Constitution.

CHAPTER 3 -THE STATE ACTION DOCTRINE UNDER INDIAN CONSTITUTION AND ITS EXPANSION.

This chapter examines the genesis of state action doctrine, its import to the Indian Constitution and its evolution in India. The chapter also comprises a detailed analysis of Article 12 of the Constitution and its expansion through various cases. Further, it exhaustively looks into the judicial reasonings and tracks it for the purpose of understanding the scope of the State under Article 12. Further, the scope of Articles 32 and 226 is also analyzed to see if state action doctrine is equally applicable in both.

CHAPTER 4 - ARTICLES 14, 19 AND 21 OF THE CONSTITUTION AND THE QUESTION OF HORIZONTALITY

This chapter thoroughly examines the scope of Horizontality in Articles 14, 19 and 21. Through a catena of judgments, the author tries to draw a conclusion that there is a

significant lack of clarity in the application of horizontality. The chapter also critiques the recent Judgment of *Kaushal Kishor*[5] and discusses its aftermath.

CHAPTER 5 - COMPARATIVE STUDY OF HORIZONTALITY APPROACH IN SOUTH AFRICA, U.S., AND INDIA.

This chapter facilitates a comparative understanding of horizontality. The structure of the Bill of Rights and the way in which the Bill of Rights is enforced in the U.S. and South Africa is looked into. Also, a comparison is made with the Indian Approach. It also focuses on how the Judiciary in the U.S., South Africa and India have embraced private actions under the constitutional mandate.

CHAPTER 6 - CONCLUSION AND RECOMMENDATIONS

The final chapter summarizes the whole topic and suggests the best way to be adopted by the Indian Judiciary to enforce part III and uphold constitutional values and Constitutionalism. The author also attempts to give recommendations for the way ahead.

1.9 LITERATURE REVIEW

1. Sujith Nair, *Horizontal Application of Fundamental Rights: Benign or Misconceived?* 7 CALJ 76 (2023)

In this article, the author examines different models pertaining to the horizontal application of fundamental rights across the world. The author also examines direct, indirect horizontality, and positive obligations and how they have been incorporated by different countries. The author also explains the Indian Jurisprudence of part III and warns about potential issues arising from expanding fundamental rights applicability in India.

2. Stephen Gardbaum, The "Horizontal Effect" of Constitutional Rights, 102 MICH 387, (2003).

The article proceeds with an analysis of existing theories and jurisprudence on vertical and horizontal application of the Bill of Rights in comparative constitutional law and illustrates its practical application in Ireland, Canada, South Africa, Germany, and the United

[5] Kaushal Kishor v. State of Uttar Pradesh, 2023 4 SCC 1.

Kingdom. It further concentrates on the position of law in the United States with special reference to the state action doctrine and how the Judiciary addressed horizontality. The author's input in the discussion favors the horizontal approach to constitutional rights.

3. Gautam Bhatia, *Horizontality under the Indian Constitution: A Schema*, INDIAN CONSTITUTIONAL LAW AND PHILOSOPHY (May 24, 2015)

The author delves into the concept of horizontality and points out the significant lack of clarity about the different ways in which the Indian Supreme Court has invoked horizontality and the constitutional questions that need to be resolved in such cases. The author vividly explained the vertical approach and highlighted its demerits as well. A comparative analysis of horizontality is the key highlight of the article. This essay is an attempt to schematize the way in which the Indian Judiciary has invoked horizontality and also highlights some of the key unresolved issues in jurisprudence.

4. Shameek Sen, *Transformative Constitution and the Horizontality Approach: An Exploratory Study*, 10 INDIAN J.L. & JUST. 141 (2019).

The author addresses the inherent limitations of the peremptory vision of Fundamental Rights as a negative right imposing a constraint on the State and advocates a positive duty-based approach in order to fulfill the constitutional visions of a transformed society. The article vividly explains the evolution of "other authority" under Article 12. This paper also explores the possibility of such horizontality in areas like free speech, spaces where the private non-state players play a significant role in imposing regulations above and over the state regulations. It also incorporates a comparative analysis of horizontality in different countries.

5. Gandhi, Pathik, *De-Constructing the State Action Doctrine in India: A Comparative Analysis* (October 7, 2009).

The author critically examines the concept of the state action doctrine within the Indian legal framework. In this paper, the authors have examined the vertical approach taken by the Indian Supreme Court and advocated two possible alternatives that afford the protection of fundamental rights against non-state actors. Gandhi's paper contributes to the ongoing discourse on constitutional law by providing a detailed critique of the state action doctrine

as it stands in India. By comparing it with other jurisdictions, the paper highlights potential areas for reform and adaptation to ensure robust protection of fundamental rights in an evolving socio-political landscape.

6. Chirwa, D.M., *The horizontal application of constitutional rights in a comparative perspective, AJOL* Law, Democracy & Development, pp.21-48.

It explores the evolving recognition and application of the Bill of Rights in private contexts. It critically analyses the position of state action doctrine in the U.S. and its evolution through various cases. It also delves into the horizontal approach in Canada, Germany, Ireland and South Africa. This article suggests that comparative constitutional jurisprudence does not strictly follow the traditional vertical approach that envisages private actions as being beyond the scope of constitutional rights. Rather, it substantiates and supports the horizontal application of the Bill of Rights.

CHAPTER 2

IDEA OF CONSTITUTIONALISM, LIMITED STATE ACTION AND THE STRUCTURE OF FUNDAMENTAL RIGHTS IN INDIA

2.1 INTRODUCTION

To look into the concept of Horizontal application of fundamental rights and to see if it is taking a step further or a reverse turn in Indian jurisprudence, one must have clarity on some basic questions like why we need a constitution and what are the telos behind the Constitution. Further, what is the true meaning of Constitutionalism, and how are fundamental rights framed under the Indian Constitution? The question of who has the fundamental rights and against whom it can be addressed should also be discussed to clearly understand the horizontality and verticality of fundamental rights under the Constitutional regime. This chapter is an attempt to find answers to the above questions.

2.2 THE TRUE MEANING OF THE CONSTITUTION AND CONSTITUTIONALISM

Sir John Dalberg Action said, "Power corrupts, and absolute power corrupts absolutely."[6]

Every government needs power to govern the nation, but unfettered power cannot be given to the government. It will lead to a situation where the State has unlimited entry to an individual's private sphere, creating an authoritarian government as Hobbes envisioned in his book "Leviathan." In such a situation, the rights and freedoms exercised by the individual are arbitrarily restricted by the State. Civil liberties of an individual have an epitome position in any nation. There should always be a mechanism to limit the action of the State or the government over fundamental individual rights. At this juncture, one must look into the object of having a Constitution. Why we need a constitution was a constant question in various instances. Over the years, many have tried defining the Constitution

[6] Ruzela Da Cruz, *Constitutionalism in India: Essentials, Components, and Importance*, 2 JUS CORPUS L.J. 512 (2022).

beyond identifying it as a superior norm. Some believe that it gives rights to the citizens. For some, it formalized the functions of the State, and for others, it gave power to different State organs. Ancient Roman natural law theorists viewed the Constitution as a "higher law." But later, we can see a shift in this idea of "higher law" to something more precise than a higher law. [7]They mean the constitution as a tool for institutional restraints on power that protect private rights, such as the separation of powers, electoral accountability, or systems of checks and balances.[8] Looking into British, American and European Constitutions that came up very early in the 19th century, one can say that the Constitution is just a means, and what matters is the ends or the object it carries.[9] The purpose of all these Constitutions is identical.[10]The Constitution was described as the *garantiste* or the protector of the rights of the people by legal jurist Sartori. Garantism is the essence of constitutionalism. People adore the Constitution as it was a fundamental law or set of principles and a correlative institutional arrangement that would restrict arbitrary power and ensure a "limited government."[11] Thus, the Constitution upholds Constitutionalism.

Constitutionalism put forth the idea of limited state action, which is far beyond the four corners of a written constitution. Legal scholars like McIlwain and Corwin interpreted Constitutionalism in a broader sense to limit the power of the State by law.[12] Even without a constitution, Constitutionalism should prevail in any nation. Thus, the written Constitution is merely envisaged as a tool to restrict the action of the State. One can trace the origin of Constitutionalism to the idea of government put forth by John Locke in his book *Two Treatises of Government (1689 CE*). According to him, through a social contract, citizens surrendered some of the rights to the government and the core rights, including the right to life, liberty, and property, which the people retained. The state intervention on those core rights was unwarranted. Thus, the social contract not only pioneered the formation of a government and a society but also set a limit on the government hence formed. In the

[7] Robert P. Kraynak, *Tocqueville's Constitutionalism*, 81(4) The American Political Science Review 1175(1987).
[8] Id at 2
[9] : Giovanni Sartori, *Constitutionalism: A Preliminary Discussion*, 56(4) The American Political Science Review 853(1962).
[10] Id
[11] 1d
[12] Robert P. Kraynak, *supra* note 2

same way, the Constitution, being the modern social contract, not only determines the functions of different government organs but also sets boundaries for the state action or the functioning of the State should be in adherence to the Constitution. Constitutionalism prioritizes individual rights and liberty.[13]

A clearer view can be grabbed from the words of the Founding Father of the U.S. Constitution, James Madison. He states, *"In framing government which is to be administered by men over men, the greatest difficulty lies in this, you must first enable the government to control the governed, and in the next place oblige it to control itself."*[14] This reflects that the vision of the Constitution is not only controlling the people but also controlling the government itself. Thus, Constitutionalism is the antithesis of arbitrariness.[15] Constitutionalism as a philosophy affirms that the Constitution is supreme in reinforcing and ushering governmental powers so that society's social, political, and economic aspirations are fulfilled. The dynamic relations between citizens and the State, between various layers of government and amidst the organs of the government, provide hierarchical and horizontal ties of control so that the power holder is made accountable. It engages with institutions of government, the rights of individuals and groups, and the formulation of limitations on institutional power.[16] Aristotle says every good government has to be constitutional, which means limited government.[17]

Dieter Grim, in his chapter 'The Achievement of Constitutionalism and its Prospects in a Changed World,' in the book *The Twilight of Constitutionalism,* eds. Petra Dobner and M. Loughlin (2010) 291. addresses Constitutionalism as an achievement. The words are quoted as follows;

"Constitutionalism deserves to be called an achievement because it rules out any absolute or arbitrary power of men over men. By submitting all government action to rules it makes the use of public power predictable. It provides a consensual basis for persons and groups

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[13] Bhagyashri Neware, *Constitution and Constitutionalism: A Study Perspective of India*, 4 INDIAN J.L. & LEGAL RSCH. 1 (2022).
[14] DICEY A.V., INTRODUCTION TO THE LAW OF THE CONSTITUTION (10th ed. 1959)
[15] Id
[16] Beverly Baines, Daphine Barak-Erez, and Tsavi Kahana (Ed), *Feminist Constitutionalism: Global Perspectives* 11(4) International Journal of Constitutional Law 1124(2012)
[17] Md. Saif Ali Khan & Sharafat Ali, *Transformative Constitutionalism: Contemporary Issues and Challenges in India*, 3 INT'l J.L. MGMT. & HUMAN. 1411 (2020).

with different ideas and interests to resolve their disputes in a civilized manner. And it enables a peaceful transition of power to be made. Under favorable conditions it can even contribute to the integration of a society. Constitutionalism is not an ideal type in the Weberian sense that allows only an approximation, but can never be completely reached. It is a historical reality that was in principle already fully developed by the first constitutions in North America and France and fulfilled its promise in a number of countries that adopted in this sense."[18] Thus, from an Indian perspective, Constitutionalism was an end goal of the constitution drafters, and it is still a work in progress.

In ***R.C. Poudyal v Union of India,***[19] the Supreme Court opined that the mere existence of a constitution does not guarantee Constitutionalism. The political maturity and traditions of the people give meaning to a constitution that would otherwise embody political hopes and ideals. In the case of ***S.R. Chaudhuri v. the State of Punjab,***[20] the Supreme Court again reiterated that the mere existence of a constitution alone does not ensure Constitutionalism. Hence, a constitution needs to have certain principles and qualities that impose limitations on the power of the government.[21] In ***State, (NCT of Delhi) v Union of India,***[22] the Supreme Court observed that the essence of Constitutionalism is to control power centers by distributing powers among several state organs in a way that each of them control one another and cooperate in formulating the will of the State. Thus, the distribution of power between different government organs and the maintenance of a check and balance system are parameters that limit the state's power. In ***I.R. Coelho v State of Tamil Nadu &Ors***,[23] the Supreme Court observed that the principle of Constitutionalism is a legal principle that requires the exercise of control over the State to restrain it from meddling with the democratic principles, which includes the protection of Fundamental Rights. Further, in ***Rameshwar Prasad (VI) v. Union of India*,**[24] the court observed that

[18] Dieter Grimm, *The Achievement of Constitutionalism and its Prospects in a Changed World*, in *The Twilight of Constitutionalism?* 3 (Petra Dobner & Martin Loughlin eds., Oxford Univ. Press 2010), https://doi.org/10.1093/acprof/9780199585007.003.0001.
[19] R.C. Poudyal v Union of India, **1993 AIR 1804**
[20] S.R. Chaudhuri v. State of Punjab, (2001) 7 SCC 126
[21] Id
[22] State, (NCT of Delhi) v Union of India**, (2018) 8 SCC 501**
[23] I.R. Coelho v State of Tamil Nadu &Ors, **(2007) 2 SCC 1**
[24] Rameshwar Prasad (VI) v. Union of India, (2006) 2 SCC 1

Constitutionalism abhors absolutism, whereby the subjective satisfaction of an authority is substituted for objectivity based on Constitutional principles.

Further, in ***Rajeev Suri v. DDA***[25], the court observed that in every discourse involving the state and a citizen, the question of Constitutionalism is evident, and its meaning is very complex as many have given different meanings to it. Some have correlated it with fundamental concepts of the rule of law and judicial review as envisaged in the Constitution. In contrast, others have considered it a radical idea to transform the Constitution over and above its true import. For some, judicial supremacy over the functioning of the executive and legislature is considered essential to Constitutionalism.[26] For others like Prof. Barendt, separation of power is the spirit of Constitutionalism.[27] The court observed that "*Constitutionalism, therefore, is a relative concept which envisages a constitutional order wherein powers and limits on the exercise of those powers are duly acknowledged. It is a tool used to reach up to the ultimate goal of constitutionalisation of governance and cannot be deployed to present an alternative model of governance. We must state that it would not only be absurd but also fraught with dangers of overreach and ambiguity if subjective principles of interpretation are applied by detaching them from the textual scheme of the Constitution, particularly when the textual scheme lays down an elaborate structure of administration. To do so would be to drag a duly elected Government on the edges as it would be under constant fear of being adjudged wrong on the basis of undefined principles that appeal to "three gentlemen or five gentlemen sitting as a Court." And what will suffer is a public interest in the form of public exchequer including sovereignty of the nation."*[28] Further, it was envisaged that Constitutionalism is a work in progress that will fill blood and flesh to the existing scheme. It has stood the test of constitutional validity and not nudge with the scheme of the Constitution itself.[29]

Constitutionalism ensures that the relationship between those governing and those governed is enforced. Baxi defines Constitutionalism: "Constitutionalism, most generally

[25] Rajeev Suri v. DDA, (2022) 11 SCC 1
[26] Id
[27] E. BARENDT, AN INTRODUCTION TO CONSTITUTIONAL LAW 6 (Clarendon Press, Oxford 1998)
[28] Rajeev Suri v. DDA, (2022) 11 SCC 1
[29] Id

understood, provides for structures, forms, and apparatuses of governance and modes of legitimation of power. However, Constitutionalism is not all about governance; it also provides contested sites for ideas and practices concerning justice, rights, development, and individual associational autonomy. Constitutionalism offers narratives for both rule and resistance.[30]

Academicians like Douglas Greenberg opined that Constitutionalism is committed to setting up limitations on ordinary political power; it tries to balance the power and intervention of state and individual rights and liberties. Further, it inates from the cultural, historical and social background of a Nation and resides in public consciousness. Therefore, from the above words, Douglas Greenberg suggests that if the power given to the State conflicts with the citizens' fundamental rights, the rights of the citizens should prevail, and they cannot be eclipsed under unreasonable state power.

Further, D. D Basu put forth that Constitutionalism strives to protect the democratic principles upon which a nation is built and limit governmental power from eroding it. These democratic principles and values include the protection of fundamental rights. The tradition of written Constitutionalism makes applying concepts and doctrine of unwritten living Constitution possible. The Constitution is a living heritage; you cannot destroy its identity.[31] Thus, Constitutionalism focuses on institutional mechanisms to limit, divide and balance the powers of the government.[32] This mechanism is attained through the institution of the Constitution, and the different modes incorporated to uphold Constitutionalism are discussed below as Constitutionalism's limbs.

2.3 LIMBS OF CONSTITUTIONALISM

The Constitution has built a complex mechanism to uphold Constitutionalism. Separation of power, check and balance system of governance, judicial review, and Fundamental rights are all incorporated to safeguard the constitutional values and limit the power of the

[30] Vrinda Narain, *Postcolonial Constitutionalism in India: Complexities and Contradictions*, 25 **S. Cal. Interdisc. L.J.** 122, 123 (2016).
[31] 1 DD BASU, SHORTER CONSTITUTION OF INDIA 15(Justice AR Lakshamanan, Justice Bhagabati Prosad Banerjee & V.R. Manohar, 14th ed. 2009)
[32] Robert P. Kraynak, *Tocqueville's Constitutionalism*, 81(4) The American Political Science Review 1175,1177 (1987).

government. An essential component of Constitutionalism is the popular sovereignty. This implies that the ultimate sovereignty vests with the people. Another structure is the fundamental rights and directive principles. A clear boundary is drawn under the fundamental right to limit the State's action over individual rights.

Separation of power and a check/ balance system is the essence of our Constitution. Constitutionalism requires that power is not concentrated in only one organ of the State. It requires that power be divided across all three state organs: the legislature, executive, and Judiciary. If power is concentrated in only one organ of the State, then this may lead to abuse of power, tyranny, and even dictatorship.[33] Another limb is the independent Judiciary and its power of Judicial review. The Judiciary enforces and protects individual rights.

The rule of law should prevail in Constitutionalism. As propounded by A. V Dicey, the law should have supremacy, and no one should be above the law, not even the government. Therefore, the government should rule according to the rule of law, not their whims and fancies. Liberty and discretion are two sides of the same coin. Individuals can have maximum liberty only if the government's discretion is exercised objectively and unarbitraryly.

The basic structure of the Constitution is, in essence, the body of Constitutionalism, examining various cases from Kesavantha Bharathi to I. R Coelho, most of the components enumerated above have been elevated as a basic structure feature. Thus, the Judiciary devised the concept of the basic structure itself to limit the power of the government and prevent the destruction of the Constitution itself. As observed in Kesavantha Bharathi, Our Constitution is not a mere political document. It is essentially a social document. It is based on a social philosophy. Thus, the Basic structure should be preserved to attain Constitutionalism. However, there are opposing views that suggest changes to the Constitution to make it a living constitution and not to stick to the stagnant ideas of the constitution makers, which could not be adapted in contemporary society. One such debate is moving beyond the state concept, by which fundamental rights are enforceable vertically

[33] Ruzela Da Cruz, *Constitutionalism in India: Essentials, Components, and Importance,* 2 JUS CORPUS L.J. 512, 514(2022).

and horizontally on private actors who are rampantly interfering with other fundamental rights.

2.4 WAVE AGAINST THE NOTION OF CONSTITUTIONALISM

Constitutionalism is not an unopposed concept. Theorists like Hobbes and Austin thought that limited government is incoherent.[34] Austin's view of unlimited power is deeply rooted in his popular sovereignty idea.[35] He believes that the ultimate sovereignty resides with the people. However, it should be understood that the concept of this popular sovereignty and power exercised by the government should be distinguished to understand the real meaning of limited government.

The British Parliament, being the supreme authority or sovereign, is an example of how this idea of unlimited power for the government was misused over the years. Further, today, the public/ private distinction is getting blurred, and more private actors are engaged in those activities that were once the monopoly of the State. Moreover, in the widening global economy, there is less manifestation of the political sovereignty of the State, which has led to growing concerns against the doctrine of Constitutionalism being an inadequate check on political power as it only focuses on the roles of states.[36] Globalization has changed the political, economic and social face of the State. Non-state entities have occupied the fields once occupied by the State, and therefore, today, there is a need to rethink the State's claim to Constitutional exclusivity. New horizons of Constitutionalism have emerged, which shadow the traditional approach of Constitutionalism, amalgamated with the state alone.

2.5 NEW HORIZONS OF CONSTITUTIONALISM BEYOND THE STATE

Today, globalization has posed the greatest threat to the traditional concept of Constitutionalism, which is linked to the State. Whether the state-centric unitary Constitutionalism holds good today is a persistent question that many scholars raise. It is

[34] W. Waluchow and Dimitrios Kyritsis, *Constitutionalism*, STANFORD ENCYCLOPEDIA OF PHILOSOPHY (June 21,2024), https://plato.stanford.edu/entries/constitutionalism/
[35] Id
[36] Doris Matu, *Improving Access to Justice in Kenya through Horizontal Application of the Bill of Rights and Judicial Review*, 2 STRATHMORE L. REV. 63, 67 (2017).

argued to rethink Constitutionalism beyond the State. With the dilution of the concept of sovereignty and State, theories of Constitutionalism beyond the State are evolving. They argue that non-state forms of political authority should also be considered sites of Constitutionalism.[37] Neil Walker's supranational Constitutionalism, Gunther Teubner's societal Constitutionalism, and the new Constitutionalism developed by Stephen Gill are milestones in the new journey of Constitutionalism beyond the State.[38]

SUPRANATIONAL CONSTITUTIONALISM – As theorized by Neil Walker, supranational Constitutionalism tries to cut the imaginary thread attached to Constitutionalism, i.e., state actors. He proposes that with the decentralization of economic, commercial, political, social and other activities, global entities like the EU, WTO, United Nations and Council of Europe have emerged concerning the exercise of legal and political authority.[39] Accordingly, it is contended that the traditional view of state sovereignty will not survive in a multilevel governance structure that gives equal importance to supranational bodies regarding decision-making.[40] He argues that the idea of the State being the Centre of constitutional authority is untenable. [41] Thus, Walker's theory is an example of how the scope of Constitutionalism, as envisaged traditionally, is taking a paradigm shift.

SOCIETAL CONSTITUTIONALISM – Gunther Tuebner is the prominent exponent of societal Constitutionalism. Societal Constitutionalism further widens Constitutionalism's ambit, even including private actors under its grab in the global sphere. According to Tuebner, the focus of the current constitutional disputes has shifted to activities of private actors, including human rights violations by Multinational corporations, health and environmental degradations on free trades, contemporary threats posed by internet and service providers to freedom of speech and expression, issues pertaining in the global

[37] Gavin W. Anderson, *beyond 'Constitutionalism Beyond the State',* 39(3) Journal of Law and Society 359, 360 (2012)
[38] Id at 361
[39] N. Walker, *Late Sovereignty in the European Union* in Sovereignty in transition, 10(N. Walker ed., Hart Publishing 2003)
[40] M.P. Maduro, *Europe and the Constitution: what if this is as good as it gets?* in European Constitutionalism Beyond the State 84(J.H.H. Weiler & M. Wind eds., Cambridge Univ. Press 2003)
[41] Gavin W. Anderson, *supra* note 37

financial market etc.[42] In effect, Teubner extends Walker's analysis of the necessarily constitutional character of polities to a host of non-state settings, opening up 'the media, multinational groups, global law firms, professional bodies' as sites of constitutional discourse.[43] Thus, the powerful private enterprises excluded from the traditional view of Constitutionalism are also included under the new version of societal Constitutionalism.

NEW CONSTITUTIONALISM – Stephen Gill has theorized new Constitutionalism as an outspring of neoliberalism in the global market after the great depression, which urged for deregulation, reduction of government spending, privatization and globalization in the market economy. Gill emphasized how transnational treaties and agreements like WTO, TRIPS, FTA, and Bilateral trade agreements acted analogous to a constitution in the global economy to ensure social control.[44]Thus, Gill points out that even globally, a de facto Constitution is established to control different actors.

Further, with the entry of transformative Constitutionalism, individualism and autonomy are given more importance, and other individuals' intervention in the individual sphere is also considered an infringement of fundamental rights. Thus, the concept of Constitutionalism has taken new roads, and the current debates on Constitutionalism beyond the State happening in the global sphere significantly impact the traditional notion of Constitutionalism affixed to the state alone. At this juncture, the question of enforcement of fundamental rights beyond the state action doctrine is very relevant. Understanding the genesis of fundamental rights and its structural framework enshrined in the Constitution is essential.

2.6 STRUCTURE OF FUNDAMENTAL RIGHTS IN INDIA

To understand the structure of Part III of the Constitution, the political theory underlying the text of the Constitution should be examined. The origin of fundamental rights can be attributed to the theories of various theorists and jurists. The roots of Fundamental rights are often connected to natural rights theories. The theories of liberalism and individualism

[42] G. Teubner, *Constitutionalizing Polycontexturality,* 20 Social and Legal Studies 210, (2011).
[43] Gavin W. Anderson, *supra* note 37
[44] Gavin W. Anderson, *supra* note 37

are the touchstone of these rights, and they were molded as a shield against the absolutism and tyranny of the rulers.

"Constitution is natural law under the skin"- Edward Corwin[45]

If so, then fundamental rights are natural rights under the skin. Looking into the thoughts of natural law theorists after the Renaissance period, one can see that individualism is the outspring of the Enlightenment period.

HOBBESIAN THEORY OF RIGHTS - Hobbes was the first in line during the period of Enlightenment to theorize individual rights. Hobbes's theory does not recognize substantial individual rights. In Hobbesian political theory, in the State of Nature, *"every man has a Right to everything, even to one another's body."*[46] Thus, we can equate the idea of individual rights portrayed under Hobbesian theory as "liberty rights or privileges" under the Hohfeldian theory of rights.[47] No obligation or duty is cast on one another over these liberty rights[48] . There was no security in exercising these liberty rights in the state of nature as they often conflicted with external impediments (impediments caused by other people's use of unlimited rights).[49] In the state of nature, liberty rights are of no use since they are not protected and are unrestricted. For illustration, if A has a right over land X, to use that right, others should have a duty not to interfere in the land or to facilitate A's use of the land. But in the Hobbesian State of nature, there is no corresponding duty; therefore, a person, B, can trespass over the land. It was almost like having no right at all. Otherwise, if we take Hampton's example of everyone's right to the apple in a tree,[50]and suppose A ran to pluck an apple, but he was defeated by others who also could interfere with his right and

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[45] Gary L. McDowell, *The Corrosive Constitutionalism of Edward S. Corwin,* 14(3) Law & Social Inquiry 603, 608(1989).

[46] Lloyd, Sharon A. and Susanne Sreedhar, *Hobbes's Moral and Political Philosophy,* The Stanford Encyclopedia of Philosophy, (June 21 2024, 4.31 pm), https://plato.stanford.edu/archives/fall2022/entries/hobbes-moral/.

[47] Eleanor Curran, *An Immodest Proposal: Hobbes Rather than Locke Provides a Forerunner for Modern Rights Theory*,32(4) Law and Philosophy 515 (2013).

[48] Eleanor Curran*, Hobbes's Theory of Rights: A Modern Interest Theory*, 6(1) The Journal of Ethics 63,64 (2002).

[49] Id at 65

[50] JEAN HAMPTON, HOBBES AND THE SOCIAL CONTRACT TRADITION 51 (CAMBRIDGE UNIVERSITY PRESS, 2012)

yield the apple. Thus, the Hobbesian right is impeded from every side. [51]Only when liberty rights are transformed into claims rights or rights correlated with duties will these rights be protected.

According to Hobbes, a set of precepts or rules was adequate to escape from this state of nature and preserve the individual's life.[52] These agreements are called the laws of nature, where individuals relinquish their rights by transferring or renouncing them. Hobbes explained it as follows; *"To lay down a man's Right to anything is to divest himself of the Liberty, of hindering another of the benefit of his Right to the same."*[53] i.e., if A lays down his right to the apple on the tree, then A can no longer interfere with B's right over the apple. Further, he argues that some rights of nature cannot be renounced, such as the right to self-preservation. Even if some right is acknowledged as retained, the retained rights are said to be weakened so much by the power and rights of the sovereign that they are rendered insignificant, rights in name only.[54] The sovereign has unlimited power in the state of peace as the individuals surrender all their rights, and no rights are left to judge the legitimacy of the sovereign.[55]

Thus, Hobbes's political theory was perceived to have minimal contribution to natural rights, which are camouflaged as fundamental rights or Bills of Rights in the modern liberal ideas of rights. I believe that Hobbes's rights theory failed to limit the action of the State over individual rights; instead, more attention was given to the power conferred on the State. To support this, the words of Brian Tierny may be looked into. He rightly criticized Hobbesian rights theory as it failed to recognize the duty of others toward the rights of individuals.[56]

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[51] Eleanor Curran, *supra* note 48 at 81

[52] Eleanor Curran, *supra* note 48 at 68

[53] THOMAS HOBBES, **LEVIATHAN** 190 (MICHAEL OAKESHOTT ED., COLLIER BOOKS 1962) (1651).

[54] 'No one could claim rights of self-ownership against such power', WILL KYMLICKA, CONTEMPORARY POLITICAL PHILOSOPHY 130 (OXFORD: CLARENDON PRESS, 1990).

[55] D. J. C. Carmichael, *Hobbes on Natural Right in Society: The "Leviathan" Account* 23(1) Canadian Journal of Political Science 3 (1999)

[56] "I am inclined to agree that the work of Hobbes represents an aberration from earlier ideas about natural rights and natural law, though some scholars have seen his work as derived from late medieval scholasticism. In any case, his ideas have little to do with modern ways of thinking about human rights. Hobbes's characteristic teaching was that individuals have rights, but no duty to respect the rights of others. Modern

LOCKEAN THEORY OF RIGHTS - John Locke's political theory is considered the forerunner of modern rights theory. It is considered to be the precursor of revolutions in France and America. Locke set individual rights at the center of his political theory. Lockean theory recognizes the individual's inalienable rights and the existence of the State's corresponding duty. Unlike Hobbes, Locke held a paramount position on certain rights retained by individuals, and the State was bound not to interfere in these rights. Locke considered the right to life, liberty, and property inalienable natural rights inspired by the Puritan movements. Following the same line of thought of Hobbes, he also gave great importance to self-preservation. Unlike Hobbes, Locke kept these individual rights on a higher pedestal, and the authority formed by the people's consent is not an unlimited and arbitrary sovereign.

Accordingly, in Locke's State of Nature, there was inadequate protection of the inherent rights and liberties of the individual. To protect these rights, they formed the government in the form of a social contract by which a part of the rights is surrendered to the community as a whole and in reciprocal, the government secures the retained rights. Further, the government so formed has to work within the limits imposed for the very reason it was constructed. i.e., to protect the rights retained. Thus, individual liberty and limited government are two faces of the same coin.[57] The same concept is reflected in Part III of the Constitution. With this in mind, we should try to answer the question of the extent of state intervention in individual liberty. Where does the power of the State end? And what is the extent of individual liberty or rights? The answer differs from Nation to Nation, depending on the political, social, economic and cultural backgrounds, history and the context in which fundamental rights germinated.

HOHFELDIAN THEORY OF RIGHTS – Hohfeldian "claim right" closely resembles the structure we have incorporated in our Constitution as fundamental rights. A right that creates an opposite correlated duty on another is a claim right. These duties can be either

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codes of human rights enumerate rights that others are bound to respect. The situation is different with Locke. His rights involve duties to others, and it is widely agreed that Locke's work was an important influence in the formation of modern liberal ideas, including ideas concerning rights" Brian Tierney, *Historical Roots of Modern Rights: Before Locke and After, Ave* Maria Law Review 3 (2005).

[57] Nicholas L. DiVita, *John Locke's Theory of Government and Fundamental Constitutional Rights: A Proposal for Understanding,* 84 W. Va. L. Rev. 825(1982).

abstaining from interfering or impeding the exercise of a right by the right holder or facilitating or performing actions to aid the right holder in exercising his right. So, if A has a claim right to X against B, then B has a correlative duty not to interfere with A's having or doing X, or sometimes, a duty to give X to A or to help A to have or do X.[58] Therefore, it can be a negative or positive duty. Fundamental rights create such a duty on the state. It is often negative, but in certain circumstances, even a positive obligation is cast.

STUART MILL'S NEGATIVE LIBERTY - Stuart Mill, in his essay "On Liberty," described liberty as protection against the tyranny of political rulers.[59] Accordingly, liberty and authority are two opposing forces, and for Mill, power to the authorities was necessary, but at the same time, it was dangerous. Therefore, limits were set against the rulers in two ways. Firstly, recognition of these political rights or liberties of the people and, in case of infringement of these rights, will amount to a breach of the duty of the rulers. Specific resistance and rebellion are also available against it. Secondly, constitutional checks based on people's consent also act as a limit. Taking the same analogy to the Indian Constitution, recognition of political rights and liberty is echoed in Part III of the Constitution. Further, judicial review acts as a constitutional check on the infringement of these rights. Thus, the concept of rights reflected in Part III of the Constitution can be correlated to negative liberty as envisioned by Stuart Mill.

Fundamental rights are structured in the American model of the Bill of Rights. The Constitutional makers divided fundamental rights and directive principles into two parts as if the first part, i.e., Part III, is justiciable, and they imposed a negative duty on the State not to interfere in these rights. Meanwhile, the latter, Part IV, was designed as a non-justiciable positive duty.

Fundamental rights are structured to limit the action of the "state" under Article 12 of the Constitution. In the constitutional assembly debate on 29th April 1947, Mr. K.M. Munshi suggested introducing the expression "for this Part" after the expression "Unless the context

[58] Eleanor Curran, *supra* note 48 at 64
[59] John Stuart Mill, *On Liberty*. In *On Liberty, Utilitarianism, and Other Essays,* (Mark Philip and Frederick Rosen eds., Oxford University Press 2015)

otherwise requires" to Article 12.[60] Thus, it can be interpreted that the constitutional makers intended to apply Part III only in case of intervention of the "state" over Fundamental rights.

Further, in the constitutional assembly debate held on 25th November 1948, Dr. Ambedkar observed that the object of Fundamental Rights is twofold. First, every citizen must be able to claim these rights. Secondly, every authority with either the power to make laws or the power to have discretion vested in it should be subject to these rights. Therefore, if the fundamental rights are to be clear, they must be binding not only upon the Central Government and the Provincial Government. They must also be binding upon every authority created by law and have specific power to make laws, rules, or by-laws.[61]

Further, the object of fundamental rights has always been a topic of discussion, and there are two conflicting views on the same: declaratory and constitutive. The declaratory view argues that fundamental rights exist even before the Constitution as natural rights, and the Constitution merely declares these rights.[62] Thus, the declaratory view looks up to the natural law theories. On the other hand, the constitutive view states that fundamental rights are creations of the Constitution. I support the declaratory view as the very object of Part III itself, as evident from the Constitutional Assembly debate, which is to rein in state action or limit its boundaries and not create new rights. These rights are inherently there within, which could be traced even in the Magna Carta, Bill of Rights, and human rights documents, but ultimately, they are just the trail of evolution and not the starting point.

THE CONSTITUTIONAL BALANCE – I think Part III balances individualism and absolutism. Individual rights are protected; at the same time, duty is cast on the State in the form of a negative manner in the State when it comes to fundamental rights. Further, with

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[60] Kumar Kartikeya, The Conceptualisation of "State" vis-a-vis Fundamental Rights, **SCC Online (June 21, 2024, 6.35 pm)** https://www.scconline.com/Members/SearchResult.aspx

[61] Constituent Assembly Debates, Vol. VII, 610-611 (25-11-48).

62 S. Sundara Rami Ready, *Fundamentalness of Fundamental rights and Directive Principles in the Indian Constitution,* 22(3) Journal of the Indian Law Institute 399 (1980).

reasonable restrictions provided under various fundamental rights, there is no absolute right to the individuals; some rights may be more absolute than others.

The constitutional balance reflected in Part III can be interpreted from looking into the American Bill of Rights as the former is just a disguised version of the latter. In an American case, *Jackson v. City of Joliet*[63] , the court emphasized the context in which the Bill of Rights is structured in a way of negative rights. It was observed that *"Our Constitution is a charter of negative rather than positive liberties. The men who wrote the Bill of Rights were not concerned that the government might do too little for the people but that it might do too much to them. The Fourteenth Amendment, adopted in 1868 at the height of laissez-faire thinking, sought to protect Americans from oppression by the state government, not to secure their basic governmental services."*[64] This is reflected in our Part III. Article 21 begins with "No person shall be deprived of his life, and a personal liberty…", and Article 14 reads as *"the state shall not…"*. Thus, it is evident that the fundamental rights were designed similarly to the Bill of Rights. i.e., to protect individuals from abuse of power by the newly formed government and to limit their power. Affirmative obligations and positive duties were separately arranged under the Directive principles to attain the socio-economic goals. Slowly, through various cases, the directive principles have made a backdoor entry into the fundamental rights regime, and through this, even positive obligation is making way to Part III. However, this kind of positive duty or obligation on the state is far impractical and farfetched in India. The scope of this kind of affirmative obligation is undoubtedly limited.[65]

2.7 CONCLUSION

Fundamental rights under the Constitution do not exist in isolation. It is structured in such a manner as to limit the State's encroachment over these rights or uphold Constitutionalism. Further, it can be viewed from another perspective that fundamental rights legitimize the act of the government to the extent of reasonable restrictions beyond which it cannot carve

[63] Jackson v. City of Joliet, 465 U.S. 1049 (1983).
[64] Id
65 David P. Currie, *Positive and Negative Constitutional Rights,* 53(3) The University of Chicago Law Review, 864, 872 (1986)

in. Keeping this in mind, enforcement of fundamental rights between individuals or beyond the State is far more ideological in Indian Ground, where even the concept of individualism and autonomy is struggling to show up. I believe it would be a reverse turn from the established theory of rights on which the whole structure of fundamental rights is built. I believe it will resemble Hobbes's commonwealth, where the State has absolute power to curtail rights and regulate private affairs. Even private affairs will be constitutionalized, leading to a situation where no right exists.

CHAPTER 3

THE STATE ACTION DOCTRINE UNDER INDIAN CONSTITUTION AND ITS EXPANSION

3.1 INTRODUCTION

State Action doctrine means that fundamental rights under the Constitution apply to state actions, not private ones.[66] This approach is otherwise called the vertical application of fundamental rights. Verticalists are classic liberalists who argue that fundamental rights are limits set on the encroachments made by the State on individual autonomy and cannot be applied in private affairs. They argue that fundamental rights have zero or minimal role in private law disputes. However, with privatization and liberalization, the concept of "state" has diluted, and the Judiciary has widened its ambit to take in even private actions. However, to what extent can this private action be embraced, and to what extent can "State" be widened? This question is addressed in this chapter. Through various cases, the author tracks the evolution of state action doctrine in India and examines its relevance to Part III of the Constitution.

3.2 THE GENESIS OF STATE ACTION DOCTRINE AND IT'S IMPORT TO INDIAN CONSTITUTION

The state action doctrine was born in the *civil rights case*[67] in the USA. Black Americans initiated the case before the lower Court against the owners of theaters, hotels, restaurants and transit companies that refused to admit them or excluded them from "white-only" facilities. During the reconstruction period, Congress passed the Civil Rights Act of 1875, which attempted to address the racial discrimination deeply rooted in the U.S. The statute gave everyone access to public places like theatres, transportation, accommodation centers, etc., regardless of race and color. The business owners challenged the above act in the civil rights case. Five lower court cases, *United States v. Stanley*, *United States v. Ryan*, *United States v. Nichols*, *United States v. Singleton*, and *Robinson et ux. v. Memphis & Charleston*

[66] Stephan Jaggi, *How the German Concepts of Horizontalism and Proportionality Could Improve the US State Action Doctrine*, 30 IND. INT'l & COMP. L. REV. 195 (2020).
[67] civil rights case, 1 109 U.S. 3

R.R. Co., were combined and heard by the Supreme Court. The majority held that the 13th and 14th Amendments cannot have a broader scope to interfere in private activities even if there is explicit discrimination, and Congress cannot outlaw such private acts that are discriminatory under S.5 of the Fourteenth Amendment. Justice Harlan dissented and even took the view that private action should be included under the constitutional limit under the scope of performing a public function.

The Judiciary took a similar approach in later cases to limit the action of legislature, executive, and judiciary, which are agencies exercising the above powers of the State. The only scope of including private actors was under the exception of "public function." Only in those circumstances is a private actor deemed a state actor. A substantial expansion of the state action doctrine was employed by the American Supreme Court to curb racial discrimination.[68] The growth of state action on private acts is amalgamated with state support, private acts of state character, acts done under statutory powers, agents of the State etc. This evolution of state action in the U.S. will be dealt with in detail in Chapter V on a comparative study of the horizontal application of fundamental rights. However, in crux, one can say that the ultimate test applied in the U.S. to determine enforcement of the Bill of Rights is whether the infringement of a person's right is reasonably attributable to the State.[69] The only exception is the private party doing public functions.

The Indian Constitution has embodied the American concept of state action in Part III of the Constitution under Article 12, subject to such differences in social and political conditions and constitutional setup.[70] The evolution and expansion of the State in India is in line with that in the USA. To what extent can the concept of "state" be expanded in India? This is discussed below.

3.3 CONSTRUCTION AND EVOLUTION OF THE DOCTRINE IN INDIA

[68] D.D. BASU, COMMENTARY ON CONSTITUTION OF INDIA, (9TH EDT. 2014)
[69] Id
[70] Id

Under the Indian Constitution, fundamental rights are a limb of Constitutionalism that limits state action. In the case ***State of W.B. v. Subodh Gopal Bose***,[71] it was observed that *"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 definition of State is given under Article 12 of the Constitution for the application of provisions contained in part III.[72] This constitutional construct embodies the state action doctrine germinating in the American system. The significance of Article 12 comes into the picture when fundamental rights infringement is challenged under Article 32. Here, the Court mainly looks into "the state" aspect for the maintainability of such writs and enforcement of fundamental rights. Whereas, when it comes to Article 226 remedy, the High Courts have wider power and can be applied against "any person or authority" on nonconstitutional grounds as well as contravention of provisions outside Part III of the Constitution. Even then, "any authority or person" cannot be extended boundlessly. It should be confined to any person or authority performing public duty. Thus, an invisible cloak of state action is applied in Article 226 as well.

Further looking into the Constituent Assembly debates on 25th November 1948, [73] it is evident that Article 12 of the Constitution defining "state" was an incarnation of the state action doctrine. Here, one of the assembly members, Sri. Mahmood Ali Baig Sahib Bahadur raised the argument that the definition of State had not been entered in this Article. He also questioned the ambiguity of the term "other authority" in the definition. He contended that since "any authority "is a vague term, anyone having an authority who comes under "state" can abridge fundamental rights, which would lead to an absurd situation. Therefore, Mohammed Ali. Baig submitted that Article 12 is unnecessary and finds no place as it leads to confusion.[74] Dr. B. R. Ambedkar defended this argument very well and explained why Article 12 must be part of the Constitution. He emphasized that the object of fundamental rights is that every citizen must be able to claim them, and it

[71]State of W.B. v. Subodh Gopal Bose, 1954 AIR 92

[72] D.D. Basu, *supra* note 68.

[73] Constitutional Assembly Debates VOL VII, PP 607 – 611.

[74] 1 SAMARADITYA PAL, INDIA'S CONSTITUTION, ORIGINS AND EVOLUTION, CONSTITUENT ASSEMBLY DEBATES AND LOK SABHA DEBATES ON CONSTITUTIONAL AMENDMENTS AND SUPREME COURT JUDGMENTS (1st Ed. 2019).

should bind every authority that has either the power to make laws or the power to have discretion vested in it.[75] Therefore, rather than repeating the authorities again and again, he intended to give a composite definition as such under Part III.

3.4 CONCEPT OF STATE UNDER ARTICLE 12 OF THE CONSTITUTION

Part III of the Constitution begins with the definition of "State" under Article 12. It includes the Government and the Parliament of India along with the Government and the Legislature of each of the states. Further, all local authorities and other authorities that exist in the territory of India or function under the control of the Government of India are also included.[76]

The definition of "State" under Article 12 is open-ended and not exclusive or exhaustive. The word "includes" in the Article makes it possible for the Judiciary to interpret the State more broadly and include three organs of Government and other authorities added under the state action doctrine in the USA.[77]The first part of the definition is unambiguous and specific. Therefore, there was no confusion involved, but the second part of the definition lacked clarity as to what constitutes local authority and other authorities. Much of the academic discussion revolved around this second part, and the concept of the State widened in two directions, firstly expanding the list of authorities under the State and secondly, expanding the functions performed by the State. This expansion has been vividly tracked and explained under the coming subtopics.

3. 5 THE ENIGMA OF "LOCAL AUTHORITIES" UNDER ARTICLE 12

The primary point of discussion revolved around what comes under local authority. For this definition, the term "local authority" relates to Section 3 (31) of the General Clauses Act of 1897, which shall mean a municipal committee, district board, body of port commissioner or other authority legally entitled to or entrusted by the Government with,

[75] Id
[76] INDIA CONST. Art. 12.
[77] D. D Basu, *supra* note 68.

the control or management of a municipal or local fund. Local authorities are under the exclusive control of the states under entry 5 of List II of the 7th Schedule.[78]

In ***Rashid Ahmed v. Municipal Board, Kairana,***[79] "It is among the leading references in which a Municipal Board was determined to be a local authority within Article 12. Additionally, this group comprises the panchayats, municipalities, and cooperative societies in Parts IX, IX-A, and IX-B, respectively."

In ***Ajit Singh v. State of Punjab,***[80] it was held that village panchayats are included in the definition of local authority.

In ***Mohammad Yasin v. Town Area Committee***,[81] the Supreme Court observed that a body can be considered a local authority if it has a separate and independent legal existence and not a mere governmental agency. Further, it should be tasked to function in a particular area and constituted by members who are wholly, or partly, directly or indirectly, elected by the inhabitants of the area. They should also exercise autonomy and should be governed by a statute giving such governmental functions and duties usually held by the government. They should also have financial independence and the power to raise funds for the furtherance of their activities and fulfillment of their objectives by levying taxes, rates, charges, or fees. Municipalities, Panchayats and Cooperative societies are such authorities.

Therefore, what comes under local authorities was defined by the Judiciary and its boundaries were fixed. The debate then concentrated on the term "other authorities."

3.6 THE JUDICIAL ENDEAVOR TO SOLVE THE RIDDLE OF 'OTHER AUTHORITIES" UNDER ARTICLE 12

The term "other authorities" has been a penumbra wherein the Judiciary has been widening the ambit of the State from time to time. The Judiciary has devised various standards and tests to determine what constitutes an institution or entity that falls within this definition.[82]

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[78] D. D Basu, *supra* note 68.
[79] Rashid Ahmed v. Municipal Board, Kairana, AIR 1950 SC 163
[80] Ajit Singh v. the State of Punjab, AIR 1967 SC 856.
[81] Mohammad Yasin v. Town Area Committee, 1952 AIR 115.
[82] Priyesh Pathak, *"State" under Part III of the Constitution of India: A Study of Interpretation by Judiciary*, 3 INDIAN J. INTEGRATED RSCH. L. 1 (2023).

3.6.1 TEST OF EJUSDEM GENERIS

The Judiciary made the first attempt to define other authorities in the case of the ***University of Madras v. Shanta Bai,***[83] where the question was whether the University comes under the definition of State under Article 12. The Court utilized the principle of ***Ejusdem Generis***, according to which when a legal text has a general term preceded by several specific terms, the general term must be interpreted to contain only that which would broadly be in relation or inconsistent with the specific terms.[84]Accordingly, the word "local " and other authorities should be construed as ejusdem generis with the Government or legislature, so construed can only mean authorities exercising governmental functions.[85] Applying it to the facts of the case, Madras University was a corporate body established under the Madras Act VII of 1923 and was not charged with executing any governmental functions. Its purpose is purely to promote education. Thus, the Court held that the University does not come under the ambit of "State" under Article 12. With the help of American cases, they distinguished state-maintained universities from state-aided universities. The court further established that the former is covered under Article 12 and the latter is not a state as defined in Art. 12 of the Constitution.

A change in this trend is visible in the case of ***Ujjam Bai v. State of U. P,***[86]where the question of whether the sale tax authority is covered under the definition of State under Article 12 was addressed. Here, the petitioners relied on the rule of ejusdem generis to equate the functioning of a tax authority to that of a state. In the five judges, Justice S. K Das refused to entertain the question of "other authority." Justice J. L Kapur lightly answered the question that the quasi-judicial order of the Sales tax Officer cannot be challenged under Art. 32, and the broader question of whether the Judiciary is included in the definition of "State" under Art. 12[87] was left unanswered. Justice Subha Rao, applying the ejusdem generis rule, considered tax authority as an executive body and observed that it is covered under the meaning of Article 12. The petitioner's argument of omission of

[83] The University of Madras v. Shantabai, AIR 1954 Mad 67.
[84] Satyaveer Singh, Tracing the Ambit of State under Article 12, 2(2) JCLJ 190, 194 (2022).
[85] *Supra* note 83.
[86] Ujjam Bai v. State of U. P, AIR 1962 SC 1621.
[87] Id

judicial authorities from the definition of State by the drafters was not heeded on the ground that tax authority here is acting under the guise of the executive and they will automatically be included under Article 12. If the framers intended to exclude all judicial bodies, then even the Government and Parliament would have to be excluded when acting in their quasi-judicial capacity. Justice Hidayatullah observed that taxing authorities, though they act in a pattern of Judiciary, are not civil Courts of judicature; they are executive and are covered under Article 12, being instrumentalities of the State. But Justice Rajagopala Ayyankar took a different turn from the ejusdem generis rule. He observed that the classification of functions is unnecessary. Negating the ejusdem rule, Justice Ayyankar propounded that every authority created by a statute and vested with such powers will be covered under the wide ambit of "other authorities."[88] Thus, Justice Ayyankar observed that the taxing departments are instrumentalities of the State. Still, the ejusdem generis rule cannot be uniformly applied as the authorities under Article 12 are not of the same genus.

But again, there was not much clarity as to what rule must be applied when defining other authorities. Many High Courts followed the earlier rule of ejusdem generis, which is evident from the following two cases. In ***B.W. Devadas v. Selection Committee for Admission of Students to the Karnataka Engineering College***,[89]the High Court of Mysore reiterated that the University is not a state, followed the same road taken in the University of Madras and held that only instrumentalities of State functioning under executive or legislative nature come under Article 12. Further, the Punjab High Court in ***Krishan Gopal Ram Chand Sharma* v. *Punjab University***[90] also followed the decision given in the case of *the University of Madras* and the principle laid down therein was approved and applied.

3.6.2 THE TWIN APPROACHES

Further, a chance to look into "other authorities" came to the forefront before the Supreme Court in ***Rajasthan Electricity Board v. Mohan Lal.***[91] The case dealt with an employee promotion dispute challenged on grounds of violation of Articles 14 and 16 of the

[88] Id
[89] B.W. Devadas v. Selection Committee for Admission of Students to the Karnataka Engineering College, AIR 1964 Mysore 6.
[90] Krishan Gopal Ram Chand Sharma v. Punjab University, AIR 1966 Pun 34.
[91] Rajasthan Electricity Board v. Mohan Lal, AIR 1967 SC 1857.

Constitution. The question raised before the Court was whether the Electricity Board comes under the definition of State under Article 12 of the Constitution. Here, the Court criticized the application of ejusdem generis as no distinct genus or category was running through the bodies already named under Article 12. The Court explained that ejusdem generis should be applied cautiously and not be stretched too far. It should be applied only in cases where there is a distinct genus or category that can be called a class or kind of object. It cannot be applied if the characters are widely ranged.[92] The majority held that the electricity board is covered under Article 12 as it is a statutory body controlled by the Government. They relied on the dissenting judgment of Ayyankar in the case of ***Ujjam Bai v. State of U. P***[93] and the decision in ***K.S. Ramamurthi Reddiar v. Chief Commissioner, Pondicherry***[94] to propose a new approach that all bodies formed by a statute and controlled by State are covered under Article 12.[95] Therefore, the majority followed a structural approach.

But, Justice K T Shah dissented from this view and gave a concurrent opinion that "other authorities" can be defined based on a "functional test," i.e., those performing a sovereign function of state are protected and constitutional or statutory bodies that do not exercise such sovereign power of the State are not within the meaning of State.[96]Therefore, since the electricity board exercises sovereign powers under the statute, it comes within the meaning of "other authorities" under Article 12. Therefore, two different approaches were put forth in this case to define the boundaries of "other authorities."

Further, the observation of Justice K T Shah is very notable as he again reiterated that the purpose of the expression "State" in Article 12 is for its application to Part III of the Constitution. It is a green flag for my hypothesis in this work, i.e., horizontality cannot be applied to fundamental rights in India under Article 32. He further highlighted that while we try to define other authority in Article 12, one must contemplate two aspects. Firstly, the sweep of fundamental rights over the power of the authority; secondly, one must not keep a blind eye towards the restrictions imposed upon the exercise of certain fundamental

[92] CRAIES, ON STATUTE LAW 181 (6TH ED. 1963)
[93] *Supra* note 86
[94] K.S. Ramamurthi Reddiar v. Chief Commissioner, Pondicherry, (1964) 1 SCR 656
[95] *Supra* note 84 at 194
[96] *Supra* note 91

rights. He opined that while defining other authorities under Article 12, one should bear in mind whether the constitution drafters intended to impose fundamental rights against them and, at the same time, whether they are cast with the sovereign power to bring in restrictions on these rights.

With this in mind, one must try to stretch the application of fundamental rights horizontally. The reasonable restrictions given under the fundamental rights intend to circumscribe the acts of entities that come under Article 12 by way of notifications, legislations, orders etc., which is covered as "law" under Article 13 of the Constitution. Thus, if applying fundamental rights is considered too far to restrict even private actors without limits, it can backfire on the basic idea of fundamental rights inscribed under the Constitution.

In ***Sabhajit Ternary v. Union of India***,[97] the question arose as to whether the Council of Scientific and Industrial Research, a registered society, was an "authority" within the ambit of Article 12. The Court observed that the definitive test in determining whether an entity would fall within the ambit of Article 12 is how the entity is created. Therefore, only statutory bodies would satisfy the requirements of Article 12. It was held that CSIR is not a body within Article 12.

3.6.3. TEST OF AGENCY OR INSTRUMENTALITY

The next turn in the journey of Article 12 occurred in the case of ***Sukhdev Singh v. Bhagat Ram***[98], where the dismissed employees of three statutory corporations: (1) Oil and Natural Gas Commission, (2) Life Insurance Corporation and (3) Industrial Finance Corporation claimed reinstatement. The Corporations were incorporated under the Oil and Natural Gas Commission Act of 1959, the LIC Act of 1956 and the Industrial Finance Corporation Act of 1948. The question before the Supreme Court was whether the three Corporations were "other authorities" under Article 12 of the Constitution. This case was decided on the same day as the *Sabhajit Tewary case(supra)*.

The Court observed that the state action needs to be extended to limit every governing power under the bounds of the Constitution. The Court relied on some American cases to

[97] Sabhajit Ternary v. Union of India, (1975) 1 SCC 485
[98] Sukhdev Singh v. Bhagat ram (1975) 1 SCC 421

observe that the corporations would be bound by the constitutional limitations of being an agency of the State. The majority gave a broader view to the state action doctrine to incorporate Corporation within the meaning of State as it is an agency or instrumentality of the State.

Further, whether state action can be extended to private enterprises was addressed. Taking track of American courts, the court tried distinguishing private and state actions. The Court takes our attention to Article 13(2) of the Constitution, which reads, "No State shall make any law which takes away or abridges the rights guaranteed by Part III." Therefore, the Court observed that state action alone is prohibited from intervening in Part III, and wrongful private action that is unsupported or not connected to state authority in the shape of laws, customs, or judicial or executive proceedings is not prohibited.[99] Unless the private action has a connection to the State, it cannot be thus termed state action, and the Constitution does not limit these private actions.

The Court formulated a test of agency by which mere financial support for private actions does not transform it into state action, but an additional factor should be attached to such actions. Firstly, it can be an element of control exercised by the State. Therefore, it was held that State financial support plus an exceptional degree of control over the management and policies is needed to characterize an operation as State action.[100] Secondly, the additional factor could be other things like the exercise of a public function. Therefore, if an entity has extraordinary financial reliance on the state and performs a public duty, it is an agency of the state. The Court took a functional approach and held that if a body is performing a function that is of such public importance and so closely related to governmental functions, it can be designated as a governmental agency, and the presence or absence of State financial assistance becomes irrelevant in construing State action.[101] Thus, the Court combined the functional and structural approaches to formulate the new test of agency or instrumentality.

[99] Id
[100] Id
[101] Id

The Court also criticized the difficulty in segregating government and non-government functions, as sometimes private action may be governmental, or state action can be non-governmental. Finally, the majority held that the statutory corporation is within the meaning of State on the following grounds. i.e., the central government has a significant share of capital and profit, exercises control over its policy, carries on a business that is of great public importance and enjoys a monopoly status. Further, it is very interesting to note the stand taken by the majority on whether a private corporation that might violate the fundamental rights of its employees comes under the ambit of the State. The Court neglected to answer this question or refused to expand the application of fundamental rights to that extent, again hinting towards non-application of horizontality and sticking to the vertical approach pioneered by the Constitutional Drafters. Therefore, it is clear that pure private actions are not a concern of the Constitution, and there are no constitutional limits to such private actions.

Justice Alagiriswami dissented from the majority decision. Relying on the test put forth in the case of *Rajasthan Electricity Board (supra)***,** he held that the Corporation doesn't come under the ambit of other authorities as they are not exercising any sovereign power or authority of the State. Justice Alagiriswami also looked into the distinction between government function and non-government functions to suggest that only those functions done in governmental and quasi-governmental character are covered under the state action, and commercial or trade-related activities do not come within the state action. Therefore, narrowing down the ambit of "other authorities" is evident from the dissenting opinion.

The next case in the row was ***R.D Reddy v. International Airport Authority of India and others,***[102]in which the question of whether airport authority is within the ambit of the State was asked. The Court relied on the agency or instrumentality test propounded in the case of *Sukhdev Singh* and elaborated the instrumentality test. The correctness of the decision in ***Sabhajit Tewary v. Union of India***[103]was doubted in this case. Accordingly, the Court gave a broader interpretation to the term "other authorities" and highlighted the following factors to be looked into while determining the scope of state action. The Court opined that

[102] Ramana Dayaram Shetty v. International Airport Authority of India, (1979) 3 SCC 489.
[103] *Supra* note 97.

in order to take the shelter of the state under Article 12, the authority should be receiving significant financial assistance from the state or other forms of assistance of an unusual or extraordinary nature. Further, the body should enjoy monopoly status conferred or protected by the state, and it should exercise public functions closely related to governmental functions. The above test is not exhaustive; The cumulative effect of all the relevant factors controlling it needs to be considered.

Thus, the concept of state action became more crystallized and structured after the R. D Shetty case. This has been followed in later cases of statutory corporations as well. In ***Managing Director, U. P Warehouse v. Vijay Narayan Vajpayee***[104] , the Supreme Court held that the U. P Warehouse Corporation formed as a statutory body is covered under Article 12. In ***Som Prakash Rekhi v. Union of India,***[105] the question for consideration was whether a public corporation would fall under the definition of Article 12. Here, the test of instrumentality or agency put forth in the R. D Shetty case was reiterated, and it was held that Bharat Petroleum Corporation Limited falls within the definition of State. The Court also observed that the real test to determine an authority under Article 12 is the functional approach. The older test concentrated on whether an authority was formed by or under a statute. But here, the Court shifted the approach of looking into "how the legal person is born" to the newer version of "why it is created."[106] Thus, here, the Court emphasized the functional approach over looking into how a body is created.

3.6.4 THE TURNING POINT - AJAY HASIA AND THE NEW FUNCTIONAL, STRUCTURAL AND FINANCIAL TEST

On the same day of the *Som Prakash (supra)*, the Supreme Court dealt with the case of ***Ajay Hasia v. Khalid Mujib,***[107] wherein the Court advanced a six-pronged test to determine whether an authority was an instrumentality of the State. The petitioners challenged the status and nature of Regional Engineering College, Srinagar, formed under the Jammu and Kashmir Registration of Societies Act., 1898. Till then, the discussions revolved around

[104]Managing Director, U. P Warehouse v. Vijay Narayan Vajpayee, (1980) 3 SCC 459
[105] Som Prakash Rekhi v. Union of India, AIR 1981 SC 221
[106] Id
[107] Ajay Hasia v. Khalid Mujib, (1981) 1 SCC 722

statutory corporations forming instrumentality of the State. However, Ajay Hasia also addressed whether the instrumentality test applies to companies and cooperative societies. Here, the Court gave more attention to why a body is formed rather than concentrating on how it is created. Further, they modified the test laid down in the case of ***R. D Shetty***[108]. The factors determining the scope of "other authority" were the quantum of share capital held by the Govt., the financial assistance given by the State, the existence of state-conferred or protected monopoly status, the existence of deep and pervasive State control, performing functions of public importance and closely related to Governmental function or a department of Government is transferred to the body. If an entity is an agency or instrumentality of the Government, the above test should be satisfied. Here, the Court emphasized the governmental control factor more and reduced the importance of the functional approach to just one head under governmental function.

Many cases after this followed the test laid in Ajay Hasia and R. D Shetty to define authorities under Article 12. Some such examples are narrated below. In ***B.S. Minhas v. Indian Statistical Institute,***[109]the Court held that the Indian Statistical Institute, a registered society, is State under Article 12, applying the test on Ajay Hasia. In ***P.K. Ramachandra Iyer* v. *Union of India*,**[110] it was held that the Indian Council of Agricultural Research (ICAR) and the Indian Veterinary Research Institute are bodies covered under "other authorities" in Article 12 of the Constitution. In ***Workmen of Food Corporation of India v. M/s. Food Corporation of India,*** [111] applying the instrumentality test, the Court held that Food Corporation is an instrumentality of the State covered by the expression "other authority" in Article 12.

In ***Manmohan Singh Jaitla v. Commissioner, Union Territory of Chandigarh***[112]**,** the Supreme Court held that aided schools receiving 90% expense from Government falls within the expression "other authorities" under Article 12. The Supreme Court overruled the High Court decision that held that the school is not covered under Article 12. For this,

[108] R.D Reddy v. International Airport Authority of India and others, (1979) 3 SCC 489.
[109] B.S. Minhas v. Indian Statistical Institute, (1983) 4 SCC 582.
[110] P.K. Ramachandra Iyer v. Union of India, (1984) 2 SCC 141.
[111] Workmen of Food Corporation of India v. M/s. Food Corporation of India, (1985) 2 SCC 136.
[112] Manmohan Singh Jaitla v. Commissioner, Union Territory of Chandigarh, 1985 AIR 364.

the Court relied on the test laid down in Ajay Hasia and substantiated that the State has significant financial assistance to meet almost the entire expenditure of the school, like the Corporation in the Ajay Hasia case and also there existed deep and pervasive State control which qualifies it as a state entity.

Another example is the case of ***Central Inland Water Transport Corporation v. Brojo Nath Ganguly,***[113] where the Supreme Court relied on the *Sukhdev Singh case(supra), the Ajay Hasia (supra)*and *U.P. Warehousing Corpn. (supra).* It was held that a corporation working as a government company as defined in Section 617 of the Companies Act was termed as the instrumentality of the State as it is nothing but the State working under the corporate veil carrying out a governmental activity and governmental functions of vital public importance.

Further, in ***Sheela Barse v. Secretary, Children's Aid Society,***[114] the Supreme Court, following the above test, held that Bombay Children's Aid Society registered under Societies Registration Act, 1860, should have been considered an instrumentality of State within the meaning of Article 12.

Applying the instrumentality test in ***Tekraj Vasandi v. Union of India,***[115] the Supreme Court held that the Institute of Constitutional and Parliamentary Studies is neither an agency nor an instrumentality of the State. The Court observed that it is unnecessary for all the tests to be satisfied to reach a conclusion either for or against holding an institution to be "State." Therefore, the test is to see if the body significantly or prominently resembles the state at first sight and no other view is possible.[116] Therefore, the Court held that the normal tests may not apply to ICPS, and it was held not an authority under Article 12. Thus, again, it was reiterated that satisfying the judicial test of instrumentality or showing a state action was necessary to invoke remedies under Article 32 to enforce fundamental rights.

[113] Central Inland Water Transport Corporation v. Brojo Nath Ganguly, (1986)3 SCC 156.
[114]Sheela Barse v. Secretary, Children's Aid Society, (1987) 3 SCC 50.
[115] Tekraj Vasandi v. Union of India, (1988) 1 SCC 236.
[116] Id

The Supreme Court in ***All India Sainik Schools Employees' Assn.* v. *Defence Minister-cum-Chairman, Board of Governors, Sainik Schools Society***[117]applying the tests indicated in *Ajay Hasia* held that the Sainik School Society is a "State."

In ***Star Enterprises v. City and Development Corporation of Maharashtra Ltd***.,[118] a Government company constituted as the New Town Development Authority under a statute was held to be an authority under Article 12. In ***Chander Mohan Khanna v. National Council of Educational Research and Training,***[119] the question was whether NCERT, a registered society, was a "State" within Article 12 of the Constitution. Here, the Court also referred to the test laid down for Ajay Hasia, R D Shetty, Sukhdev Singh, Som Prakash, etc. After considering the provisions of its memorandum of association as well as the rules of NCERT, this Court concluded that since NCERT was primarily an autonomous body as its activities were not fully related to governmental functions and the government control was very minimal and confined only to the proper utilization of the grant. Financial control was also very little, and therefore, it was not taken within the concept of State under Article 12 of the Constitution.

In ***Mysore Paper Mills Ltd. v. Mysore Paper Mills Officers' Assn***[120] applying the above tests till then, the Court held that a company that is substantially financed and financially controlled by the Government, managed by government nominated directors and carrying on essential functions of public interest under the control of the Government is "an authority" within the meaning of Article 12. Many other cases in the row relied on the instrumentality test to grab various authorities within the ambit of the State in Article 12.

3.6.5 DEEP AND PERVASIVE CONTROL TEST

After the long debates on stretching the definition of "state" over the decades, the Supreme Court in ***Pradeep Kumar Biswas v. Indian Institute of Chemical Biology***[121] propounded the deep and pervasive control test. Here, the question was whether the Council of

[117] All India Sainik Schools Employees' Assn. v. Defence Minister-cum-Chairman, Board of Governors, Sainik Schools Society 1989 Supp (1) SCC 205.
[118] Star Enterprises v. City and Development Corporation of Maharashtra Ltd., (1990) 3 SCC 280.
[119] Chander Mohan Khanna v. National Council of Educational Research and Training, 1991) 4 SCC 578.
[120] Mysore Paper Mills Ltd. v. Mysore Paper Mills Officers' Assn, (2002) 2 SCC 167.
[121] Pradeep Kumar Biswas v. Indian Institute of Chemical Biology, (2002) 5 SCC 111.

Scientific and Industrial Research is stated within Article 12. The ratio of *Sabhajit Tewary* was criticized and watered down in the above relay of cases, but on no occasion was the decision overruled.

But in *Pradeep Kumar,* overruling the decision in ***Sabhajit Tewary v. Union of India,***[122] the Supreme Court held that the test formulated in Ajay Hasia and many other cases was not a rigid test so that a body falling within any one of them is an authority under Article 12. The real test is whether the body's functional, administrative and financial control is governed or dominated by the Government. Further, the Court held that such control should be pervasive and particular to the body in question. This will make an entity part of the State within Article 12. On the other hand, when the control is merely regulatory, whether under statute or otherwise, it would not make the body a State.[123]

3.7 THE STATUS OF THE JUDICIARY UNDER THE STATE CONCEPT

The Judiciary is neither explicitly included under Article 12 nor explicitly excluded from it. There have been discussions surrounding whether the Judiciary falls under the term state under Article 12 even from an early period. The question came up in ***Naresh Mirajakar v. State of Maharashtra,***[124] which dealt with a defamation case. One of the parties called as a witness asked the Court to prohibit publicity of his evidence. The trial court passed an order prohibiting the publication of his evidence, and this order was challenged under Article 32. The Court did not hesitate to extend protection of the fundamental rights even if the High Courts breached them. The Court also restricted the discussion to determinations by Courts strictly so-called-Courts, which are invested with plenary power to determine civil disputes or to try offences. Quasi-judicial or administrative tribunals or tribunals with limited authority were not considered.

In ***A.R. Antulay v. R. S Nayak,***[125] the Court held that an earlier decision of a court could not be challenged on the grounds of violation of fundamental rights. Thus, reversing the

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[122] *Supra* note 97
[123] *Supra* note 121
[124] Naresh Mirajakar v. State of Maharashtra**,**1966 SCR (3) 744.
[125] A.R. Antulay v. R. S Nayak, 1988 AIR 1531.

position of law, it was held that the Judiciary was not amenable to writs, which shows that the Judiciary is not within the State definition under Article 12.

Again, in ***Rupa Ashok Hurra v. Ashok Hurra,***[126] the question was whether an aggrieved person could challenge the order of the Supreme Court after the petition for review of the said judgment had been dismissed. The Court held that after dismissal under Article 32, a petition is not allowed, but it devised a mechanism called a "curative petition," under which the aggrieved party can approach the Court in case of gross violation of the process of law.

Further, in ***Riju Prasad Sarmah v. State of Assam***[127]**,** the petitioner contended that 'State' includes all the three organs of the State, including the Judiciary. Therefore, it cannot perpetuate discrimination in violation of Article 14 of the Constitution. It was held that while the Court is acting in a judicial capacity, it cannot be regarded as a State. However, administrative action is covered.

3. 8 PRIVATE PARTIES DOING PUBLIC FUNCTION - A BACKDOOR ENTRY FOR PRIVATE ACTIONS UNDER ARTICLE 226

While looking into horizontality, it is very important to distinguish and study the scope of Article 226 and Article 32. Article 32 provides the right to remedy, which itself is a fundamental right. Writ jurisdiction under Article 32 is applicable strictly to entities that come under the definition of “state” under Article 12. On the other hand, Article 226 is much wider. It confers power on the High Court to issue writs not only for the enforcement of Fundamental Rights but also for “any other purpose” against “any person or authority.” Therefore, there existed a question of whether other authorities under Article 12 and Article 226 had the same meaning. But looking into various cases, we can see that Article 226 had a wide ambit, and it can even take more private entities under its ambit under the public function test evolved in ***Zee Telefilms Ltd. v. Union of India.***[128]

Also, there are instances where the court discussed whether Article 12 can also take in private entities in a similar model. The Supreme Court of India had to deliberate on whether a private entity discharging important public functions would come under the

[126] Rupa Ashok Hurra v. Ashok Hurra, AIR 2002 SC 1771.
[127] Riju Prasad Sarmah v. State of Assam, 2015 (7) SCALE 602, 61.
[128] Zee Telefilms Ltd. v. Union of India, (2005) 4 SCC 649.

definition of "other authorities" in ***MC Mehta v. Union of India.***[129] The question that arose in MC Mehta was whether victims of a gas leak from a private chemical and fertilizer plant could sue for compensation under Article 32 of the Constitution. Here, the court refused to determine if a private corporation can be held as a state under Article 12, but it allowed the petition and thereby allowed a backdoor entry of private actors under Article 32 without even determining the question of Article 12.

This allowed the Courts to steadily augment the ambit of the term "other authorities" to prevent the Government from bypassing its constitutional obligations by creating companies, corporations, etc., to perform its duties.[130] This has led to the steady expansion of the concept of "State" under Article 12 over time to include even entities that perform functions that closely resemble those performed by the Government in its sovereign capacity.[131] But still, performing governmental functions of a public nature was not the sole criterion under the different tests that evolved in Ajay Hasi(supra), R.D Shetty(supra), *etc.* It was merely one of the factors within the composite's tests, and a private actor performing a public function cannot be invoked under Article 32.

The National Commission to Review the Working of the Constitution (NCRWC) has recommended that an Explanation be added to Article 12 wherein the word' other authorities' would mean the authorities whose functions relate to that of a public nature.[132] This was an effort to define the scope of the State under Article 12 and eliminate ambiguity in the term "other authority." But this was not taken in. Therefore, what constitutes a State is actually what the Judiciary determines. If an authority could escape from the flare of the above tests, there is no question of enforcement of fundamental rights against such entities. However, this penumbra has been reduced by the Judiciary by taking in more and more entities under Article 12, but this doesn't extend to private entities doing public functions.

The trail of "other authorities" under Article 226 is different. In ***Andi Mukta Sadguru Shree Muktajee Vandas Swami Suvarna Jayanti Mahotasav Smarak Trust v. V.R.***

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[129]MC Mehta v. Union of India (1987) 1 SCC 395.
[130] Zee Telefilms Ltd. v. Union of India, (2005) 4 SCC 649.
[131] Ramakrishna Mission v. Kago Kunya, (2019) 16 SCC 303.
[132] *NCRWC Report 2002*, Ministry of Law & Justice, Government of India, http://legalaffairs.gov.in/sites/default/files/chapter%203.pdf, (last visited June 22, 2024)

Rudani,[133] a trust was running a science college in Ahmedabad, initially with temporary affiliation to Gujarat University and later with permanent affiliation. A dispute arose between the University Area Teachers Association and the University, which was resolved by the Chancellor's award. The award was accepted by the State Government and the University, and the University directed all affiliated colleges to pay teachers according to the award. Instead of implementing the award, the trust terminated 11 teachers, claiming they were surplus, and sought permission from the University to remove them. The University did not accept their request, leading the trust to decide to close down the college. The retrenched employees demanded their legitimate dues, including salary, allowances, provident fund, and gratuity.

The employees moved the High Court Under Article 226, seeking a writ of mandamus to compel the trust to pay their dues. The High Court granted the writ petitions, and the case eventually reached the Supreme Court. Before the Supreme Court, the main question was the maintainability of mandamus against a private body. Here, the apex court observed two exceptions to mandamus. A mandamus cannot be issued if the rights claimed are purely private. Also, if the college is purely a private body with no public duty or function, mandamus will not lie.[134] But, here, since the determination of conditions of service is not purely private character, issuing mandamus was held valid. Thus, it paved the path for thinking that Article 226 has a wider ambit.

The turning point of Articles 12 and 226 is the case of *Zee Telefilms Ltd. (supra),* where the court clearly determined the scope of Articles 32 and 226 and held that a private actor performing a public function may not be covered under Article 12 definition of state but it will definitely be covered under Article 226.

Here, the majority applied the Pradeep Kumar test of deep and pervasive control to hold that BCCI was under mere regulatory control of the Government, and since the is no such deep control of the Government, it was held by the majority that BCCI is not State under Article 12. However, minority judgment paved the way for the backdoor entry of private

[133] Andi Mukta Sadguru Shree Muktajee Vandas Swami Suvarna Jayanti Mahotasav Smarak Trust v. V.R. Rudani, 1989 (2) SCC 691

[134] Id

actors, who were answerable to violations of fundamental rights through writ jurisdiction under Article 226. Reverting back to the functional approach, the minority held that to contemplate the true meaning of other authority; one must look into the function of such bodies. The minority observed that the test in *Pradeep Kumar* cannot be applied to private entities. The minority held that an authority, in order to fit in Article 12, should perform public functions.

In ***Zee telefilms (supra),*** while holding that BCCI is not covered under "State" within Article 12. It led to the conundrum with regard to the amenability of writs under Articles 32 and 226. It was observed that Article 226 can be utilized even to include private parties doing public functions accountable for infringement of fundamental rights. Thus, the High Court can issue writs to nonstate entities, although a boundary is fixed with the public function test. Article 226 is broader but works on the same horizon as Article 32. Thus, through this case, private entities have made a backdoor entry to the sphere of Part III violation and under the public function thread, fundamental rights are enforceable even against private entities.

But what constitutes public function was a question unanswered. In ***G Bassi Reddy v. International Crops Research Institute,***[135] the court tried to define public functions as those functions similar or closely related to state functions under its sovereign capacity. In this case, the question was whether ICRISAT, a nonprofit research and training center, comes within the meaning of "other authorities" for the purpose of Article 226. Applying the above test of public function, the court held that ICRISAT is not amenable to the writ under Article 226. However, this strict interpretation of "public function as "function of governmental nature" was again diluted to function involving public interest or public benefit in later cases where Article 226 was applied.

Judiciary finally defined "public function" in ***Binny Ltd. & Anr vs V. Sadasivan & Ors.***[136]The question raised here was whether writ jurisdiction under Article 226 can be applied against a private company. It was observed that Article 226 is much broader, but it is a public law remedy and is available against a body or person performing public law

[135] G Bassi Reddy v International Crops Research Institute, 2003 (4) SCC 225
[136] Binny Ltd. & Anr vs V. Sadasivan & Ors, 2005 (6) SCC 657.

functions. The court also tried to define public function as those activities done by a body to achieve some collective benefit for the public or a section of the public and accepted by the public or that section of the public as having authority to do so.[137] They rightly observed that there cannot be any general definition of public authority or public action, but purely private actions are still not covered under Article 226. There are many illustrations to substantiate that private disputes purely of a private nature are not maintainable under Article 226. Article 226 looks into the nature of duty rather than the identity of the actor.

This approach is reflected in the following cases. In ***Surya Devi v. Ram Chander Rai***,[138] the appellant challenged an order of the High Court that dismissed the temporary injunction sought against private respondents through an appeal. Here, the Court held that Certiorari and mandamus can be applied even to private party disputes. This reflects a purely private dispute, but the court held it maintainable. But this was later overruled in *Radhey v. Chhabi Nath.*

Again, in ***Shalini Shyam Shetty v. Rajendra Shankar,[139]*** the court dealt with a private dispute between a landlord and a tenant. Here, the Court again reiterated that Article 226 can be invoked in private disputes, but it should be shown that the private party is acting in collusion with statutory authority. The Supreme Court criticized the route taken by the High Court in entertaining the landlord-tenant dispute under the tag of writ petition. It was held that the Court, under Article 226, is not the appropriate forum to look into private disputes involving land and other matters. Further, the court observed that any one of the respondents needs to be a person or authority performing a statutory or public duty to be amenable to a writ petition.

Further, the position of law in Surya Devi was overruled in the case of ***Radhey Shyam v. Chhabi Nath,[140]*** which observed that the writ of mandamus does not lie against a private person. Further, in ***Praga Tools Corporation vs. Shri C.A. Imanual***,[141] the court held that

[137] Vishnu S. Warrier, *Re-Defining the Definition of "State" under Article 12 of the Indian Constitution*, 1 CALJ 39, 43 (2013).
[138] Surya Devi v. Ram Chander Rai, (2003) 6 SCC 675.
[139] Shalini Shyam Shetty v. Rajendra Shankar, (2010) 8 SCC 329.
[140] Radhey Shyam v. Chhabi Nath, (2015) 5 SCC 423.
[141] Praga Tools Corporation vs. Shri C.A. Imanual, 1969 AIR 1306

no writ of mandamus will lie against a company incorporated under the Companies Act under Article 226 since it is not performing any statutory or public function.

One of the latest instances of invoking Article 226 against a private person was ***ABC v. Police Commissioner***[142] , in which the mother of a rape victim filed a writ petition before the Delhi High Court alleging disclosure of FIR information by the Commissioner of Police and two media groups and thereby infringing the victims fundamental right to privacy and confidentiality guaranteed under Article 21 of the Constitution. Here, the court opined that the respondents performed public functions and, therefore, were amenable to Art. 226.

Similarly, in ***Ramesh Ahluwalia v. State of Punjab***[143] , the termination of staff from a private, unaided school managed by society was challenged. The High Court dismissed the petition, holding that the petitioner cannot invoke Article 226 as a private unaided school doesn't come under the ambit of the state or its instrumentalities.

Another decision along the same line is ***Ramakrishna Mission vs. Kago Kunya,***[144] where the court looked into the amenability of a writ under Article 226 against a private Mission Hospital. The court vividly looked into what constitutes public function and held that activities of the Mission, a non-profit entity, are not closely related to those performed by the state in its sovereign capacity, nor do they partake of the nature of public duty, and they are not maintainable under Article 226.

Thus, even if we go by Article 226, the greatest extent to grab private actors is under the test of public function. Thus, the essence of "state action" is diluted in Art. 226 to deal with the non-state power centers.

The dilemma of whether the public function test should apply only to Article 226 or is applicable to Article 12 authorities persisted after *Zeefilms(supra).* ***Dr. Janet Jeyapaul v. SRM University***[145] is such an instance where SRM University was held amenable to the writ under Art. 32 on applying the public function test. This is completely opposite to the earlier views. Thus, from the above cases, it is clear that other authorities under Article 226 are much wider than other authorities under Article 12.

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[142]ABC v. Police Commissioner, Writ Petition (C) No. 12730 of 2005.
[143] Ramesh Ahluwalia v. State of Punjab, (2012) 12 SCC 331
[144] Ramakrishna Mission vs. Kago Kunya, (2019) 16 SCC 303
[145] Dr. Janet Jeyapaul v. SRM University, (2015) 16 SCC 530.

But what is shocking in this current flow of Article 12 is the latest path taken by the Judiciary in the case of *Kaushal Kishor (supra),* in which the Supreme Court held that Articles 19 and 21 could be applied against private entities and other than the State or its instrumentalities under Article 32. Thus, again, we can see a massive shift in the state action doctrine used by the Judiciary over decades while interpreting the scope of Article 12. The majority judgment knocks down the whole foundation of "state" under Article 12.[146] The majority judgment failed to address several issues relating to the horizontal application of fundamental rights, which shall be discussed in the coming chapter. The final position of the "instrumentality test or agency test," which the Judiciary crystallized while interpreting authorities under Article 32, and the "public function test" crystallized regarding Article 226, has been ignored. It is an unconstitutional informal constitutional change.[147]

I believe that under the guise of transformative Constitutionalism, the whole scheme of Part III will be demolished if we move in this direction. It is vital to address the lack of clarity in the Judiciary as to what extent state action should be applied in India. It is essential to retread the track taken by the Judiciary. One must remember that the whole object of Part III of the Constitution is to protect the freedoms and rights mentioned therein against arbitrary invasion by the State.[148]

3. 9 CONCLUSION

Article 12 of the Constitution gives the definition of state for the purpose of invoking fundamental rights. Article 12 is not an exhaustive definition, and the terms “local authorities” and “other authorities” are a penumbra. The legislature has left the definition open-ended in order to develop it to fit the needs of society, and this role was exploited by the judiciary. The change in the power centers from the traditional state actors to the non-state actors led to the dilemma of how to extend the fundamental rights over these private actors. The Indian Judiciary has widely interpreted Article 12 and tried to find a solution

[146] *Ashwin Vardarajan, Supreme Court’s Horizontality Judgment: Errors, Omissions and Questions Left Unanswered*, Law School Policy Review & Kautilya Society (last visited June 22, 2024, 2.18 am)
[147] Anujay Shrivastava, *Indian Supreme Court’s Judgment on ‘Horizontal Application’ of Fundamental Rights: An ‘Unconstitutional Informal Constitutional Change’?*, IACL-AIDC Blog (June 22, 2024, 2.27 am) https://blog-iacl-aidc.org/2023-posts/2023/1/31/indian-supreme-courts-judgment-on-horizontal-application-of-fundamental-rights-an-unconstitutional-informal-constitutional-change.
[148] The state of West Bengal v. Subhodh Gopal Bose and Ors., 1954 AIR 92

by incorporating corporations, companies, statutory bodies, societies and many entities under the veil of State with the help of different tests like the test of ejusdem generis, test of instrumentality or agency, deep and pervasive control test and many others. The track taken by the Indian Judiciary was similar to what is applied in countries like the U.S., where a nexus to the state was needed to perceive non-state actions under the ambit of the state. All these efforts have been taken by the Judiciary to preserve Article 12 as it holds great significance. From the catena of decisions, we have seen that the greatest extent to which the state action under Article 12 was extended is the functional, financial and administrative control test or the deep and pervasive control test propounded in the *Pradeep case(supra).*

But at the same time, we should consider that Article 32 is not the only route through which fundamental rights violations can be addressed. Fundamental rights can be enforced under Article 226 of the Constitution as well, and it is much broader than Article 32 as it particularly gives the terms “for any other purpose and against any person or authority.” Therefore, the High Courts have the power to enforce fundamental rights against other authorities. This led to the question of whether “other authority” under Article 226 and Article 32 had the same meaning and limitations. To this, the judiciary, in various instances, opined that the ambit of Article 226 is much wider than Article 32. To what extent “other authority” in Article 226 can be widened was looked into in *Zee Telefilms Ltd. (supra).*

It was the turning point of Articles 12, 32 and 226, where the court clearly determined the scope of Articles 32 and 226 and held that a private actor performing public function might not be covered under Article 12 definition of the state, but it will definitely be covered under Article 226. Thus, Art. 226 facilitates backdoor entry of private actions on fundamental rights violations.

Therefore, to tackle the issue of private actors' intervention in the fundamental rights of citizens, there is no need to abolish the state action doctrine altogether. Widening “State” by the Judiciary in an inconsistent and even unreasonable fashion cannot find a solution. Justice R. C Lahoti has rightly pointed this out as follows.

"Expanding dimension of "the State" doctrine through judicial wisdom ought to be accompanied by wise limitations else the expansion may go much beyond what even the framers of Article 12 may have thought of."[149]

Further, taking track of direct horizontality, as evident in *Kaushal Kishor(supra),* will not yield the result as it will make Article 12 merely dead letters. It is justified to impose fundamental rights obligations upon a private party as long as it continues to be in the shoes of the State under Article 12[150] So instead of taking a pure horizontal approach of fundamental rights or simply taking in everything under the ambit of "state" under Article 12 by Judicial inventions will ultimately result in defeating the whole purpose of Article 12. Instead, we have Article 226, which is much wider and capable of taking in more private actors to the extent of "private actor doing public function." Beyond which is not justified. Criticisms raised against the state action as a conceptual disaster[151] and opinions of Stephen Gardbaum, Chemerinsky and Mark Tushnet about abolishing it[152]will not hold good in the Indian Perspective as we have a protecting net around this state doctrine under Article 226. So, private entities that are distilled out of Article 12 can be made accountable under Article 226 for fundamental rights violations.[153] Article 226 is capable of dealing with the contemporary issue of new power centers or private invasions of fundamental rights. Instead of exploiting this route, the judiciary has shattered the whole structure of Part III by taking everything under fundamental violations under Article 32 under the name of horizontality, regardless of their identity. This is dealt with in detail in the next chapter.

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[149] *Supra* note 121

[150] Gautham Bhatia, *what is the "State"? – I: Article 12 and Constitutional Obligations,* WordPress (June 22, 2024, 2.27 am) https://indconlawphil.wordpress.com/2014/04/26/what-is-the-state-i-article-12-and-constitutional-obligation

[151] Charles L. Black, *"State Action, "Equal Protection, and California's Proposition* 14, 81 HARV. L. REV. 69, 95 (1967).

[152] Stephen Gardbaum, *The Horizontal effect of Constitutional Rights*, 102 MICH. L. REV. 387,414,418 (2003); see MARK TUSHNET, State Action in 2020, in THE CONSTITUTION IN 2020 69-77 (Jack Balkin & Reva Siegel eds., 1st ed. 2009); see Erwin Chemerinsky, *Rethinking State Action*, 80 Nw. L. REv. 503, 522 (1985).

CHAPTER 4

ARTICLES 14, 19 AND 21 OF THE CONSTITUTION AND THE QUESTION OF HORIZONTALITY

4.1 INTRODUCTION

From the previous chapter, it is clear that we have been following the traditional vertical application of fundamental rights. In various cases, the Judiciary has diluted this pure verticality approach by including private actors under the scope of "state" through different tests. The Judiciary under Article 32, has enforced fundamental rights on private actors by taking in horizontality also. However, the Judiciary has differing opinions on the scope of enforcement of fundamental rights on private actions. There are drawbacks to going further along this same line. The courts have moved beyond the tests to determine state action, and Article 12 has become insignificant. The chapter discusses the core fundamental rights and their horizontal application. Further, the chapter examines whether the Constitutional mandate should be applied against private entities. The drawbacks of this approach are also looked into.

4.2 HORIZONTALITY AND VERTICALITY – THE TWO POLES

One of the poles represents a vertical approach, which argues that individual rights bind or impose Constitutional duties only on the government. Accordingly, the Constitutional mandate is not binding on private interactions. The vertical approach intends to instill a public-private divide and liberate private affairs from the bounds of Constitutional regulations.[154] This will protect the private sphere's liberty, autonomy, choice, privacy, and heterogeneity from the four walls of constitutional norms.[155]They are based on classic liberalism, concentrating on the State's intrusion over the private sphere.

[154] Stephen Gardbaum, The "Horizontal Effect" of Constitutional Rights,103(3) Michigan Law Review, Dec., 2003, 387 (2003).
[155] Id

The ***Zoroastrian Cooperative Housing Society Ltd v. District Registrar Cooperative societies and others***[156] depicts the pure verticality approach taken by the Judiciary. Here, the restrictive covenant of Parsi cooperative society based on religion was challenged as against public policy and violative of Article 14. The society restricted membership of the society only to Parsi members. One of the members of the society demolished an old building and erected flats on the plot with the society's permission on an obligation that such flats would be sold only to members of the Parsi community. However, respondent 2 negotiated with a non-Parsi person and sought permission from the society for such transfer, which was rejected. The question was whether the restrictive covenant contravened public policy under S. 4 of the Local Act, the right to hold and alienate property under Article 300A of the Constitution and Article 14. Whether public policy under the Local Act should reflect constitutional values was also raised. The Court observed, "*It is true that our Constitution has set goals for ourselves, and one such goal is doing away with discrimination based on religion or sex. But that goal has to be achieved by legislative intervention and not by the Court coining a theory that whatever is not consistent with the scheme or a provision of the Constitution, be it under Part III or Part IV thereof, could be declared to be opposed to public policy by the Court."*[157]

The above lines clearly show the reluctance of the Judiciary to take in private actors under the tag of fundamental rights violation. Further, the Court held that a plausible attack on the byelaw based on the constitutional scheme would not stand. Freedom to contract cannot be curtailed for fundamental rights violations. Thus, a pure vertical approach weighs private and State actions on different scales.

The opposite pole is the horizontal approach, which preaches that the Constitution limits State and private actors. Constitutional duties are uniformly imposed on government bodies and private entities, thereby supervising interpersonal relations. Horizontality negates the private-public divide in Constitutional matters. They criticize the justifications by the verticalists on the ground that the vertical position automatically privileges the autonomy

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156 Zoroastrian Cooperative Housing Society Ltd v. District Registrar Cooperative societies and others, 2005 (5) SCC 632.

157 Id

and privacy of citizen-threateners over that of their victim.[158]The horizontal approach protects the rights of the victim regardless of whether it is a state or private actor. The horizontal approach assimilates constitutional values in every individual.[159]

Further, horizontality is looked into as direct horizontality and indirect horizontality. In direct horizontality, private entities are directly scrutinized for violation of fundamental rights without considering the State and non-state distinction, and fundamental rights can be enforced against all entities. However, in indirect horizontality, the State is involved as it bridges two private parties through private laws. The law that justifies the private action against fundamental rights is challenged in indirect horizontality. In indirect horizontality, the Constitution has a radiating effect on common law or statutory law in the private realm, and it should be aligned with the Constitution. In the Indian context, direct horizontality has been applied to various provisions like Article 15(2), 17, 23 and 24. Indirect horizontality has extended its entry through the expansive definition of "state" under Article 12. In this study, the horizontality of Articles 14, 19 and 21 is looked into.

4.3 HORIZONTAL APPLICATION OF ARTICLE 14, 19 AND 21

Articles 14, 19 and 21 are considered as the golden triangle of the Indian Constitution. These fundamental rights play a vital role in the Constitution and do not exist in water-tight compartments. They are correlated to each other. Initially, the Judiciary took a narrow view of these rights and held that they are distinct and mutually exclusive. This was reflected in the case of ***A K Gopalan v. State of Madras***,[160] where the Court negated the correlation of these articles. The same question was later addressed in the case of ***Bank Nationalisation,***[161] where the Court disapproved of the exclusivity theory upheld in ***A K Gopalan(supra)***[162]

Later, in ***Maneka Gandhi v. Union of India,***[163] the Supreme Court examined the interrelation between Articles 14, 19 and 21. The Court observed that they are not distinct

[158] Erwin Chemerinsky, *Rethinking State Action,* 80 Nw. U. L. REV. 503(1985)
[159] *Supra* note 4
[160] A K Gopalan v. State of Madras, AIR 1950 SC 27.
[161] R. C Cooper v. Union of India (1970) 1 SCC 248.
[162] 2 SAMARADITYA PAL, INDIA'S CONSTITUTION ORIGINS AND EVOLUTION, (LexisNexis 2010)
[163] Maneka Gandhi v. Union of India, (1978) 1 SCC 248

and mutually exclusive.[164] Therefore, whenever the State curtails Article 14, it should meet the test of procedure established by law prescribed under Article 21 and the test of reasonableness under Article 19. Similarly, any procedure established by law taking away a person's right to life and personal liberty should meet the test laid in Articles 14 and 19. Therefore, it is not any procedure established by law that can take away the right to life. It should be a just, fair and reasonable procedure. In the same way, a restriction brought in against freedoms guaranteed under Article 19 should not only satisfy the reasonable restrictions mandate in Article 19 but also comply with the test laid down in Articles 14 and 21. Articles 14, 19 and 21 provide the maximum autonomy and liberty to the citizens.

Article 14 has broad connotations. Initially, it wheeled around discrimination and classifications. Still, later on, through various tests devised by the Judiciary, the scope of equality started to strike down arbitrariness, irrationality, unreasonableness, natural justice violations, etc. In cases like ***Air India v. Nargesh Mirza***[165], ***Anwar Ali Sarkar v. State of West Bengal,*** [166] and ***Madhu Limaye v. The Superintendent, Tihar Jail***[167] , the Court analyzed Article 14 using the test of reasonable classification.

But this shifted to the test of arbitrariness from the case of ***E. P Royappa v. State of Tamil Nadu,***[168] where it was held that arbitrariness is an antithesis to equality. This was followed in ***A.L. Kalra v. Project and Equipment Corpn. of India Ltd.***[169]***, D.S. Nakara v. Union of India***[170] and many other cases. Again, this test was modified in cases like ***Shayara Bano v. Union of India***[171] and ***Navtej Singh Johar v. Union of India***[172] **,** where the Court has taken manifest arbitrariness as the mandate for Article 14 violation.

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[164] Id

[165]Air India v. Nargesh Mirza, 1981 AIR 1829, 1981 (4) SCC 335

[166]Anwar Ali Sarkar v. State of West Bengal, AIR1952CAL150,

[167]Madhu Limaye v. The Superintendent, Tihar Jail, 1970 (1) SCC 525

[168] E. P Royappa v. State of Tamil Nadu (1974) 4 SCC 3, 38: AIR 1974 SC 555.

[169]A.L. Kalra v. Project and Equipment Corpn. of India Ltd 1984 (3) SCC 316

[170] D.S. Nakara v. Union of India (1983) 1 SCC 305.

[171] Shayara Bano v. Union of India AIR 2017 SC 4609.

[172] Navtej Singh Johar v. Union of India AIR 2018 SC 4321, AIR 2018 SC(CRI) 1169

It is well established that Article 14 strikes at arbitrariness in state action and ensures fairness and equality of treatment.[173] The validity of every state action is tested on the touchstone of Article 14. Fairness in action by the State and non-arbitrariness in essence and substance is the crux of Article 14.[174] The Court reviews any state action when they act according to their whims and fancies. The Judiciary in various cases like ***Bachan Singh v. State of Punjab,***[175] ***Mahesh Chandra v. Regional Manager, U.P. Financial Corporation,***[176] ***and A.P.Aggarwal v. Government of NCT of Delhi*** [177]has particularly pointed out that Article 14 strikes the unreasonable, arbitrary and irrational actions of the State in fields of administration, legislation, executive etc. Article 14 ensures that every state action is based on rational and relevant principles and reasons. It is not discriminatory and not based on extraneous factors. Thus, it is clear that time and again, the Judiciary has viewed that the ambit of Article 14 is limited to state action and equality cannot be mandated in private actions.

This approach is evident in ***Zoroastrian Cooperative Housing Society Ltd v. District Registrar Cooperative Societies and others,***[178] where the Court refused to interfere in the bye-law of a particular community that limited its membership based on religion. The Court emphasized that unless there is some legislative intervention prohibiting such discrimination based on religion, the Judiciary cannot step in and coin a theory that such practice is against public policy under the Constitution.

We can look into this aspect with different examples. Consider a contract entered by the State and a private party for constructing a public road and another contract between two private parties for constructing a private road. In the first one, there is a public law element in the contract, and the party involved comes under the grab of state definition under Article 12; therefore, it is amenable to writs, and in case of the State imposing arbitrary terms of the contract, public law remedy can be invoked even if there is alternate contractual remedy available. The actions of the State, its instrumentalities, other authorities or persons

[173] *Supra* note 168
[174] Union of India v. International Trading Co., (2003) 5 SCC 437
[175] Bachan Singh v. State of Punjab, AIR 1982 SC 1325
[176] Mahesh Chandra v. Regional Manager, U.P. Financial Corporation, AIR 1993 SC 935
[177]AIR 2000 SC 205
[178] *Supra* note 156

functioning under the guise of State and bearing a public law element are amenable to judicial review and its validity is tested on the anvil of Article 14.[179]

However, in the latter situation, the arbitrary terms of the contract cannot be challenged as a fundamental rights violation under Article 14. It can be challenged as a contractual dispute in civil Court. Thus, it is clear that even if the State takes in the robe of a private entity while entering into a contract, it should fulfill the obligation under Article 14. On the other hand, a private party is not bound by such a mandate and is not subject to scrutiny under writ jurisdiction.[180]

Another example is adherence to the natural justice principle enshrined in Article 14. As an employer, the State should abide by the natural justice principle when taking action against its employees. But is the same applicable to a private employer dismissing an employee from a private institute? The answer is apparent: equality comes into play in state actions, not private ones.

The logic behind such a distinction is clearly to draw a boundary to protect the autonomy of the citizens. At the same time, not all private acts are exempted from the orbit of Article 14. There are instances where the Judiciary has identified private actions as state actions and held them violative of Article 14.

One such instance is the case of ***Charu Khurana v. Union of India***[181]***,*** where the petitioner, a woman makeup artist, challenged clause 4 in the bye-law of the Cine Costume Artists and Hair Dressers Association, which prohibited membership of the association to the women on the ground of violation of Article 14, 19(1)(g) and 21. The Supreme Court invalidated the clause and held that a trade union registered under the statutory provision cannot make a rule/regulation/bye-law contrary to the constitutional mandate. In this case, the trade union was not a state under Article 12; therefore, it was not amenable to the writ. The Judiciary blindly invalidated the bye-law even after recognizing that the Trade union is not covered under Article 12. Therefore, this case opened a pandora box of confusion, taking a stand utterly different from the precedent of the ***Zoroastrian Cooperative Housing***

[179] Union of India v. Graphic Industries Co., (1994) 5 SCC 398
[180]N.G. Projects Limited (S) v. Vinod Kumar Jain and Others (S). (2020) 16 SCC 489
[181]Charu Khurana v. Union of India, (2015), **1 SCC 192**

Society.[182] The Court took a horizontal approach to invalidate the bye-law, which can be described as an end without reasons or logic. This decision was hugely criticized for its approach. I also believe that decisions like Charu Khurana were mistakes made by the Judiciary. The Judiciary should have restrained itself and referred the matter to the appropriate forum.

In ***Jeeja Ghosh v. Union of India,***[183] the petitioner suffering from cerebral palsy was asked to get off a private airplane, SpiceJet, on account of his disability. Irrespective of being a private actor, the Court directed the respondent to compensate the petitioner for violating her fundamental right to equality under Article 14 and dignity under Article 21, read together with international obligations recognizing the rights of persons with disabilities.

Discrimination and inequality are deeply rooted in Indian grounds. However, under the label of fundamental right violation, the Judiciary has stretched constitutional mandate over private choices without a consistent view.

The Judiciary has looked into the actual content of these freedoms and their contours in various cases, and it has held that these freedoms in Article 19 are not close-ended. The restrictions and rights are harmoniously constructed so that the restrictions are not permitted to swallow these rights. Any restriction on Article 19 should have an element of state action. A private entity cannot bring in restriction on another private person under the scope of Article 19(2). It is not the intent of that provision. Restrictions are made on the State's actions. Under such circumstances, there is no scope for horizontal application of Article 19. The only interference between private parties concerning freedom of speech is the case of defamation. Here, defamation is a reasonable restriction on Article 19, and a person can bring action against such defamatory statements. But writ jurisdiction is not the appropriate remedy. Private laws govern it.

In ***P.D. Shamdasani v. Central Bank of India,***[184] the petitioner held five shares in Central Bank of India Ltd. The bank sold these shares to a third party to recover a debt owed by the petitioner. The petitioner challenged this transfer on the ground that it violated his

[182] Supra note 156
[183] Jeeja Ghosh v. Union of India, (2016) 7 SCC 761
[184] P.D. Shamdasani v. Central Bank of India, 1952 AIR 59

fundamental rights enshrined under Article 19(1)(f) (right to acquire, hold, and dispose of property) and Article 31(1) (protection against compulsory acquisition of property). The Court dismissed the writ on preliminary grounds. Looking into the language and structure of Article 19, the Court held that it is intended to restrict state action other than the legitimate exercise of their power and not to look into violations of property rights by individual entities. Thus, the Judiciary took a pure vertical approach to Article 19.

The right to life and personal liberty is guaranteed under Article 21. Though couched negatively, it provides that no person should be deprived of his life and personal liberty unless through a procedure established by law.

For the first time, the Court discussed the enforcement of Article 21 against a private person in the case of ***Vidya Varma v. Dr. Shiv Narain Varma.***[185] It dealt with a writ petition filed under Article 32 for a writ of habeas corpus filed on behalf of Vidya Verma against her father, Dr. Shiv Narayan Verma. The Court observed that the detention was not by an authority under the definition of State under Article 21. The Court, relying on the dissenting opinion of Justice Patanjali Das in ***A K Gopalan v. State of Madras***[186]and the ratio in ***P.D. Shamdasani v. Central Bank of India,***[187] dismissed the petition holding that Article 21 violation by a private person cannot be invoked under Article 32. The ratio in Shamdasani was discussed earlier. In A K Gopalan, the dissenting judge opined, *"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."* [188] Therefore, the initial approach of the Judiciary was vertical.

The Judiciary later shifted from considering fundamental rights as the negative right to a positive obligation of the State in various cases to fulfill its international human rights obligations. One such instance is ***Vishaka v. State of Rajasthan,***[189]where the Court issued guidelines in line with international conventions in the absence of legislative guidelines to

[185] Vidya Varma v. Dr. Shiv Narain Varma, AIR 1956 SC 108
[186] *supra* note 160
[187] *Supra* note 184
[188] *Supra* note 181
[189]Vishaka v. State of Rajasthan (1997) 6 SCC 241.

check sexual harassment of women in public and private workplaces. Here, the State was held liable for violating Articles 14, 19 and 21 of the petitioners and directed to take steps as envisaged in the guidelines within a reasonable time. In this case, we can see enforcement of fundamental rights against private actors, though horizontality was not discussed.

After five years, the apex court in ***Medha Kotwal Lele v. Union of India***[190] looked into petitions filed by women organizations complaining about the non-formation of complaint committees following the Vishaka guidelines in various public and private establishments to look into sexual harassment in workplace cases. The Court directed such public and private institutions to implement the Vishaka guidelines within two months as it violates the rights under Articles 14, 19 and 21.

From the outside, we might feel that both Vishaka and Medha Kotwal applied horizontality. Still, it is crucial to note that public and private discrimination was challenged in these cases, and the State was a respondent. On both occasions, the Court held that the State curtails Articles 14, 19 and 21 and has a positive duty to regulate private actors so that these rights are not violated.[191]Therefore, the approach of the Judiciary in the above cases cannot be generally applied in all cases where Articles 14, 19 and 21 are violated because I believe that the Judiciary took in private actors within the grab of writ jurisdiction as there was no specific legislature dealing with sexual offenses in the workplace; even the criminal law didn't address the offense at that time. The Judiciary had no other means to protect the rights of the victim. The Judiciary issued such guidelines to fill in this lacuna and treated it as a fundamental right violation. If there were legislation specifically dealing with sexual offence at the workplace, the question of fundamental rights violation would never have arisen. Instead, it would have been a statutory offence.

[190]Medha Kotwal Lele v. Union of India, (2013) 1 SCC 297.

191 Gautham Bhatia, *Horizontality under the Indian Constitution: A Schema,* Constitutional Law and Philosophy, ISSUES IN CONTEMPORARY CONSTITUTIONAL LAW, WITH A SPECIAL FOCUS ON INDIA AND KENYA,(June 22 2024, 7.29 pm) https://indconlawphil.wordpress.com/ 2015/05/24/horizontality-under-the-indian-constitution-a-schema/

Tracking the same line of thought, in ***Bandhu Mukti Morcha v. Union of India,***[192] the Court looked into a public interest litigation that addressed the deteriorated State of workmen engaged in quarries in the State of Haryana. The workers lived in inhumane, unhygienic and extreme situations like bonded laborers. Their families lived near the quarries without proper shelter, food and other amenities. The Court formed a committee to investigate the matter, and the report submitted showed that the allegations were true. The Court held that being a welfare state, it is the positive duty of the State to provide proper working conditions to the workmen engaged in such activities and asked the State to take proactive steps to protect the workmen from the employers. The Court observed that the State should monitor these employers to ensure that they abide by the law, and if there is any vacuum in the law, the State should take appropriate steps. Also, the State was asked to levy special cess from these activities to be used for the welfare of the workers.

The Court was confused about who should be accountable for ensuring educational facilities for the children of the quarry workers. The Court could have made the State Government or the employer responsible. The employer was made responsible for providing adequate healthcare, working conditions, sanitary facilities, shelter, food, water and educational facilities to the workers and their family members. Thus, the Court made the State and the employer equally responsible for safeguarding the workers' rights. The Court didn't discuss horizontality as the State was directly present in the case.

In ***M C Mehta v. Union of India,***[193] the petitioner sought the closure of units of Shriram Foods and Fertilizers Ltd., particularly after the oleum leak incident. The Court weighed its duty to protect the fundamental rights of the citizens over the existence of alternate remedies in the ordinary civil Court available for granting compensation. Therefore, seeing it as an exceptional violation of Article 21, the Court held that Article 32 has a remedial scope for awarding compensation. The Court discussed the expansion of Article 12 through tests devised in various cases. Still, it refused to answer whether a private corporation like Shriram Food and Fertilizers Ltd. falls within the ambit of Article 12. The Court, taking in the tortious principle of strict liability under ***Rylands v. Fletcher,***[194] directed the Delhi

[192]Bandhu Mukti Morcha v. Union of India**, (**1991) 4 SCC 177
[193] M C Mehta v. Union of India, 1987 AIR 1086
[194] Rylands v. Fletcher, 1866 Law Report 1 Exchequer 265

Legal Aid and Advice Board to take up the cases of all those who claim to have suffered on account of oleum gas and to file actions on their behalf in the appropriate Court for claiming compensation against Shriram. It is clear that the Judiciary, in this case, took a different approach than giving direct compensation; instead, it directed the matter to the proper forum. Since the Judiciary could not determine the identity of the Corporation, they refused to set up the machinery to look into the claims for compensation. This was the right approach.

M.C Mehta v. Kamal Nath[195] dealt with environmental degradation and pollution caused by private entities by illegally discharging effluents and blockage of river Beas. The writ was filed as a PIL by the victims claiming compensation for such severe pollution attributed to the factories. The counsel for the respondent contended that compensation under Article 32 could be claimed by the victims against arbitrary executive action or atrocities from the public authorities cast with public duty, not to impose fines on these private entities. The Court held that it could not directly impose a fine for any pollution under Article 142 unless the trial procedure prescribed under the statute is followed and the person is found guilty. However, under the scope of Article 32, relying on the public trust doctrine and polluter pays principle, the Court directed the motel owners to pay compensation for restitution of the environment and remove the constructions that caused pollution.

Further, the Court observed that pollution is a civil wrong and a tort; therefore, civil remedy can be obtained under a specific statute in the form of a fine. Also, as a constitutional tort, the Court, under Article 32, can direct the entity to pay compensation. Here, the Court failed to discuss the enforcement of fundamental rights on private entities. Merely determining the issue as an Article 21 violation and failing to follow the fundamental duties under Article 51 A(g), the Court delivered the judgment without paying much attention to the person against whom the writ was filed. This approach is evident in many cases where the Judiciary mechanically looks into fundamental right violations, disregarding the concept of "state" under Article 12.

[195] M.C Mehta v. Kamal Nath, (2000) 6 SCC 213

In ***Bodhisatwa Gautam v. Subra Chakraborty,***[196] the Court considered rape as an infringement of the right to life under Article 21 and awarded interim compensation to the victim. Here, a criminal complaint was registered by Subra Chakraborty, who was a student of Baptist College, Kohima, against a lecturer, Bodhisatva Gautam alleging offences under S. 312, 420, 493,496, 498A of IPC for deceiving her to marry, committing rape, forced abortion and other offences. The accused filed a petition before the High Court to quash the complaint and proceedings initiated against him. On dismissal of the said petition, an SLP was moved before the Supreme Court. The Court held that fundamental rights can be enforced against private bodies and individuals.[197] Thus, the approach of the Judiciary was in favor of horizontality.

In this case, the Court relied on ***Rudul Shah v. State of Bihar*** [198] and ***Peoples' Union for Democratic Rights (through its Secretary & Anr.) v. Police Commissioner, Delhi Police H.Q.s. & An***r.[199] to justify its jurisdiction in awarding compensation to the victim. Similarly, in ***Chairman, Railway Board & Ors. v. Chandrima Das and Ors***[200] , compensation was awarded to the victims. But the difference is that in all these cases, the ultimate burden of the compensation was cast on the State under its positive obligation, as rape is a fundamental right violation. However, the Court failed to distinguish these factors in *Bodhisattva Gautam(supra).*

At this juncture, it is pertinent to note that certain offences have different shades. For example, rape is a criminal offence; at the same time, it is treated as a fundamental right violation in various cases. Here, a remedy in the form of compensation can be retrieved from the civil Court in ordinary proceedings or through writ. While compensation is claimed against the State, writ remedy is used as a public law remedy and against a private person, one can take the civil law mechanism to claim compensation. This aspect was also not looked into in the *Bodhisattva Gautam* case.

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[196] Bodhisattva Gautam v. Subra Chakraborty, 1996 AIR 922, 1996 SCC (1) 490
[197] Id
[198] Rudul Shah v. State of Bihar, AIR 1983 SC 1086.
[199] Peoples' Union for Democratic Rights (through its Secretary & Anr.) v. Police Commissioner, Delhi Police H.Q.s. & Anr (1989) 4 SCC 730.
[200]Chairman, Railway Board & Ors. v. Chandrima Das and Ors, 2000 (2) SCC 465

In ***Parmanand Katara v. Union of India,***[201] the apex court elevated the right to medical aid as an essential element of Article 21. The writ petition was filed under Article 32 as a PIL against the significant number of accident cases neglected by the hospital authority in fear of the legal issues that may follow after such medicolegal cases. The question before the Court was whether the medical authority could provide adequate emergency treatment to the accident victims without complying with the cumbersome legal procedures and proceedings that may follow. The Court held that the State has a positive duty to preserve the life of the citizens under the Constitution. Further, this state obligation also extends to doctors in the Government hospitals to provide medical assistance. Though horizontality was not directly discussed in this case, it comes into the picture when the same obligation is cast on all the medical institutions and doctors to provide services to emergency patients without delay and preserve the lives of the citizens. Thus, the Judiciary has taken a horizontality approach concerning infringement of Article 21.

In ***Consumer Education and Research Centre v. Union of India,***[202] a writ petition under Article 32 was filed by an organization in the public interest addressing the rising occupational accidents, diseases and the deteriorating conditions of the workers. The petitioner sought the Court to issue directions to all industries to maintain proper health records and provide mandatory health insurance to the workers. It also sought directions to be issued against the authorities to form a committee to look into these matters and the appropriate government to extend the benefits of the Factories Act and other legislations to these workers.

Looking into the matter, the Court held that the right to the health of a worker is an integral element of the right to life under Article 21. The Court reading Article 21, along with Articles 39(c), 41 and 43 of the Constitution, held that the State and the industry, whether public or private, are responsible for providing all such facilities to safeguard the health, strength and vigor of the workmen during employment, leisure and after retirement.[203] The Court observed that in appropriate cases, the employer, whether it be a public authority, industry or even private person, is bound by the directions issued by the

[201] Parmanand Katara v. Union of India, 1989 (4) SCC 286

[202]Consumer Education and Research Centre v. Union of India, (1995) 3 SCC 42.

[203] Id

Court under Article 32. Thus, again, the Judiciary reflected a horizontal approach to enforce Article 21. Here, the Judiciary neglected the scope of Article 12.

Horizontality was applied in educational institution cases. Initially, in the case of the ***University of Madras v. Shanta Bhai***[204] applying the state action doctrine, the Court held that the university is not a State within Article 12 on the ground that they do not perform any government function even if they may be aided and maintained by the State. Later on, state-maintained educational institutions were considered State under Article 12.[205] The status of State maintained and aided educational institutions evolved in line with the evolution of state action doctrine through different tests. However, private institutions were left outside the State's regime under Article 12. These private educational institutions were later on amenable to writs under Article 226 through the public function test.[206] However, a change in this jurisprudence is evident after the case of ***Janet Jaya Paul v. SRM University***,[207]where the Court held that SRM University is a State under Article 12. The Court solely relied on the public function element of the educational institution and observed that it did all the functions similar to other universities covered under the UGC Act to categorize it under Article 12. After ***Unnikrishnan v. State of Andhra Pradesh***[208] ***, the*** right to primary education was read as a fundamental right under the right to life and later brought in as Article 21A.

Whether Article 21A mandate should be applied to all educational institutions was a frequent question raised before the Judiciary. This was reflected in the cases of ***T.M.A. Pai Foundation v. State of Karnataka*** [209] and ***P.A. Inamdar v. State of Maharashtra.***[210] In ***Unaided Private Schools of Rajasthan v. Union of India,***[211] the apex court discussed the scope and applicability of the Right to Education Act, 2009 and Article 21A on unaided

[204] University of Madras v. Shanta Bhai, AIR 1954 Mad 67
[205] *Ashalata d/o Baboolal* v. *M.B. Vikram University*, AIR 1961 MP 299*, Smt. Ena Ghosh* v. *State of West Bengal* AIR 1962 Cal 420, *Krishna Gopal Sharma* v. *Punjab University Through its Registrar* AIR 1966 P&H 34 and *B.W. Devadas* v. *Selection Committee, Karnataka Engineering College* AIR 1964 Mys 6
[206] Trehan & Pande, *Application of fundamental rights against Educational Institutions in India: Moving beyond the State Action Doctrine*, 4(4) Comparative Const. L. Administrative L. Quarterly 15 (2020).
[207]Janet Jaya Paul v. SRM University, 2015 (16) SCC 530
[208]Unnikrishnan v. State of Andhra Pradesh (1992) 3 SCC 666
[209]T.M.A. Pai Foundation v. State of Karnataka, (2002) 8 SCC 481
[210] P.A. Inamdar v. State of Maharashtra, (2005) 6 SCC 537
[211] Unaided Private Schools of Rajasthan v. Union of India (2012) 6 SCC

non-minority schools. The constitutionality of Section 12 of the Right of Children to Free and Compulsory Education Act, 2009 was challenged on the ground that it violated Articles 19(1)(g) and 30 of those who had established schools in the private sector.

The petitioner contended that constitutional obligation on the State could not be transferred to private educational institutions so as to abrogate Article 19(1)(g), Article 26(a), Article 29(1) and Article 30(1) of the Constitution. On the other hand, the respondent contended that the State should realize the object of the RTE Act and Article 21A even through state and private actors. Further, they submitted that under the RTE Act, the state obligation is passed on to private institutions based on the social inclusiveness principle. The majority held that S. 12 of RTE was only a reasonable restriction on Articles 19(1)(g) and 30 of the private educational institutions and held that it is applicable to all educational institutions, including State, aided or unaided institutions, minority and non-minority institutions. Thus, Article 21A was applied horizontally.

The dissenting judge, Justice Radhakrishnan, negated the respondent's contention and took a vertical approach. He observed that though many socio-economic goals are elevated to fundamental rights, Article 21A cast a positive obligation on the State to provide compulsory education and not on unaided minority and non-minority institutions. The private institution is cast with only a negative obligation not to interfere with the rights of the children. The Court further observed that when socio-economic goals are elevated to fundamental rights, such rights are available against the State and not private actors, like private schools, private hospitals etc., unless they get aid, grants or other concessions from the State. [212] He reiterated that the State cannot fix quotas or reservation policies in private, unaided educational institutions as it is a severe infringement of the rights and autonomy of private institutes.

However, there was a shift in this approach when the High Court of Kerala looked into the question of horizontality in the case of ***Sobha George Adolfus v. State of Kerala.***[213] In this case, the petitioner filed the petition challenging the denial of promotion of her grandson from 6th grade to 7th grade in a minority institution. The petitioner relied on the Non-

[212] Id
[213] Sobha George Adolfus v. State of Kerala**,** WP(C). No. 30712 of 2015 (L)

Detention Policy ("NDP") envisaged under Section 16 of the RTE Act to challenge the impugned denial of promotion. The Court observed that RTE is not applicable to minority institutions. At this outset, the Judiciary had two options: either viewing the non-detention provision as a statutory provision and not granting relief to the petitioner or viewing the statutory provision as a fundamental right guaranteed under Article 21 and providing relief. The Court here dealt with the question of whether fundamental rights can be enforced against a minority institution, which is a private actor. Taking into consideration various instances where the Judiciary has applied horizontality, the Court took the latter view and held that fundamental rights can be enforced horizontally against private minority institutions. The Court looked into S. 16 of RTE as an epitome of the best interest of the child. It held that denial of promotion up to the elementary school level is an infringement of the fundamental right of the child under Article 21. This is a perfect example of how the Court looked into the question of the enforcement of fundamental rights against private institutions through the statute.

Thus, the Judiciary reflected a horizontal approach in Sobha Adolfus's case, which is entirely different from the earlier vertical approach in the Unaided Private School's case. This itself shows that the Judiciary lacks clarity in the application of horizontality.

In ***R. Rajagopal v. State of Tamil Nadu***[214] , an accused called Auto Shanker, who was undergoing life imprisonment, wrote his autobiography with permission from the jail authority. In his autobiography, his relationship with some senior prison officers was revealed. He was convicted and punished for the death penalty. Before being hanged, he sent the book to his wife, which was then announced to be published by the petitioners. The prison authority sent letters to the petitioner alleging that such publication is against the prison rules and, therefore, not to be published.

Against this, a writ petition filed by the petitioner before the High Court claiming infringement of freedom of the press, speech and expression under Article 19(1)(a) was dismissed. Therefore, a writ petition is filed before the Supreme Court under Article 32. One of the crucial questions raised before the Court was whether a citizen of the country

[214] R. Rajagopal v. State of Tamil Nadu, (1994) 6 SCC 632.

can prevent another person from writing his autobiography. Here, the Court held that under the freedom of the press enshrined in Article 19 (1)(a), the petitioners could publish the autobiography based on material available in the public sphere. Also, it was observed that the right to privacy is an intrinsic element of the right to life under Article 21; such publications cannot invade the privacy of the officers and auto Shanker. The Court stated that the State and its officials can take action against such publication once it is published through the private law remedy of defamation and privacy. Thus, even after recognizing the right to freedom of speech and privacy, the Judiciary directed the parties to approach the private law remedy to enforce those rights, which is the right approach.

Another instance of a privacy dispute was with ***Justice KS. Puttuswamy (Retd.) v. Union of India.***[215] The constitutionality of the Aadhar Act was challenged on the grounds of invasion of citizens' privacy. Here, the Court discussed the scope of the right to privacy and its applicability in state and non-state actors. It was observed that the right to privacy is a facet of the right to life and personal liberty under Article 21. The majority held that the right to privacy cast both positive and negative obligations on the State. The negative obligation of the State is not to interfere in the private space of an individual, and the positive obligation is to control other non-state actors from abridging the right to privacy. Justice Sanjay Kishan Kaul observed that the right to privacy can be claimed against private and State entities.

Further, it was opined that in the recognition and enforcement of privacy rights against private entities, legislative intervention by the state is required. [216] Therefore, the State has to regulate the private actors. Thus, the right to privacy was applied horizontally to non-state actors in the form of the State's positive obligation.

Justice Chalameshwar took a very different approach in the privacy case, which I believe is the right approach. He observed that claims against privacy invasion can be made against State and non-state actors. Further, it was rightly observed that an interest may be recognized as a fundamental and common law right. The right to privacy can be a common law or statutory right as well as a fundamental right. Where the interference with a

[215] Justice KS. Puttuswamy (Retd.) v. Union of India, (2017) 10 SCC 1

[216] Id

recognized interest is by the State or any other entity recognized under Article 12, a claim for violating a fundamental right would lie. But, if an identical interference is made by a non-state actor, an action at common law would lie in an ordinary court.[217] Therefore, Justice Chalameshwar has tried to uphold the state action doctrine and the idea of verticality enshrined in Article 12 by suggesting two forums for infringement of the same right but by two different entities.

Another turning point in the Judiciary's journey of horizontality is the case of ***Kaushal Kishor v. State of UP***[218] , which is dealt with in detail below.

4.4. KAUSHAL KISHOR AND THE CURRENT DEBATE

The recent judgment of Apex Cout in ***Kaushal Kishor v. State of Uttar Pradesh***[219] has taken a new turn in the debate of horizontality. Here, a special leave petition and a writ petition were tagged together and brought before the Constitutional Bench. A writ petition was filed under Article 32 to monitor the investigation of a rape case and register a complaint against the then Minister for Urban Development of the Government of U.P. for making statements outrageous to the modesty of a rape victim. The SLP arose out of writ petitions dismissed by the Kerala High Court, which was filed in the public interest against the derogatory statements made by the then Electricity minister of Kerala. Their prayer was to issue a direction to the Chief Minister to make a code of conduct for the ministers and also to take action against the minister for his remarks.

The Court came up with five questions that were of academic interest. One of the crucial questions was whether the fundamental rights under Articles 19 and 21 could be claimed against private entities other than the State and its instrumentalities under Article 12. Another question was whether the State has a positive duty to protect the rights of the citizens under Article 21, even against the threat to their liberty by acts or omissions of another person or private agency.

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[217] Id
[218] *Supra* note 4
[219] Id

The main issue in the case was whether the right to freedom of speech could be restricted by another fundamental right, namely, the right to life and dignity of the victim. The Court viewed this matter as a conflict between two fundamental rights and Article 21 as an extra restriction on Article 19(1)(a). The Court held that the restrictions provided in Article 19(2) are exhaustive, and under the guise of conflicting fundamental rights or invoking other fundamental rights, additional restrictions cannot be imposed on Article 19(1)(a).[220]

The Court, at length, discussed the concept of horizontality applied in various countries like the USA, Ireland, South Africa, and the U.K. and compared it with the Indian context. The Court took a literal interpretation of Part III of the Constitution and suggested that there existed a dichotomy in Part III, rights that are addressed to the State and those not directly worded against the State. Therefore, the majority observed that those rights not explicitly addressed to the State can be enforced against non-state actors. That was a very illogical reasoning given by the Judiciary. They considered the statement of the minister inconsistent with the fundamental rights of the citizens as a constitutional tort. The majority in 4:1 held that Article 19 and Article 21 can be enforced against persons other than the State and its instrumentalities. On the question of invasion of personal liberty under Article 21, the Court held that the State has a positive duty to preserve Article 21 even from the non-state actors.

Justice Naga Ratna dissented from the view of the majority on horizontality, considering the following difficulties. Certain rights are recognized as fundamental rights as well as statutory rights. Therefore, two parallel avenues for settling the dispute and getting compensation are available. Taking in everything under writ jurisdiction will disregard the common law or statutory remedies available. It will contradict the precedents followed in cases like Zoroastrian Housing Corp. and P. D Shamdasani, which refused the horizontality approach. It will disregard the whole jurisprudential effort put in by the Judiciary to interpret Article 12, and the exhaustion of alternate remedies will result in dead letters. Also, the courts will have to look into disputed questions of fact, which are usually not looked into in writ matters.

[220] Id

Therefore, on these grounds, Justice Naga Ratna observed that Articles 19 and Article 21 cannot be applied horizontally. This is a somewhat consistent view of the Judiciary and reinforces the vertical approach enshrined in the Constitution.

Further, Justice Nagaratna reflected that if fundamental rights can be directly enforced on state and non-state actors without looking into their identity, then why did the constitution drafters spend time in drafting Article 12, and why did the Court spend all its time and effort in interpreting and widening the scope of Article 12. This approach will definitely devastate the whole concept of Constitutionalism and the basic structure of the Constitution, as well as narrow down the scope of individual autonomy.

The judgment was heavily criticized as being against the scheme of the Constitution and an unconstitutional informal constitutional change by the Judiciary.[221] Here, the Judiciary has completely deviated from the constitutional structure of Part III, enforceable against the State under Article 12. The majority view is rooted in new principles of law that are contrary to the original principles of the Constitution.

At this point, it is also relevant to discuss the recent cases filed against WhatsApp and Facebook, which are challenging their data-sharing agreements that invade the privacy of individuals. The verdict in Kaushal Kishor has an impact on the data protection cases. Data privacy violations can be addressed through statutory remedies under IPC, I.T. Act, New Data Protection Act etc., as well as fundamental right infringement under Article 21. Plainly going by Article 12, WhatsApp and Facebook are not amendable to the writ under Article 32 as they are not covered under the ambit of the State. Also, they are not private entities solely engaged in a public function. Therefore, Article 226 cannot be invoked. But, with the new track taken by the Judiciary in Kaushal Kishor, fundamental rights are directly enforced on private entities through a horizontal approach. Therefore, it has opened new debates.

221 Anujay Shrivastava, *Indian Supreme Court's Judgment on 'Horizontal Application' of Fundamental Rights: An 'Unconstitutional Informal Constitutional Change'?*, IACL-IADC Blog (June 22, 2024, 7.51 pm) https://blog-iacl-aidc.org/2023-posts/2023/1/31/indian-supreme-courts-judgment-on-horizontal-application-of-fundamental-rights-an-unconstitutional-informal-constitutional-change

4.5. CONCLUSION

Throughout this chapter, I have examined various cases in which horizontality has been applied to fundamental rights under Articles 14, 19, 21 and 21 A. From tracking these cases, it is evident that the judiciary has come far from the State Action doctrine instilled under Article 12 of the Constitution. It should also be pointed out that there is a significant disparity in the way different courts view fundamental rights and horizontality. In certain cases, private actions are taken by stretching "other authority" under Article 12. In other instances, certain rights are elevated as positive rights to cast a positive obligation on the state to regulate private actors or make laws in the private sphere. Similarly, in the latest case of Kaushal Kishor(supra), we can see a direct application of Article 32 to invoke writ jurisdiction and enforce fundamental rights against private actors. At this juncture, it is important to imbibe the words of Justice Seervai, "*The greatest danger in the administration of justice and constitutional interpretation arises from the genuine desire of judges to do justice in each case."*[222]

Currently, we are going through this great disaster because the Judiciary has routinely abandoned Article 12 while dealing with fundamental rights. Rather than looking into the identity of the actor and the nature of the function, the Judiciary has shifted to a right-based approach under which any Fundamental Rights violation is maintainable under Article 32. The reasons relied on by the Judiciary are also very illogical. The judiciary doesn't even discuss maintainability, as we saw in cases like *Bodhisatva(supra)* and many others. The judiciary blindly applies fundamental rights, which is destroying a good precedent system in India.

Also, under the name of Judicial activism, the judiciary is acting beyond its bounds. Even when an alternate remedy exists in statutory or common law, Article 32 is recklessly employed. Also, the alternate and broader route of Article 226 is not applied. Ideally, when private actions are directly challenged under Article 32, the court should primarily look into Article 12, and if the alleged party doesn't comply with Article 12, it should direct the

[222] Samarthnayar, *Ends without Means or Reasons: Charu Khurana v/s Union of India,* Legal service India (June 22, 2024, 7.51 pm) https://www.legalserviceindia.com/legal/article-2714-ends-without-means-or-reasons-charu-khurana-v-s-union-of-india.html

matter to the High Court for its jurisdiction under Article 226. But this is rarely done by the Apex Court. I even doubt that the judiciary has taken such a path to portray SC as proactive and dynamic and also to gain fame. But jurisprudentially, it is a wrong turn.

The jurisprudence behind part III itself is eroding in this circumstance because, firstly, the negative liberties have been elevated to the status of positive liberties on many occasions. Secondly, the thread of state action under Article 12, which is a mandatory element for invoking Article 32 jurisdiction, is relinquished.

Thirdly, the essence of Part III is to preserve a private sphere that is free from interference. By taking the route of horizontality, this essence itself is lost. Individual autonomy and liberty hold paramount positions in any country. Private choices should not be subjected to the constitutional limits set forth for state interventions. Private and State actors should be looked into through different prisms. Therefore, taking private actions under the writ petitions for violation of fundamental rights will destroy the whole structure of Part III. The judiciary has to take a consistent approach while dealing with the encroachment of fundamental rights by non-state actors rather than taking a case-by-case approach. From this chapter, it is clear that horizontality will have a direct impact on the concept of "state" under Article 12. It will be dead letters if we go this track. Rather, the right track is to invoke Article 226, which is much wider to take in private entities to an extent, as elaborated in the previous chapter.

CHAPTER 5

COMPARATIVE STUDY OF HORIZONTALITY APPROACH IN THE US, SOUTH AFRICA AND INDIA

5.1 INTRODUCTION

The scope and application of fundamental rights is a core issue discussed in the field of Constitutional law. The debate of verticality v/s horizontality has been a hot topic of discussion in comparative Constitutional law. Many countries applied these concepts at varying levels. Countries like the U.S. and India have taken the vertical approach firmly rooted in the "state action doctrine." However, trends in the U.S. are shifting from verticality to horizontality by expanding the state action. In countries like South Africa, Ireland and Canada, the Constitution has instilled the horizontal structure, and they have applied horizontality to varying degrees. In this chapter, the approach regarding the application of fundamental rights in the USA and South Africa is analyzed and distinguished. Also, a comparison is drawn with the Indian approach.

5.2 USA

U.S. Constitution put forth the traditional vertical approach by encapsulating the constitutional axiom of "state action," under which fundamental rights are applied against state actors and not against private actors. To understand why the vertical approach was enshrined in the American Bill of Rights, we should trace the history and constitutional background of the USA. The French and American revolutions paved the way for the Bill of Rights. Both of these revolutions marked the resistance of the working class against the bourgeoisie class. They were trying to erect a wall between the private sphere and state interference. The economic system revolved around feudalism and slavery. The Bill of Rights reflects the class interest, and its primary function was to limit state intervention and enhance liberalism and individualism.

5.2.1 STRUCTURE OF BILL OF RIGHTS

The genesis or roots of the Bill of Rights can be attributed to the Magna Carta, 1215, the English Bill of Rights, 1689, and Virginia's Declaration of Rights, 1776, drafted by George

Mason. The Bill of Rights also reflects the Lockean idea of rights. It portrays a social contract between the State and the citizens in the form of ten amendments to limit the State and preserve individual liberties.

The Bill of Rights was framed based on the vision and desire of the bourgeoisie class to have an unregulated economy free from state meddling. They were exclusively enforceable against the State. The drafters were not concerned if the State would do significantly less for the citizens but feared they might do too much.[223] Looking into the constitutional debates and preamble to the resolution for introducing the Bill of Rights, we can clearly affirm that the Bill of Rights was structured to limit the abuse of power by the governor general and Congress. [224] Initially, as proposed by James Madison, the Bill of Rights was not applicable to the states. However, in the 1860s, after the ratification of the Fourteenth Amendment, the Bill of Rights was extended to the state government.

The Bill of Rights is structured as negative rights against the State. The negative wording is visible in many provisions. For example, look into the due process clause and the non-establishment clause. These amendments primarily enumerate what the government cannot do or cast a negative obligation on the State not to do something, thereby protecting individuals from governmental overreach and ensuring their freedom from interference. There are no positive obligations requiring state action.

The Judiciary, in various cases, opined that the Bill of Rights is negative liberties and not positive liberties. In ***DeShaney v. Winnebago County Department of Social Services***,[225] a boy was assaulted by his father. This was addressed before the county's Department of Social Service, but they didn't take any action to take custody of the child. The issue was brought before the Supreme Court as a violation of the Due process clause under the Fourteenth Amendment. The Court clarified that the Fourteenth Amendment does not cast a duty on the State to protect individuals from private actions. It was emphasized that the due process clause under the Fourteenth Amendment sets limitations on the State's power

[223] David P. Currie, *Positive and Negative Constitutional Rights*, 53 University of Chicago Law Review 864 (1986).
[224] Id p-865
[225]DeShaney v. Winnebago County Department of Social Services, 489 U.S. 189 (1989)

to act and does not provide a protection of minimum safety and security against private actions.

Similarly, in ***Castle Rock v. Gonzales***, [226]there was a restraining order obtained by a lady against her estranged husband with respect to their child. The child was kidnapped and killed by the husband despite the restraining order. A petition was filed against the police authority for not enforcing the restraining order. The Supreme Court, negating the claim, held that the due process clause does not cast a positive right to government aid to protect life, liberty or property.

Similarly, in ***United States v. Reese,***[227] the apex court observed that the Fifteenth Amendment does not guarantee the right of suffrage for everyone; rather, it prohibits the State from building any barriers to exercising the right and giving preferences based on race, color, sex etc. There are many other instances where the Judiciary has reiterated that the Bill of Rights does not cast a positive obligation on the State.

5.2.2 THE STATE ACTION DOCTRINE AND ITS EXPANSION

The U.S. Constitution ushered in the state action doctrine. According to the state action doctrine, the Bill of Rights is enforceable only against state actors. The private actors fall outside the ambit of these constitutional norms. State action doctrine is enshrined in the U.S. Constitution to uphold private autonomy. The drafters believed that if the private actors were brought under the constitutional mandate, it would put an end to individual autonomy. For example, under the Constitutional mandate, Congress may not take into consideration a person's religion when entering into a contract. Still, private actors can look into religion when they enter into a contract. Similarly, the State cannot support a particular religion, but individuals can contribute to a church that is purely a private cation and not violative of the Bill of Rights.[228]

[226] Castle Rock v. Gonzales, 545 U.S. 748 (2005)
[227] *United States v. Reese,* 92 U. S. 214 .
[228] Lillian BeVier and John Harrison, *The State Action Principle and its Critics*,96(8) Virginia Law Review 1767, 1769 (2010).

The 14th Amendment instilled the state action doctrine. In ***Virginia v Rives***,[229]the Supreme Court observed that the 14th Amendment applies only to "state action" and has no effect on private actions. After that, in ***Exparte, Virginia,***[230] the petitioner, a county court Judge, was charged under the Civil Rights Act of 1875 for refusing to admit a black American as his clerk. Under the Act, qualified citizens should not be disqualified based on caste, religion, color, sex etc. The petitioner filed the writ of Habeas Corpus against this action, claiming that such a provision of the Civil Rights Act is unconstitutional. The Court emphasized that a state acts through its legislative, executive and judicial organs, and no agency, officers or agents who are cast with such power shall deny the equal protection clause to the citizens and thereby uphold the constitutionality of the Act.

The state action doctrine was again reiterated in the ***Civil Rights case***.[231] This was a case initiated by Black Americans against the practice of "white-only" facilities in theaters, hotels, and transit companies. During the reconstruction period, Congress passed the Civil Rights Act of 1875, which attempted to address the racial discrimination deeply rooted in the U.S. The statute gave everyone access to public places like theatres, transportation, accommodation centers, etc., regardless of race and color. The business owners challenged the above Act in the civil rights case. Five lower court cases, *United States v. Stanley*, *United States v. Ryan*, *United States v. Nichols*, *United States v. Singleton*, and *Robinson et al. v. Memphis & Charleston R.R. Co.,* were combined and heard by the Supreme Court. The majority held that the 13th and 14th Amendments cannot have a broader scope to interfere in private activities even if there is explicit discrimination, and Congress cannot outlaw such private acts that are discriminatory under S.5 of the Fourteenth Amendment.

Initially, the state action doctrine was confined only to the Fourteenth Amendment. Later on, however, it spread explicitly upon all the amendments. One instance is ***James v. Bowman***, [232] where the respondent was charged under state law for bribing and intimidating certain persons from casting their votes in the 56th Congress election. The

[229] Virginia v Rives, 100U.S. 313(1879).
[230] Exparte Virginia, 100 U.S. 339 (1879).
[231] Civil Rights cases, 109 U.S. 3 (1883).
[232]James v. Bowman, 190 U.S. 127 (1903).

Court echoed that the Fifteenth Amendment solely questions the State's actions and does not contemplate wrongful acts of private individuals.

Similarly, in ***Parker v. Brown,***[233] a state agricultural proration program was challenged as violative of the Antitrust laws, which aimed at prohibiting monopolies and regulating free and fair competition in the market and contended that such power of the State is not protected under the commercial clause. The Court held that the state action was protected under the commerce clause. The state action doctrine was vividly discussed and reinforced.

Another landmark judgment that instilled the state action doctrine was ***Shelley v. Kraemer.***[234] Here, the Supreme Court held that a racially discriminatory covenant is not violative of the Fourteenth Amendment, but enforcement of such covenant by the state court was held unconstitutional. Here, the people belonging to the Caucasian race jointly entered into a covenant in 1911 that restricted the transfer of their property to people belonging to other races for fifty years. In 1945, Shelly and his family, who belonged to the African-American race, purchased one of the properties without knowing it. One of the neighbors, Kraemer, filed a suit to enforce the covenant and challenged the purchase. The Court clearly appreciated the private sphere and its autonomy; at the same time, the Court limited the enforcement of private discrimination by the Judiciary, which is a state actor. This judgment made a significant impact on the residential segregation practiced by white Americans. Thus, the approach of the Court was purely vertical to limit the actions of legislative, executive and judicial organs of the State against violation of the Bill of Rights. However, it had an indirect impact on private actions, as if any private actions, if tried to be enforced by the Judiciary, take the color of state action. Thus, it became easy to change private actions into state actions.

Further, the scope of state action with respect to free speech under the 1st Amendment is illustrated in ***Herbet v. Lando.***[235] Here, the petitioner sued the respondent, editor of a channel, for defamation through television documentaries and articles. The Supreme Court held that the 21st Amendment does not protect the editorial process to escape the charges

[233] Parker v. Brown 317 U.S. 341 (U.S. 1943).
[234] Shelley v. Kraemer**, 334 U.S. 1 (1948).**
[235] Herbert v. Lando, 441 U.S. 153 (1979).

of libel. The majority negated the respondent's contention that libel cases would have a chilling effect on the freedom of the press and editorial process. The Court opined that the editors should take extra care. The dissenting judges, on the other hand, suggested that more protection should be given to the editorial process. This case portrays how the Court viewed freedom of speech narrowly and refused to give protection in case of private disputes like defamation.

In ***Lugar v. Edmonson Oil Co***.,[236] the Court applied the state action doctrine while examining the application of the due process clause on the prejudgment attachment of property of the petitioner by the respondent Edmond Oil Ltd., which is a private entity. The respondent filed a petition against the petitioner in the Virginia state court and applied for a prejudgment attachment on the grounds that the petitioner may dispose of the property to defraud his creditors. The clerk of state court approved it, and the County sheriff enforced it. Later, at the hearing, the trial court dismissed the attachment. The petitioner, at this stage, filed a case before the district court against the illegal attachment undertaken by the respondent along with officers of the State on the grounds of violation of the due process clause. Here, the Court observed that the Fourteenth Amendment can be applied only against state action. Further, it was emphasized that the state action doctrine conserves the sphere of individual freedom by limiting the reach of federal law and federal judicial power.[237]

Over the years, the state action doctrine has been largely criticized for its notion that private and State actions can be perfectly distinguished. The criticism becomes more relevant in the contemporary period, where the private-public divide is getting blurred. A pure state action theory indeed fails to understand that private actions can sometimes be closely linked or supported by state actors, and they are as powerful as state actors in limiting the liberty of individuals.[238] These thoughts triggered changes in the judicial decisions as well. Consequently, the Judiciary began to expand the state action doctrine in the 1940s to include even private actions in exceptional situations.

[236] Lugar v. Edmonson Oil Co., 457 U.S. 922 (1982).
[237] Id
[238] supra note 228

5.2.3 EMBRACING PRIVATE ACTIONS UNDER THE STATE ACTION DOCTRINE

The trail in the USA is similar to that in India. It has not mechanically interpreted the state action doctrine. The courts tried to look into private actions as a camouflage of state action on various occasions. Private actions were considered state action when they perform a public function, when there is a close nexus between the private action and the State, when active state involvement is involved or when there is significant state encouragement either covertly or overtly over the private actions.

The ambit of the State widened mainly to eliminate the racial discrimination and segregation persistent in the private sphere in the USA supported by the State. After the decision in ***Plessy v. Ferguson***,[239] the separate but equal doctrine became instilled in American jurisprudence, and its aftermath was the legitimization of many of the Jim Crow laws in the U.S. at that time until its overruling in ***Brown v. Board of Education.***[240]

The state action doctrine significantly evolved after the 1940s. After Brown's judgment, private discrimination became the central point of discussion in the Judiciary. They began to widen the thirteenth and fourteenth Amendments to embrace private entities. For example, In ***Burton v. Wilmington Parking Authority,***[241] an African American was denied service in a coffee shop that was functioning inside the garage space of Wilmington Parking Authority. Burton filed an injunction against the shop for functioning in a discriminatory and segregated manner, violating the Fourteenth Amendment. Here, the majority opined that the restaurant was closely linked to the State as it was accepting benefits from the authority. The parking authority and the restaurant worked in an integrated manner with respect to finance and functioning. Therefore, the Court held private discrimination as a state action and violation of the Fourteenth Amendment.

In ***Cooper v Aaron,***[242] upholding Brown's judgment, the Court held that schools should take steps to desegregate their schools in line with the Supreme Court judgment, and the

[239] Plessy v. Ferguson, 163 U.S. 537 (1896).
[240] Brown v. Board of Education, 347 U.S. 483 (1954).
[241] Burton v. Wilmington Parking Auth., 365 U.S. 715 (1961).
[242] Cooper v Aaron, 1958, 358 U.S. 14.

State cannot nullify it. Here, the Court observed that any acts performed by a private actor with the participation or involvement through any management, arrangement finance or property may also constitute state action.[243] In ***Peterson v City of Greenville, S.C.,***[244] a group of blacks was convicted for trespassing at a private restaurant that provided segregated facilities to black Americans and white Americans. The Court took a very prospective approach. Here, the restriction brought in by the private restaurant owner was elevated to state action as it is backed by an ordinance passed by the city authority, which is a state agent, that required the restaurants to operate on a segregation basis. Here, the private actor is not left with any choice but to follow the authority's explicit ordinance of segregation, which was interpreted as state action.

In ***Jackson v Metropolitan Edison Co***.,[245] the Court held that a private action could be treated as a state action if it is established that it has a close nexus to the state action.[246] In ***Blum v Paretsky,***[247] the Court took the view that if there is enough coercive force or encouragement from the State in a particular private action, it is deemed to be a state action.

In ***Smith v. Allwright,***[248] private actors performing a government function were construed as state action, which is similar to the Indian functional test. Also, private actions with the active involvement of state actors were qualified as state actions.

Further, by analyzing various cases, we can see that the Supreme Court in the U.S. also practiced the instrumentality or agency test to define the boundaries of the State with respect to various corporations. For example, the Inland Waterways Corporation was interpreted as State in ***Inland Waterways Corp.*** **v.** ***Young,*** [249]and in ***Lebron v. National Railroad Passengers Corp.,***[250] the Court held that Amtrak, a national railway passenger

[243] Danwood Mzikenge Chirwa, *The Horizontal Application of Constitutional Rights in a Comparative Perspective*, 10 LAW DEMOCRACY & DEV. 21 (2006).
[244] Peterson v City of Greenville, 373 U.S. 244 (1963).
[245] 419 U.S. 345 (1974).
[246] Danwood Mzikenge, *Supra* note 243.
[247] Blum v Paretsky, 457 U.S. 991 (1982).

[248] Smith v. Allwright**,** 457 U.S. 991 (1982)
[249]Inland *Waterways Corp. v. Young,* 309 U. S. 517 (1940)
250 Lebron v. National Railroad Passenger Corporation, 513 U.S. 374 (1995)

corporation formed by a statute receiving substantial funds from the State constituted State for individual rights violation.

Thus, starting with the public function test, followed by the close nexus test and instrumentality or agency test, the Judiciary has widened the scope of the State to include private actions in exceptional cases. However, the Court strictly refused to enforce the Bill of Rights in cases where there was no state action. The perfect example is ***De Shaney v. Winnebago County Department of Social Services,***[251] in which the Judiciary clearly emphasized that the death of a boy by his father's abuse cannot be attributed to state action. Under the ambit of the right to life, state inaction to protect life cannot be taken in.

Similarly, in ***Columbia Broadcasting System v. Democratic National Committee,***[252] the radio station's policy that refused air time to third parties who aired controversial issues was challenged. The question raised was whether the radio station that was working under the license granted by the State to broadcast over airwaves in the public domain should abide by the First Amendment when it sells air time to third parties. Here, the Court did not equate the broadcasting company with the State and held that their policy did not violate 1st Amendment.

Further, purely private action was challenged in ***Flagg Brothers Inc. v. Brooks;*** here, the respondent was evicted from her house, and her belongings were kept in the petitioner's storage. Even after notice of due payments, the respondent refused to pay the charges. Against the threat of the sale of her possessions, the respondent filed a suit for damages, injunction and also a declaration on the ground that such a sale violated the Due Process and Equal Protection Clauses enshrined under the Fourteenth Amendment. The Court looked into whether Flagg Brother's action could be ascribed as state action. The Court held that it is purely a private action and cannot be attributed to the State. Therefore, the claim against the Fourteenth Amendment violation did not stand.

Therefore, the track of cases shows that initially, the Judiciary took a strict and rigid vertical approach to enforcing the Bill of Rights against the legislative, executive and judicial

[251] *Supra* note 225
[252] CBS v. Democratic Nat'l Committee, 412 U.S. 94 (1973)

branches of the State. But later on, this verticality approach was loosened by bringing in more entities under the state action doctrine. However, only private actions that have the color of state action or close nexus with state or private acts done by stepping into the shoes of the State were incorporated under the ambit of the Bill of Rights. Purely private actions were always outside the scope of the Bill of Rights. However, a shift from the pure vertical approach to absorb tincts of horizontality is visible from the way the Judiciary understood and interpreted the Bill of Rights in the case of Shelley and ***New York Times v. Sullivan***.[253] The aftermath of Shelly was that private discrimination could be made state discrimination by simply filing a suit against it.[254] However, Shelley was not exploited in the subsequent cases, and it shut the backdoor entry of private actions into state actions.

5.3 SOUTH AFRICA

The History of South Africa has played a vital role in its Constitutional Structure. It has ingrained the essence of transformative Constitutionalism to rectify the past mistakes of the apartheid era of institutionalized discrimination. As defined by Karle Klare, "*transformative constitutionalism is a long-term project of constitutional enactment, interpretation, and enforcement committed to transforming a country's political and social institutions and power relationships in a democratic, participatory and egalitarian direction."* [255]

It envisages a transformative vision rather than the old constitutions based on classic liberalism.[256] Quoting the words of Justice Kriegler, "The fundamental rights and freedoms guaranteed under the South African Constitution have a depth of meaning not echoed in other constitutions around the world."[257] Therefore, the South African Constitution depicts a pure horizontal approach guaranteeing individual rights against both private and State actions.

5.3.1 THE STRUCTURE OF THE BILL OF RIGHTS

[253] New York Times v. Sullivan, 376 U.S. 254 (1964)
[254] Terri Peretti, *Constructing the State Action Doctrine, 1940-1990,* 35(2) Law & Social Inquiry 273 (2010)
[255] Karl E. Klare, *Legal Culture and Transformative Constitutionalism,* 14 S. AFR. J. ON HUM. RTS. 146 (1998).
[256] Id
[257] Du Plessis v De Klerk, 1996 (5) BCLR 658 (CC)

The idea of transformative Constitutionalism is reflected in the structure of the Bill of Rights. Throughout the drafting process, negotiations and discussions have taken place between people belonging to two ideologies. i.e., the libertarians and liberationist egalitarians. Libertarianism believed in the classical liberalism concepts that were perpetuated during the Enlightenment period and argued for a bill of rights, focusing on individual liberty as a core value rather than equality.[258] On the other hand, liberationists took an egalitarian approach to pave for equality in resources and opportunities and saw the Bill of Rights as a vehicle for socio-economic upliftment.[259] These views had a significant impact on the structure of the Bill of Rights.

The Bill of Rights is structured as positive rights, creating a positive obligation on the State to protect these rights. S.7(2) is the epitome of these positive rights, imposing a duty on the State to protect the Bill of Rights of the citizens. S. 7 specifically attached four duties to the State, i.e., "to respect, protect, promote and fulfill the bill of rights," which comparatively cast a significant burden on the State to be an active guardian rather than a passive spectator.

The Judiciary, in various instances, recognized this positive role of the State. For example, in ***Carmichele v Minister of Safety and Security and Another***[260], an accused was released by the authority and during that period, he assaulted another person. The petitioner approached the Constitutional Court, addressing the State's failure to protect the life of the petitioner and similarly failing to fulfill its positive obligation to uphold the spirit, purport and object of the Bill of Rights. The Court heeded the petitioner's contention and observed that under the Constitution, the State is cast with both the duty not to interfere in the rights of the citizens as well as to provide appropriate protection to everyone through laws and structures designed to afford such protection.

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[258] Lourens M. Du Plessis, *The Genesis of the Provisions Concerned with the Application and Interpretation of the Chapter on Fundamental Rights in South Africa's Transitional Constitution*, J. S. AFR. L. 706, 708 (1994).
[259] Id
[260] Carmichele v Minister of Safety and Security and Another, 2001 (10) BCLR 995 (CC)

Further, in ***President of the Republic of South Africa & Another v Modderklip Boerdery (Pty) Ltd***, [261]about 400 people were evicted from municipal land, and these evicted people took shelter in an adjacent private farm owned by the respondent in 2000. In April 2001, an eviction order was issued, but the occupiers had no place to go, and they failed to comply. The number of occupiers continued to increase, and when the owner approached the police force, they asked for about 1.8 million rands to evict the occupiers, which was far higher than the actual worth of the land. The issue raised was whether the right to protection from arbitrary deprivation of property and uncompensated expropriation of property is breached when the State remains passive in the face of the massive invasion of the respondent's farm. The failure of the State to provide alternate rehabilitation to the occupiers and enforce the rights of the private land owner under S. 25 and 26 were addressed. The Court held that S. 25 and 26 were violated, and the State failed to fulfill its positive obligation to assist the landowner in claiming his land as well as provide alternate accommodation to the occupiers. Thus, this case also demonstrates how the positive rights under the Constitution are interpreted by the Court to enforce these duties.

Further, the Bill of Rights is enforceable against both state action and private action. Regardless of the identity of the infringer, the Bill of Rights is enforceable, and constitutional norms will radiate even in private actions. This radiation of constitutional norms and values on the private sphere is called the horizontal application of the Bill of Rights. Horizontality in South Africa is explicitly reflected in the textual provisions of the Constitution.[262] Section 8 of the Constitution clearly mentions the application of the Bill of Rights, under which S. 8(1) mentions the application of the Bill of Rights over legislative, executive and judicial organs that cover state actions. Further, S. 8(2) mentions its application to all natural and juristic persons, which clearly implies private actions.

In the interim Constitution, such a provision was absent, and its aftermath was reflected in ***De Klerk & another v Du Plessis & others,***[263] where the Court held that the Bill of Rights was not applicable against private actions. However, after the final Constitution, this

[261]President of the Republic of South Africa & Another v Modderklip Boerdery (Pty) Ltd, 2005 (5) SA 3 (CC)

[262] Stephen Gardbaum, *The "Horizontal Effect" of Constitutional Rights*,Vol. 102, No. 3, MCH 387, 401(2003).

[263]De Klerk & another v Du Plessis & others, 1995 (2) SA 40 (T)

position significantly changed, and under the new structure of the Bill of Rights, both private and State action was addressed, regardless of their identity. Thus, the positive tone of the Bill of Rights and the broad scope of addressees mentioned in S. 8 clearly attributed to the horizontal application of fundamental rights.

5.3.2 HORIZONTALITY UNDER SOUTH AFRICAN CONSTITUTION

South African Constitution, being one of the newest constitutions in the world, is a refined version of many other constitutions. The initial interim Constitution reflected the traditional orthodox approach of Constitutionalism, which was confined to state actions, and horizontal application was not appreciated.[264] Thus, the Judiciary was confused about deciding the extent to which the Bill of Rights could be invoked against private actors. In cases like ***Mandela v Felati***,[265] the Court accepted the horizontal application of the Bill of Rights. In cases like ***De Klerk & another v Du Plessis(supra),*** the Court held that only a vertical approach can be taken. In ***Motala & another v University of Natal***,[266] the Court took a middle approach that while some rights may be applied vertically, others can be applied horizontally. Finally, in ***Potgieter en "nander v Kilian***[267], the Court observed that if the Parliament had the intent to apply the Bill of Rights in private actions, it would have explicitly mentioned it, and such omission is not accidental but deliberate.

But in ***Du Plessis v. De Clarke,***[268]the majority took a vertical approach and observed that *"though the interim constitution didn't provide for horizontal application of the bill of rights, the values inscribed in chapter III will permeate in common law in all aspects including the private litigation."*[269] However, the dissenting judge, Justice Kriegler, took a view similar to the U.S. decision in Shelly v. Kraemer, holding that private entities are at liberty to do their private affairs as they wish as far as the fundamental rights are concerned. Further, he illustrated that a landlord is free to refuse to let a flat be left to a person based

[264] Debra Smidt, *Horizontal Rights*, 4 JUTA's BUS. L. 153 (1996).
[265] Mandela v Felati, 1995 (1) SA251 (W).
[266]Motala & another v University of Natal, 1995 (3) BCLR 374 (D).
[267]Potgieter en "nander v Kilian, 1996 (2) SA 27 (N)
[268] Du Plessis v. De Clarke ,1996 (3) SA 850 (CC).
[269] Id

on race and gender. A white bigot can refuse to sell a property to a person of color, and a social club may restrict entry to blackball Jews, Catholics, Afrikaners or anyone he wishes. Further, an employee can discriminate based on race, sex etc.; a church may close its doors to mourners of a particular color or class. But none of them can invoke the law to enforce or protect their bigotry.[270] The dissenting opinion given by Kriegler J. became the subject matter of a lot of academic debate. Justice Kriegler tried to settle the verticality versus horizontality debate. He said that Chapter 3 rights do not operate only against the State but also horizontally as between individuals where Statutes are involved. Thus, the majority took a vertical approach, and the dissenting judge took a horizontal approach.

All these confusions were cleared when the draft of the final Constitution was structured in 1996, which incorporated the application of the Bill of Rights on all natural and juristic persons regardless of the state action concept.

The final Constitution of South Africa has incorporated horizontality in Section 8. Other provisions like S. 26(3) providing for the right not to be evicted, S. 27(3) providing the right not to be refused emergency medical treatment, the rights of prisoners to adequate nutrition and medical treatment under S. 35(2) and rights of children to essential nutrition, shelter, primary health care and social services under S. 28 also reflect horizontality. S. 29(2) requires courts to interpret legislation or develop the common law in line with the general spirit, purport and objects of the Bill of Rights, which can be looked into as indirect horizontality or constitutionalizing the common law.

After the Final Constitution was adopted and its effective enforcement on February 4, 1997, the first case that raised the horizontality issue was ***Khumalo vs. Holomisa.***[271] In this case, Khulamo, the plaintiff, sued a newspaper for publishing a defamatory article against him. The editor of the newspaper, who was against this defamation charge, contended that the defamation law is unconstitutional as it deprives a person of freedom of speech. When the matter came before the Supreme Court, the Court faced the issue of balancing two conflicting rights: the right to dignity and reputation of one person versus freedom of speech of another. Here, the Court held that the defamation law is constitutional and

[270] Id
[271] Khumalo vs. Holomisa. 2002 (5) SA 401 (CC)

consistent with the Bill of Rights. The takeaway from the judgment is that, unusually, in a private dispute, the S. 16 constitutional right was utilized. The Court emphasized that under the current trend of potential invasion of constitutional rights by State as well as private actors, freedom of speech should be applied horizontally as contemplated by section 8(2) of the Constitution, and common law should develop in the manner contemplated by section 8(3) of the Constitution. This was very similar to the case of the New York Times in the U.S. Therefore while dealing with Khumalo,the Constitutional Court of South Africa applied the Final Constitution, which had come into force then.

The horizontal effect was taken to another extreme by the Constitutional Court of South Africa in ***Governing Body of the Juma Musjid Primary School & Others vs. Essay N.O. and Others,***[272] wherein it was held that an eviction order obtained by the owner of a private land on which a public school was located, could not be enforced as it would impact the students' right to primary education and the best interests of the child under S. 28 and 29 of the South African Constitution. The Court held that a private landowner and non-state actor has a Constitutional obligation not to impair the right to primary education under S. 29 of the Constitution. The above examples are merely illustrative. The track taken by the Court in South Africa is consistent and has always echoed horizontality.

5.4 DRAWING A COMPARISON WITH INDIAN APPROACH

Throughout the previous chapters, I have explained how fundamental rights have been incorporated into the Indian Constitution as negative rights based on liberalist ideas of the Western revolution. The essence of Part III can be interpreted by looking at the American Bill of Rights, as the Indian fundamental rights are just a disguised version of the U.S. Bill of Rights.

Further, it envisages a vertical approach firmly bound to the state action doctrine. The state action doctrine has been textualized in the Indian Constitution under Article 12. The very object of defining the State was upholding Constitutionalism or limiting the State's action over the private sphere. Through various judgments, the Court has widened the ambit of

[272] Governing Body of the Juma Musjid Primary School & Others vs. Essay N.O. and Others (CCT 29/10) [2011] ZACC 13

the State and adapted to the contemporary needs to take in even private actors that are connected to the State.

Initially, it was in the case of the ***University of Madras v. Shanta Bai,***[273] where the Court tried to define the scope of the State under the principle of Ejusdem Generis. Later on, the instrumentality or agency test was applied, as emphasized in ***Sukhdev Singh v. Bhagatram.***[274]Instrumentality tests were improvised in later cases like ***R.D Reddy v. International Airport Authority of India and others,***[275] ***Sabhajit Tewary v. Union of India***[276] and ***Ajay Hasia v. Khalid Mujib.***[277] Then, through the deep and pervasive control test in ***Pradeep Kumar Biswas v. Indian Institute of Chemical Biology.***[278]

Looking into the evolution of state action doctrine in India, we can clearly see its resemblance to the track taken by the Judiciary in the U.S. Further, the entry of private actions is very similar. Under the tag of private parties doing public functions, even private entities are incorporated in India. This is somewhat similar to the U.S. approach, and purely private actions were not enforced against fundamental rights violations. Just what we saw in cases like ***Zoroastrian Cooperative Housing Society Ltd v. District Registrar Cooperative Societies and others,***[279] ***P.D. Shamdasani v. Central Bank of India***[280] and ***Vidya Varma v. Dr. Shiv Narain Varma.***[281]

But lately, the Court has taken horizontality through different tracks in India. Firstly, private entities were taken in through the widened definition of State under Article 12. Secondly, it casts a positive obligation on the State to regulate private actions, as we illustrated in ***Bandhu Mukti Morcha v. Union of India***[282] and many other cases in Chapter IV. Thirdly, through private laws or statutes, the Court enforces fundamental rights on private actors,

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[273] The University of Madras v. Shantabai, AIR 1954 Mad 67.
[274] Sukhdev Singh v. Bhagatram, (1975) 1 SCC 421.
[275] Ramana Dayaram Shetty v. International Airport Authority of India, (1979) 3 SCC 489.
[276] Sabhajit Tewary v. Union of India, 1975 AIR 1329.
[277] Ajay Hasia v. Khalid Mujib, (1981) 1 SCC 722.
[278] Pradeep Kumar Biswas v. Indian Institute of Chemical Biology, (2002) 5 SCC 111.
[279] Zoroastrian Cooperative Housing Society Ltd v. District Registrar Cooperative Societies and others, 2005 (5) SCC 632.
[280] P.D. Shamdasani v. Central Bank of India, 1952 AIR 59.
[281] Vidya Varma v. Dr. Shiv Narain Varma, AIR 1956 SC 108.
[282] Bandhu Mukti Morcha v. Union of India, (1991) 4 SCC 177.

which is an indirect application of horizontality; fourthly, direct horizontality was applied to elevate directive principles to the position of fundamental rights and are enforced through the state and non-state actors. On some occasions, the Judiciary doesn't even look into the identity of the actor and bluntly takes a horizontal approach.

Thus, tracking through different cases, we can see a shift in the Indian traditional vertical approach to the horizontality approach, which is way far different from the track taken by other countries like the USA and South Africa.

5.5 CONCLUSION

On a comparative note, we can say that horizontality differs based on a country's internal structure and ideologies.[283] Comparing the U.S., South Africa, and India, the primary objective of the Bill of Rights and the structure incorporated in these countries are far different. India and the U.S. followed a liberalist approach and structured it as a negative right. On the other hand, South Africa has structured the Bill of Rights as positive rights based on an egalitarian liberationist approach, which makes it more suitable or adaptable for a horizontal approach.

Again, the text of the Indian and U.S. constitutions has specifically used the word "state" throughout the Articles to bind only state actions. The definition of State under Article 12 of the Indian Constitution further makes the vertical approach more rigid. State action doctrine was enshrined in these constitutions expressly to limit state intervention in the private sphere. It ingrains Constitutionalism. Accordingly, it aims to maximize the autonomy and freedom of individuals in the private sphere.

On the other hand, the text in the South African Constitution, specifically S. 8, provides for a combined approach, taking in both State and private actions under the grab of the Bill of Rights. It reflects transformative Constitutionalism. The history of human rights movements in South Africa justifies the reason why the Bill of Rights has both vertical and horizontal operations. Thus, the constitutional text of the U.S. and India clearly supports a vertical approach, and South Africa supports a horizontal approach.

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[283] Mark Tushnet, *The issue of state action/horizontal effect in comparative constitutional law,* 1(1) I*nternational Journal of Constitutional Law,* 79(2003)

The difficulty in determining if horizontality or verticality should be applied also depends on the judicial structure and the role of the Court in different countries. In India, initially, the Judiciary had a sense of restraint, but now the Judiciary is highly motivated towards activism, and thereby, it has overtaken the role of other organs. The Judiciary has moved away from the initial textual interpretation, and now, it is adopting progressive interpretations that are beyond the lines of the Constitution. Thereby, the Judiciary has immense discretion. In this scenario, giving more power to the Judiciary to apply fundamental rights horizontally can result in grave danger, as witnessed in *Kaushal Kishor's judgment*.

The position is different in the U.S. as they strongly abide by the precedential system, and rarely does the Judiciary take an approach different from the established ratios. This is clearly evident when looking into various cases in this chapter. Further, in South Africa, the text of the Constitution is pretty much clear, and there is not much penumbra to be filled in by the Judiciary. Therefore, the element of subjectivity is very limited. Further, the Judiciary is also included under the ambit of State in both the U.S. and South Africa, which makes it possible to enforce the bill of rights against the Judiciary. However, in India, only administrative activities of the Judiciary are incorporated under the state definition; thus, the violation of fundamental rights by the Judiciary cannot be addressed. Thus, the Judiciary in India is a double-edged blade with huge powers.

From the above analysis, we can conclude that the USA and South Africa are opposite in the way they structured the Bill of Rights, interpret the Bill of Rights and look into private actors. Indian Judiciary has traditionally followed the U.S. approach, and it has shown a significant shift from this track recently towards the South African approach, which is inconsistent with the inbuilt constitutional structure and jurisprudence. The state action doctrine refined and evolved throughout the decade will become toothless with such a sudden shift in the judicial approach. Moreover, the Judiciary is not the authority to determine the enforcement of fundamental rights application. If any changes need to be made to accommodate new power centers other than the State, the legislature should make such accommodations.

Further, both the U.S. and South African approach have their own demerits as they represent extreme ends in the horizontality/Verticality debate. Therefore, it is always good to take a middle ground in the debate of horizontality versus horizontality. In India, this middle road is to remold the state action doctrine compatible enough to take in more power centers other than the traditional power centers.

The ultimate question is that, with the philosophical shift in the function of the State, the concept of fundamental rights also shifts. From the above discussion, it is clear that invoking fundamental rights in private affairs will destroy individual choice and identity. Thus, a purely horizontal application of fundamental rights like South Africa is not compatible with the values that are enshrined in the Indian Constitution. Rather, A pure vertical approach also has its shortcomings. The most appropriate is to stick to the state action doctrine, and adaptations should be made to the state action doctrine to take in more entities and more functions under its grasp, just like the U.S. approach.

CHAPTER 6

CONCLUSION AND WAY FORWARD

6.1 SUMMARY

The object of the Constitution is to provide maximum protection of individual rights from the State or limit the State's action over individual spheres of liberty. The text of the Indian Constitution envisages enforcement of fundamental rights against state actors and thereby upholds this doctrine of limited state action. This is evident from the whole structure of Part III. The concept of "State" is defined in Article 12 only for the purpose of fundamental rights enforcement. Further, Article 13 provides a definition of law that further suggests that all activities of the State can be restricted. Where any action of "the State," be it a law or executive action, does contravene any such right, it is the Judiciary that has been constitutionally obligated to declare such a law or executive action as invalid.[284]

To quote the words of Dr. B. R Ambedkar,

"The object of Fundamental Rights is twofold. First, every citizen must be in a position to claim these rights. Secondly, they must be binding upon every authority which has got either the power to make laws or the power to have discretion vested in it."[285]

Therefore, it is clear that Fundamental rights were modeled to protect the core rights from state intervention because, during that time, the ultimate power center was the State. I have vividly explained the concept of Constitutionalism or limited state action, which is the essence of Part III of the Constitution in previous chapters.

But with the advent of time, there has been a shift in these power centers, and it has been a persistent question whether traditional state-centered understandings of constitutional law should be supplemented or supplanted by Constitutionalism beyond the State.[286] Private

[284] India Const. Art. 13.
[285] Rajasthan SEB v. Mohan Lal, (1967) 3 SCR 377
[286] Gavin W. Anderson, *beyond 'Constitutionalism Beyond the State',* Vol. 39, No. 3 Journal of Law and Society 359(2012)

actors have evolved and exercise huge powers in private spheres. They perform many of the traditional governmental functions, and there are close financial, functional, and managerial relations between the State and these private actors. Thus, the traditional state-centric approach of fundamental rights is vehemently criticized.

The Judiciary initially began to widen the concept of the State to take in more entities and more functions within its ambit through various tests, from the ejusdem generis test to the agency test. The Judiciary also tried to take private actions under the public function test. Therefore, the Indian Judiciary followed a diluted version of state action doctrine or a loosened version of verticality.

However, all over the world, we can see new approaches adopted by the Judiciary to rein in the private invasions of constitutional rights. In this work, I have vividly examined the approaches of the South African Court and the U.S. Supreme Court regarding the enforcement of the Bill of Rights. From that, I believe that the South African approach is not fully adaptable in India as the structure of the Bill of Rights, private law remedies, the role of the Judiciary, history, and culture is far different from ours. It is, therefore, better to take a track parallel to the U.S. as we have a lot of similar things, including the structure of the Bill of Rights, State action doctrine and the idea of liberalism.

The Judiciary has taken up the role of determining the answer to this question, but that, too, doesn't have much clarity. In Chapter 4, I have elucidated the shift of the Judiciary from the vertical approach to horizontal to enforce fundamental rights in exceptional cases. From the trial cases in this work, we can see that the Judiciary took the horizontal approach through different routes. In certain cases, private entities were taken in through the widened definition of State under Article 12. On some occasions, the court tried to cast a positive obligation on the State to regulate private actors. Such an outlook will ultimately lead to the conundrum of what the scope of such positive duties cast upon the State would be and to what extent the State must regulate the private actors as part of their positive duties.[287] I believe it is a sharp shift from the negative liberty concept of part III to positive liberties, and the State cannot be burdened to that extent.

[287] *Supra* note 4

Further, in certain cases, direct horizontality was applied to elevate directive principles to the position of fundamental rights, which are enforced through the state and non-state actors. On some occasions, through private laws or statutes, the court enforces fundamental rights on private actors, which is an indirect application of horizontality. In other cases, the Judiciary hasn't even looked into the identity of the actor and bluntly applied horizontality. All these approaches adversely affect the concept of "state" under Article 12. It becomes toothless, and the whole jurisprudential growth in that line becomes worthless.

Also, ultimately, it is the Judiciary that determines against whom fundamental rights are to be enforced. The Judiciary, while doing so, can take any approach to interpret the Constitution. Depending on the interpretative technique deployed by the Judiciary, the horizontality/ verticality routes will also change. Therefore, it can lead to arbitrariness and uncertainty in the judicial power. This judicial uncertainty was examined and discussed throughout the 4th chapter through various cases particularly affecting Articles 14, 19 and 21. I submit that under the guise of transformative constitutionalism or living constitutionalist approach, the Judiciary has taken an inapt approach. The Judiciary should keep in mind that the nature and structure of the fundamental rights and state action doctrine enshrined in Article 12 holds epitome value. Though we should depart from the pure vertical approach, moving far beyond this approach will put fundamental rights in peril. The whole jurisprudential foundation will crumble.

Other concerns of taking private actions under writ jurisdiction are the concentration of cases and taking in disputed questions of facts before the Higher Judiciary. Also, how the Judiciary determines the punishment is also an issue. Supreme Court and High Court can give fines, compensatory benefits and writ remedies, but they cannot provide grave punishments like imprisonment etc., that can be provided under statutory remedies. Even though these are very weak claims, we cannot neglect them.

At the same time, we should consider that Article 32 is not the only route through which fundamental rights violations can be addressed. Article 226 bestows power on the High Court to issue writs not only for enforcement of Fundamental Rights. However, the words for “any other purpose” against “any person or authority” attached to Article 226 give a wider meaning to it. This led to the question of whether “other authority” under Article 226

and Article 32 had the same meaning and limitations. In various instances, the judiciary opined that the ambit of Article 226 is much wider than Article 32. To what extent “other authority” in Article 226 can be widened was looked into in *Zee Telefilms Ltd. (supra).*

It was the turning point of Articles 12, 32 and 226, where the court clearly determined the scope of Articles 32 and 226 and held that a private actor performing public function may not be covered under Article 12 definition of state, but it will definitely be covered under Article 226. Thus, Art. 226 facilitates backdoor entry of private actions on fundamental rights violations.

Therefore, to tackle the issue of private actors' intervention in the fundamental rights of citizens, there is no need to abolish the state action doctrine altogether. Widening “State” by the Judiciary in an inconsistent and even unreasonable fashion cannot find a solution.

Therefore, to summarize, constitutionalizing private actions will affect the autonomy and liberty of the citizens. Further, the judicial interventions will also increase as they can review the private actions regardless of the legislative framework. For example, The High Court and Supreme Court in India can take suo motu cases of fundamental rights infringement. Therefore, even if two private entities themselves choose to do something that is against part III, there is scope for the Judiciary to interfere and streamline the private activities. Therefore, the concepts of choice, liberty and freedom will be buried. Finally, this extension of fundamental rights to private persons shifts authority from commercial or civil law courts to constitutional courts, rendering private law redundant and superfluous.

Another issue is the unfettered power conferred on the Judiciary to weigh and balance the fundamental rights. i.e., when two persons with conflicting fundamental rights approach the Judiciary, they are the sole arbitrators in determining which right will prevail over the other. For instance, in a defamation case, the right to privacy of one person is in conflict with the right to freedom of expression of the other person. Similarly, the contractual obligation of one person can be challenged on the basis of conflicting fundamental rights. The right to trade can be questioned, as can other persons' right to equality. Therefore, the whole object and purpose of the Constitution can be destroyed by going in the horizontal direction. It will automatically result in the prominence of some fundamental rights over others.

At the same time, it should be noted that taking a pure vertical approach will not meet the needs of contemporary society. Many have criticized this pure vertical approach clinging to state action doctrine. Chemerinsky, for example, suggests putting an end to the state action doctrine and directly applying individual rights to all actors, government, as well as private in the U.S. He also opined that courts should not dismiss cases for lack of state action, and they have to decide all cases based on the merits, balancing the competing constitutional principles involved in each case.[288] However, I strongly oppose this view on the above grounds of unfettered power going into the hands of the Judiciary and the lack of clarity and subjectivity of the Judiciary in India. Similarly, a direct horizontal model, like that in South Africa, is also not suggested. Many of the countries accept neither position entirely but take a middle position somewhere in the theoretical spectrum between verticality and horizontality, known as "indirect horizontality."[289]

From examining a lot of cases and materials on the topic and after a thorough comparative analysis of horizontality, I strongly negate the horizontal application of fundamental rights in India. It will destroy the concept of "state" under Article 12 and is a direct challenge to the concept of Constitutionalism and the basic structure of the Constitution. The right approach is not constitutionalizing people by directly enforcing fundamental rights against them but by constitutionalizing the laws in India so that the values of the Constitution will radiate in private laws dynamically. Also, invoking the writ jurisdiction under Article 226 is enough to take in private actors to an extent, as determined in *Zee Films (supra).* Therefore, entities escaping from the hook of Article 32 will definitely be caught in Article 226, and Article 12 will be instilled.

6.2 RECOMMENDATIONS

1. The Judiciary should strictly look into the identity and nature of the entity when Part III violations are raised before it under Article 32. It should refrain from bluntly enforcing fundamental rights without looking into state action requirements under

[288] Stephan Jaggi, *How the German Concepts of Horizontalism and Proportionality Could Improve the US State Action Doctrine,* 30 IND. INT'l & COMP. L. REV. 195 (2020).
[289] Bobby Anand, *Fundamental Rights – Vertical or Horizontal*, Lawyers club India, (June 22, 2024, 8.58 pm)https://www.lawyersclubindia.com/articles/FUNDAMENTAL-RIGHTS-VERTICAL-OR-HORIZONTAL-218.asp

Article 12. The Courts should adhere to the precedents and have clarity on how fundamental rights should be applied. It should not blindly enforce fundamental rights under Article 32. From various cases studied in this work, it is clear that the court, at various instances, has not looked into maintainability, and in some cases, though it was observed by the court that an entity is not covered under Article 12, it was not discussed, but the remedy was given in a mechanical fashion.

2. The Judiciary should rein itself when private actions are brought under writ petitions. When alternate remedies are available, private actions need not be taken under fundamental rights violation. Though it is the discretion of the Judiciary, such a practice will automatically corrode the statutory channels of remedy.
3. It is equally important to build a strong system of courts, including civil, criminal, and tribunals, to provide adequate remedies for private disputes because a right can be both fundamental and statutory in nature. Many cases are brought under Articles 226 and 32 rather than taking the alternate remedy as it is often stagnant, inadequate and time-consuming. If these issues are sorted, private disputes can be easily resolved under private law remedies rather than going for public law remedies. Even the remedy under statutes is much broader, but for the above-mentioned reasons, there is an increasing trend of invoking writs.
4. The legislature should remold Article 12 and redefine the State to adapt to the changing needs; otherwise, it is inefficient in the current scenario of increased fundamental rights violations by private actors. Further, the judiciary will elastically widen it with new tests and experiments. The National Commission to Review the Working of the Constitution (NCRWC) has recommended that an Explanation be added to Article 12 wherein the word' other authorities' would mean the authorities whose functions relate to that of a public nature.[290] This was an effort to define the scope of the State under Article 12 and eliminate ambiguity in the term "other authority." But this yielded no result. Legislative thoughts in this line are very much needed.

[290] *NCRWC Report 2002*, Ministry of Law & Justice, Government of India, http://legalaffairs.gov.in/sites/default/files/chapter%203.pdf, (last visited June 22, 2024)

5. The legislature should make legislation to specifically address private violations of fundamental rights. If there is statutory law regulating private actions, the litigants have the option to exploit it rather than invoking the writ jurisdictions under Articles 32 and 226. For example, data protection laws, POSH, POCSO, defamation provisions in IPC, and so on provide effective alternative remedy mechanisms and a range of punishments. These legislations should reflect the constitutional values.
6. A person aggrieved by the private invasion of fundamental rights should invoke Article 226, which is an equally efficacious remedy.

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APPENDIX

THE NATIONAL UNIVERSITY OF ADVANCED LEGAL STUDIES

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CERTIFICATE ON PLAGIARISM CHECK

1.	Name of the Candidate	Elizabeth K J
2.	Title of thesis/dissertation	Critical analysis of Impact of Horizontal Application of Fundamental Rights on the concept of State under Article 12 – With reference to Articles 14, 19 and 21
3.	Name of the supervisor	Dr. Nandita Narayan
4.	Similar content (%)	6%
5.	Acceptable maximum limit (%)	10%
6.	Software used	Grammarly
7.	Date of verification	24 June 2024

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General metrics

55,633	8,527	417	34 min 6 sec	1 hr 5 min
characters	words	sentences	reading time	speaking time

Score

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132	80	52
Issues left	Critical	Advanced

Plagiarism

3 %

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chapter 3

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characters	words	sentences	reading time	speaking time

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92

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Writing Issues

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chap 4

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General metrics

52,607	8,314	393	33 min 15 sec	1 hr 3 min
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Writing Issues

79	53	26
Issues left	Critical	Advanced

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6 %

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6% of your text matches 36 sources on the web or in archives of academic publications

chapter 5 and 6

by Elizabeth K J

General metrics

59,297	9,340	429	37 min 21 sec	1 hr 11 min
characters	words	sentences	reading time	speaking time

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Writing Issues

105	61	44
Issues left	Critical	Advanced

Plagiarism

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