Fundamental Rights - Vertical Or Horizontal?

FUNDAMENTAL RIGHTSâ€”“VERTICAL OR HORIZONTAL?

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Attention is drawn to Supreme Court's recent decision in Zoroastrian Coop. Housing case1 (referred to hereinafter as the ZCHS case) wherein the Court considered a private arrangement incorporating a restrictive covenant on the basis of religion. The issues that arise are whether public policy needs to reflect constitutional values and goals and whether the State authorities ought to give their imprimatur to private agreements if they are inconsistent with those values. It will be demonstrated that the concept of "indirect horizonality", applied in several commonwealth jurisdictions, offers a coherent theoretical underpinning in analysing the Constitution vis-à-vis private law.

In this seemingly innocuous case, members of the Parsi community established a cooperative housing society under the local Act. A bye-law of the housing society confined its membership to the Parsi community. A question arose whether a subsequent non-Parsi purchaser could be excluded from membership because of the bye-law. The High Court held that the restriction in the bye-law was unfair. This article focuses upon the controversy in the Supreme Court, which primarily centred upon whether the restrictive bye-law contravened the "public policy" under Section 4 of the local Act insomuch as it was inconsistent with the mandate of Article 15 of the Constitution.

Allowing the appeal, the Supreme Court held that the bye-law was not contrary to Section 4 of the local Act. This was because the public policy had to be searched for "within the four corners of the Act"2, without necessarily reflecting constitutional guarantees unless explicitly provided for in the enactment. Hence constitutional goals could only "be achieved by legislative intervention" and not by the court's interpretation of public policy. Accordingly, something more had to be shown "than a plausible argument based on the constitutional scheme" to nullify a voluntary agreement, especially since the freedom to contract "cannot be curbed or curtailed relying on fundamental rights"3 Therefore according to the Court even though it may seem retrograde in secular India, the enactment did not bar cooperative societies from discriminating on the ground of religion only.4

It is submitted that the Court in ZCHS case adopted a strict verticalist reading of fundamental rights. According to this approach fundamental rights are only attracted in cases of "State action". This is in direct contradistinction to the purely horizontalist approach which treats fundamental rights applicable not only against "State action" but against actions of private bodies as well. Most modern commonwealth jurisdictions accept neither position entirely, but a position somewhere in the middle of the theoretical spectrum between verticality and horizontality known as "indirect horizonality".

The classical vertical/horizontal divide The perplexing vertical/horizontal dichotomy is oft described as misleading. It tends to generalise the approach to fundamental rights by assuming that all fundamental rights have a similar purpose and design. With this "all or nothing" approach, verticalists argue that it is only in situations where there is "State action" that fundamental rights can conceivably apply. They borrow the underlying theme of classical liberalism in emphasising the preservation of the private sphere against coercive State intrusion. According to them, the society's ultimate goal is to maximise private space in which individuals will be free to pursue their own conceptions of good. Classical liberalists apprehend, though not entirely reasonably, that the imposition of human rights obligations in the private sector would be to "roll forward the frontiers of the State and roll back the frontiers of civil society"5 Therefore individual autonomy is of paramount importance and private choices should not be subjected to the justification that is necessary once fundamental rights are engaged against State action. In other words, fundamental rights ought to have no role whatsoever or an absolutely minimal one in private law disputes. On the other hand, horizontalists argue that the whole public/private law divide is misconceived. It would be dishonest if private individuals are not governed by the same set of standards and values that the State is bound by against a private individual. Irish law is a leading exponent of the direct horizontality approach. In a series of decisions the Irish Supreme Court has developed a sui generis "constitutional tort" which effectively allows the Court to remedy a breach of a constitutional right committed by a private individual. This approach bears resemblance to the dicta of Saghir Ahmad, J. in awarding compensation to a rape victim for the violation of her right to live life with dignity under Article 21, independent of any constructive causal link with the State authorities.8

11 Similarly, in environmental pollution matters, though Bhagwati, C.J. initially refrained from conclusively holding private corporations engaged in hazardous industries liable for violations of fundamental rights in case of accidents, Jeevan Reddy, J. skirted the issue in Bichhri case by concluding that the Court is obliged to intervene when private polluting units blatantly disregard the law.9

The similarity, however, ends there. Apart from such exceptional cases and certain horizontal-oriented provisions of the Constitution, the discernible general rule is that fundamental rights may be claimed against the "State" as defined under Article 12.15 That however does not necessarily mean that Part III has no role to play in influencing the common
law or private arrangements. In most commonwealth jurisdictions such a role is contemplated because of the "indirect horizontality" concept but the extent of the constitutional influence over private law primarily depends upon the perceptible nature of the duty of the courts in either considering themselves absolutely obliged to interpret all causes of action compatible with fundamental rights or simply to "take into account" the fundamental values while deciding cases between private individuals inter se. This difference in emphasis creates the distinction between "strong" and "weak" indirect horizontality.16

The dynamics of indirect horizontality: comparative dimensions Perhaps the rationale behind the preferred indirect horizontality model is best explained through the German constitutional experience. While the German basic law (GBL) is a strong reaction against totalitarianism and the degradation of human dignity, a phenomenon commonly witnessed during World War II, still in deciding cases between private parties there is no direct application of fundamental rights.17 German jurisprudence, however, recognises that "basic right norms contain not only defensive subjective rights for the individual" but simultaneously also epitomise "an objective value system which, as a fundamental constitutional value for all areas of the law, acts as a guiding principle and stimulus for the legislature, executive and judiciary".18 Hence though the basic rights do not apply directly to the private law but because they embody an objective value system they render a "radiating effect" on the private law. This radiating effect could apply in several ways. For instance the Federal Constitutional Court in Luth case observed that general clauses containing mandatory rules of law providing for the general welfare, concepts such as contra bono mores, public policy and good morals are most likely to be substantially exposed to the influence of constitutional law because,

In order to determine what is required by social norms such as these, one has to consider first the ensemble of value concepts that a nation has developed at a certain point in its intellectual history and laid down in its constitution. That is why the general clauses have rightly been called the points where basic rights have breached the domain of private law.20

A similar approach has been endorsed in Canada21 and South Africa22. In Dolphin Delivery21, the Canadian Supreme Court held that though action by the legislative, executive or administrative branches is necessary before the Charter applies to either public or private litigation, "the Charter is far from irrelevant to private litigants whose disputes fail to be decided at common law" because it must be developed "in a manner consistent with the fundamental values enshrined in the Charter".23 In subsequent cases, the Canadian Supreme Court has subjected the common law and private relationships to the scrutiny of the objective values enshrined in the Charter.24 However, the Court has steadfastly maintained the fine distinction between "Charter rights" and "Charter values" lest the application of the Charter unnecessarily expands horizontally.25 The majority of the South African Constitutional Court also endorsed the "indirect horizontality" model by accepting that "values embodied in Chapter 3 (fundamental rights) will permeate the common law in all its aspects, including private litigation"26

Recently in England, the horizontality debate generated intense academic interest during the incorporation of the Human Rights Act and the early stages of the transformation of the common law cause of action of breach of confidence into a right of privacy consistent with Article 8 of the European Convention.27 The courts have also had to decide complex legal issues based on the supposed horizontal effect of the developing right of privacy.28 The general approach has however been consistent with the indirect horizontality model that the common law must be developed incrementally so that Articles 8 and 10 of the European Convention are absorbed and interwoven into the common law rather than recognising an independent stand alone right of privacy.29 Further, Lord Nicholls in the House of Lords pertinently observed that the "values of Articles 8 and 10 are as much applicable in disputes between individuals or between an individual and a non-governmental body such as a newspaper as they are in disputes between individuals and public authorities"30

It may be worth mentioning here that our Constitution, however, makes no distinction between statutory law and common law for the enforcement of fundamental rights. This is because of the non-distinctive feature in the definition of "law" and "law in force" for the purposes of Article 13. The pre-emption cases provide a striking paradigm. In Bhau Ram v. Baijnath Singh31, the Court struck down Section 10 of the Rewa State Pre-emption Act, 1946 which provided for pre-emption on the ground of vicinage as violative of Articles 15 and 19(1)(f). However, even without this legislative measure, in a private action based upon the custom of pre-emption on the ground of vicinage, a Constitution Bench followed Bhau Ram31 on the footing that custom was a "law in force" within the meaning of Article 13 of the Constitution.32

Having analysed this comparative commonwealth approach, the view taken by the Supreme Court in ZCHS case1 may now be considered in detail. The essence of the judgment revolves around two arguments that proved determinative. The first related to the status of the "freedom to contract" and the other pertained to the utility of the narrow construction of public policy. In relation to the former, the Court treated the "freedom to contract" virtually as absolute because according to it the "freedom to contract cannot be curtailed or curbed relying on the fundamental rights enshrined in Part III against State action"33 If that were indeed so, it would mean that voluntary agreements could defeat fundamental
With regard to the latter, the debate is perennial. The courts across the commonwealth have grappled not only to define the elusive concept of public policy but also in applying its two conflicting positions known as the "narrow view" and the "broad view". The "narrow view" is manifest in Gherulal Parakh37 where the Court cautioned that new heads of public policy should not be created. This has not though deterred the Court from subsequently applying the broader view of the "variable notion of public policy as a principle of judicial legislation"38 The question nevertheless remains whether by adopting the "narrow view" the Court was justified in examining the public policy only from "within the four corners of the Act", regardless of our constitutional values. Apart from the compelling rationale provided by German jurisprudence, Indian case-law also does not support such a limitation. If public policy was to be only so examined, the paradoxical result would be that public policy would be solely dependent on the nature of the enactment. However, it is submitted that an enactment can never determine the most essential public policy consideration, which Mathew, J. pointed out, was the function of Judges under our Constitution and laws to apply the variable notion of public policy "founded on the current needs of the community" which means that the courts have to strike a balance between the competing interests of the whole community vis-à-vis a beneficial section of it.39

It is further submitted that the view that public policy need not reflect constitutional guarantees and therefore legislation, not court intervention, must achieve constitutional goals, seems inconsistent with prior case-law. In Central Inland Water Transport v. Brojo Nath Ganguly, Madon, J. expressly held that in matters pertaining to public policy the court may, lacking precedent, "always be guided by ... the principles underlining the fundamental rights and the directive principles enshrined in our Constitution"40 It is submitted that this is the more desirable approach and it therefore now becomes important to examine the constitutional values embodied in Article 15 and to see if the private arrangements in ZCHS case1 are inconsistent with those values.

The structure and underlying values of Article 15 Article 15 has oft been described as a facet of the general rule of equality under Article 14.41 However, Article 15 makes a vital departure from Article 14. Under Article 15(1) our founding fathers considered it paramount to forbid the State from making any distinction based solely on certain categories such as race, religion, caste, sex or place of birth as a necessary corollary to the advancement of the goal of an egalitarian society. While Article 15(1) insists that all the State authorities remain colour-blind to any distinction based "only" on the specified grounds,42 Article 15(2) further enmeshes the banned category theory into our social fabric by targeting private individuals thereby making the "State action" doctrine irrelevant for the purpose while inducing horizontal effect.43 Indeed far-reaching societal consequences were contemplated by Article 15(2). For example, in the Constituent Assembly it was observed that Hindus would have to change their eating habits and customs because a member of any community would be entitled to be served in their hotels.44 Similarly, the term "shop" in Article 15(2) was used in its generic sense to cover the widest possible assortment of activities.45 It is submitted that implicit in the prohibition on the basis of these categories was the alacrity to ban their source: prejudice. It was perceived that any distinction based on the banned categories must necessarily include the expression of prejudice to the detriment of the disadvantaged section of society.46 It is this underlying value of Article 15 that must be considered to have permeated our social fabric. It is submitted that the ZCHS case1 seems not to uphold this underlying value for the following reasons:

(1) While the Court seems to explain away the restrictive covenant as an innocuous measure designed to preserve the Parsi culture and way of life47, there may simply be more to it than that. Religion is a banned category because secularism "is the cornerstone of an egalitarian and forward looking society" upon which "a uniform and durable national identity in a multi-religious and socially disintegrated society" may flourish because pluralism is the bedrock of Indian secularism.48 Restrictive covenants such as the one in ZCHS case1 hardly promote such pristine values. On the contrary, history teaches us that a multi-pluralist society based upon religious tolerance can never be achieved when communities are polarised. The fatal consequences of such polarisation weighed considerably with the Court in Bhau Ram31. There the ostensible purpose for the law of pre-emption on the ground of vicinage was the exclusion of strangers belonging to a different religion, race or caste from acquiring property in the neighbourhood. Wanchoo, J. concluded that this violated Article 15 because "such division of society now into groups and exclusion of strangers from any locality cannot be considered reasonable"49

(2) Even assuming that a plausible justification exists for establishing a housing society based only upon religion, the sequitur of ZCHS case1 would allow housing societies to legitimately discriminate not only on the criterion of religion but...
also race, caste, sex and place of birth. Carried to its logical end, it means that one must become more accustomed to
enduring housing societies exclusively for people of certain race, of certain region or of certain caste, etc. Such practices
will harm the interests of a multi-pluralist society. It must also be appreciated that the effect of distinctions based upon the
banned categories is entirely different from those based upon otherwise benign features. The Court in ZCHS case1
endeavoured to equate the cooperative housing societies based on religion with cooperative societies exclusively for
vegetarians, agricultural workers and labourers. The equation, it is submitted, does not seem to obtain because
distinctions based on those benign categories are not inconsistent with our constitutional values and therefore not
contrary to public policy. That is, however, just assuming that the ZCHS case1 rationale is limited to cooperative societies
and would not apply to every private arrangement. It is submitted that in any case identifying features based on these
banned categories would only scar the psyche of modern Indian society and must be resisted.

Can the State give its imprimatur in violation of Article 15?: The Kriegler approach

The second limb of the argument proceeds on a different footing. It assumes that there exists a private realm in which private individuals may contract with one another regardless of constitutional values or their consequences because public policy is irrelevant in this domain. Still, can courts and other branches of the Government recognise and validly enforce undesirable practices which are constitutionally forbidden for the State to endeavour? According to a critically acclaimed approach of recent origin, such private space is still limited to situations where there is no resort to law because constitutional objectives and values must "pervade all laws". Hence no State authority could recognise agreements, contrary to Article 15, as validly binding and enforceable. In this regard the persuasive dissenting judgment of Kriegler, J. of the South African Constitutional Court in Du Plessis v. De Klerk51 is clearly instructive. In that case, Kriegler, J. transcended the vertical/horizontal dichotomy altogether in the effort to reconcile undue interference with private autonomy and the otherwise all-pervasive nature of fundamental rights. The essence of the judgment is that the State, "as the maker of the laws, the administrator of the laws and applier of the laws, is bound to stay within the four corners" of the chapter relating to fundamental rights. Viewed in this manner, the approach recognises the importance of the all-encompassing nature of fundamental rights without sacrificing the value of preserving individual autonomy in the private sphere by shifting the emphasis pertaining to the applicability of fundamental rights from a dual tier legal structure (i.e. directly applying to "law" while indirectly applying to private relationships) to the singular objective of effectively pervading the area of operation regulated and recognised by the State, including legal remedies. Private relationships are therefore left undisturbed insofar as they are not regulated by or resorted to law. As Kriegler, J. succinctly put it:

Unless and until there is a resort to law, private individuals are at liberty to conduct their private affairs exactly as they please as far as the fundamental rights and freedoms are concerned. As far as the chapter is concerned a landlord is free to refuse to let a flat to someone because of race, gender or whatever; a white bigot may refuse to sell property to a person of colour; a social club may blackball Jews, Catholics or Afrikaners if it so wishes. An employer is at liberty to discriminate on racial grounds in the engagement of staff; a hotelier may refuse to let a room to a homosexual; a church may close its doors to mourners of a particular colour or class. But none of them can invoke the law to enforce or protect their bigotry.53

Though dissenting, this refreshing approach has generated a great deal of academic interest and has been endorsed by distinguished authors. It is also perceived to be a theoretically more coherent view than the controversial approach of the US Supreme Court in Shelley v. Kraemer55 to which it bears at first blush some resemblance. In Shelley55, a racially restrictive covenant which restrained a black couple from purchasing property in a white dominant residential area was questioned. In that case, the respondents filed a suit against the black couple restraining them from taking possession and divesting their title in the property. The Missouri Supreme Court held that the restrictive covenant was enforceable and did not violate any rights guaranteed to the petitioners under the Constitution. The US Supreme Court reversed the Missouri Court and held, perhaps quite dangerously, that the enforcement of the restrictive covenants by the State courts constituted "State action" since it bore the "clear and unmistakable imprimatur of the State" because it was only due to the "active intervention of the State courts" that the petitioners were denied the enjoyment of their property merely on the ground of race. Though Shelley's result was laudable, the approach of the Court has been astutely criticised for the unsupportable consequences that may follow in terming court orders as "State action"58 The criticism has been effective and a complex case-law suggests that the rule in Shelley v. Kraemer55 is not invariably available in private litigation.59

It is submitted that, regardless of the criticism, the point made in Shelley55 is fairly obvious. The courts do import the inherent abhorrence expressed in the constitutional values when sections of society are discriminated solely on grounds induced by prejudice, even in private law disputes, though it may require a fair amount of ingenuity.

It is submitted that if the Kriegler approach was adopted in ZCHS case1, it could easily be seen that the Registrar of Cooperative Societies, as a statutory authority under the local Act, would undoubtedly have all the necessary features of "State" for the purposes of Article 12. Hence, clearly the Registrar being such an authority could not recognise as legally
binding a restrictive covenant which would violate the constitutional mandate of Article 15, even assuming that the private parties may be bound by such terms.

* Advocate, Supreme Court Return to Text

- Id., at p. 652, para 18. Return to Text
- Id., at 659-60 Return to Text
- Id., at 661 Return to Text
- Id., at 660 Return to Text
- Id., at p. 657, para 27. Return to Text
- Id., at 659 Return to Text
- D. Oliver, "The Frontiers of the State: Public Authorities and Public Function under the HRA", (2000) PL 476 at 477; see however Kriegler, J., dissenting in Du Plessis v. DeKlerk, (1996) 3 SA 850 (CC) at 120. The learned Judge considered this apprehension to be a "bogeyman". Return to Text
- For example in Lovett v. Gogan, (1995) I.L.R.M. 12 the Court granted an injunction against a non-licensed transporter to prevent interference with the licensed plaintiff's constitutional right to earn a livelihood; see also Meskell v. Coras Eireann, (1973) IR 121 and C.M. v. T.M., (1991) I.L.R.M. 268 Return to Text
- For example Article 15(2) which is subsequently analysed in detail. Return to Text
- Von Monch/Kunig, Grundgesetz-Kommentar Band 1, (1992) 4 Aufl Art 1 Rn 6 Vorb Art 1-19 Rn 31. Return to Text
- Known in German law as "Ausstrahlungswirkung". Return to Text
- See the Canadian Supreme Court decision in RWDSU v. Dolphin Delivery, (1986) 2 SCR 573 per McIntyre, J. Return to Text
- See the South African Constitutional Court decision in Du Plessis v. De Klerk, (1996) 3 SA 850 (CC) per Kentridge, A.J. Return to Text
- See fn 21 at 603. Return to Text
- See Hills at 95 per Cory, J. Return to Text
- See fn 22 at 60. Return to Text
- See Campbell v. MGN, (2004) 2 All ER 995 at 1003 per Lord Nicholls (dissenting, but not on this point). Return to Text
- 1962 Supp (3) SCR 724 Return to Text
- Sant Ram v. Labh Singh, (1964) 7 SCR 756 per Hidayatullah, J. Return to Text
- See fn 1, at p. 657, para 27. Return to Text
- (1985) 3 SCC 545 at 570. Return to Text
- See fn 35 at p. 482, para 30; Central Inland Water Transport Corpn. Ltd. v. Brojo Nath Ganguly, (1986) 3 SCC 156 at
  - Ibid. Return to Text
- (1986) 3 SCC 156 at p. 218, para 92 (emphasis supplied). Return to Text
- See for example State of Kerala v. N.M. Thomas, (1976) 2 SCC 310. Return to Text
- The word "only" assumes significance because it suggests that where the State does make a distinction on the basis of a banned category "coupled with other considerations", it is not violative of Article 15(1). See Air India v. Nergesh Meerza, (1981) 4 SCC 335 at 362 per Fazl Ali, J. Return to Text
- M.C. Mehta v. Union of India, (1987) 1 SCC 395 at 418 per Bhagwati, C.J. Return to Text
- CAD Vol. VII at 659. Return to Text
- Id., at 661 Return to Text
- See, however, the illuminating discussion on how sources may be banned without necessarily banning the categories in R. Dworkin, Law's Empire, 383-86 (2002). Return to Text
- See fn 1 at 659. Return to Text
- Valsamma Paul v. Cochin University, (1996) 3 SCC 545 at 562 per K. Ramaswamy, J. Return to Text
- + Ed.: See also observations of Dharmadhikari, J. in this regard in the recent case of Bal Patil v. Union of India, (2005) 6 SCC 690. Return to Text
- Bhau Ram v. Baijnath Singh, 1962 Supp (3) SCR 724 at 735 Return to Text
- See fn 1 at 662. Return to Text
- See fn 22. Return to Text
- Id., at 915 Return to Text
- Id., at 914-15 Return to Text
- 334 US 1 (1948) per Vinson, C.J. Return to Text
- Id., at 19-20. This principle subsequently enabled the Supreme Court in New York Times v. Sullivan, 376 US 255 (1964) to hold unconstitutional an Alabama defamation law in an action by private litigants. Return to Text
- Most commonwealth jurisdictions ordinarily do not consider "court orders" to be "State action" for the purpose of applying fundamental rights primarily for the reason that the true nature and character of the judicial process makes court orders inappropriate to be considered as violative of fundamental rights. See Naresh Shridhar Mirajkar v. State of Maharashtra, (1968) 3 SCR 744 at 760-61 and also RWDSU v. Dolphin Delivery, (1986) 2 SCR 573 at 600 (Can SC). Return to Text
- See generally L.H. Tribe, American Constitutional law, Chap. 18 (1988). Return to Text