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Horizontal Enforcement of Fundamental Rights in Bangladesh: Extending the Scope of Judicial Review

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ABSTRACT

Judicial review, in general, is the power exercised by Judiciary of a state to assess whether any activity of the legislative, executive, and administrative organs of government are in accordance with the constitution or not. Article 102 of the Constitution of Bangladesh has empowered its' Supreme Court to exercise this power by offering writ jurisdiction, which basically is applied to ensure fundamental rights of any aggrieved person. If the historical tradition of judicial review in Asia is thoroughly observed, it would be found that the vertical enforcement of fundamental rights was exclusively present in many counties where the judicial review can be exercised only against the state arms. But recently horizontal enforcement of fundamental rights is emerging noticeably, through constitutional transplantation, in Asia as well in Bangladesh, which extends the writ jurisdiction against the private individual as well. In some recent cases, the conservative vertical approach of the Courts of Bangladesh is altering or can be said attempting to alter for ensuring fundamental rights at large, albeit not by directly enforcing horizontally against any private individual but at least finding a connotation between the state and the private stakeholder through 'Datafin test'. This paper has explored the scope and prospect of the horizontal enforcement of fundamental rights in Bangladesh under the constitutional obligation and tries to make a thin line of demarcation to what extent, this enforcement would be of horizontal as well as vertical effect.

Keywords: Horizontal Effect, Fundamental Rights, Judicial Review, Constitutional Obligation, Private Actor.

I. INTRODUCTION

The common notion of judicial reviewing power is conferred on the Court. on the grounds that powers may only be legitimately utilized within their genuine limitations, and that a public official cannot exceed the scope of his constitutionally mandated authority. In Bangladesh, the

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High Court Division can review the activities of State organs' if they are in violation of the Constitution, due to Article 102 of the Constitution. But at the same time, it cannot be denied that, upholding the constitution of a country for the benefit of the people by the higher courts should be prioritized over any procedural rigidity. As a protector of the constitution, the higher judiciary should play a key role by taking the matters which are detrimental to the constitutionality.³ Though the judicial review under Article 102 is typically confined into enforcement against the public bodies, it can be stretched even against the private bodies, to address the accountability void left by the privatization of public businesses, outsourcing of government services, and deregulation of trade and business.⁴ Such extension- in one sentence can be a new dimension of enforcing horizontal fundamental rights in Bangladesh.

While the discussion comes regarding the fundamental rights, one vital concern that stepped out is their application's prospect. While determining the ultimate recipients of the fundamental rights which usually includes the people of the country- at the same time, it brings another responding question, on whose shoulder the liability to fulfill these rights will be imposed? How these rights are binding upon those stakeholders? In particular, what is their reach into the 'private' sphere? This matter is commonly referred to as the 'vertical' and 'horizontal' effect in comparative constitutional law. Such options typically refer to whether fundamental rights govern just governmental stakeholders' activities with private entities (vertical) or the relationships in both private entities (horizontal) (horizontal).⁵

In latest days, comparative constitutional law intellectuals have been particularly interested in the topic of horizontal effect. The reason can be of many instances. Like, the remarkable spurt of constitution-making which was occurred throughout the globe since 1989, it has taken on massive real implications.

Along with other vital decisions about the framework of fundamental rights, the makers of the constitutions were also involved in finding solutions to many issues such as validating private entities' duties to enforce fundamental rights and the periphery of such validation. Furthermore, dealing with a wide spectrum of instances which started from post-apartheid to post-communism, certainly prompted intellectuals to reconsider the nature and functions of constitutions.

³Amena Jahan Urmy & Abue Jawfore Taufique Ahamed Ahade, *Constitutional Transplantation of the Indian Judicial View: Introducing Suo Moto Writ in Bangladesh*, 11:4 Pen Acclaims Journal 1 (2020).

⁴ Dr. Chowdhury Ishrak Ahmed Siddiky, *Stretching the scope of judicial review*, The Daily Star, July 12, 2016. <<https://www.thedailystar.net/law-our-rights/stretching-the-scope-judicial-review-1252186>>

⁵ Stephen Gardbaum, *The structure and scope of constitutional rights*, in *Comparative Constitutional Law* 391 (Tom Ginsburg & Rosalind Dixon eds.,2011).

If the historical tradition of judicial review in Asia is thoroughly observed, it would be found that the vertical enforcement of fundamental rights was exclusively present in many countries where the judicial review can be exercised only against the state arms. But recently horizontal enforcement of fundamental rights is emerging noticeably, through constitutional transplantation, in Asia as well in Bangladesh, which extends the writ jurisdiction against the private individual as well. In some recent cases, the conservative vertical approach of the Courts of Bangladesh is altering or can be said attempting to alter for ensuring fundamental rights at large, albeit not by directly enforcing horizontally against any private individual but at least finding a connotation between the state and the private stakeholder through 'Datafin test'. This paper has explored the scope and prospect of the horizontal enforcement of fundamental rights in Bangladesh under the constitutional obligation and tries to make a thin line of demarcation to what extent, this enforcement would be of horizontal as well as vertical effect.

II. CONCEPTUAL FRAMEWORK

Judicial Review means one kind of judicial proceeding where a judge examines the legality of a public body's decision or action in light of the Constitution. It includes the court's authority to declare a law passed by the legislature to be unconstitutional and void because it is incompatible with the Constitution or the provisions of fundamental rights. Judicial Review differs in procedure and scope from country to country and state to state, but its goal remains the same: to protect the sanctity of the land's Constitution.⁶

Vertically effective rights only apply to the government, whereas horizontally effective rights also apply to private actors. Starting from civil and political rights to economic, social, and cultural rights- their tendency to be enforced vertically is common, in contrary to the limited number of rights which can be enforced horizontally. Private actors are not obligated directly by constitutional rights, specifically by fundamental rights, but that does not mean that those rights cannot be applied to them while determining their legal relationships among themselves- nonetheless also bifurcate their actions into lawful and unlawful, simultaneously highlighting the valid interests, choices, and actions- which can be subject to protection under the constitution. Instead, conventional vertical effect simply precludes more precise method for a constitution to govern individual citizens: by levying constitutional obligations upon them.⁷

The vertical approach's traditional animating idea is an apparent advantage in the bifurcation

⁶ Paolo Mazzotti & Mariolina Eliantonio, *Transnational Judicial Review in Horizontal Composite Procedures: Berlioz, Donnellan, and the Constitutional Law of the Union*, 5:1 European Papers 42,43 (2020)

⁷ Stephen Gardbaum, *The "Horizontal Effect" of Constitutional Rights*, 102:3 Michigan Law Review 387, 388 (2003)

of public-private actors in terms of enforcing fundamental rights, which offered the private actors to be freed from the constant, mandatory monitoring of constitutional laws. To justify this divergence, the ideals of freedom, independence, privacy, and market efficiency are brought into such argument. According to this viewpoint, the most important and distinctive function of a constitution is to provide law for legislators rather than citizens, thereby filling a grave loophole in the rule of law.

Arguing for the contrary, horizontal approach mainly criticizes the 'liberal' vertical approach that is almost well-known. Hence, the functionality of the Constitution heavily influences the vital and significant values of a society, it must be comprehended that such function ought to be applying for every citizen of such community. Furthermore, considering the current setting, enormously influential private individuals and institutions may threaten constitutional rights and values just as much as governments, and the vertical approach automatically privileges the autonomy and privacy of such citizen-threateners over those of their victims. Thus, the arbitrariness of racists, sexists, and hate-spewers is definitively chosen over that of individuals who are affected or barred as a result of their acts, with no obvious explanation during a net evaluation of autonomy gains and losses. Furthermore, as the vertical effect does not ipso facto preclude the individuals to be the subject of statutes other than constitution, ambiguity remains in the reason behind which autonomy is particularly/uniquely endangered by constitutional provision.⁸

(A) Direct and indirect horizontal effect

'Direct horizontal effect' basically obligates the private individuals by the fundamental rights of the constitution. In case of such application of horizontal effect, people can issue writ against any private actor, if their fundamental rights are infringed by that actor. Such practice is seen in Colombia and Ireland where constitutional tort remedies are provided. 'Indirect horizontal effect,' on the other hand, indicates that, while constitutional rights may not explicitly govern or impose responsibilities on private individuals, they can nonetheless influence and regulate them implicitly. The effect of a constitutional right on a person, as opposed to the instant, unmediated, or direct enforcement in the purview of completely horizontal approach, is what is referred to as 'indirect' in the idea.⁹

Indirect horizontality usually manifests itself in one of two ways. Vertically enforced rights place routinely a positive constitutional obligation on the administration that they have to

⁸ 3 n.3 passim

⁹ 5. n.5, 394

provide a shield on the private persons against specific acts committed by another private person, which can be said for an example deprivation of life or property, forced labor etc. In this case, constitutional rights have an indirect influence on private persons and entities because they require the government to adopt and enforce legislation prohibiting some of their actions that are not explicitly governed by the constitution. The European Convention on Human Rights has made extensive use of this method.¹⁰

The second method is to apply fundamental rights against private legislation, or norms and ideals that govern individuals' lawful interactions with one another. Bill of rights when used in a legislation it always hold some sort of influence, for which people not only cite them but also widely use them in any litigation, has an indirect horizontal effect, restricting what they can be permitted to do and which of their beliefs, decisions, and actions are entitled to its protection. So, although a bill of rights rules all activities when it has direct horizontal impact, it also governs all laws when it has indirect horizontal effect. A constitutional structure constricts the bifurcation between public-private divide by submitting private law provisions to the criteria of a bill of rights to be followed, specifically.

In short, constitutional rights can control private individuals in main methods: (1) explicitly by ruling their action; and (2) implicitly by managing the private statutes which structure their legal relationships with one another. Later one restricts what private individuals may lawfully do and which of their values, choices, and activities can be legally protected.¹¹

(B) 'Strong' and 'Weak' indirect horizontal effect

Indeed, the research suggests a further distinction between 'strong' and 'weak' indirect horizontal effects. First one denotes that all kind of private legislation (irrespective of its nature or source) which can fall under the category of common law or any domestic Act or even any dispute which is entirely in between two private parties- altogether they will be formulated incorporating the bill of rights. In comparison to any other sorts of activities of the Govt., a 'weak' indirect horizontal impact indicates the opposite of the direct impact by excluding a few numbers of private laws shall not be reflects the fundamental rights s enumerated in the bill of rights. Like in Canada, the Charter of Fundamental Rights and Freedoms, unlike a legislation, is no applicable in case of common law at issue in private litigation, despite the fact that judges are expected to consider these principles while formulating common law.

Such influence on private law can be dichotomized into two paradigms- direct (when

¹⁰ *Storck v Germany* 61603/00 ECHR 406 (2005).

¹¹ Chemerinsky & Erwin, *Rethinking State Action*, 80 *Northwestern University Law Review*,503 (1985).

fundamental rights apply completely, evenly, and expressly) or indirect (when fundamental rights are not applied or when interpreting the constitutional provisions, the judges shall ponder those rights and values). The former is known as the “strong indirect horizontal effect,” while the latter is known as the “weak indirect horizontal impact”. Regardless of whether of these two ways is employed, the overall position is defined by the obliqueness of the effect on private actors, not by private law.

So, it can be suggested that the range of general positions be extended such that it can and should be comprehended in four ways: (1) no horizontal effect (strong verticality), (2) weak indirect horizontal effect, (3) strong indirect horizontal effect, and (4) direct horizontal effect. to be noted, for states on the direct horizontal end of the spectrum, they aren't always mutually distinct options because they often use some type of indirect horizontal influence as well.¹²

III. EMERGENCE OF HORIZONTAL ENFORCEMENT OF FUNDAMENTAL RIGHTS UNDER COMPARATIVE CONSTITUTIONAL LAW

(A) Practice in India:

The Supreme Court has repeatedly maintained that the fundamental rights enshrined in Part III of the Constitution is applicable solely to the Govt. and not to private persons. Such stance is derived from the then Constituent Assembly's individual comprehension, the wording of the two common or definitional Articles, with which Part III has started; Articles 12 and 13, along with the text of many particular rights provisions that specifically designate the addressee as 'the State'. Article 14 prohibits the state from depriving anybody of equality before the law/equal protection under the law; Article 15(1) prohibits discrimination on certain grounds; and Article 16 mandates equal opportunity in public employment. 'Under Art. 13(2), it is State activity of a certain sort that is banned,' writes the famous treatise writer HM Seervai. Individual violations of individual rights are not protected by Art. 13 in general (2).¹³

Simultaneously, the Supreme Court has observed many exclusions to this general rule, holding that Articles 17 (abolition of "untouchability"), 23 (prohibition of human trafficking and forced labor), and 24 (prohibition of employment of children under the age of fourteen in factories, mines, or other hazardous occupations) are "plainly and indubitably enforceable against everyone." Furthermore, such decisions and the 1947–48 Constituent Assembly debates is

¹² Stephen Gardbaum, *Where the (State) Action Is*, 4 *International Journal of Constitutional Law* 760 (2006).

¹³ HM Seervai, *Constitutional Law of India*, vol 1 (4th edn, Universal Book Traders 1991) 374.

sufficient in reaching to the conclusion that Article 15(2) bars some definite kinds of private discrimination based on religion, caste, race, sex, or place of birth, specifically by licensed entities concerning “access to shops, public restaurants, hotels, and places of public entertainment.”¹⁴

As India is considered as a welfare-state, it proves its concern towards the citizens through widely accepting horizontal enforcement of fundamental rights. Specifically, in the case of *Society for Unaided Private Schools of Rajasthan v Union of India*¹⁵, in which the court upheld the constitutional validity of Right to Education Act 2009. This Act requires all the public and private schools in India must admit 25% of children aged 6-14 who belong to disadvantaged groups. Provision 21A of Part III of the Constitution has a distinct Article relating to the plan. As a result, we can see that the court has used the horizontal impact of fundamental rights on occasion for the better welfare of the nation.

In the *MC Mehta v State of Tamil Nadu*¹⁶ case, the court determined that hiring the minors in the Shivkasi cracker business violated Article 24 of the child labor prohibition. The employer was ordered by the court to compensate the children. As a result, we might conclude that the court used the horizontal impact of fundamental rights to impose the horizontal application. We may deduce to a large part from the different examples given above that until and until the horizontal effect is used, the benefits of the FR will not be able to be experienced by citizens in the purest sense. Fundamental rights applications like this push people to be law abiding citizens who carry out their responsibilities honestly.

In India, the indirect horizontal application has been employed in a number of instances, the most well-known of which being *Vishaka v State of Rajasthan*¹⁷, a case in which a laborer was raped by a miscreant in Bhatari village, Rajasthan. The Supreme Court used an indirect horizontal approach in that instance, relying on the CEDAW norms against sexual harassment. In those circumstances, the state is under a positive responsibility to guard private persons from sexual harassment at work. Through this approach, the indirect horizontal impact penetrates into the legal vacuum of the social structure reducing the chasm between the public and private sectors.

The Supreme Court applied the Kreigler method in the *Zoroastrian Society case*¹⁸, which states

¹⁴ Constituent Assembly Debates, vol 3 (Lok Sabha Secretariat 1986) 426, 29 April 1947 (Sardar Vallabhbhai Patel).

¹⁵ 6 SCC (2012).

¹⁶ AIR 1997 SC 699, 6 SCC 756 (1996).

¹⁷ 6 SCC 241(1997).

¹⁸ Zoroastrian Co-Operative vs District Registrar Co-Operative, 5 SCC 632 (2005)

that in the absence of any statute prohibiting any sort of bigotry, the court will support the right of private individuals to contract, even if it is judged to be contrary to the spirit of the constitution. Furthermore, the indirect horizontal application has two subcategories within its domain. The two types of indirect horizontal effects are strong and weak. When all private law of the land is subject to constitutional rights, the indirect horizontal effect is strong, whereas when all private law is not governed by the constitution, the indirect horizontal effect is weak.¹⁹

To summarize, India currently has a rather extensive and layered horizontality jurisprudence. However, there are a few factors to keep in mind. The Court must conceptually differentiate between different sorts of horizontality based on the identification of the players and the nature of the challenged activity. After then, the Court must build these diverse models in a way that is doctrinally coherent and defensible.

(B) Practice in South Africa

Direct horizontality is the stated, albeit incomplete and complicated, mandate of sections 8(2), 8(3), and 9(4) of the constitution in South Africa, has brought significant attentions of academic research as a model state practicing horizontal impact. The Bill of Rights is applied both 'directly' (under provision 8) and 'indirectly' (under section 39) to the common law. The Bill of Rights can be used either directly or indirectly through constructing common law in accordance with the Bill of Rights' "spirit, meaning, and goals." (Michelman, 2008).

The Republic of South Africa's Constitution, Act 200 of 1993 has been served as an interim constitution, established developed new jurisprudence based on constitutionalism and constitutional supremacy. A justiciable Bill of Rights was enshrined within it, ensuring the enforcement and protection of the state's citizens' fundamental rights. Bills of rights have historically been envisioned as a vehicle for protecting and enforcing fundamental human rights against the state, as well as the misuse of governmental authority and power. The subject of whether the Bill of Rights may be applied horizontally was hotly contested before the South African Constitutional Court in *Du Plessis and Others v De Klerk and Others*.²⁰

In an equally vehement decision, the majority of the Court held that the Bill of Rights could not be applied directly horizontally in general. Although the Court's conclusion was impacted by a thorough textual study, it was also influenced by other factors. The functioning of a bill of rights in the private domain would be contradictory to the concept of a constitutional state and would

¹⁹ Dr. Dilip Kumar Upadhyay, *Horizontal application of Fundamental Rights: Issues and Concerns* (Madhav University) 18 February 2020

²⁰ 3 SA 850 (1996).

render the law imprecise and unpredictable, according to one of the most prominent of these arguments. However, a few months later, in *In Re: Certification of the Constitution of the Republic of South Africa* case²¹, the same Constitutional Court certified that Section 8 (2) of Chapter 3 unambiguously permitted for the horizontal application of the Bill of Rights.

IV. PRACTICE IN BANGLADESH

A constitution may incorporate the word "Judicial Review" implicitly. The Constitution of the People's Republic of Bangladesh can be mentioned as an ideal illustration of such constitution. This phrase is not even referenced once in this article. However, the Bangladesh Constitution's provisions 7(2), 26, 44(1), and 102 implicitly support the Judicial Review system. In this case, the court deals with the question whether any action under review is lawful or not and quash it on the findings upon unlawfulness.²² Such power conferred by Article 102 is a basic structure of Bangladesh and in view of the decision in *Anwar Hossain Chowdhury*²³, it cannot be taken away or curtailed even by amendment of the constitution. From the observation of the court from, *Khondokar Delwar Hossain v. Italian Marble Works*²⁴, the obligation of judicial review for enforcing fundamental rights are reckoned stating one of the principles of judicial review and followed on the ground that the constitutional rights of the citizen, should be adjudicated as quickly as possible and delay often resulted into denial of rights. However, when the power of judicial review is given to the High Court Division as per Article 102(1) of the constitution, it cannot be curtailed. While the right to seek judicial review under Article 102(2) is not basic or definite, rather is available when no other similar effective remedy exists.²⁵

According to the Constitution, fundamental rights s can be enforced in court against "any person or authority," even those involved in Govt. activities. This can be accomplished by the Court providing any "suitable" directives or by incorporating a suitable writ-order, under Article 102. (2). Nonetheless, irrespective of the matter that any right may be applied horizontally or not is contingent on whether or not any private person is obligated to abide by such right. Relevantly, it is worth noting that the Constitution's rights sections are phrased in a variety of ways, with certain rights being explicitly or indirectly horizontal while others being non-horizontal.²⁶ As

²¹ 10 BCLR 1253 (1996).

²² *Anti-corruption Commission v Dr. HBM Iqbal* 15 MLR (AD) 103 (2010).

²³ BLD (Spl) 1 (1989)

²⁴ 62 DLR (AD) 298 (2010)

²⁵ Asef Rafid, *Constitutional Basis for Judicial Review in Bangladesh- With Special Reference to Marbury V. Madison Case*, Bangladesh Journal of Legal Studies (10 August, 2016) ,<https://bdjls.org/introduction-judicial-review-bangladesh/>

²⁶ Sudhir Krishnaswamy, 'Horizontal Application of Fundamental Rights and State Action in India' in C R Kumar and K Chockalingam (eds), *Human Rights, Justice, and Constitutional Empowerment* (Oxford University Press 2007) 47-73.

an example, Article 27 (equal protection of law), articles 32 (right to life and liberty), 35(5) (provision against torture)- direct horizontality is not seemed there to in terms of enforcement. Because those rights can be enforced against anyone- either against public body or private body- so that indirect horizontality can be applied. Contrary to these nature, direct horizontality is visited only through the bar on forced labour (Article 34) as private actors are more prone to violate this right.²⁷

In Bangladesh, there is no jurisprudence that accepts the application of fundamental rights to private actors. *Sultana Nahar v Bangladesh* (1998)²⁸ exhibited judicial conservatism in broadening remedies in situations relating private parties' acts. Certain sex-workers were evicted by the townspeople in this case, prompting a lawyer to file a writ petition where he seeks protection for that unhappy individuals' group. Not only did the Court deny his standing, it also ruled that the remedies under the constitution were not available for any private-sector criminality. Furthermore, in *Sultana Nahar*, a restrictive constitutional construction resulted in a failure to recognize the horizontality of fundamental rights.

In the realm of public law compensation, there has recently been an unusual development: the Court is delivering compensation orders against some private corporations such as private medical services, private transport companies. Such remedy is unquestionably authorized by the Constitution's Article 102(1), which allows the Court to issue an "order" to enforce fundamental rights. Consequently, imposing compensation judgments against private individuals can most likely be regarded a kind of fundamental rights horizontality. The Court has never written down any reasoning showing that they were defending fundamental rights in any of these compensation judgements. In reality, in common law tort suits, the Court provided constitutional remedies. As a result, some academics believe that the Court's compensating jurisprudence is nonetheless unprincipled. The discussion of this evolution is outside the scope of this work.²⁹

The High Court Division in *Zakir Hossain Munshi v Grameen Phone* (2003) case accepted judicial review against Grameen Phone, Bangladesh's leading private cellular phone provider, which turned the developing jurisprudence of this country. This review was allowed as per the principle of legality under article 102(2), the ultimate intention of such acceptance to safeguard

²⁷ Ridwanul Hoque, *Horizontality of Fundamental Rights in Bangladesh*, 32(1) Dhaka University Law Journal 54,59 (2021).

²⁸ 18 BLD 361 (HCD) (1998).

²⁹ Ridwanul Hoque and Sharawat Shamin, *Bangladesh: State of Liberal Democracy* in Richard Albert et al. (eds), 2017 Global Review of Constitutional Law (I-CONnect and the Clough Center for the Study of Constitutional Democracy 28, 31-21 (2018).

the consumers from illegally imposing extra charges. The issue was a question of legality or due process of law rather than a breach of fundamental rights. Because the corporation was a "licensee of the government," the age-old norm that writ petition would not lie against any private entity has been considerably eased via this judgment.³⁰

The HCD said in ***Rokeya Akhtar Begum v Bangladesh*** that

“Fundamental rights can be enforced against private bodies, and that judicial review can be brought against a private entity if it performs functions in connection with the Republic's or a local authority's activities.”

It also said that- *“the source of authority is not the only factor to consider when determining whether or not a body is subject to judicial review. Rather, the functional test is what determines whether a private conduct is subject to constitutional judicial review”*. The central question was whether the College authorities were public authorities subject to judicial scrutiny under Art. 102(2) based on the legality premise. It wasn't a matter of judicial review under Article 102(1) based on a violation of fundamental rights. The Court, nevertheless, commented that *“when fundamental rights are relied on, the question of the status of the impugned person or authority loses [its] relevance because [of] the phrase ‘any person or authority’ [in art. 102]”*

In HCD level, direct horizontal enforcement of fundamental rights was sought magnificently in ***Mainul Hosein v Anwar Hossain***³¹, though Appellate Division declined to rule on direct horizontality on appeal. Mr. Anwar Hossain was Daily Ittefaq's second executive director, as well as the printer, publisher, and editor and subsequently elected as a Minister in the then Govt during 1996. Mr. Hossain then cancelled the employment contracts of 2 workers, not only this, he also get appointed as an editor-in-charge of that newspaper, using the power of his official position. In these situations, Mr. Mainul Hosein, filed the petition questioning legitimacy of the Minister who held a public position at the same time participating in the administration of a private firm, as well as the validity of such actions he took against those workers.

The High Court Division issued a divided judgement in the case of Mainul Hosein. The ruling was dismissed by Justice Abedin, but Justice Mamun made it absolute, holding that fundamental rights can be enforced against private individuals. Justice Aziz, agreed with Mamun J. after hearing the case. The senior judge on the Bench, Abedin J, who delivered the split judgement, denied believing that the freedom of the press which is one of the fundamental rights was infringed here. Though Mamun J, failed to offer any rationale regarding the infringement issue,

³⁰ [2003] 55 DLR 130 (HCD)

³¹ [2006] 58 DLR 117 (HCD)

but he did state emphatically that Article 102(1) refers that against any private individual, such order might be obtained. The similar avoidance of accepting direct horizontality of rights is also observed in the judgment of Aziz J. His hesitancy may be deduced from his reference on an Indian case, *Shri Anadi Trust v VR Rudani*³², where the Supreme Court of India favored broadening constitutional remedies with a view to increasing "judicial supervision over the fast-growing tangle of bodies impacting people's rights." The Appellate Division overturned the ruling of the HCD in Mainul Hosein on appeal.³³ However, it appears to have taken a rather technical approach. It didn't actually address the problem of judicially enforcing fundamental rights against a private organization.

The High Court Division emphatically held a strong obiter in 2013's case (*Moulana Md. Abdul Hakim v Bangladesh*³⁴), where "judicial review was successfully extended over an impugned action of a public nature by a private entity, that breaches of fundamental rights by private entities are subject to judicial review under Article 102 (1)."

Mr. Abdul Hakim who was the principal of a madrasah, a non-government Islamic educational school, was fired by the madrasah management committee in February 2011. Mr. Hakim filed a legal challenge to the ruling. The respondent objected to the application, claiming that because this petition was issued by a private entity, it should not be subject to judicial review under the Constitution's Article 102(2).

The Court decided on jurisdiction by using a broad meaning to the expression "any individual undertaking any functions in connection with the affairs of the Republic" as defined in art. 102. (2). It was recognized that one must examine the nature of the functions of the body in question, rather than only the source of its power. *R v Panel on Takeovers and Mergers, ex parte Datafin* [1987] QB 815 and *R v Disciplinary Committee of the Jockey Club, ex parte Aga Khan* [1993] were referred often in this judgment. The court recognized that private entities' actions in some definite areas, such as education and health, are basically tasks that belong to the public sphere. Private educational institutions in Bangladesh usually hold management committees, those are consist of some private individuals, guardians as well as Politian. These schools and colleges are partially sponsored by the government. It does not only sponsor to some extent, but also plays an important part in regulating their operation. Statutes govern the establishment and operation of such school committees. When considering the circumstances of this case, the Court considered a number of criteria, including the madrasah's management committee's

³² [1989] AIR 1607 (SC)

³³ [2006] 58 DLR 229 (AD).

³⁴ [2014] 34 BLD 129 (HCD)

ability to affect the petitioner's rights and interests. It was discovered that the body has this capability and that there was a regulatory link between its activities and statutory control. The Court determined that the management committee of Mr. Abdul Hakim's madrasah was performing a public role, based on one of Datafin's methodologies (whether the body has been "woven into the fabric of public regulation").³⁵

Thus, with the courses of time, the Courts of Bangladesh are liberally interpreting the scope of judicial review and stretching to horizontal enforcement of fundamental rights, though not directly but through indirect horizontality envisioned in Abdul Hakim case.

V. CONCLUSION

The common technique and significant way to adopt a vertical position within the rudimentary dichotomy is perfectly consistent with indirect horizontal effect - is also demonstrated in the renowned case decision of *New York Times v Sullivan*³⁶, which invalidated part of the private law of defamation on free speech grounds inside a constitutional structure recognized for its verge 'State Action' prerequisite.

We can observe the last improvement so far in Bangladesh through the case of Abdul Hakim, where the court had to determine the reality and degree of the public element of any ostensibly private authority's operating ambit by applying the standards put forth in the preceding instances. The Abdul Hakim judgement has established a precedent that contradicts the well-established idea that any order or decision of a private entity cannot be questioned under Bangladesh's Constitution, Article 102. The court in the Abdul Hakim case appropriately justified its stance in relation to the case's maintainability by wanting to dive into the excursions made by courts in other jurisdictions owing to a lack of case law in the nation.

In today's globalized world, courts must be pragmatic in their grasp of the complexity of social or economic business in the public sector, as it presents chances for private groups to form partnerships with the government to keep trade, commerce, and service delivery flowing. As a result, it's important to know if the judgments made by these private entities are entwined in the larger regulatory power of public authorities. As the Abdul Hakim case has demonstrated, it is a topic worth investigating by both attorneys and judges. Bangladesh would increasingly accept such approach, reading generously and drawing precedent from comparable constitutional legislation, as the jurisprudence of horizontal enforcement of fundamental rights s by widening

³⁵ 12 n.25 passim

³⁶ 376 US 254 (1964)

the scope of judicial review grows.
