

## The Ghost of Article 12 in the Indian Constitution: the Verticality v. Horizontality Conundrum

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### Abstract

The chapter on fundamental rights in the Constitution of India, under article 12, identifies the “state” as the actor against whom fundamental rights can be enforced. Decades-long jurisprudence invoking article 12 has established the vertical enforcement of fundamental rights against state actors. However, a constitutional bench judgment in *Kaushal Kishor* (2023) alters this position, wherein the Supreme Court of India expanded the scope of fundamental rights against both state and non-state actors. This article analyzes the dictum in *Kishor* to argue that even when fundamental rights have been sporadically enforced against non-state actors, it has been by obligating the state to mitigate fundamental rights transgressions by non-state actors (doctrine of indirect horizontal application). The article raises constitutional concerns about the Court’s reasoning in *Kishor*, positing that it ignores the constitutional mandate of article 12, disregards the judicial precedents supporting the vertical application of fundamental rights, and grants an unbounded sanction to enforce fundamental rights against virtually “anyone.”

**Keywords:** Fundamental Rights, Article 12, State Action, Vertical Application, Horizontal Application

### I. INTRODUCTION

The chapter on fundamental rights in the Constitution of India is sacrosanct to the Indian citizenry. Developing from the US Constitution’s Bill of Rights, Part III of the Indian Constitution provides indispensable natural rights, which are reactions against the evils of the past rather than just guarantees for a brighter future.<sup>1</sup> However, the Joint Select Committee of the British Parliament on the Government of India Bill, 1934, expressed a certain degree of skepticism about the bill, which was a precursor to the Constitution of India. The committee believed that the declared rights were so abstract in nature that they would have no legal effect of any kind or that they might impose embarrassing restrictions on the legislature’s power.<sup>2</sup> The subject of fundamental rights also loomed large in the deliberations of the Sapru Committee (1944–45), which suggested that the chapter on fundamental rights was necessary to prescribe the extents of the legislature, executive, and judiciary.<sup>3</sup>

Under Part III of the Constitution of India, this limitation is manifested in article 13, which prohibits the “state” from making any law that contravenes fundamental rights.<sup>4</sup> The language of article 13, however, establishes a prerequisite. For an inquiry under article 13, it is imperative to identify the meaning of the term “state.” To define “state,” the Constitution of India, under article 12, enlists the Parliament of India, the Government of India, state legislatures, state governments, local authorities, and other authorities within the territory of India or under the

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<sup>1</sup> H.R. Khanna, *Making of India’s Constitution* (Lucknow: Eastern Book Company, 2008), 32.

<sup>2</sup> *Ibid.*, 36, 37.

<sup>3</sup> Sir Tej Bahadur Sapru, “Sapru Committee Report” (1945), <https://www.constitutionofindia.net/historical-constitution/sapru-committee-report-sir-tej-bahadur-sapru-1945/>.

<sup>4</sup> Constitution of India, art. 13, clause 2.

control of government as “state.”<sup>5</sup> Though most of the terms under article 12 are capable of an exhaustive understanding, the question that remains unanswered is the indeterminacy of the term “other authorities.” It is doctrinally pertinent to identify the meaning of the term “other authorities” because this term can expand or shrink the application of Part III as observed later in this article.

The judicial exercise in this regard has been devoid of any discernible pattern. Commencing with initial investigations<sup>6</sup> on the “form of the body” (i.e., the structuralist approach), the Supreme Court of India has also considered the “functionalist” dimensions of the term to evaluate “why” the body was created.<sup>7</sup> Nevertheless, the thrust of both these approaches has been on the vertical application of fundamental rights. Through a catena of judicial pronouncements<sup>8</sup>, the courts have forged a vertical relationship between citizens and the state vis-à-vis the enforceability of Part III. The doctrine of state action, which postulates that fundamental rights are only available against state action, has dominated the constitutional dialogue under article 12. Yet, episodic glimpses of the horizontal application of fundamental rights can be witnessed in various scholarship<sup>9</sup> and judicial pronouncements<sup>10</sup>.

The normative interpretation of rights under Part III reflects two constitutional tensions: (a) with whom do the fundamental rights subsist (i.e., the citizens or the people)?; and (b) against whom are the fundamental rights enforceable? This article addresses the latter issue by assessing the vertical and horizontal applications of fundamental rights. At the onset, the traditional doctrine of the vertical application of fundamental rights can be established and, thereby, the doctrine of state action. The examination further leads to the exploration of the Supreme Court’s reluctance to recognize such organizations as the Board of Control for Cricket in India (BCCI)<sup>11</sup> as part of the “state.”

The focus of the assessment is the recent dictum of a constitutional bench of the Supreme Court in *Kaushal Kishor*<sup>12</sup>, which categorically laid out that fundamental rights can be enforced against non-state actors as well. This article sets forth concerns about the horizontal application of fundamental rights and the Pandora’s box this type of application can open. The objective of this scholarship is to discern whether the doctrine of horizontal application of fundamental rights is capable of ushering in an era of social transformation or whether it has the potency to destroy the foundations of article 12<sup>13</sup> and, with it, the edifice that has painstakingly built the doctrine of state action.

## II. TRACING THE JURISPRUDENCE UNDER ARTICLE 12

The term “other authorities” in article 12 has been under judicial scrutiny since the birth of the 1950 Constitution.<sup>14</sup> The judiciary’s initial narrow view, held for a brief period only, was based on the doctrine of *ejusdem generis*<sup>15</sup>, which has evolved over time. The second phase of judicial interpretation was guided by the

<sup>5</sup> *Ibid.*, art. 12.

<sup>6</sup> *University of Madras v. Shantha Bai*, AIR 1954 Mad 67.

<sup>7</sup> Ananth Padmanabhan, “Rights: Breadth, Scope, and Applicability,” in *The Oxford Handbook of the Indian Constitution*, eds. Sujit Choudhary, Madhav Khosla, and Pratap Bhanu Mehta (Oxford: Oxford University Press, 2021), 585.

<sup>8</sup> *Electricity Board, Rajasthan v. Mohan Lal*, AIR 1967 SC 1857; *Sukhdev v. Bhagatram*, AIR 1975 SC 1331; *R.D. Shetty v. Airport Authority*, AIR 1979 SC 1628; *Ajay Hasia v. Khalid Mujib*, AIR 1981 SC 487; *Pradeep Kumar Biswas v. Indian Institute of Chemical Biology*, (2002) 5 SCC 111.

<sup>9</sup> Sudhir Krishnaswamy, “Horizontal Application of Fundamental Rights and State Action in India,” in *Human Rights, Justice and Constitutional Empowerment*, eds. C. Raj Kumar and K. Chockalingam (Oxford: Oxford University Press, 2007), 51. See also Stephen Gardbaum, “Horizontal Effect,” in *The Oxford Handbook of the Indian Constitution*, eds. Sujit Choudhary, Madhav Khosla, and Pratap Bhanu Mehta (Oxford: Oxford University Press, 2021), 602–07.

<sup>10</sup> *People’s Union for Democratic Rights v. Union of India*, 1982 AIR 1473; *MC Mehta v. State of Tamil Nadu*, AIR 1997 SC 699; *Avinash Mehrotra v. Union of India*, 6 SCC 398 (2009).

<sup>11</sup> *Zee Telefilms v. Union of India*, (2005) 4 SCC 649.

<sup>12</sup> *Kaushal Kishor v. State of Uttar Pradesh*, (2023) 4 SCC 1.

<sup>13</sup> Anujay Shrivastava, “Indian Supreme Court’s Judgment on ‘Horizontal Application’ of Fundamental Rights: An ‘Unconstitutional Informal Constitutional Change’?,” *IACL-AIDC Blog*, Jan. 31, 2023, <https://blog-iacl-aidec.org/2023-posts/2023/1/31/indian-supreme-courts-judgment-on-horizontal-application-of-fundamental-rights-an-unconstitutional-informal-constitutional-change>.

<sup>14</sup> M.P. Singh, “Fundamental Rights, State Action and Cricket in India,” *Asia Pacific Law Review* 13, no. 2 (2005): 203–14.

<sup>15</sup> *University of Madras v. Shantha Bai*, AIR 1954 Mad 67 [5].

“structuralist approach,”<sup>16</sup> which focused on “**how**” the body was created. While recognizing organizations such as the Life Insurance Corporation<sup>17</sup>, the Oil and Natural Gas Corporation<sup>18</sup>, the Industrial Finance Corporation<sup>19</sup>, and Bharat Petroleum<sup>20</sup> as “states,” the Supreme Court opined that all authorities that are a creation of or function under a statute or constitutional body constitute “other authorities.” Contemplating the state’s engagement in the promotion of the educational and economic interests of the weaker sections of society, along with the right to engage in any trade or business as envisaged by articles 19(1)(g) and 298, it was theorized that it is immaterial to assess the nature of the functions performed by the authority.<sup>21</sup> A common theme in these pronouncements was the genetic origin of these authorities.

The judicial approach under article 12, though liberal, has not been coherent. Beginning with the post-1970 cases, it is possible to witness a shift from the question of “**how**” to the question of “**why**.” Referred to as the Supreme Court’s “functionalist approach,”<sup>22</sup> the focus shifted to the nature of the functions performed by the organizations and reached the forefront of the discussion under article 12. The apex court, in subsequent cases<sup>23</sup>, has observed that the determination relevant to establishing an authority as a “state” is whether it is an agency or instrumentality of the state.

However, this too has been marred by confusion. In cases such as *Zee Telefilms*<sup>24</sup>, the Court refused to recognize the BCCI as a state under article 12, despite the public nature of the functions the body performed in a domain where it exercised a “state-protected” monopoly.<sup>25</sup> Contrary to this, the minority in the BCCI case relied on the test of “financially, functionally or administratively dominated by or is under the control of the Government,” carved out in *Pradeep Kumar Biswas*<sup>26</sup>, to articulate that the emphasis for determining whether an authority is a “state” ought to be on the nature of the functions performed. Nevertheless, the Supreme Court’s liberal approach in a plethora of cases that ultimately culminated in *Pradeep Kumar Biswas*<sup>27</sup> has not found favor in recognizing the BCCI or even the judiciary<sup>28</sup> as a “state.” The reasoning is particularly interesting in terms of the argument this article intends to develop. The Supreme Court was anxious to expand the agency test further when the state was distancing itself from commercial activities, and there was an increasing influx of non-state actors in the public domain. The Court went to great lengths to establish that the BCCI did not satisfy the agency test and warned that the expanding horizons of article 12 reflected a possibility to spearhead litigation under article 32, which would burden the apex court’s dockets.

To provide a remedy against rights violations by such organizations or non-state actors, the Supreme Court proposed the “alternate remedy route” under article 226. Article 226 empowers the Indian High Courts to entertain writ petitions against any actor (state or non-state) for violating all constitutional rights, including fundamental rights.<sup>29</sup> The Court posited that the proceedings under article 32 could only be initiated against the “state,” and the remedies against non-state actors were available under the broader scope of article 226. It is interesting to note Justice Hegde’s observation in *Zee Telefilms*:

[T]o argue that every entity, which validly or invalidly arrogates to itself the right to regulate or for that matter even starts regulating the fundamental right of the citizen under Article 19(1)(g), is a State within the meaning of Article 12 is to put the cart before the horse [...]. **The pre-requisite for invoking the enforcement of a fundamental right under Article 32 is that the violator of that right should be a State first.**<sup>30</sup>

<sup>16</sup> Padmanabhan, “Rights: Breadth, Scope, and Applicability,” 583.

<sup>17</sup> *Sukhdev*, AIR 1975 SC 1331 [67].

<sup>18</sup> *Ibid.*

<sup>19</sup> *Ibid.*

<sup>20</sup> *Som Prakash v. Union of India*, AIR 1981 SC 212.

<sup>21</sup> *Electricity Board*, AIR 1967 SC 1857 [6].

<sup>22</sup> Padmanabhan, “Rights: Breadth, Scope, and Applicability,” 585.

<sup>23</sup> *R.D. Shetty v. Airport Authority*, AIR 1979 SC 1628; *Ajay Hasia v. Khalid Mujib*, AIR 1981 SC 487.

<sup>24</sup> *Zee Telefilms*, (2005) 4 SCC 649.

<sup>25</sup> Singh, “Fundamental Rights,” 208.

<sup>26</sup> *Pradeep Kumar Biswas v. Indian Institute of Chemical Biology*, (2002) 5 SCC 111.

<sup>27</sup> *Ibid.*

<sup>28</sup> *Rupa Ashok Hurra*, (2002) 3 SCC 388.

<sup>29</sup> Constitution of India, art. 226, clause 1.

<sup>30</sup> *Zee Telefilms*, (2005) 4 SCC 649 (emphasis added).

Paradoxically, after establishing the above standard of determination, the Supreme Court declared in *Kaushal Kishor*<sup>31</sup> that a claim to enforce fundamental rights need not necessarily rest on the doctrine of state action.

### III. IDENTIFYING THE ACTORS FOR ENFORCEMENT OF FUNDAMENTAL RIGHTS

The “actor question,” as theorized by Padmanabhan<sup>32</sup>, locates the holders of fundamental rights and the actors against whom the fundamental rights can be enforced. Though the Constitution does not fossilize the list of entities that can be the “state,” the inclusion of article 12 in the constitutional text reflects the position the Constituent Assembly intended to establish. During the debates on article 12 (draft article 7), Dr. B.R. Ambedkar emphasized why, in his opinion, the presence of article 12 was indispensable. He attested that the object of the chapter on fundamental rights was that every citizen must be able to claim those rights, and the same should be binding on every authority.<sup>33</sup> The authorities, he posited, would include the central government, provincial governments, district local boards, municipalities, panchayats (village councils), and every authority to which the power to make laws, rules, regulations, bylaws, etc. is vested.<sup>34</sup> The investigations in this study are restricted to the second limb of the “actor” question (i.e., against whom the fundamental rights can be enforced).

Per the textual understanding of the Indian Constitution, some fundamental rights can be identified as vertically enforceable against state actors, while some fundamental rights remain ambivalent in enforceability.

#### 3.1 Specific State Obligations

The chapter on fundamental rights has often cast a specific constitutional obligation on the state to honor citizens’ and/or non-citizens’ rights. The traditional doctrine that supports that fundamental rights can only be enforced against the state is found in the phrasing of articles 14, 15(1), 15(3), 15(4), 16, 18, and 21A. The expressions in these articles, such as ‘[t]he State shall not deny [...]’<sup>35</sup>; ‘[t]he State shall not discriminate [...]’<sup>36</sup>; ‘[t]here shall be equality of opportunity [...] under the State’<sup>37</sup>; and ‘[n]o title [...] shall be conferred by the State’<sup>38</sup>, are obligations expressly directed at the state. This textual reading of the Constitution is supported by H.M. Seervai when he argues<sup>39</sup> that, under article 13, it is state action that is prohibited, maintaining that the individual [private] invasion of individual rights is not within the ambit of article 13. *Ergo*, identifying the actor on whom the constitutional obligations rest is at the heart of the conjoint reading of articles 12 and 13.

#### 3.2 Subject-less Fundamental Rights

In addition to specific state-directed obligations, the Constitution of India prescribes certain fundamental rights that are subject-less in their enforceability. These instances of ambivalent rights are observed in articles 15(2), 19, 21, 25(1), 26, 29, and 30(1). As these rights do not identify the persons against whom the fundamental rights are enforceable, the inquiry that emerges herein is whether the mores of article 12 guide such non-specific obligations.

The scope of how the Constituent Assembly viewed rights, such as those delineated above, is echoed in the words of Mr. Shibban Lal Saxena when he debated the scope of article 15(2) (draft article 9). Specifically, he stated the following:

Food is a matter where Hindus have got special habits and they generally will not allow anybody to enter the place where they eat food. I hope that the Hindu society will realize that they have now to change those

<sup>31</sup> *Kaushal Kishor*, (2023) 4 SCC 1.

<sup>32</sup> Padmanabhan, “Rights: Breadth, Scope, and Applicability,” 581.

<sup>33</sup> *Constituent Assembly Debates*, vol. 7 (India: Lok Sabha Secretariat, 1986).

<sup>34</sup> *Ibid.*

<sup>35</sup> Constitution of India, art. 14.

<sup>36</sup> *Ibid.*, art. 15, clause 1.

<sup>37</sup> *Ibid.*, art. 16, clause 1.

<sup>38</sup> *Ibid.*, art. 18.

<sup>39</sup> H.M. Seervai, *Constitutional Law of India* (New Delhi: Universal Book Traders, 1991), 374.

habits and that anybody who is not a Hindu will be able to enter these shops or hotels where so far food is served to Hindus only. **I think this is a very serious thing because henceforth it will be a fundamental right of every citizen to enter any Hindu Hotel.** Anybody can now claim entry to **any place** where food is sold.<sup>40</sup>

Though in the backdrop of this observation, it is possible to reason that the constitutional obligation set forth under the non-discriminatory principle of article 15 is not directed solely at state actors, the judicial approach has only sometimes operated in tandem with this argument. In *Zoroastrian Cooperation Housing*<sup>41</sup>, the Supreme Court refused to declare an exclusionary bylaw on the grounds of religion as unconstitutional by juxtaposing it against the freedom to contract. This vertical reading of article 15 attracts the doctrine of state action. It reestablishes that a remedy for curtailment of fundamental rights does not lie against private actors (in this case, a cooperative housing society). Remnants of a strict vertical school of thought, as reflected in *Zee Telefilms*<sup>42</sup>, are also observed in cases such as *Chander Mohan Khanna*<sup>43</sup> and *Tekraj*<sup>44</sup>, wherein the National Council of Educational Research and Training (N.C.E.R.T.) and the Indian Institute of Constitutional and Parliamentary Studies were respectively kept outside the purview of article 12 and, *ipso facto*, articles 13 and 32.

While the jurisprudence developed under article 12 solidifies the vertical approach to enforcing fundamental rights, discordant notes of horizontal application can be witnessed sporadically. Upon the analysis of the cases enforcing fundamental rights horizontally, two methodologies can be discerned—indirect horizontality and direct horizontality.

The courts have occasionally fashioned a remedy under Part III of the Indian Constitution by obligating the state to ensure compliance with fundamental rights if private actors encroach on them. Charting this route, courts have enforced ambivalent rights horizontally without direct enforcement against non-state actors (doctrine of indirect horizontality). This judicial approach engages in a constitutional dialogue between fundamental rights holders and actors (both state and non-state) against whom those rights can be enforced. One of the practices herein rests on the engagement with the chapter on fundamental duties under the Constitution of India. It casts a duty upon every citizen to abide by the Constitution<sup>45</sup>, thus providing a gateway for horizontality in fundamental rights enforcement.<sup>46</sup> One of the instances where the Supreme Court experimented with forging an indirect horizontal application of fundamental rights was in *People's Union for Democratic Rights*<sup>47</sup>. There, Justice Bhagwati identified specific fundamental rights (articles 17, 23, and 24) that don't expressly put limitations on the state's exercise of power and thus could be enforced *in rem*. The doctrine of indirect horizontality postulates that despite the transgressors of the rights being private actors, the state is still obliged to perform its positive constitutional duties to ensure compliance with fundamental rights. Thus, the state remains constitutionally obligated to bind the non-state actors that transgress fundamental rights.

Additionally, on rare occasions, the Supreme Court has held non-state actors directly responsible for fundamental rights transgressions despite, on many occasions,<sup>48</sup> vociferously holding that fundamental rights are enforceable only against the state. This trend particularly emerges when interpreting the right to life under article 21 and the right against exploitation under article 23. The Court, while recognizing the culpability of private transgressors in *MC Mehta v. State of Tamil Nadu*<sup>49</sup>, as well as indirectly applying fundamental rights horizontally by giving the state a set of directions, has also found private employers to be personally liable.

In *MC Mehta*, the Supreme Court directed the erring employers to contribute to the Child Labor Rehabilitation-cum-Welfare Fund set up to benefit child laborers employed by private players in hazardous conditions. This approach of the direct horizontal application of fundamental rights is also observed in *Avinash Mehrotra v. Union of India*<sup>50</sup>. In that case<sup>51</sup>, while championing the right to life and education of children, the Court ordered

<sup>40</sup> *Constituent Assembly Debates*, vol. 7 (emphasis added).

<sup>41</sup> *Zoroastrian Cooperative v. District Registrar*, AIR 2005 SC 2306.

<sup>42</sup> *Zee Telefilms*, (2005) 4 SCC 649.

<sup>43</sup> *Chander Mohan Khanna v. National Council of Educational Research and Training*, 1992 AIR 76.

<sup>44</sup> *Tekraj Vasandi Alias K.L. Basandhi v. Union of India*, 1988 AIR 469.

<sup>45</sup> Constitution of India, art. 51A.

<sup>46</sup> *Vishaka v. State of Rajasthan*, AIR 1997 SC 3011.

<sup>47</sup> *People's Union for Democratic Rights*, 1982 AIR 1473.

<sup>48</sup> *Zee Telefilms*, (2005) 4 SCC 649; *Board of Control for Cricket v. Cricket Association of Bihar & Ors.*, (2015) 3 SCC 251.

<sup>49</sup> *MC Mehta*, AIR 1997 SC 699.

<sup>50</sup> *Avinash Mehrotra*, 6 SCC 398 (2009).

<sup>51</sup> *Ibid.*

school buildings to comply with the national building code and be safe and secure for students. To achieve this end, the school authorities, both public and private, were held constitutionally duty bound to ensure that school buildings have fire safety equipment installed and inflammable and toxic materials safely stored.

The judiciary is inclined to apply fundamental rights horizontally. One recent instance of such judicial adventurism is *Kaushal Kishor*,<sup>52</sup> where a constitutional bench intended to provide a blueprint for future adjudication against non-state actors under article 32. Purported to transform the scope of article 12, this judicial—or arguably, academic—exercise<sup>53</sup> adds fuel to the flame and fails to provide a guided expansion of the chapter on fundamental rights. The argument here is not that the horizontal application of fundamental rights under the Indian Constitution is an absolute impossibility or undesirable, but rather, some threats lie in an unbridled expansion of the horizontality doctrine.

#### IV. CASE IN POINT – *KAUSHAL KISHOR V. UNION OF INDIA*

Justice V. Ramasubramanian's majority opinion traces global jurisprudence on the horizontality of constitutional rights. The analysis starts with an interrogation of cases under the US Constitution<sup>54</sup>, Irish constitutional law cases<sup>55</sup>, and express horizontal guarantees under the 1996 Constitution of the Republic of South Africa. This exercise is, however, also marred by convoluted juxtaposition. Relying on the English case of *X v. Y*<sup>56</sup>, the Court notes the state's positive constitutional obligations and not the constitutional rights' direct horizontality against private actors. The Court of Appeal in the same case, to answer the question of horizontal application of fundamental rights, stated the following:

Article 8 is not confined in its effect to relations between individuals and the state and public authorities. **It has been interpreted [...] as imposing a positive obligation on the state to secure the observance and enjoyment of the right between private individuals.**<sup>57</sup>

This approach can be further observed when the majority discusses *X & Y v. The Netherlands*<sup>58</sup>. Interpreting article 8 of the European Convention on Human Rights<sup>59</sup>, the Court observed that the primary goal of article 8 is to prevent public authorities' encroachment of rights. Nonetheless, this negative undertaking can be further supplemented by the state's positive obligations against private violators. These cases advocate the **indirect** horizontal application of fundamental rights by subjecting the state to perform a positive constitutional duty, reminding that the negative nature of obligations under the Indian Constitution does not restrict the state's role. Though engaging with horizontality, these global perspectives fall short of establishing an irrefutable claim of a direct blanket horizontal enforceability of fundamental rights—a stance the Supreme Court of India later established in this case.

The Court's perplexing view can also be discerned when it positively answers whether the state is under a duty to *affirmatively* protect the rights of a citizen under article 21, even against a threat to a citizen's liberty through another citizen's or private agency's acts or omissions.<sup>60</sup> To answer this, the Court surveys cases such as *Pt.*

<sup>52</sup> *Kaushal Kishor*, (2023) 4 SCC 1.

<sup>53</sup> Gautam Bhatia, "Kaushal Kishor, Horizontal Rights, and Free Speech: Glaring Conceptual Errors," *Indian Constitutional Law and Philosophy*, Jan. 27, 2023, <https://indconlawphil.wordpress.com/2023/01/27/kaushal-kishor-horizontal-rights-and-free-speech-glaring-conceptual-errors/>.

<sup>54</sup> *Kaushal Kishor*, (2023) 4 SCC 1 [50–53].

<sup>55</sup> *Ibid.*, 55–57.

<sup>56</sup> *Ibid.*, 68.

<sup>57</sup> *Ibid.* (emphasis added).

<sup>58</sup> *Ibid.*, 70.

<sup>59</sup> European Convention on Human Rights, art. 8 – Right to respect for private and family life “1. Everyone has the right to respect for his private and family life, his home and his correspondence. 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic wellbeing of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.”

<sup>60</sup> *Kaushal Kishor*, (2023) 4 SCC 1 [103].

*Parmanand Katara*<sup>61</sup>, *People's Union for Civil Liberties*<sup>62</sup>, and *In Re: India Woman*<sup>63</sup>, wherein the Court acknowledged the state's duty to protect personal liberty, even against private breaches. This further solidifies the indirect approach to enforce fundamental rights horizontally.

The Court has interchangeably used the state's affirmative duty to mitigate fundamental rights transgressions by non-state actors with direct enforceability of fundamental rights against non-state actors. Preliminarily, the assessment confirms that engaging with the global standards of horizontality has yielded no support in favor of direct horizontal application.

The comparative analysis of horizontality is followed by a jurisprudential investigation under article 12, which also fails to support the conclusion reached. In the Court's endeavor to establish the judiciary's subsiding reluctance to enforce fundamental rights only against state actors, it turns to cases such as the *People's Union for Democratic Rights*<sup>64</sup>, *S. Rangarajan*<sup>65</sup>, *Lucknow Development Authority*<sup>66</sup>, *Smt. Nilabati*<sup>67</sup>, *Sukhdev Singh*<sup>68</sup>, and *Justice K.S. Puttaswamy*<sup>69</sup>. However, these cases too, except *Bodhisattwa Gautam*<sup>70</sup>, have cast obligations on the state to perform its positive duty<sup>71</sup> or have relied on common law remedies or doctrines, such as the polluter pays principle<sup>72</sup>, to hold private transgressors accountable.

Interestingly, the Court has referred to *Janet Jeyapaul*<sup>73</sup> to argue horizontality but has grossly failed to appreciate the essence of that decision. In *Janet Jeyapaul*<sup>74</sup>, the Court reasoned that (a) it is quintessential that the transgressor of fundamental rights is a "state," and (b) in case the first inquiry fails to yield an affirmative answer, the alternate remedy is available under article 226 and not article 32. This too comes with a caveat of the "public duty test." The Court in *Jeyapaul*<sup>75</sup> emphasized that what is relevant is not the form of the body but rather the nature of the functions performed. It reasoned that, even while proceeding against 'any person or authority' (whether state or non-state) under article 226, an element of public duty must be involved. Thus, a person or an authority will be amenable to the Court's writ jurisdiction under article 226 if they have a positive obligation to the holder of the fundamental right. Evidently, the discourse on both the vertical and horizontal enforceability of fundamental rights is hinged on the positive obligations that the state and non-state transgressors of the rights owe.

The Court, in *Kishor*, conveniently ignored this crucial aspect of the enforceability of fundamental rights. To quote the apex court verbatim, "A fundamental right under Article 19 or 21 can be enforced even against persons other than the State or its instrumentalities."<sup>76</sup> The lack of a causal relationship between the survey of cases that has for decades jurisprudentially articulated the doctrine of state action under article 12 and the conclusion reached, is bizarre at best and *per incuriam* at worst. To contextualize this, let us examine a set of propositions:

Proposition A: Fundamental rights are enforceable only against the "state" under article 32.

Proposition B: The BCCI is not a "state."

Proposition C: Fundamental rights are enforceable against "state" and "non-state" actors under article 32.

In reading Proposition A with B, the result is that fundamental rights will not be enforceable against the BCCI. However, when Proposition C is introduced into this matrix, fundamental rights will be enforceable against the BCCI. *Kaushal Kishor* virtually makes article 12 invisible. The Supreme Court undertook an in-depth scrutiny in *Zee*

<sup>61</sup> *Pt. Parmanand Katara v. Union of India*, AIR 1989 SC 2039.

<sup>62</sup> *People's Union for Civil Liberties v. Union of India*, (1997) 1 SCC 301.

<sup>63</sup> *In Re: India Woman*, (2014) 4 SCC 786.

<sup>64</sup> *People's Union for Democratic Rights*, 1982 AIR 1473.

<sup>65</sup> *S. Rangarajan v. P. Jagjivan Ram*, 1989 SCR (2) 204.

<sup>66</sup> *Lucknow Development Authority v. M.K. Gupta*, (1994) 1 SCC 243.

<sup>67</sup> *Nilabati Behera (Smt.) alias Lalita Behera (Through the Supreme Court Legal Aid Committee) v. State of Orissa & Ors.*, (1993) 2 SCC 746.

<sup>68</sup> *Sukhdev*, AIR 1975 SC 1331.

<sup>69</sup> *K.S. Puttaswamy (Retd.) v. Union of India*, (2019) 1 SCC 1.

<sup>70</sup> *Bodhisattwa Gautam v. Subhra Chakraborty*, 1996) 1 SC 490.

<sup>71</sup> *K.S. Puttaswamy (Retd.)*, (2019) 1 SCC 1 [617].

<sup>72</sup> *Vellore Citizens' Welfare Forum v. Union of India*, (1996) 5 SCC 647.

<sup>73</sup> *Janet Jeyapaul v. SRM University*, (2015) 16 SCC 530.

<sup>74</sup> *Ibid.*

<sup>75</sup> *Ibid.*, 20.

<sup>76</sup> *Kaushal Kishor*, (2023) 4 SCC 1 [78].

*Telefilms*<sup>77</sup> to establish why the BCCI is not a “state”: that dictum is rendered inconsequential. Let us now examine another proposition on this touchstone, a proposition supported by the Supreme Court’s decision in *Rupa Ashok Hurra*<sup>78</sup>:

Proposition D: The judiciary is not a “state.”

The effect of Proposition C on Proposition D would be that fundamental rights can now be enforced, even against the judiciary. The proportion of such permutations and combinations that *Kaushal Kishor* can open is hitherto undreamt of. It leads to various unanswered questions: Does this render article 12 redundant, and where should a line be drawn while enforcing article 32 horizontally? The unbounded sanction to proceed horizontally postulated in *Kaushal Kishor* does not align with the constitutional scheme that backs the existence of article 12 in the Constitution of India.

## V. DOES THE LAW LIE IN DISSENT?

Justice B.V. Nagarathna’s dissenting opinion in *Kishor* exhibits a nuanced understanding of the enforceability of fundamental rights under article 32. The analysis stems from the distinctions ascribed to fundamental rights and the congruent common law rights. The focus of the discourse, and rightfully so, is not on the substance of these rights but rather on their enforceability. As developed by the dissenting judge, this rationale relies on another celebrated dissent in constitutional history—Justice H.R. Khanna’s in *ADM Jabalpur*<sup>79</sup>. To establish the precedential strength of Justice Khanna’s dissent, it is pertinent to note that the apex court in *Puttaswamy*<sup>80</sup> affirmed Justice Khanna’s dissent, and it thus holds the force of law.

Both Justices B.V. Nagarathna and H.R. Khanna view fundamental rights as a subset of higher values inherent to a being in civilized society. Acknowledging this, they assert that Part III of the Indian Constitution is not the sole repository of such rights. This lucid understanding of the substantive nature of these rights accurately identifies their enforceability. With the enunciation that certain primordial rights have been accorded constitutional status, the dissenting judge brings home the argument that the intent behind the inclusion of such rights in the Indian Constitution was to make them enforceable only against the state—thus prohibiting it from invading such rights. This dictum takes note of *Kesavananda Bharati*<sup>81</sup>, wherein the plurality opinion designates that fundamental rights are available against the state.

The dissenting opinion further clarifies that the similarity of the content of fundamental rights and common law rights should not lead to the belief that the two are similar in terms of enforceability. The issue of the enforceability of fundamental rights considers the latter half of the “actor question”—that is, the actors against whom fundamental rights can be enforced (as previously discussed in Part 3 above). What is relevant for determining the enforceability of fundamental rights is the identification of the “status of the transgressor.”

The theoretical framework of Part III of the Indian Constitution essentially regulates the relationship between the state and its citizens, except for certain fundamental rights that are categorically enforceable against non-state actors (for instance, clause [2] of article 15). The incidence of duty to abide by the constitutional mandate is thus on the “state.” The conclusion that Justice B.V. Nagarathna reached postulates that the horizontality of articles 19 and 21 may only be permitted if the fundamental differences between fundamental rights and common law rights are ignored. This analysis further engages with the exponential jurisprudential growth of article 12 to interpret the term “state.” It is argued that this discourse reaffirms that the “status of the transgressor” is relevant for the enforceability claims under article 32. The dissent maintains that if this were not true, the Supreme Court could have entertained all claims under Part III for years without going on to the questions of maintainability.

The conclusion, however, comes with a caution. It is elucidated that the argument against horizontality is not meant to be understood that the transgressor can go scot-free because they are not a “state” in *sensu stricto*. Fundamental rights, through common law remedies, can be enforced under article 226 of the Indian Constitution. This reasoning appreciates and applies the apex court’s dictum in *Zee Telefilms*<sup>82</sup> and *Janet Jeyapaul*<sup>83</sup>. The

<sup>77</sup> *Zee Telefilms*, (2005) 4 SCC 649.

<sup>78</sup> *Rupa Ashok Hurra*, (2002) 3 SCC 388.

<sup>79</sup> *Additional District Magistrate, Jabalpur v. Shivakant Shukla*, AIR 1976 SC 1207.

<sup>80</sup> *K.S. Puttaswamy (Retd.)*, (2019) 1 SCC 1.

<sup>81</sup> *His Holiness Kesavananda Bharati Sripadagalvaru v. State of Kerala*, (1973) 4 SCC 225.

<sup>82</sup> *Zee Telefilms*, (2005) 4 SCC 649.

<sup>83</sup> *Janet Jeyapaul*, (2015) 16 SCC 530.



factum of the non-enforceability of fundamental rights under article 32 does not brand these rights as toothless when non-state actors abridge them. The dissent applied the doctrine of state action, which appreciates the significance of the term “state” under article 12, and understands the enforceability of fundamental rights by grasping the critical difference between fundamental rights and common law rights:

The rights in the realm of common law, which may be similar or identical in their content to the Fundamental Rights under Article 19/21, operate horizontally. **However, the Fundamental Rights under Articles 19 and 21, may not be justiciable horizontally before the Constitutional Courts except those rights which have been statutorily recognized and in accordance with the applicable law.** However, they may be the basis for seeking common law remedies [...].<sup>84</sup>

## VI. CONCLUSION

Though popularly believed to be vertical, the Indian Constitution’s chapter on fundamental rights, in some instances, allows for horizontality. The substantive rights under articles 15(2), 17, and 23 of the Constitution, for example, accommodate actions against non-state actors as seen in the *Constituent Assembly Debates*<sup>85</sup> and various judicial pronouncements<sup>86</sup>. Whereas constitutional scholars argue for the horizontal application of fundamental rights<sup>87</sup>, the contention developed is not against such horizontality but is rather an unbounded sanction to proceed against **anyone**. *Kaushal Kishor*<sup>88</sup> represents not only a flawed interpretation of the doctrine of horizontal application; it also disregards the very existence of article 12 and convolutes a state’s positive duty to mitigate private transgressions with the direct horizontal application of fundamental rights.

Categorized as an “unconstitutional informal constitutional change,<sup>89</sup>” this dictum effectively makes article 12 invisible, destroys the doctrine of state action, and dismembers the constitutional scheme of granting specific common law rights the status of fundamental rights under the Indian Constitution. Justice B.V. Nagarathna, in the dissenting opinion, backed by the reasoning in *Zee Telefilms*<sup>90</sup> and *Janet Jaypaul*<sup>91</sup>, rightly points out that the grant of constitutional status to these rights was to restrict or regulate invasions at the behest of the “state.” This declaration does not suggest that private invaders should enjoy immunity. It instead postulates that the remedy against non-state actors lies (a) under the common law; (b) under article 226 of the Constitution, wherein the High Court’s jurisdiction extends to both fundamental and non-fundamental rights and against both state and non-state actors; and (c) by obligating the state to perform constitutional positive duties mitigating non-state invasion (indirect horizontal application).

The majority’s reasoning, or lack thereof, in *Kaushal Kishor*<sup>92</sup> raises a critical constitutional concern. When the constitutional bench declared that fundamental rights under articles 19 and 21 can be enforced against both state and non-state actors, it tacitly overruled *Zee Telefilms*<sup>93</sup>. In *Zee Telefilms*<sup>94</sup>, the five-judge bench refused to entertain a claim based on article 19 against a non-state actor. *Kishor* not only ignores this precedent but it also actively negates the judgment delivered by a bench of the same level, which is constitutionally impermissible. Judicial discipline and propriety dictates that a coordinate bench is duty bound to follow an earlier coordinate bench’s decision. If the adjudicating bench disagrees with the earlier precedent, then the matter ought to be referred to a larger bench.<sup>95</sup> The majority opinion in *Kishor* has either wrongly applied the existing precedent or has failed to fully appreciate the scheme of article 12. Either way, it discounts the rationale developed in *Zee Telefilms* and thus virtually overrules it.

<sup>84</sup> *Kaushal Kishor*, (2023) 4 SCC 1 [43] (emphasis added).

<sup>85</sup> *Constituent Assembly Debates*, vol. 7.

<sup>86</sup> *MC Mehta*, AIR 1997 SC 699; *Bandhua Mukti Morcha v. Union of India*, (1997) 10 SCC 549; *Bachpan Bachao Andolan v. Union of India*, (2011) 5 SCC 1.

<sup>87</sup> Krishnaswamy, “Horizontal application of Fundamental Rights and State Action in India,” 47–73.

<sup>88</sup> *Kaushal Kishor*, (2023) 4 SCC 1.

<sup>89</sup> Shrivastava, “Indian Supreme Court’s Judgment on ‘Horizontal Application.’”

<sup>90</sup> *Zee Telefilms*, (2005) 4 SCC 649.

<sup>91</sup> *Janet Jeyapaul*, (2015) 16 SCC 530.

<sup>92</sup> *Kaushal Kishor*, (2023) 4 SCC 1.

<sup>93</sup> *Zee Telefilms*, (2005) 4 SCC 649.

<sup>94</sup> *Ibid.*

<sup>95</sup> *Mary Pushpam v. Telvi Curusumary & Ors.*, (2024) 1 SCR 11.

Even though the horizontal enforceability of fundamental rights is transformative, the unguided and unbounded sanction granted to proceed against virtually “**anyone**” is concerning. The argument favoring direct horizontal application to enforce fundamental rights against state and non-state actors undermines the constitutional scheme that backs Part III generally and article 12 in particular and could also summon a floodgate of litigation under article 32.