Making Rights a Reality: A Case for Enforcing Constitutional Rights Horizontally

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Abstract
Whilst calls to uphold and protect our constitutional rights have so often been raised, the legal position is far from the truth. An examination of the constitution reveals that Part II of the Federal Constitution declares our fundamental rights without restricting its enforcement between individuals per se. Despite the absence of such limitations, the Malaysian courts have consistently rejected the horizontal enforcement of constitutional rights, thereby rendering the individual's constitutional rights largely illusory. Given the constraint, this article aims to explain why our constitutional rights should be enforced horizontally and suggest a proper method which the courts can adopt to enforce these rights horizontally.

Keywords: Federal Constitution; constitutional rights; public and private divide; horizontal enforcement; individuals; illusion

1. Introduction

The call to uphold and protect our constitutional rights is raised so often that it has now become a cliché. Whilst these sources and judicial decisions consistently recognise our constitutional rights as an important foundation in our Federal Constitution, the legal position is far from the truth. An examination of the Federal Constitution reveals that the constitution merely specifies the different constitutional rights found in Part II of the Constitution. It does not prohibit nor limit (either expressly or impliedly) the horizontal enforcement of constitutional rights between individuals.

Despite the absence of any prohibition or limitation found in the Federal Constitution, the Malaysian courts have consistently held that constitutional rights are only enforceable against the government and not between individuals per se. This dichotomy between the private and public divide was ironically created by the judiciary, the very institution which was established to protect and defend the constitutional rights of individuals. In *Beatrice a/p AT Fernandez v Sistem Penerbangan Malaysia*,[88] the Federal Court of Malaysia had expressly declared that constitutional law is a branch of public law *which deals with the contravention of individual rights by the Legislature or the Executive or its agencies*. (emphasis mine). The Federal Court's view was subsequently affirmed by the Court of Appeal in *Airasia Berhad v Rafizah Shima Mohamed Aris*[89] where the Court of Appeal had

[88] [2005] 3 MLJ 681, para 13.
[89] [2014] 5 MLRA 553, 560 at para 26.

observed that " … The interpretation accorded by Beatrice's case on the constitutional effect is called [the] *'vertical effect' ….*[which] essentially *constitutional law, as a branch of public law, only addresses the contravention of an individual's rights by a public authority*." [emphasis mine]

The decisions of the courts to create a private and public divide have effectively limited the impact of constitutional rights amongst individuals. Based on the current position of law, the enforcement of constitutional rights between individuals in Malaysia remains largely illusory. Whilst the state is actively promoting and instilling the importance of protecting one's constitutional rights on one hand, on the other, the effectiveness and enforceability of these rights between individuals are largely muted. This results in a zero-sum game.

This article will provide various reasons to justify why the Malaysian courts should adopt the horizontal approach to constitutional rights instead of the current 'public and private divide.' The final part of this article will propose the proper method which the courts can adopt to enforce constitutional rights horizontally, thereby transforming the rights from an illusion into a reality.

2. Can Individuals Enforce their Constitutional Rights Against Each Other?

There are currently two prevailing views on this issue.[90] The first, known as the 'vertical view'[91] argues that public law (i.e. constitutional law in this case) is strictly confined to the relationship between the state and the public. Hence, public law (i.e. constitutional law in this case) does not regulate the relationship between private individuals. This means that an individual will not be able to enforce his/her constitutional rights against another individual.[92]

The opposing view (better known as the 'horizontal view') however contends that besides the state, constitutional rights are enforceable between individuals inter se.[93] Although the

[90] Stephen Gardbaum, 'The "Horizontal Effect" of Constitutional Rights' [2003] 102(3) Michigan Law Review 387, 388.

[91] Ibid, 394: "The first polar position is that of a purely vertical approach to the issue ... Rights regulate only the conduct of governmental actors in their dealings with private citizens but not relations among private citizens … The well-known justifications for this division lie in the values of liberty, autonomy, and privacy. A constitution's most critical and distinctive function is to provide law for the lawmaker, not for the citizen, thereby filling what would otherwise be a serious gap in the rule of law."

[92] Gardbaum (n 90), 446: "Once again, this appears to involve a paradigmatic instance of vertical effect: private individuals have no constitutional duty to refrain from race or sex discrimination in choosing what contracts to enter into and with whom, or in disposing of their property, or against whom to assert and exercise property rights."

[93] Gardbaum (n 90), 359: "The horizontal position expressly rejects a public-private division in constitutional law, and its justifications reflect a well-known critique of the "liberal" vertical position." Murray Hunt, 'The "Horizontal Effect" of the Human Rights Act' [1998] PL 423, 424-426: "In 2003, the United Nations Commission on Human Rights (Commission), historically the most important incubator of human rights agreements,

horizontal view may be subdivided into various subcategories, essentially this view has two sub-categories. They are the 'direct horizontal' view and 'indirect horizontal' view.[94] The horizontal view (direct or otherwise) effectively provides the individual with the additional protection of the law over personal interests, preferences, and actions.[95] Besides relying on civil laws, the individual may also enforce his constitutional rights against the other individual, thus making the constitution a reality.

Whilst the direct horizontal view takes the position that an individual may rely on the constitution to enforce his constitutional rights against another individual (since the constitution governs the relationship between private individuals),[96] the proponents of the indirect horizontal view have adopted a less aggressive approach. Whilst disagreeing that constitutional duties should be directly imposed on individuals alike,[97] the proponents of the latter view asserts that constitutional rights, like a 'brooding omnipresence' should influence and shape the relationships amongst individuals through different ways.

Regulation is one way in which the constitution could be enforced. The constitution can regulate the laws by 'placing limits on an individual's interests, preferences, and/or action.' Although individuals are not bound by the Constitution, the laws that they invoke and rely

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received two proposed instruments that might appear to realign human rights law horizontally: private actors would have duties as well as rights, and they would owe those duties to society as a whole or to individuals within it. The draft Declaration on Human Social Responsibilities (Declaration) would identify duties that all individuals owe to their societies; and the Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights (draft Norms) would set out duties of businesses under human rights law." The draft declaration was prepared by a special rapporteur to the Commission, Miguel Alfonso Martínez of Cuba, and is appended as Annex I to his report. UN Commission on Human Rights, 'Promotion and Protection of Human Rights: Human Rights and Human Responsibilities' (17 March 2003) Annex I, UN Doc. E/CN.4/2003/105; John H. Knox, 'Horizontal Human Rights Law' [2007] American Journal of International Law 1.

[94] Cheryl Saunders, 'Constitutional Rights and the Common Law' in András Sajó and Renáta Uitz (eds), *The Constitution In Private Relations: Expanding Constitutionalism* (The Netherlands Eleven International Pub, Utrecht 2005) 183, 213, cited in Victor V. Ramraj, 'Beyond the Courts, beyond the State: Reflections on Caldwell's "Horizontal Rights and Chinese Constitutionalism"' [2012] 88(1) Chicago-Kent Law Review 93. In her survey of Canada, South Africa, and Australia, Saunders discovered that in a common law legal system, constitutional rights might influence private legal relations in four ways: direct affect of the rights and obligations of parties under the common law; they may override the common law through a state action doctrine, treating the courts as emanations of the state; they may indirectly influence the common law, under authority of the constitution; they may be used as a source on which courts draw in the parallel development of the common law.

[95] Gardbaum (n 90), 391.

[96] As Justice Walsh expressed in the Irish case of *Meskell v Coras Iompair Eireann* [1973] IR 121, 133, "[I]f a person has suffered damage by virtue of a breach of a constitutional right or the infringement of a constitutional right, that person is entitled to seek redress against the person or persons who infringed that right." Similarly, in *Educational Company of Ireland Ltd v Fitzpatrick (No 2)* [1961] IR 845, 368, it held that " ... if one citizen has a right under the Constitution there exists a correlative duty on the part of other citizens to respect that right and not to interfere with it."

[97] Gardbaum (n 90) 398; Ernest Caldwell, 'Horizontal Rights and Chinese Constitutionalism: Judicialization through Labor Disputes', [2012] 88(1) Chicago-Kent Law Review 77.

on in actions inter se are so bound.[98] So, for example, if " ... the Constitution prohibits racially restrictive covenants valid contracts, then private individuals otherwise wishing to enter or enforce them are indirectly regulated by the Constitution."[99]

Creative judicial interpretation is another method where the constitution can be used to influence individual rights indirectly. Nowhere does it state that the constitution is only applicable to the individual-state relationship. On the contrary, the extent and effect of the constitution is solely dependent upon the interpretation of the courts. A strict interpretation would limit constitutional rights whilst a liberal interpretation of the constitution would enlarge the impact of the constitution. Examples of these contrasting approaches can be seen in the decisions of the following jurisdictions; the Irish courts,[100] the courts of the United States,[101] and Germany[102] *vis a vis* the Malaysian courts.[103] In *Shelley v Kraemer,*[104] private covenants that restricted the sale of houses to only whites were held by the US Supreme Court to contravene the equal protection clause.[105] The equal protection clause was also successfully applied in the United States against a private restaurant owner who had refused to serve another individual.[106] In Ireland, the Supreme Court in *Meskell v C.I.E.*[107] has recognised that constitutional rights 'carr[y] with it its own right to a remedy or for the enforcement of it' and they are rights in addition to common law and equitable right(s).[108] This principle was subsequently adopted in *Hunter v Duckworth & Co Ltd*[109] and *Gray v Garda Commissioner.*[110] In *Parsons v Kavanagh* the Irish High Court granted an

[98] Gardbaum (n 90), 421.
[99] Gardbaum (n 90), 437.
[100] Per Justice Costello in *Hosford v John Murphy & Sons* [1987] I.R. 621, 626 where it was stated, "Uniquely, the Irish Constitution confers a right of action for breach of constitutionally protected rights against persons other than the State and its officials."
[101] Examples of cases which adopt the horizontal rights include *Shelley v Kraemer* (1984) 334 U.S. 1, *Peterson v City of Greenville* (1963) SCt, 373 US 244 and *Burton v Wilmington Parking Authority* (1961) 365 U.S. 715.
[102] The *Lüth Case* (1958) 7 BVerfGe 198, 207f, deciding for Lüth, the Constitutional Court held that there must be " ... a balancing or weighing of the colliding constitutional principles and the application of rules of the civil law." According to Robert Alexy, 'Constitutional Rights, Balancing and Rationality' [2003] 16(2) Ratio Juris 131, 133, Lüth's decision was considered 'groundbreaking' because this decision effectively allows the values or principles found in the constitutional rights to apply not only limited between the citizen and the state but it expanded into 'to all areas of law' as well. The 'radiating effect' of constitutional rights over the entire legal system has resulted in Constitutional rights becoming ubiquitous.
[103] *Beatrice a/p AT Fernandez v Sistem Penerbangan Malaysia* [2005] 3 MLJ 681; *Airasia Berhad v Rafizah Shima Mohamed Aris* [2014] 5 MLRA 553.
[104] (1948) 334 U.S. 1.
[105] U.S. Constitution, Section 1 Amendment XIV: All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.
[106] See *Burton v Wilmington Parking Authority* (n 101); *Peterson* (n 101).
[107] [1973] I I.R. 121.
[108] Ibid, 134.
[109] [2003] IEHC 81.
[110] [2007] IEHC 52, [2007] 2 I.R. 654; "For all of these reasons, Gray is a straightforward application of Meskell." Gerard Hogan, 'The Farthest - December 1972' [2019] LXII Irish Jurist 1, 7.

injunction against a defendant, an unlicensed transport company that was found to have interfered with the plaintiff licensed transport company's constitutional right to earn a livelihood.[111] The approach of the Irish, US, and German courts to extend constitutional rights horizontally between private individuals was not well accepted by the Malaysian courts. The Malaysian courts had instead chosen to adopt the pedantic 'hands-off' approach on constitutional issues between private individuals. This approach has negatively deprived Malaysians of the right to enforce their constitutional rights against each other.

3. The Malaysian Position

A review of the list of cases in Malaysia indicates that the Malaysian courts have adopted the 'vertical view.' It is however humbly submitted that the reasons which were provided by the courts are trivial and are devoid of any justification. In *Beatrice a/p AT Fernandez v Sistem Penerbangan Malaysia,*[112] the applicant, a flight stewardess, was required to resign when she became pregnant. When she refused to do so, the respondent, following the terms of the collective agreement, terminated her services. Being dissatisfied with the respondent's decision, the applicant applied to the court for a declaration that *inter alia* the 'collective agreement was void since it contravened Art. 8(2) of the Federal Constitution.'

In rejecting the applicant's allegation that the collective agreement contravened Article 8(2) of the Federal Constitution, the Federal Court held that " ... it is simply not possible to expand the scope of [Art.] 8 of the Federal Constitution to cover collective agreements such as the one in question."[113] The court reasoned that "*Constitutional law,* as a branch of public law, *deals with the contravention of individual rights by the Legislature or the Executive or its agencies." (emphasis mine)* Constitutional law does not extend its substantive or procedural provisions to infringements of an individual's legal right by another individual.'[114] The Federal Court also decided that 'the reference to the [word] "law" in [Art.] 8 of the Federal Constitution does not include a collective agreement entered into between an employer and a trade union of workmen.'[115] Based on the reasons given, the Federal Court concluded that 'to invoke Art. 8 of the Federal Constitution', the applicant must show that by some law or action of the Executive, it has breached Article 8' which the applicant has failed to do so.[116]

[111] [1990] 10 I.L.R.M. 560. In *Murtagh Props. Ltd. v Cleary* [1972] I.R. 330, the Irish High Court ordered an injunction against a trade union for violating an individual's constitutional right to equality by objecting to the employment of women by plaintiff publican). See *Lovett v Gogan* [1995] 1 I.L.R.M. 12.
[112] [2005] 3 MLJ 681.
[113] *Beatrice a/p AT Fernandez* (n 103) 688, para 13 B.
[114] Ibid, 688, para 13 C.
[115] Ibid, 688, para 13 D.
[116] Ibid, 692, para 29 D.

The decision of Beatrice Fernandez was subsequently followed by the Court of Appeal in *Airasia Berhad v Rafizah Shima Mohamed Aris*.[117] Explaining the decision of Beatrice, the Court of Appeal in *Airasia* held that "The interpretation accorded by Beatrice case on the constitutional effect is called 'vertical effect' which essentially stipulates that constitutional law, as a branch of public law, only addresses the contravention of an individual's rights *by a public authority* ... " [118] (emphasis mine). This view was subsequently adopted by the High Court in the case of *John Dadit v Bong Meng Chiat &Ors*[119] on Article 5 of the Federal Constitution.

4. Why Should Malaysia Adopt The 'Horizontal' Approach On Constitutional Rights?

It is submitted that the 'vertical view' which asserts that constitutional rights are only enforceable against the state may be too restrictive. Why must there be a difference between breaches committed by private individuals and the state concerning constitutional rights when those committed by the individuals are just as serious as the breaches which are committed by the state?[120] To reduce the harshness, it is suggested that the courts should invoke the provisions of 'Fundamental Liberties' in Part II of the Federal Constitution horizontally. The argument that the Malaysian courts should adopt the horizontal view instead of the current 'vertical' view can be supported by the following reasons:

(A) Legal definitions (or artifice)

As Richard Kay rightly pointed out, what legally defines a 'person',[121] 'property', 'contract' or other legal units will determine the extent of their particular rights or liabilities.[122] The scope of these legal definitions (or artifice) may oftentimes cause harm or deprive the parties of certain rights or protection by the relevant legislation merely because these parties do not come within the scope of the legal definition.[123] If individuals can suffer even though certain

[117] [2014] 5 MLJ 318.
[118] Ibid 326, para 261.
[119] [2015] MLRHU 1351.
[120] Erwin Chemerinsky, 'Rethinking State Action' [1985] 8(3) Northwestern University Law Review 503, 510: "Private discrimination causes and perpetuates social inequalities at least as pernicious as those caused by government action."
[121] Richard Kay, 'The State Action Doctrine, the Public- Private Distinction, and the Independence of Constitutional Law' (1993) Faculty Articles and Papers 10, 329, 336 <https://opencommons.uconn.edu/law_papers/10> accessed 8 August 2019 '*The very definition of a person is, in many respects, a legal artifice. The corporate personality is the most familiar example of this phenomenon. But the influence of legal definition is far broader than this. That a human being can sustain a legal wrong but a tree cannot is the result of an implicit decision of the state.'*
[122] Ibid, "The history of slavery reveals that not even a physical human being is immune from redefinition with respect to the capacity to bear rights and duties." Mark Tushnet, 'The American Law of Slavery, 1810-1860: A Study in the Persistence of Legal Autonomy' (1975) 10(119) Law & Soc. Rev.
[123] Kay (n 121) 336: "Thus, the very conceptual categories in which we define what is an injury, who has caused it, and who has suffered from it are public artifacts. Perhaps more to the point, the distinction between public and private is itself determined by law."

concepts are defined by the law, what more if these concepts are not defined at all? This is particularly true for the definition of 'public' in the context of Constitutional Law.

What does the term 'public' encompass? How many persons must be affected before it is categorised as the 'public'? Should a group of people within a community or an organization (e.g. 'Trade Union') be considered the 'public'? The ambiguity surrounding the word 'public'[124]is confusing. This unfortunate result may be caused by the penumbra of uncertainty,'[125] which is an inherent feature of the English language.[126]
This conundrum can be solved if the term 'public' is viewed from a "normative" aspect[127] which includes the individual instead of merely referring to a common enterprise of the people in a state, i.e seen from a "positive empirical sense."[128]

The idea that the public derives its existence from the individual is rooted in the social contract theory.[129] The theory basically states that 'society is formed by the [collective] agreement' of individuals. It is 'individuals' who have collectively decided to lend their rights in exchange for better living conditions.[130] Seen from this perspective, Roscoe Pound had

[124] This dilemma could be traced back to Gustav Radbruch, Kurt Wilk (tr), *The Legal Philosophies of Lask, Radbruch, and Dabin* (ed, Cambridge, Mass.: Harvard University Press 1950) 124; Roscoe Pound, 'Public Law and Private Law' (1939) 24(4) Cornell Law Review 469; Sin Boon Ann, 'Public Law: An Examination of Purpose (Part I)' (1991) Sing. J. Legal Stud. 431, 434 where the author queried, "What is the meaning in law of a public law case?"

[125] H.L.A. Hart, *Concept of Law* (Oxford: Clarendon Press 1961), 119 " ... [words have] a core of certainty and a penumbra of doubt."

[126] Sin Boon Ann, 'Public Law: An Examination of Purpose (Part II)' (1992) Sing. J. Legal Stud. 164, 174, "The English language unfortunately, and very much unlike the language of mathematics, suffers from a lack of precision and open-texturedness … [and the] failure to articulate which sense is being used that has often been the source of confusion in the private/public distinction debate."

[127] Ibid, 176, " … the individual has subordinated a part of his freedom to the legitimate authority which then reserves the right to dictate how and when the individual should or should not behave. This quintessentially represents the second notion of the word 'public'. It is the notion that 'public' stands for the right of the legitimate authority to interfere with the rights of the individual in the name of societal interest. In real terms it may mean for instance, the act of the individual in not contracting with another solely on the basis of race, should be seen as falling into the public domain such that it ought to attract the intervention of the state. Used in this sense therefore, the word 'public' acquires a normative aspect."

[128] Sin (n 126), 175, " … 'public' may be viewed in the positive empirical sense. This may be seen at different levels. At one level, "public" refers to the whole body politic, or the aggregate of the citizens of a state, county or community. In other words, it refers to or relates to the people in a country or community as a whole. Seen in this context, it may be said that 'public' is the embodiment of the community of people, the community of which is normally, although not necessarily, defined by some geographical or territorial boundary."

[129] n/a, 'Social Contract Theory' (*Internet Encyclopedia of Philosophy*) <https://iep.utm.edu/soc-cont/>accessed 13 February 2021, " ... all their Wills, by plurality of voices, unto one Will: which is as much to say to appoint one Man, or Assembly of men, to beare their Person … this is more than Consent … it is a real Unitie of them all, in one and the same Person ... as if every man should say to every man, I authorise and give up my right of governing my self to this man or to this Assembly of men on this condition that thou give give up thy right to him and Authorise all this actions in like manner … This is the generation of that LEVIATHAN, or rather of the Mortal God to which we own under the Immortal God, our peace and defence."

[130] Sin (n 126) 174.

labelled 'public law' as a 'subordinating law' over 'private law.' In fact, Pound went so far as to argue that the validity of public law is dependent upon the individual.[131]

Based on the arguments above, it can be concluded that the public owes its existence to individuals who form the basic unit of society. Hence, it is only right that public law should include the individual[132] since individualism resides at the heart of society.[133] The importance of the individual was emphasised by Ronald Dworkin when he noted that, "Individual rights are political trumps held by the individuals. Individuals have rights when, for some reason, a collective goal is not a sufficient justification for denying them what they wish, as individuals, to have or to do, or not a sufficient justification for imposing some loss or injury upon them."[134] As the English jurist William Blackstone stated, "The public good is … nothing more essentially interested, than in the protection of every individual's private rights."[135]

(B) Natural Rights

Fundamental rights (or 'natural rights'), according to Natural Lawyers[136]came into existence long before any constitution was created.[137] Proponents of Natural Law argue that our fundamental rights which are found in the constitution today were originally natural rights. These fundamental rights are God-given inalienable rights. These rights pre-existed even

[131] Pound (n 124), 479, "Most of all, however, the idea of public law, as a subordinating law, replacing private law has been furthered by the general acceptance since the world war of what may be called a give-it-up philosophy … Hence they cannot be recognized as valid except in the scheme of some individual system, and even in that system, valid for the individual whose scheme it is, the criterion of highest value is not demonstrable to that individual."

[132] Kevin Y.L. Tan, "The Role of Public Law in a Developing Asia' (2004) Sing. J. Legal Stud. 265, 271, "Fundamental to public law logic and thinking is the idea that there should be limits to state and government power and that law and legal institutions should be established and nourished to check the use of such power. Law was seen as a means to protect individuals from the arbitrariness and caprice of unbridled power."

[133] Societies, made up of individuals and any number and type of groups, strive for what is good through their own rules and conventions outside the laws of states. In classic republican theory, the individual's freedom may be partly compromised to serve the needs of the state; Gabrielle Appleby, Alexander Reilly, Laura Grenfell, *Australian Public Law* (Third Edition, Oxford University Press 2018) 19.

[134] Ronald Dworkin, *Taking Rights Seriously* (Harvard University Press 1977), xi. Ronald Dworkin, *Is Democracy Possible Here? Principles for a New Political Debate* (Princeton: Princeton University Press 2006) 31, "Certain interests of individuals are so important that it would be wrong for the community to sacrifice those interests just to secure an overall benefit."

[135] William Blackstone, *Commentaries on the Laws of England* (1827 ed, Clarendon Press), 101.

[136] Richard A. Epstein, 'The Utilitarian Foundations of Natural Law' (1989) 12 Harvard Journal of Law and Public Policy 711, 713, "While natural lawyers recognize the difference between analytical and empirical truths, they often strive to identify a grand set of necessary empirical truths about human nature that are not made, but rather are discovered through some combination of introspection, observation, and rational discourse."

[137] Karl Deuble, 'The Constitution and Enforceable Natural Law' (2016) The Review: A Journal of Undergraduate Student Research 17, 2 <https://fisherpub.sjfc.edu/ur/vol17/iss1/5/> accessed 18 July 2019, "The role of government is then to protect these rights because in a state of nature these rights are not protected. Man only creates a government so that he may gain protection of his natural rights. This limited view of government is very important because evidence of this natural theory of law is a huge part of our Constitution that is often misunderstood or ignored."

before the idea of democracy was born or the constitution was created. The constitution, argues natural lawyers, does not create these basic or natural rights. Instead, the constitution is created to formally recognize, protect and enforce the existence of these rights in society,[138] thereby preventing society from falling back into the destructive 'pre-social' contract position.

The Natural Law argument has exposed the absurdity of the vertical viewpoint in two aspects. Firstly, fundamental rights are not creatures of the constitution. Secondly, the vertical argument that constitutional rights are inapplicable between individuals today shows that instead of recognizing and protecting the natural rights of individuals, (which it was originally intended to) the Constitution has instead effectively taken away the natural rights of its citizens[139]in terms of the Constitution's horizontal effect.

The horizontal enforcement of constitutional rights is also supported by Positivism.[140]According to Kelsen, "It is … possible for the legal order, by obliging the law-creating organs *to respect or apply certain moral norms [emphasis mine]* or political principles or opinions of experts to transform these norms, principles, or opinions into legal norms, and thus into sources of law."[141] When natural rights are codified in the Constitution, the courts should enforce these rights strictly[142]and not impose any limits or conditions on the enforcement of these rights.

(C) Horizontal Effect of the Constitution on Government Link Companies

The post-modern governments of today are increasingly " ... export[ing] ... functions to private actors which were traditionally considered attributes of sovereignty, or [were] at

[138] On the relationship between Natural Law and the Federal Constitution please refer to Sharon K. Chahil, 'A Study of the relationship between Natural Rights Theory and the Doctrine of Constitutionalism Encapsulated Within the Federal Constitution' [2005] 6 MLJ i.

[139] B. Lobo, 'Does The Law of Human Rights Pervade all Malaysian Law in view of Part II of the Federal Constitution?' [2007] 7 MLJ lxxxvi, xcvii: "Further, as submitted, 'Fundamental rights' in Part II of the Constitution can override any other provision (including art 127) of the Constitution. It is natural law. It is binding on all human beings. With respect, as such it cannot be 'abridged' by any legislation including Constitutional legislation." Dworkin (n 134), according to Professor Dworkin, rights are always seen as 'trumps'.

[140] n/a, 'Legal Positivism' (*Internet Encyclopedia of Philosophy*) <https://iep.utm.edu/legalpos/#H1> accessed 15 February 2021, "Legal positivism is a philosophy of law that emphasizes the conventional nature of law - that it is socially constructed … Legal positivism does not base law on divine commandments, reason, or human rights … [it] does not imply an ethical justification for the content of the law, nor a decision for or against the obedience to law. Positivists do not judge laws by questions of justice or humanity, but merely by the ways in which the laws have been created."

[141] Hans Kelsen, Anders Wedberg (trans.), *General Theory of Law and State* (Cambridge, MA: Harvard University Press; reprinted, New York: Russell and Russell 1961), 132.

[142] John Austin, *Austin: The Province Of Jurisprudence Determined* (Wilfrid E. Rumble ed, Cambridge University Press 1995) 157, "The existence of law is one thing; its merit and demerit another. Whether it be or be not is one enquiry; whether it be or be not conformable to an assumed standard, is a different enquiry."

least perceived as integral parts of the operation of a legitimate government."[143] This phenomenon has increased the relevance and importance of horizontal rights; particularly between the public and companies which are controlled or linked to the government (GLCs).[144] Due to the rise of privatisation, the threat against the constitutional rights of individuals does emanate from the government directly but through various indirect forms and shades. They include multinational enterprises (which could be in a form of a public-private partnership[145]), government link companies (GLC's), and even state restraint.[146]

This view strikingly resembles the development of Malaysia, which is almost identical to the development of other countries. There was a point in time in Malaysia's history where important operations of the state which affect society (for example water, electricity, transport, and telecommunications[147]) were controlled and handled solely by the government. Before the advent of "privatization"[148] and "corporatization",[149] there existed

[143] Renáta Uitz, 'Yet Another Revival of Horizontal Effect of Constitutional Rights: Why? And Why Now?' in András Sajó, Renáta Uitz (eds), *An Introduction, in The Constitution In Private Relations: Expanding Constitutionalism* (Eleven International Pub 2005) 1, 13, cited in Ramraj (n 94) 97 " … in the twentieth century, threats to fundamental rights no longer emanated from the state alone, but precisely from powerful private parties or bearers of societal power, which usually means incorporated companies and associations." Florian RÖdl, 'Fundamental Rights, Private Law, and Societal Constitution: On the Logic of the So-Called Horizontal Effect' [2013] 20(2) Indiana Journal of Global Legal Studies 1015, 1025.

[144] Ramraj (n 94), 97; Chemerinsky (n 120), 501-502. According to Thynne, "In its divestment programme … the Government will have to transform its undertakings which are commercially viable into something which may eventually be sold off in the market. The transformation process follows three broad strategies. First, the entity concerned may be commercialised without any accompanying change to its legal-structural characteristics. Secondly, public organisations may be corporatised. This essentially entails transforming the legal structure of the enterprise into a corporate body which in law may own property, and may sue and be sued. The process of incorporation may either take the form of the creation of a body by an Act of Parliament, in which case it becomes a statutory board, or the form of a company registered under the Companies Act. Thirdly, the final strategy in the transformation process lies in selling the enterprise to the public.' Ian Thynne, 'Public Enterprise Transformation: Changing Patterns of Ownership, Accountability and Control'in Ng and Wagner (eds.) *Marketisation in ASEAN* (Institute of Southeast Asian Studies, Singapore 1990) 170-172.

[145] Fong-Woon Lai, Muhammad Kashif Shad, et al, 'Revisiting Privatization and Economic Growth in Malaysia: An Empirical Examination' (2018) SHS Web of Conferences 56, 05004, ICML, 9 <https://www.shs-conferences.org/articles/shsconf/pdf/2018/17/shsconf_iclm2018_05004.pdf> accessed 25 June 2019.

[146] Ramraj (n 120), 100-101, "The crucial point - and the one that resonates even more widely in an era dominated by multinational enterprises and the rise and resurgence of private power (and its hybrid variations) that operate within and beyond the state-is that the moderation or restraint of state power ought no longer to be the singular concern of constitutional law … But whatever the case might be domestically, it is increasingly apparent-and this is the second point-that threats to individual and communal well-being come not only or primarily from the state, but from multiple forms and shades of private power and the projection of that power around the globe ...". Roberto Mangabeira Unger, *Law In Modern Society* (The Free Press 1976) 201-202, " … the increasing recognition of [coporatisation and privatisation] over the lives of their members makes it even harder to maintain the distinction between state action and private conduct."

[147] K.L. Phua, 'Corporatization and Privatization of Public Services: Origins and Rise of a Controversial Concept' (2001) Akademika 58, 45, 45-46 <ejournals.ukm.my/akademika/article/download/2966/1891> accessed 25 June 2019, "The policy of privatization of public services was first introduced in Malaysia in 1983… In the years that followed, major public sector entities such as Malaysian Airline System, Lembaga Letrik Negara and Jabatan Telekom were privatized (broadly defined) and became Malaysia Airlines, Tenaga Nasional and Telekom Malaysia respectively."

[148] Ibid, 46-47, "The Economic Planning Unit's definition of privatization is "transfer to the private sector of activities and functions which have traditionally rested with the public sector" and involves one or more of the

a clear demarcation between the public and private services in Malaysia. Telecommunications, for example, came under the control of the Jabatan Telekommunikasi Malaysia (JTM) or the Malaysian Telecommunications Department.[150]

However, with the rapidly rising globalised economy and an intense global move towards privatization (including various public-private forms of partnerships,)[151] "post-modern governments" are now slowly releasing and transferring the control and operations of these basic services which affect society at large into the hands of private companies.[152] This is evident from the increasing numbers of government-linked companies like Tenaga Nasional Berhad, Telekom, Syabas, and Petronas (commonly known as 'GLC's) where the government continues to retain direct or indirect control over these companies through the investment arm of government.[153]

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following components: management responsibility, assets or the right to use assets, and personnel (Economic Planning Unit no date). Thus, in Malaysia, privatization of public services can refer to any of the following (Jomo et al. 1995; Adam and Cavendish 1995) (with corporatization being a mild form of privatization): contracting out of services to the private sector, e.g., laundry, cleaning and laboratory services in hospitals; equipment and facilities maintenance management contracts, e.g., getting a private company to manage a public facility, joint ventures with the private sector, partial private ownership of publicly-owned facilities complete transfer of ownership of public facilities to the private sector, allowing the private sector to build and operate facilities such as private colleges and universities, medical centres, highways, television stations and so on."

[149] Phua (n 147), 46, *'Corporatization being a mild form of privatization*'; "The strategies of commercialization include corporatization, a scheme of approximating the private sector model of incorporation within the context of public ownership … ". Yuwa Wei, 'Corporatization and Privatization: A Chinese Perspective' [2002] 22(2) Nw. J. Int'l L. & Bus. 219 <https://scholarlycommons.law.northwestern.edu/cgi/viewcontent.cgi?article=1547&context=njilb> accessed 25 June 2019.

[150] Shankaran Nambiar, 'Revisiting Privatisation In Malaysia: The Importance of Institutional Process' [2009] 14(2) Asian Academy of Management Journal 21, 27, 33-37 <http://web.usm.my/aamj/14.2.2009/AAMJ_14.2.2.pdf> accessed 25 June 2019.

[151] Lai, Shad, et al (n 145), 9.

[152] Malaysian examples include Tenaga Nasional Berhad, Malaysian Airline System, and Malaysian International Shipping Corporation and Malaysia Airports Berhad (through a complete sale). See, Bakul H Dholakia and Ravindra H Dholakia, 'Malaysia's Privatization Programme' [1994] 19(3) Sage Journal 25, 27-28 <https://journals.sagepub.com/doi/pdf/10.1177/0256090919940302> accessed 25 June 2019. In the UK public services which were privatized included the British Rail, British Gas, British Airways and British Telecoms. See John Moore, 'British Privatization - Taking Capitalism to the People' [1992] Harvard Business Review<https://hbr.org/1992/01/british-privatization-taking-capitalism-to-the-people> accessed 25 June 2019.

[153] Nambiar (n 150), 27, "The privatisation wave in Malaysia had its beginnings in 1983, when then Prime Minister Mahathir Mohamad publicised his government's intention to embark on a privatisation policy. This was followed by the publication of Privatisation Guidelines by the Economic Planning Unit (EPU) of the Prime Minister's Department in 1985. These guidelines constituted the official document on privatisation. In February 1991, the Privatisation Masterplan (PMP) was announced. This plan set out the country's privatisation policies. In formulating its privatisation policy, the government aimed to achieve the following objectives: i. To relieve the financial and administrative burden of the government; ii. To improve efficiency and increase productivity; iii. To facilitate economic growth; iv. To reduce the size and presence of the public sector in the economy; and v. To assist in meeting the national development policy targets." On how privatization came about, see an opinion piece by Jomo Kwame Sundaram, 'How Privatisation Came To Be' *New Straits Times* (Kuala Lumpur 15 March, 2019) <https://www.nst.com.my/opinion/columnists/2019/03/469334/how-privatisation-came-be> accessed 25 June 2019.

The privatization of public services has also affected the constitutional position and thus action against these departments.[154] When public services were categorised as the 'state' previously, they were regulated and controlled by the constitution. However, after these public services were privatised or corporatized, it seems that these departments (which are still providing the same services) will not be caught under the constitution once they become 'GLC's since they are now classified as 'companies.' This is so even though the functions of these government link companies remain the same and their actions continue to affect society at large. Consequently, individuals' (who were able to enforce their constitutional rights against them) are now prevented from doing so merely because these departments are now companies and are classified as 'legal personalities'/individuals in the legal sense.[155] This will produce an absurd result and a lacuna in the law.

It begs to reason therefore that in line with the increasing developments of GLCs in the modern government, 'we need to find innovative ways of moderating power that stretch our contemporary understandings of constitutional law' as an author, Victor V. Ramraj[156] has alluded to. One way to achieve this is by expanding the horizontal rights on the modern state as opposed to the vertical view.

(D) Human Rights Commission of Malaysia

The Human Rights Commission of Malaysia Act 1999 ('HRC') was established to demonstrate Malaysia's commitment to human rights, her active involvement in the United Nations, and the growing international emphasis on human rights.[157]

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[154] Sin (n 126), 432, the subject of control of public power is particularly pertinent in the era of privatisation. With the hiving off of state enterprises through sale to the private sector, a transformation has taken place in the way in which public goods are being delivered. Traditional functions of government, such as provision of health, broadcasting, telecommunications and utility services, have increasingly been taken over by the private supplier. In consequence, the state progressively reduces its profile in these departments, limiting itself to the role of performing the regulatory functions. The choice of a private supplier in delivering public services raises equally interesting questions concerning the scope of public law.

[155] Unger (n 146) 201, "Corporatism's most obvious influence on the law is its contribution to the growth of a body of rules that break down the traditional distinction between public and private law ... ". In *Beatrice a/p AT Fernandez* (n 103), the Federal Court held since constitutional law is a branch of public law which deals with the contravention of individual rights by the Legislature or the Executive or its agencies, it does not apply to the respondent because the respondent is a company.

[156] Ramraj (n 120), 95, 'If private and hybrid (public-private) forms of power are increasingly operating beyond states, we need to find innovative ways of moderating power that stretch our contemporary understandings of constitutional law."

[157] As leader of the Malaysian delegation to the UNCHR, Tan Sri Musa, in 1994 first suggested to the Government that the time was right for Malaysia to establish its own independent national human rights institution. Several factors influenced this proposal: the growing international emphasis on human rights and recognition that it crosses boundaries and sovereignty; Malaysia's active involvement in the United Nations system; the changing political climate in Malaysia with a more politically conscious electorate and dynamic civil society … ". On 9 September 1999, the Human Rights Commission of Malaysia Act 1999 was gazetted and the

One of the primary duties of the Commission under the HRC is to inquire into complaints regarding infringements of human rights.[158] These are fundamental liberties that are enshrined in Part II of the Federal Constitution.[159] As the Commission is duty-bound to create awareness of human rights in Malaysia, the HRC has empowered the Commission to receive complaints both from private individuals and the public alike.[160] Under sections 12(1)[161]and 13(2)[162]of the HRC, the Commission is authorised to inquire into any complaint(s) which is lodged by an aggrieved person with the Commission against the government or *another individual*.[163]

Complaints against alleged breaches of constitutional rights against another individual can be horizontally enforced under s 4(2)(f)[164]of the HRC since the Commission (representing the individual) may unilaterally apply to the High Court as an 'aggrieved person' under s 12(1) of the HRC[165] and O 53 (read with s 25(2) of the Courts of Judicature Act 1964 and paragraph 1 of the Schedule of the Rules of the High Court 1980.[166]

The combined effect of all the provisions mentioned above allows anyone (including an individual) to be the respondent to a complaint under the HRC.[167] This indirectly allows constitutional rights to be horizontally enforced between individuals. Holding a similar view, the Network on National Human Rights Institutions (NNHRI) had in its report stated that while the Commission is given a wide mandate in its investigation, the Commission's

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Human Rights Commission of Malaysia (SUHAKAM) was established by Parliament <http://www.suhakam.org.my/about-suhakam/sejarah> accessed 13 September 2018.

[158] Section 12(1) of the Human Rights Commission Of Malaysia Act 1999 - "The commission may, on its own motion or on a complaint made to it by an aggrieved person or group of persons or a person acting on behalf of an aggrieved person or a group of persons, inquire into an allegation of the infringement of the human rights of such person or group of persons."

[159] Ibid, "The Commission may, on its own motion or on a complaint made to it by an aggrieved person or group of persons or a person acting on behalf of an aggrieved person or a group of persons, inquire into an allegation of the infringement of human rights of such person or group of persons." Lobo (n 139) xc, "In countries with written Constitutions, the domestic source of human rights law will usually be the Constitution. Hence the definition of 'human rights' in s 2 of the HR Act 1999 which refers to Part II of our Constitution."

[160] K.M.P. Setiawan, 'Promoting Human Rights: National Human Rights Commissions in Indonesia and Malaysia' (2013) Doctoral Thesis 122-123, 128, 140.

[161] Lobo (n 139), lxxxvi.

[162] Section 13(2) of the Human Rights Commission Of Malaysia Act 1999, section 13(2) - "Where an inquiry conducted by the commission under section 12 discloses the infringement of human rights, the commission shall have the power to refer the matter, where appropriate, to the relevant authority or person with the necessary recommendations."

[163] Telephone Conversation between the author and Ann Jennifer Victor Issacs, Deputy Secretary, Policy & Law Group Human Rights Commission of Malaysia (SUHAKAM) on 22 May 2021, "The complaints and monitoring department hears complaints of any nature which includes neighborhood complaints … ".

[164] Lobo (n 139), cxxi.

[165] *Subramaniam a/l Vythilingam v The Human Rights Commission of Malaysia (Suhakam) & Others* [2003] MLJU 94, "Section 12 (1) of the Act also employs the word 'may' and thus it gives Suhakam the discretion to 'inquire into an allegation of the infringement of the human rights of such person or group of persons.'"

[166] Now, Rules of Court 2012.

[167] Lobo (n 139), cxix.

investigation is 'still relatively passive.' Because of this, the NNHRI has recommended the Commission to adopt a more pro-active approach by embarking on fact-finding missions to indigenous peoples who are standing off against corporations.[168] The suggestion given by NNHRI has highlighted the reluctance of the Commission in investigating and enforcing horizontal constitutional rights against individuals even though it is empowered to do so.

(E) Protection of Selective Fundamental Rights

Certain constitutional rights in Malaysia are already horizontally enforceable. Take defamation for example; the individual's right to sue the other person for words or statements which affect the reputation of an individual effectively restricts the freedom of expression of one party whilst simultaneously protecting the right of reputation of the other party.[169] The 'right of reputation' as acknowledged by the Court of Appeal in *Dato' Seri Mohammad Nizar bin Jamaluddin v Sistem Televisyen Malaysia Bhd & Anor*[170] was considered a facet under the right of life in Article 21 of the Indian Constitution,[171] which has its equivalent in Article 5 of the Federal Constitution.

Contractual freedom (whether it is viewed as personal liberty[172] or a right to life[173] guaranteed under Article 5 of the Federal Constitution) is limited under the Contract's Act

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[168] Asian NGO Network on National Human Rights Institutions (ANNI), *2018 Report on the Performance and Establishment of National Human Rights Institutions in Asia*, 51-52 <https://www.forum-asia.org/uploads/wp/2018/12/2018_ANNI-Report_FINAL.pdf> accessed 20 February 2021.

[169] Gardbaum (n 90) 388, 440-446, "The issue of defamation has been a leading vehicle for courts to address the issue of indirect horizontal effect not only in the United States but also in Germany, Canada, and South Africa." In the same article, Gardbaum also discusses the horizontal impact of defamation on free speech; On the relationship between the right to free speech and defamation, see Tom Bennett, 'Horizontality's new horizons- re-examining horizontal effect: privacy, defamation and the Human Rights Act' [2010] 21(3) Ent LR 96 (Part 1) and 145 (Part 2).

[170] In *Dato' Seri Mohammad Nizar bin Jamaluddin v Sistem Televisyen Malaysia Bhd & Anor* [2014] 4 MLJ 242, para 55, the Court of Appeal acknowledged that, "It is trite law that in a defamation suit, whether for slander or libel, the law presumes that some damages will flow from the publication." This position has long been established by learned Lord Justice Bowen in the case of *Ratcliffe v Evan* [1892] 2 QB 524, 528 where he said, "The law presumes that some damages will flow in the ordinary course of things from the mere invasion of his absolute right of reputation."

[171] *Subramanian Swamy v Union of India* (2016) 7 SCC 211, AIR 2016 SC 2728, where the Supreme Court held that 'reputation of an individual is an important part of one's life'. The Supreme Court also quoted *Board of Trustees of the Port of Bombay v Dilipkumar Raghavendranath Nadkarni & Ors* 1983 (1) SCC, 124, wherein it was observed that 'right to reputation is a facet of right to life of a citizen under Article 21 of the Constitution.'

[172] *Masa Anak Nangkai And Ors v Lembaga Pembangunan Dan Lindungan And Ors* [2011] MLJU 197, "A wrong no matter how artfully disguised as the Principal Deed and the Joint Venture Agreement are, cannot overwhelm the fact that they are in violation of articles 5 and 13 of the constitution and Section 8 (a) of the Land Code." In this case, the State Government of Sarawak entered into various agreements with development companies to develop an oil palm plantation project which was made purportedly under a different name and purpose. Essentially, the development affected a native customary land. The Federal Court in *CIMB Bank Berhad v Anthony Lawrence Bourke and Alison Deborah Essex Bourke* (Federal Court Civil Appeal No. 02-105-10/2017(W)) held that an exclusion clause in a loan agreement was void and unenforceable as it was an agreement in restraint of legal proceedings under section 29 of the Contracts Act 1950 and was also contrary to public policy.

1950 because of the protection given to the weaker contracting party.[174] The statutory protection afforded to the weaker party against unfair agreements upholds the equality provisions found in Article 8 of the Federal Constitution. Employment contracts,[175] the law of tort,[176] and copyright[177] are other areas where the law has allowed individuals to legally enforce their rights horizontally.

The two examples and specific areas of the law which are listed above bring to question the extent and breadth of our fundamental rights between individuals per se. Why must the horizontal effect of our fundamental rights be solely dependent upon Parliament's intention? Shouldn't *all* our fundamental rights be available to everyone or at least all citizens?

5. The Proper Approach the Courts Should Adopt

As the bedrock of the country, the Constitution is not merely another piece of legislation but the country's foundation where the whole structure of the country is built on. When it

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[173] Shad Saleem Faruqi, *The Laws Relating to Staff Discipline at Malaysian Universities*, 1, 6 <https://legal.usm.my/v3/phocadownload/act%20605%20-%20the%20law%20relating%20to%20staff%20discpline%20at%20malaysian%20universities.pdf> accessed 4 August 2019, "We must remember that the terms of a 'private contract' cannot displace the public law principles of natural justice. Further, a litigant may argue that 'livelihood' is part of the constitutional right to 'life' and cannot be deprived 'save in accordance with law'." Dato Gopal Sri Ram, 'The Workman And The Constitution' [2007] 1 MLJ clxxii, clxxxii, "The enumerated and non-enumerated rights enshrined in Part II of the Constitution are conferred on the public at large or a class of the public and not upon any particular individual. Hence, it is not open to an individual or even a group of individuals in society to purport to contract out of these fundamental rights."

[174] Under section 11 of the Contract's Act 1950, contracts entered by minors are void. Illegal, immoral contracts and contracts against public policy are also void under section 24 of the Contract's Act 1950. Other void contracts include agreement in restraint of marriage of a person other than a minor s 27, agreement in restraint of trade, profession or business s 28 and agreements in restraint of legal proceeding except contracts to a dispute arbitration or award of scholarship under section 29. Contracts entered by minors are regulated under the Protection of Children And Young Persons (Employment) Act 1966 (Revised 1988). See also Nithiyanantham Murugesu, 'The Role of the Law and the Courts in Preventing the Abuse of Children - The Malaysian Perspective' [2010] 5 MLJ cxxv; Patrick Selim Atiyah, *From Principles to Pragmatism: Changes in the Function of the Judicial Process and the Law* (Clarendon Press, Oxford, 1978) 5, "Unlike classical law which adopts a formalistic view of contract and enforces the common intentions of the parties on the basis that the contract is freely entered into whatever the terms agreed, modern contract law is characterised by the development of doctrines which promote contractual fairness and provide protection to the weaker party in a given contractual transaction."

[175] Vanitha Sundra Karean, 'The Constitutional Right To Livelihood As A Developing Field In Malaysian Labour Jurisprudence' [2007] 5 MLJ cclxxxiv, "Employment cases have revealed an emerging labour law theory which relies upon constitutional principles at its foundations, [particularly Article 5(1) of the Federal Constitution]." See also Vanitha Sundra Karean, 'Charting New Horizons In Procedural Fairness and Substantive Fairness In Individual Labour Law In Malaysia' [2007] 6 MLJ i; Farheen Baig Sardar Baig, 'Security of Tenure vs Retrenchment: The Law and Practice in Malaysia' [2006] 3 MLJ cxxv; Ashgar Ali Ali Mohamed, 'Monetary Compensation In Dismissal Without Just Cause or Excuse: Legislative Guideline A Necessity' [2005] 6 MLJ xliii.

[176] On the relationship between the Constitution and Tort law, see William Binchy, *Meskell, the Constitution and Tort Law* (33 D.U.L.J. 2011), 339-368.

[177] Wenwei Guan, 'Copyright v Freedom of Contract: The "Contract Override" Issue in Hong Kong's Copyright Amendment' [2017] 46 HKLJ 115.

comes to deciding conflicting constitutional rights between private individuals, the method which is suggested by Richard Kay in his article entitled 'The State Action Doctrine, the Public-Private Distinction, and the Independence of Constitutional Law'[178]is a useful method to adopt.

In his article entitled 'Fundamental Rights, Private Law, and Societal Constitution: On the Logic of the So-Called Horizontal Effect', Florian Rodl asserts that fundamental rights in the Constitution must be viewed as a 'valued activity'.[179] This view is based on the fact that the existence of fundamental rights presupposes the existence of private law. Based on this view, one could argue that every law (including private law) has an inherent constitutional character[180] that is intrinsically woven into it. Constitutional rights have an indirect horizontal effect between individuals not because of their direct application or control (which they do not have) but the influence of the values which these constitutional rights have on private law disputes between individuals.[181]

In *Dato Menteri Othman Baginda v Dato Ombi Syed Ali*[182], the Federal Court had provided some guidance (particularly the first and second step) as to how the courts could apply fundamental rights found in the Federal Constitution as a 'valued activity.' Firstly, since the Federal Constitution is a document that is sui generis, the canons of interpretation that apply to ordinary statutes cannot be applied to the Constitution.[183] Secondly, in interpreting the fundamental rights of a Constitution (found in Part II of the Federal Constitution) the courts should not adopt the literal approach. Conversely, following the third principle, the courts should apply the prismatic approach.[184] This requires the presiding judge to be

[178] Kay (n 121). For a similar approach, see also RÖdl (n 143), 1030.

[179] RÖdl (n 143), 1030, "Fundamental rights have effects as values and, as such, provide orientation for the formation of concepts in private law." Chemerinsky (n 120), 533, "Rights are protected in this society in order to safeguard valued activities. Consider for example freedom of expression." See Thomas Irwin Emerson, *The System of Freedom of Expression* (Random House, 1970) where the author tried to justify why the freedom of speech is a valued activity.

[180] RÖdl (n 143), 1022, "In other words, fundamental rights presuppose private law. At least the general freedom to act … ". RÖdl (n 143), 1030, " … fundamental rights express the constitutional character always inherent to private law. Private law itself has a constitutional character. Private law is a free and democratic societal constitution."

[181] Kenneth M. Lewan, 'The Significance of Constitutional Rights for Private Law: Theory and Practice in West Germany' [1968] 17(3) International & Comparative Law Quarterly 571, 599.

[182] [1981] 1 MLJ 29.

[183] Ibid, 32, para B-C; see also Kay (n 121) 388, "Because of the extraordinary nature of the law of the Constitution, it has certain characteristics that mark it off from other kinds of law."

[184] *Sivarasa Rasiah v Badan Peguam Malaysia & Anor* [2010] 2 MLJ 333, 339, "The first has to do with the methodology of interpretation of the guaranteed rights. In three recent decisions this court has held that the provisions of the Constitution, in particular the fundamental liberties guaranteed under Part II, must be generously interpreted and that a prismatic approach to interpretation must be adopted." Other cases which applied the 'prismatic approach' include *Badan Peguam Malaysia v Kerajaan Malaysia* [2008] 2 MLJ 285, *Lee Kwan Woh v Public Prosecutor* [2009] 5 MLJ 301 and *Shamim Reza bin Abdul Samad v Public Prosecutor* [2009] 2 MLJ 506.

guided by the prevailing 'requirements of a just society in their own time'[185] (which is argued will differ from one society to another). One way which the courts could apply the prismatic approach is by considering fundamental rights as constitutional 'values' rather than just 'rights.'[186] Finally, the courts should interpret fundamental rights 'generously' whilst simultaneously reading any derogations or limitations upon these rights restrictively.[187]

Where there are conflicting rights between private individuals, the court should rely on fundamental rights to provide the necessary guiding principles[188] and references in assisting the court to determine what are legitimate interests that are worthy of protection.[189] This approach will also assist the courts to form a weightier decision between conflicting private law rights. The recognition of these constitutional values will also allow the courts through their inherent powers to develop the common law which is in line with the prevailing constitutional values of society.

In cases where the rights of an individual (based either on common law or legislation) do not conform or are found to be in conflict with the constitutional values or principles of the country, such rights should be set aside.[190] Where there are conflicting constitutional rights,

[185] *Boyce v The Queen* [2004] UKPC 32, [2005] 1 AC 400 per Lord Hoffmann, 416, para 28.

[186] Chemerinsky (n 120), 553.

[187] Gopal Sri Ram, 'The Dynamics of Constitutional Interpretation' [2017] MLJ Commemorative Issue 1, 17, " … Whilst the guaranteed rights are to be read generously, derogations upon a right are to read down, that is, they should be read narrowly and restrictively." Chemerinsky (n 120), 535, "Legislatures can limit what might be included in contracts or modify the common law, but simple legislative majorities cannot change the character of constitutional rights."

[188] Christoph Busch, 'Fundamental Rights and Private Law in the EU Member States' in Christoph Busch and Hans Schulte-Nolke (eds), *EU Compendium Fundamental Rights and Private Law: A Practical Tool for Judges* (European Law Publishers 2011) 1, 12, "According to the doctrine of "indirect horizontal effect", human rights are not used as a source of obligation but only as a source of inspiration for interpreting the private law rules. Consequently, they influence the relations between private parties only indirectly "through the interpretation of open textured norms, general clauses and value-oriented concepts such as good faith, reasonableness or negligence, which leave a margin of interpretation for courts." RÖdl (n 143) 1024, " … fundamental rights provide orientation as to what is considered unconscionable, in bad faith, and inequitable. They offer a guiding principle as to what are legitimate interests worthy of protection. They can be a point of reference for determining which rights are protected from violations by any third parties and which justifications can be put forward for interventions in the rights of third parties. This effect of forming concepts of private law by providing orientation is often expressed with the vivid term 'radiation' (Ausstrahlung)."

[189] Chemerinsky (n 120), 507, "Rights are values which can be protected by statute, common law or federal law. What is important is that protection is needed … ". Kay (n 121), 339, "Consequently, a wider reach of the constitutional rules would inevitably create more occasions for measuring the relative strengths of constitutional claims in the particular circumstances."

[190] Chemerinsky (n 120), 535, "If rights represent fundamental values, then any unjustified infringement of those values should be halted'; In a unanimous decision, the High Court of Australia in Lange v Australian Broadcasting Corporation [1997] HCA 25; (1997) 189 CLR 520, 566 decided that 'Of necessity, the common law must conform with the Constitution. The development of the common law in Australia cannot run counter to constitutional imperatives. The common law and the requirements of the Constitution cannot be at odds.'"

the courts should perform a 'balancing act'[191] between both competing constitutional rights by weighing the common law or statute against each of the conflicting constitutional rights.[192] The constitution should act as a guidepost on the way the common law or statute should be interpreted or modified following the circumstances of each case[193] and the court should endeavour to achieve the best possible result by interpreting the rights of both parties in the widest possible and most equitable way.

6. A Change in the Horizon?

Based on the reasons and the suggested guidelines which are provided above, there is no reason why the Malaysian courts should continue to enforce constitutional rights vertically. By accepting the horizontal view, the judiciary will be able to transform constitutional rights from an illusion into a reality.

[191] *Hill v Church of Scientology of Toronto* [1995] 2 SCR 1130 (Supreme Court of Canada), para 97, "When the common law is in conflict with Charter values, how should the competing principles be balanced? In my view … It must be remembered that the Charter 'challenge' in a case involving private litigants does not allege the violation of a Charter right. It addresses a conflict between principles. Therefore, the balancing must be more flexible than the traditional s. 1 analysis undertaken in cases involving governmental action cases. Charter values, framed in general terms, should be weighed against the principles which underlie the common law. The Charter values will then provide the guidelines for any modification to the common law which the court feels is necessary."

[192] Chemerinsky (n 120), 504, "Liberty would be best protected if the courts openly articulated the competing interests that they were balancing. This would force the courts clearly to identify and define the conflicting liberties, enhancing understanding of each of the rights at stake."

[193] This is in line with Article 4(1) of the Federal Constitution which states that, "This Constitution is the supreme law of the Federation and any law passed after Merdeka Day which is inconsistent with this Constitution shall, to the extent of the inconsistency, be void."

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