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## HORIZONTAL APPLICATION OF FUNDAMENTAL RIGHTS: BENIGN OR MISCONCEIVED?

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*The Indian jurisprudence concerning the applicability of fundamental rights until recently, has followed the dictum that fundamental rights can only be enforced against the State, its instrumentalities, or an entity that is impregnated with the characteristics of the State. However, with the recent decision of a constitutional bench of the Supreme Court, in *Kaushal Kishor v. State of Uttar Pradesh*, there has been a tectonic shift from this preponderant view. In its decision, the Supreme Court held that Articles 19 and 21 of the Constitution can be made enforceable even against private parties other than the State and its instrumentalities. This approach undertaken by the Supreme Court is known as the “horizontal” application of fundamental rights. This novus view adopted by the Supreme Court, though seemingly laudatory at first glance, raises a number of questions, not merely on the feasibility of such an approach, but also on its rationale in the Indian context. In this article, the author endeavours to map the prevalent legal perspectives with regard to the enforcement of fundamental rights, both in India and across the world, in an attempt to ascertain a more nuanced approach that the Supreme Court could have adopted.*

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### INTRODUCTION

A five-judge constitution bench of the Supreme Court in *Kaushal Kishor v. State of Uttar Pradesh*<sup>2</sup> (“**Kaushal Kishor**”) was, *inter alia*, faced with the

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<sup>2</sup> *Kaushal Kishor v. State of Uttar Pradesh*, 2023 4 SCC 1.

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question of whether fundamental rights under Articles 19<sup>3</sup> and 21<sup>4</sup> could be claimed against entities other than the State and its instrumentalities, *i.e.*, private actors. Two matters before a 3-judge bench<sup>5</sup> – originating from two different states, where the common prayer was to undertake strict action against ministers of the respective states who had made derogatory remarks against women – were tagged together and placed before the said constitution bench. The Supreme Court, with a 4:1 majority (Nagarathna J. dissenting), held that Part III of the Constitution,<sup>6</sup> and therefore Articles 19 and 21 can be enforced even against private actors.<sup>7</sup> *Per contra*, Nagarathna J. concluded in her dissent that the fundamental rights under Articles 19 and 21 may not be justiciable against private actors before constitutional courts except in cases where those rights have been statutorily recognised.<sup>8</sup> Where these rights have not been given statutory recognition, Nagarathna J. held that the only recourse for an aggrieved party is to seek common law remedies in civil courts.<sup>9</sup>

Thus, while the majority adopted the horizontal approach to fundamental rights, implying that fundamental rights can be made applicable not only in instances of “*state action*,” but against private bodies as well, the dissent subscribed to a vertical reading of the fundamental rights, wherein a contention of violation of fundamental rights can be attracted only in instances involving state action.

However, it is pertinent to note that the view of the majority in *Kaushal Kishor* is in direct conflict with previous constitutional bench decisions of

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<sup>3</sup> INDIA CONST. art. 19 includes, “*Right to: freedom of speech and expression; assemble peaceably and without arms; form associations or unions; move freely throughout the territory of India; reside and settle in any part of the territory of India; practise any profession, or to carry on any occupation, trade or business.*”

<sup>4</sup> INDIA CONST. art. 21 reads as, “*No person shall be deprived of his life or personal liberty except according to procedure established by law.*”

<sup>5</sup> Writ Petition (Criminal) No.113 of 2016 & Special Leave Petition (Diary) No.34629 of 2017.

<sup>6</sup> INDIA CONST. Part III (Fundamental Rights).

<sup>7</sup> *Kaushal Kishor v. State of Uttar Pradesh*, 2023 4 SCC 1, ¶ 78.

<sup>8</sup> *Id.* ¶ 43 (Nagarathna J.).

<sup>9</sup> *Id.* ¶¶ 39-43 (Nagarathna J.); *See also* RAFAL ZAKRZEWSKI, *REMEDIES RECLASSIFIED* 103–120 (Oxford University Press, 1st ed., 2005).

the Supreme Court in *P.D. Shamdasani v. Central Bank of India Ltd.*<sup>10</sup> (“**P.D. Shamdasani**”) and *Vidya Verma v. Shiv Narayan Verma*<sup>11</sup> (“**Vidya Verma**”), wherein it was held that Articles 19 and 21 did not apply to instances of invasion of a right by a private actor, and consequently, no writ under Article 32 would lie in such circumstances. Thus, with the decision in *Kaushal Kishor*, the entire jurisprudence of fundamental rights in India has turned topsy-turvy, with a drastic shift from one extreme position (no enforceability of Articles 19 and 21 against private actors) to another (plenary enforceability of Articles 19 and 21 against private actors).

In this article, in an endeavour to find a middle ground between these two jurisprudential extremities, the author shall first undertake a study of the different models pertaining to the horizontal application of fundamental rights. Since the jurisprudence on the same is still in its nascent stage in the Indian context, the author shall advert to different jurisdictions around the world for the same. Having laid the necessary conceptual groundwork, the author shall proceed forward to trace the evolution of the understanding of fundamental rights in the context of their enforcement in India, and finally, in this background, attempt to discern what challenges and opportunities the *Kaushal Kishor* judgement brings to the subsequent development of the said concept.

#### **A. DISTINGUISHING THE TYPES OF HORIZONTALITY**

As explained above, we are now confronted with two contrarian ratios as laid down by constitutional benches of equal strength. On one extreme is the ratio laid down in *Kaushal Kishor*, which subscribes to a direct horizontal model for the enforcement of fundamental rights. On the other extreme are the decisions in *P.D. Shamdasani* and *Vidya Verma* that adhere to the conventional wisdom of vertical application of fundamental rights, *i.e.*, fundamental rights regulate only the conduct of state actors in their dealings with private citizens but not relations among private citizens.<sup>12</sup> Though the bench in *Kaushal Kishor* had the opportunity to refer to notable works of prevailing scholarship on the issue, the same was glossed over. A

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<sup>10</sup> *P.D. Shamdasani v. Central Bank of India Ltd.*, 1951 SCC 1237, ¶ 9.

<sup>11</sup> *Vidya Verma v. Dr. Shiv Narain Verma*, AIR 1956 SC 108, ¶ 7.

<sup>12</sup> Stephen Gardbaum, *The “Horizontal Effect” of Constitutional Rights*, 102 MICH. L. REV. 387 (2003).

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crucial aspect that has been overlooked by both the majority opinion and the dissent is the scope of rapprochement between the two extremes of strict horizontality and strict verticality through what is known as “*indirect horizontality*”.

### **Direct Horizontality**

To understand the concept of “*indirect horizontality*”, it must first be distinguished from “*direct horizontality*.” In jurisdictions where direct horizontality is adopted, individuals can bring an action even in private law on the anvil of constitutional rights. Thus, fundamental rights apply, not only against the State but also directly against private actors.<sup>13</sup> Therefore, in these jurisdictions, the Constitution imposes constitutional duties on private actors and the state alike, thereby regulating interpersonal relations between private actors, who can sue each other for the violations of these duties.<sup>14</sup>

The best example of such jurisprudence can be found in Ireland, where the Courts have developed the mechanism of a “*constitutional tort action*”.<sup>15</sup> In *Lovett v. Gogan*,<sup>16</sup> the Irish Supreme Court granted an injunction against the operations of a private company’s unlicensed passenger road service, which was deemed to be interfering with the plaintiff-licensed transport company’s constitutional right to earn a living through lawful means. Similarly, in *Murtagh Props., Ltd. v. Cleary*,<sup>17</sup> the Irish High Court ordered an injunction against a trade union for violating women employees’ constitutional right to equality and livelihood by objecting to their employment by the plaintiff employer, despite such employment being in breach of an agreement between the plaintiff employer and the trade union.

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<sup>13</sup> A.N. Malik, *Horizontal Application of Fundamental Rights in India*, (2007) (Published Master’s thesis, University of Toronto).

<sup>14</sup> Gardbaum, *supra* note 12.

<sup>15</sup> See *Meskeel v. Coras Iompair Éireann*, [1973] I.R. 121; *Glover v. B.L.N. Ltd.*, [1973] 1 I.R. 388.

<sup>16</sup> *Lovett v. Gogan*, [1995] I.L.R.M. 12.

<sup>17</sup> *Murtagh Props. Ltd. v. Cleary*, [1972] I.R. 330.

A similar string of rationale can be found in the decisions of the European Court of Justice (“**ECJ**”) in the two seminal cases of *Walrave v. Association Union Cycliste Internationale*<sup>18</sup> and *Defrenne v. Sabena*.<sup>19</sup> While in the former, the ECJ held that Article 7 of the Treaty of Rome,<sup>20</sup> which prohibits discrimination on the ground of nationality, applies even to private organisations, in the latter case, the principle of “*equal pay for male and female workers for equal work*,” contained in Article 119 of the said Treaty,<sup>21</sup> was given direct horizontal application against private employers.

### **Indirect Horizontality**

Indirect horizontality is the third position that lies between the two polar extremes of the vertical and the direct horizontal model. In essence, this model proposes that although constitutional rights can be directly enforceable only against the State, they are nonetheless permitted to have some degree of indirect application upon private actors as well.<sup>22</sup> This indirect application is realised when private laws that govern relationships and interactions between private actors are subjected to the restraints of constitutional rights. Thus, the word ‘indirect’ in ‘indirect horizontality’ indicates that there is a layer of non-constitutional (statutory, common, or judge-made) law mediating between the Constitutional rights and the private dispute.<sup>23</sup> In short, while the direct horizontal effect of constitutional rights results from imposing straightforward constitutional duties on the private actors themselves, the indirect horizontal effect is achieved through the influence of constitutional rights on the private law that the private actors invoke in civil disputes. Hence, under direct horizontal effect, fundamental rights govern all actions, while under the indirect horizontal effect, they govern all laws.<sup>24</sup>

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<sup>18</sup> *Walrave v. Association Union Cycliste Internationale*, [1974] E.C.R. 1405.

<sup>19</sup> *Defrenne v. Sabena*, [1976] E.C.R. 455.

<sup>20</sup> *See* Treaty on the Functioning of the European Union, art. 18.

<sup>21</sup> *See* Treaty on the Functioning of the European Union, art. 157.

<sup>22</sup> Gardbaum, *supra* note 12.

<sup>23</sup> GAUTAM BHATIA, *HORIZONTAL RIGHTS: AN INSTITUTIONAL APPROACH* (Bloomsbury Publishing, 1st ed., 2023).

<sup>24</sup> Stephen Gardbaum, *The Indian Constitution and Horizontal Effect*, in *THE OXFORD HANDBOOK OF THE INDIAN CONSTITUTION* (Oxford University Press, Sujit Choudhury, et al. eds., 1st ed., 2016).

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Since the model of indirect horizontality is actualised when the values embodied in the constitution are extrapolated and applied to laws governing litigation between private parties, this usually occurs *via* the imposition of a duty on the courts to take the constitutional values into consideration while interpreting, applying and developing non-constitutional law, in congruence with those values.<sup>25</sup> Thus, private action is not directly implicated, but the law that authorises the action is at issue.<sup>26</sup> Taken a step further, private law can be modified, or even struck down by the courts, if it fails to meet constitutional standards.<sup>27</sup> The indirect horizontality approach has necessarily required juristic innovations whereby the State is held responsible for an individual's deprivation of fundamental rights, resulting from the acts of a non-state player.<sup>28</sup>

A personification of the indirect horizontality approach can be found in the jurisprudence of Canada, where courts have drawn a distinction between constitutional “rights” and “values”.<sup>29</sup> This permits them to allow, to some extent, a horizontal application of constitutional rights to private actors, even in the absence of state action, through the inherent power of the courts to develop the common law in line with the constitutional values as enshrined in the Canadian Charter of Rights and Freedoms<sup>30</sup> (“**Charter**”). This position was succinctly explained by McIntyre J. in the landmark case of *Retail, Wholesale & Dep't Store Union v. Dolphin Delivery Ltd.*,<sup>31</sup> in the following words:

*“Where such exercise of, or reliance upon, governmental action is present and where one private party invokes or relies upon it to produce an infringement of the*

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<sup>25</sup> Gardbaum, *supra* note 12.

<sup>26</sup> Gautam Bhatia, *Horizontality under the Indian Constitution: A Schema*, INDIAN CONSTITUTIONAL LAW AND PHILOSOPHY (May 24, 2015) <https://indconlawphil.wordpress.com/2015/05/24/horizontality-under-the-indian-constitution-a-schema/>.

<sup>27</sup> Stephen Gardbaum, *Where the (State) action is*, 4(4) INT'L J. CONST. LAW 760 (2006).

<sup>28</sup> Shameek Sen, *Transformative Constitution and the Horizontality Approach: An Exploratory Study*, 10 INDIAN J.L. & JUST. 141 (2019).

<sup>29</sup> Andrew S. Butler, *Constitutional Rights in Private Litigation: A Critique and Comparative Analysis*, 22 ANGLO-AM. L. REV. 1 (1993).

<sup>30</sup> Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982.

<sup>31</sup> *Retail v. Dolphin Delivery Ltd.*, [1986] 2 SCR 573.

*Charter rights of another, the Charter will be applicable. Where, however, private party “A” sues private party “B” relying on the common law and where no act of government is relied upon to support the action, the Charter will not apply. I should make it clear, however, that this is a distinct issue from the question whether the judiciary ought to apply and develop the principles of the common law in a manner consistent with the fundamental values enshrined in the Constitution. The answer to this question must be in the affirmative. In this sense, then, the Charter is far from irrelevant to private litigants whose disputes fall to be decided at common law. But this is different from the proposition that one private party owes a constitutional duty to another, which proposition underlies the purported assertion of Charter causes of action or Charter defences between individuals.”<sup>32</sup>*

In other words, while the courts continue to maintain the distinction between private and public law, the values enshrined in the Charter do not directly apply to private law, but they do influence it.<sup>33</sup> Therefore, though the litigant may not be able to argue that his Charter rights have been violated by another private actor, he will be able to argue that the private law that governs his case must be construed and developed in a manner which is consistent with the values of the Charter.<sup>34</sup>

Similar jurisprudence of indirect horizontality can be found in Germany, where the rights contained in the Grundgesetz<sup>35</sup> render a “*radiating effect*” (Ausstrahlungswirkung)<sup>36</sup> on private law. In the landmark case of *Luth*,<sup>37</sup> the Federal Constitutional Court held that Eric Luth’s right to free speech protected his political expression in organising a boycott of a film by Veit Harlan (a Nazi-era film director), even though Harlan’s economic interests were protected by private law.<sup>38</sup> Thus, the right to freedom of expression was held to permeate even private law in the following words:

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<sup>32</sup> *Id.* ¶ 39.

<sup>33</sup> *Id.*; see also *Hill v. Church of Scientology*, (1995) 2 SCR 1130.

<sup>34</sup> *Malik*, *supra* note 13.

<sup>35</sup> GRUNDGESETZ [GG] [BASIC LAW].

<sup>36</sup> *Luth*, BVerfGE 7, 198.

<sup>37</sup> *Id.*

<sup>38</sup> BÜRGERLICHES GESETZBUCH [BGB] [CIVIL CODE] §. 826 reads as “[a] person who wilfully causes damage to another in a manner contrary to good morals is bound to compensate the other for the damage.”



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*“The Constitution erects an objective system of values in its section on basic rights, and thus expresses and reinforces the validity of the basic rights. This system of values, centring on the freedom of the human being to develop in society, must apply as a constitutional axiom throughout the whole legal system: it must direct and inform legislation, administration, and judicial decision. It naturally influences private law as well; no rule of private law may conflict with it, and all such rules must be construed in accordance with its spirit.”<sup>39</sup>*

In the classic Supreme Court of the United States<sup>40</sup> decision of *New York Times v. Sullivan*,<sup>41</sup> the Court reversed a libel damages judgement against the New York Times, and held that the common law of defamation to impose heavy damages upon the New York Times, as applied by the Alabama courts for libel was inconsistent with the First Amendment safeguards of free speech.<sup>42</sup> Consequently, the Court also framed the “actual malice” test in order to make the grounds on which a libel action can be successful more stringent.<sup>43</sup> Likewise, in *Du Plessis v. De Klerk*<sup>44</sup> (also a case regarding libel), the South African Supreme Court held that courts were required to apply, and thus develop common law while having due regard to the spirit of Chapter 3 of the South African Constitution.<sup>45</sup>

### **Positive Obligation**

There is another model, which, though is seen as a form of indirect horizontality,<sup>46</sup> is distinct in some fundamental aspects. This is the model of “positive obligation.” Under this model, the courts impose an affirmative duty upon the state to safeguard the fundamental rights of citizens even against infringements by private actors, and in doing so, bring the private actors under the aegis of fundamental rights. This theory posits that the constitutional rights vested in individuals against the State are

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<sup>39</sup> Lüth, *supra* note 36.

<sup>40</sup> SCOTUS stands for “Supreme Court of the United States”.

<sup>41</sup> *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964).

<sup>42</sup> U.S. CONST. amend. I reads as, “Congress shall make no law abridging the freedom of speech, or of the press.”

<sup>43</sup> *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964).

<sup>44</sup> *Du Plessis v. De Klerk*, (1996) 3 SA 850 (CC).

<sup>45</sup> S. AFR. CONST., Part III (Fundamental Rights).

<sup>46</sup> Gardbaum, *supra* note 24.

violated not only when the State actively impinges on their enjoyment, but also when the state fails to secure these rights through its omission or inaction.<sup>47</sup> Thus, unlike conventional indirect horizontality, which brings private actors within the cover of constitutional rights by subjecting private laws to constitutional scrutiny, the model of positive obligation does the same by imposing positive constitutional duties on the state to enact certain laws and to take certain actions that regulate private individuals in accordance with the constitutional framework.<sup>48</sup> Hence, the fundamental rights of individuals as enshrined in the Constitution cast a positive obligation upon the State to regulate private actors in a manner that ensures that these rights are not violated.

An example of this approach could be found in the decision of the Constitutional Court of South Africa in the case of *Government of the Republic of South Africa. & Ors v. Grootboom & Ors*.<sup>49</sup> In this case, the Court held that Article 26 of the South African Constitution<sup>50</sup> obliges the state to devise and implement a coherent, co-ordinated housing programme and that in failing to provide for those in most desperate need, the government had failed to take reasonable measures to progressively realise the right to housing.

The approach of positive obligation also becomes apparent in many of the decisions of the European Court of Human Rights.<sup>51</sup> For example, the case of *Storck v. Germany*,<sup>52</sup> which concerned an 18-year-old woman, who had been placed in a locked ward of a private psychiatric institution at her father's demand, who believed her to be suffering from psychosis. In its decision, the Court held that the State can be responsible for the deprivation of liberty in three ways:

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<sup>47</sup> Gardbaum, *supra* note 27.

<sup>48</sup> C. O'Conneide & M. Stelzer, *Horizontal effect / State Action*, in ROUTLEDGE HANDBOOK OF CONSTITUTIONAL LAW (Taylor & Francis, M. Tushnet, T. Fleiner and C. Saunders eds., 1st ed., 2013).

<sup>49</sup> *Government of the Republic of South Africa. & Ors v. Grootboom & Ors*, 2000 (11) BCLR 1169 (CC).

<sup>50</sup> S. AFR. CONST., art. 26 reads as, "Everyone has a right to have access to adequate housing."

<sup>51</sup> See *IB v. Greece*, App. No. 552/10 Eur. Ct. H.R. (2013); *Osman v. United Kingdom*, App. No. 23452/94 Eur. Ct. H.R., (1998).

<sup>52</sup> *Storck v. Germany*, App. No. 61603/00 Eur. Ct. H.R., at 4061 (2005).

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- (i) the direct involvement of public authorities in the person's illegal detention;
- (ii) if the courts fail to interpret the law governing any claim for compensation for unlawful deprivation of liberty in the spirit of Article 5 of the European Convention on Human Rights<sup>53</sup>;
- (iii) the State has breached its positive obligation to protect the person against interferences with his or her liberty by private persons.

To surmise the three models of horizontality, direct horizontality binds individuals; indirect horizontality binds courts in their interpretation of the law; and positive obligations bind state authorities.<sup>54</sup>

### JURISPRUDENCE IN INDIA

Since "State" occupies such a pivotal space in our understanding of the applicability of fundamental rights, a gainful reference can be had by paying attention to the scheme of Part III of the Indian Constitution. *First*, Part III begins with the definition of "State" for the purposes of the said part, which includes the Government and the Parliament of India along with the Government and the Legislature of each of the states and all local or other authorities within the territory of India or under the control of the Government of India.<sup>55</sup> A mere glance at this provision will evince the fact that, while the terms "government," "legislature," and "local authority" present no difficulty in interpretation, the term "other authority" is ambiguous in its intended meaning and scope and thus became the focal point of many judicial pronouncements. The most comprehensive of these decisions was in the case of *Ajay Hasia v. Khalid Mujib Sehravardi*,<sup>56</sup> ("**Ajay Hasia**") where the court held that factors like the extent of financial control the Government has over the concerned entity, whether the concerned body enjoys monopoly status, which is either conferred or protected by the State, deep and pervasive state control over the institution,

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<sup>53</sup> European Convention on Human Rights, 1950, art. 5 reads as "*Everyone has the right to liberty and security of person.*"

<sup>54</sup> ROBERT ALEXY, *A THEORY OF CONSTITUTIONAL RIGHTS* (Oxford University Press, 2002).

<sup>55</sup> INDIA CONST. art. 12.

<sup>56</sup> *Ajay Hasia & Ors. v. Khalid Mujib Sehravardi*, (1981) 1 SCC 722, ¶ 9.

and if the function deployed by the entity is of public importance and resembles government function, are potent indicators as to whether the authority in question is a “State” within the meaning of Article 12. However, I must emphasise that, as stated in *Pradeep Kumar Biswas v. Indian Institute of Chemical Biology*<sup>57</sup> (“**Pradeep Kumar**”), the tests laid down in *Ajay Hasia* are not a rigid set of principles such that if a body falls within any one of them, it will *ipso facto* be considered “State” within the meaning of Article 12. The real question will be whether, in light of the cumulative facts of a given case, the body is financially, functionally, and administratively dominated by or under the control of the Government or whether the Government merely exercises regulatory control over the said body. If it is the former, the body will come within the meaning of “State” as per Article 12, and if it is the latter, it will not.<sup>58</sup>

Another aspect of note is that the definition of “State” under Article 12 is an inclusive one and not an exclusive or exhaustive one. This allowed the Courts to steadily augment the ambit of the term “other authorities” with a view of preventing the Government from by-passing its constitutional obligations by creating companies, corporations, etc. to perform its duties.<sup>59</sup> This has led to the steady expansion of the concept of “State” under Article 12 over time to include even entities that perform functions that closely resemble those performed by the government in its sovereign capacity.<sup>60</sup> However, unlike in the United States,<sup>61</sup> judicial pronouncements in India have kept the courts of the country, exercising their judicial powers, outside the purview of “State” and consequently, a decision of a court of competent jurisdiction cannot violate a fundamental right.<sup>62</sup>

On a perusal of all the rights enshrined in Part III of the Constitution, it can be noticed that some fundamental rights would be rendered otiose if not made applicable against private actors. For example, the right of a citizen not to be discriminated against on the grounds of religion, race, caste, sex, place of birth, or any of them, while accessing shops, public

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<sup>57</sup> *Pradeep Kumar Biswas v. Indian Institute of Chemical Biology*, (2002) 5 SCC 111.

<sup>58</sup> *Id.* ¶ 40.

<sup>59</sup> *Zee Telefilms Ltd. v. Union of India*, (2005) 4 SCC 649, ¶ 14.

<sup>60</sup> *Ramakrishna Mission v. Kago Kunya*, (2019) 16 SCC 303.

<sup>61</sup> *See Virginia v. Rives*, 100 U.S. 313 (1880).

<sup>62</sup> *Rupa Ashok Hurra v. Ashok Hurra*, (2002) 4 SCC 388.

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restaurants, hotels, places of public entertainment, public wells, and tanks;<sup>63</sup> the abolition of untouchability;<sup>64</sup> the interdiction against human trafficking<sup>65</sup> and child labour,<sup>66</sup> are rights that are “*plainly and indubitably enforceable against everyone.*”<sup>67</sup> For example, in the case of *People’s Union of Democratic Rights v. Union of India*,<sup>68</sup> the Supreme Court observed:

“...whenever any fundamental right which is enforceable against private individuals such as, for example, a fundamental right enacted in Article 17 or 23 or 24 is being violated, it is the constitutional obligation of the State to take the necessary steps for the purpose of interdicting such violation and ensuring observance of the fundamental right by the private individual who is transgressing the same. Of course, the person whose fundamental right has been violated can always approach the court for the purpose of the enforcement of his fundamental right, but that cannot absolve the State from its constitutional obligation to see that there is no violation of fundamental right...”<sup>69</sup>

Similarly, in *Indian Medical Association v. Union of India*,<sup>70</sup> the Supreme Court gave an expansive interpretation to the word ‘shops’ in Article 15(2) and brought within its ambit all kinds of establishments that provide goods or services.

However, with regard to other fundamental rights that expressly identify the “State” (as defined under Art. 12) as the addressee, the courts in India have predominantly taken the stand that these rights are safeguards of the citizens’ freedoms against the arbitrary invasion by the State.<sup>71</sup> This view

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<sup>63</sup> INDIA CONST. art. 15, cl. 2.

<sup>64</sup> INDIA CONST. art. 17.

<sup>65</sup> INDIA CONST. art. 23.

<sup>66</sup> INDIA CONST. art. 24.

<sup>67</sup> Gardbaum, *supra* note 24; Sen, *supra* note 28; *see also* the discussion regarding art. 15(2) in 7 CONST. ASSEMB. DEB. (Jan 8, 1948)

<https://www.constitutionofindia.net/constituent-assembly-debate/volume-7/>.

<sup>68</sup> *People’s Union for Democratic Rights v. Union of India*, (1982) 3 SCC 235.

<sup>69</sup> *Id.* ¶ 15.

<sup>70</sup> *Indian Medical Association v. Union of India*, (2011) 7 SCC 179.

<sup>71</sup> *State of West Bengal. v. Subodh Gopal Bose*, AIR 1954 SC 92, ¶¶ 50-52; P.D. Shamdasani v. Central Bank of India Ltd., 1951 SCC 1237, ¶ 9.

also found support in the statements of Dr. Ambedkar before the Constituent Assembly.

*“The object of the fundamental rights is two-fold. First, that every citizen must be in a position to claim those rights. Secondly, they must be binding upon every authority ---- I shall presently explain what the word “authority” means ---- upon every authority which has got either the power to make laws or the power to have discretion vested in it.”*<sup>72</sup>

This approach adheres to the classical view of freedom as conceived in the tradition of western liberalism, where the Constitution is meant to serve as a check on the tyrannical potential of the State and not on the individual conduct of citizens.<sup>73</sup> The philosophical underpinning being that there are private realms, *albeit* circumscribed by the State and society, in which individual actions must be autonomous and protected from the overreaching tendencies of the State and where individuals are free to pursue their own conception of the good.<sup>74</sup> Thus, limiting the scope of constitutional rights to the public sphere has been deemed to preserve the liberty and autonomy of citizens, preserving a heterogeneous private sphere free from the uniform and compulsory regime constructed by constitutional norms.<sup>75</sup>

The two cases that epitomise this “*vertical*” approach by the Indian Supreme Court are – *Zee Telefilms Ltd. v. Union of India*<sup>76</sup> (“**Zee Telefilms**”) and *Zoroastrian Cooperative Housing Society v. District Registrar*<sup>77</sup> (“**Zoroastrian Cooperative**”). In *Zee Telefilms*, the Supreme Court categorically held that the prerequisite for invoking the enforcement of a fundamental right under Article 32<sup>78</sup> is that the violator of that right is the State. In this case, the Board of Cricket Control of India (“**BCCI**”) terminated a contract for

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<sup>72</sup> 7 CONST. ASSEMB. DEB. (Jan 8, 1948)  
<https://www.constitutionofindia.net/constituent-assembly-debate/volume-7/>, at 610.

<sup>73</sup> Malik, *supra* note 13.

<sup>74</sup> Brest, *State Action and Libel Theory: A Casenote on Flagg Brothers v. Brooks*, 130 U.P.A. L. REV. 1296 (1982).

<sup>75</sup> Gardbaum, *supra* note 12.

<sup>76</sup> *Zee Telefilms Ltd. v. Union of India*, (2005) 4 SCC 649.

<sup>77</sup> *Zoroastrian Cooperative Housing Society v. District Registrar*, (2005) 5 SCC 632.

<sup>78</sup> INDIA CONST. art. 32. reads as “*The right to move the Supreme Court by appropriate proceedings for the enforcement of the rights conferred by this Part [III] is guaranteed.*”

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exclusive broadcasting rights with the petitioner. Consequently, the petitioner brought an action by way of a Writ Petition under Article 32 of the Constitution to restrain the BCCI from arbitrarily terminating the contract. The Court held that since the BCCI was not a “State” as per the *Pradeep Kumar*<sup>79</sup> guidelines, an Article 32 petition cannot lie against it. In *Zoroastrian Cooperative*, the Supreme Court had to adjudge the constitutional validity of the said society’s bye-law, which prohibited the sale of land by its members to any non-Parsi. Justice Balasubramanyan, speaking for the Court, upheld the validity of the said bye-laws, holding that even though the Constitution provides that there shall be no discrimination based on religion in any state action, Part III of the Constitution has not interfered with the right of a citizen to enter into a contract for his own benefit while at the same time incurring a certain liability arising out of the contract.<sup>80</sup>

However, since the State has increasingly distanced itself from commercial activities and ceded ground to private actors such as large conglomerates, fundamental rights are more likely to be violated by private enterprises rather than by the State.<sup>81</sup> As a result, the Supreme Court has progressively expanded the applicability of fundamental rights, especially in environmental and labour matters, and we start to see some semblance of horizontal application, albeit in a very rudimentary form.

This can be observed in *M.C. Mehta v. Union of India*,<sup>82</sup> where, though the Supreme Court refrained from conclusively holding private corporations as “State”,<sup>83</sup> it opined that when laws of the past do not keep pace with the changing socio-economic realities, the Courts should evolve new laws and that the ambit of the term “State” must be expanded to advance human rights jurisprudence. Whereas in *M.C. Mehta v. Kamal Nath*,<sup>84</sup> (“**Kamal Nath**”) the Supreme Court developed a novel jurisprudence by holding that the state was itself in breach of public trust by granting a lease of forest

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<sup>79</sup> *Pradeep Kumar Biswas v. Indian Institute of Chemical Biology*, (2002) 5 SCC 111.

<sup>80</sup> For a contrary view on a similar set of circumstances, see *Shelly v. Kremer*, 334 U.S. 1 (1948).

<sup>81</sup> V.N. SHUKLA, *CONSTITUTION OF INDIA* 29 (Eastern Book Company, 13th ed., 2003).

<sup>82</sup> *M.C. Mehta v. Union of India*, (1987) 1 SCC 395.

<sup>83</sup> See also *Indian Council for Enviro-Legal Action v. Union of India*, (1996) 3 SCC 212.

<sup>84</sup> *M.C. Mehta v. Kamal Nath*, (2000) 6 SCC 213.

land to a private company for commercial purposes and thereby invoked its Article 32 jurisdiction to foist liability for exemplary damages on the private company under the “*polluter pays principle*”.

Over time, the Supreme Court has become bolder in expanding its reach under Article 32. For example, in *Bodhisattwa Gautam v. Subhra Chakraborty (Ms.)*,<sup>85</sup> it granted relief to a rape victim under its Article 32 jurisdiction for the violation of the victim’s fundamental rights, holding that fundamental rights under Article 21 can be enforced even against private bodies and individuals. On similar lines, in *Consumer Education & Research Centre v. Union of India & Ors.*,<sup>86</sup> the Supreme Court held that the “right to life” under Article 21 includes not just the right to livelihood, but also the right to better standards of living and hygienic conditions in the workplace. Thus, the Court found it within its powers to issue directions, even to private employers, to pay compensation to workers affected by hazardous working conditions. Even the right of private educational institutions to freely contract has been subjected to the rigours of fundamental rights when the Court in *Mohini Jain v. State of Karnataka*<sup>87</sup> held that it was not permissible for the State to permit universities to charge a capitation fee in consideration of admissions as it amounts to denial of a citizen’s right to education.

Furthermore, it is interesting to note that we find examples of both indirect horizontality and positive obligation models being applied in India. To find a case in point for the positive obligation model in India, one needs to only refer to the judgement of the Supreme Court in *Vishakha v. State of Rajasthan*<sup>88</sup> (“**Vishakha**”), where it was held that the State’s failure to enact legislation against workplace sexual harassment in public and private employment amounted to a violation of the Petitioner’s constitutional rights under Articles 14,<sup>89</sup> 19, and 21. In *Medha Kotwal Lele v. Union of India*,<sup>90</sup>

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<sup>85</sup> *Bodhisattwa Gautam v. Subhra Chakraborty (Ms.)*, (1996) 1 SCC 490.

<sup>86</sup> *Consumer Education & Research Centre v. Union of India & Ors.*, (1995) 3 SCC 42.

<sup>87</sup> *Mohini Jain v. State of Karnataka*, (1992) 3 SCC 666.

<sup>88</sup> *Vishakha v. State of Rajasthan*, (1997) 6 SCC 241.

<sup>89</sup> INDIA CONST. art. 14 reads as “*The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India*”; art. 15 refers to “*Prohibition of discrimination on grounds of religion, race, caste, sex or place of birth*”

<sup>90</sup> *Medha Kotwal Lele v. Union of India*, (2013) 1 SCC 297.



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the Court even proceeded to direct states that had not yet implemented a workplace sexual harassment law to do so within two months.

Similarly, the indirect horizontality model is exemplified in the case of *R. Rajagopal v. State of Tamil Nadu*,<sup>91</sup> where the Supreme Court read the common law of defamation in a way to bring it into stricter compliance with Article 19(1)(a) of the Constitution.<sup>92</sup> An example of interpreting a private law statute in consilience with Part III of the Constitution rather than invalidating it is *Githa Hariharan v. Reserve Bank of India*.<sup>93</sup> Here, the Supreme Court held that Section 6 of the Hindu Minority and Guardianship Act, 1956,<sup>94</sup> which granted natural guardianship of a Hindu minor to the father and only after him, to the mother, could be interpreted to mean that the mother becomes the guardian only following the death of the father. However, as per the Court, this interpretation would be an obvious instance of the state discriminating on the basis of sex under Article 15(1). Thus, rather than annulling the provision, the Court interpreted the provision to mean that the mother could become the guardian of the minor even in the father's absence or as a result of his indifference or mutual understanding between the father and mother of her guardianship.

### **ANALYSIS OF KAUSHAL KISHOR V. STATE OF UTTAR PRADESH**

Given the background as detailed in the foregoing paragraphs, we can now better scrutinise the majority judgment in *Kaushal Kishor*. Though giving fundamental rights a horizontal application is in consonance with recent judicial developments both in India and around the world, the majority opinion has left much to be desired.

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<sup>91</sup> *R. Rajagopal v. State of Tamil Nadu*, (1994) 6 SCC 632.

<sup>92</sup> INDIA CONST. art. 19, cl. 1(a) reads as “*All citizens shall have the right to freedom of speech and expression.*”

<sup>93</sup> *Githa Hariharan v. Reserve Bank of India*, (1999) 2 SCC 228.

<sup>94</sup> Hindu Minority and Guardianship Act, 1956, § 6, No. 32, Acts of Parliament, 1956 (India).

*Firstly*, the decision in *Kaushal Kishor* follows in the tradition of landmark judicial pronouncements of the Indian Supreme Court, wherein the Court, in certain circumstances, recognised the folly of inhibiting the application of fundamental rights to the “State” alone, because every private act necessarily derives its legal validity from the extant legal landscape, which, in turn, is the creation of the State.<sup>95</sup> However, the Supreme Court has, in the past, been very circumspect in giving a direct horizontal application to fundamental rights, except in cases where the fundamental right itself would become nugatory if not made applicable against private actors.<sup>96</sup> This reluctance on the part of the Supreme Court to make the operation of fundamental rights against private actors unqualified and absolute, as it has now done in *Kaushal Kishor*, stems from the fact that doing so puts the very purpose of Article 12 into question.<sup>97</sup> If indeed all fundamental rights were intended to have direct horizontal application, then there remains no requirement to look to Article 12 to see if the entity in breach of any of those rights qualifies for such enforcement in the first place.<sup>98</sup> Furthermore, even the phrase “*except by procedure established by law*” in Article 21 and the language and structure of Article 19 necessarily preclude their vertical application.<sup>99</sup> Thus, with the decision in *Kaushal Kishor*, the decades-long jurisprudence that the courts have developed through various precedents in mapping the scope of ‘State’ under Article 12<sup>100</sup> and trying to balance the sanctity of Article 12 on the one hand with an attempt to expand the ambit of fundamental rights on the other hand<sup>101</sup> has been made inconsequential.

*Secondly*, the dissent by Nagarathna J. itself delineates much of the difficulty in permitting fundamental rights to operate horizontally.<sup>102</sup> For one, many times, an interest may simultaneously be recognised as a common law right

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<sup>95</sup> Gavin Phillipson & Alexander Williams, *Horizontal Effect and the Constitutional Constraint*, 74(6) MOD. L. REV., 878-910 (2011).

<sup>96</sup> See discussion in part C.

<sup>97</sup> Ishika Garg & Abinand Lagiseti, *Who Killed Article 12? – Horizontal Rights and the Judgment in Kaushal Kishor*, INDIAN CONSTITUTIONAL LAW AND PHILOSOPHY (Jan. 10, 2023) <https://indconlawphil.wordpress.com/2023/01/10/guest-post-who-killed-article-12-horizontal-rights-and-the-judgment-in-kaushal-kishor/>.

<sup>98</sup> *Id.*

<sup>99</sup> P.D. Shamdassani v. Central Bank of India Ltd., 1951 SCC 1237.

<sup>100</sup> See discussion in part C.

<sup>101</sup> *Id.*

<sup>102</sup> Kaushal Kishor v. State of Uttar Pradesh., 2023 4 SCC 1 (Nagarathna J. dissent).

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and a fundamental right.<sup>103</sup> In such cases, can a citizen still claim violation of his fundamental rights by a private actor before a Writ Court even if there exists a common law right that is identical in content to the fundamental right and which may be enforced by having recourse to a civil court?<sup>104</sup> If this is allowed, there will be countless private disputes that will now flood the writ courts,<sup>105</sup> which will make it increasingly difficult for the already burdened Constitutional Courts to entertain such cases of fundamental rights violation between private persons<sup>106</sup> and since private disputes invariably involve disputed questions of fact, the essential difference between civil jurisdiction and writ jurisdiction will be rendered redundant, eventually relegating the symbolic status of fundamental rights to that of ordinary private laws.<sup>107</sup> Therefore, the decision of *Kaushal Kishor* inadvertently creates more problems than it resolves. It is for this reason that Courts in other jurisdictions have developed the doctrine of horizontality incrementally, arising out of concrete cases, and not as abstract philosophical exercises.<sup>108</sup>

The majority decision in *Kaushal Kishor* presupposes the non-existence of Article 12 as a whole,<sup>109</sup> annuls the precedents on writ jurisdiction and operability of fundamental rights, and through its interpretation, blatantly violates the text of Articles 19 and 21. In view thereof, it has even been argued<sup>110</sup> that the court failed to uphold the supremacy of the constitution, and the judgment under discussion here is an instance of a needless

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<sup>103</sup> K.S. Puttaswamy v. Union of India, (2017) 10 SCC 1.

<sup>104</sup> Kaushal Kishor v. State of Uttar Pradesh, 2023 4 SCC 1, ¶ 39, 43 (Nagarathna J. dissent).

<sup>105</sup> Garg & Lagiseti, *supra* note 97.

<sup>106</sup> Ashwin Vardarajan, *Supreme Court's Horizontality Judgment: Errors, Omissions and Questions Left Unanswered*, LAW SCHOOL POLICY REVIEW & KAUTILYA SOCIETY (Jan. 19, 2023) <https://lawschoolpolicyreview.com/2023/01/19/supreme-courts-horizontality-judgment-errors-omissions-and-questions-left-unanswered/>.

<sup>107</sup> See Eleni Frantziou, *The Horizontal Effect of the EU Charter of Fundamental Rights: Rediscovering the Reasons for Horizontality*, 21(5) EUR. L. J., 657-679 (2015).

<sup>108</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>109</sup> Garg & Lagiseti, *supra* note 97.

<sup>110</sup> See discussion in part C.

“*unconstitutional informal constitutional change*”,<sup>111</sup> which is an exercise of judicial interpretation by a constitutional court that creates a binding informal constitutional change that substantially replaces or destroys a Constitution or its contents.<sup>112</sup> However, these issues could have been addressed had the majority not been silent on the kind of horizontality that it sought to make applicable in the Indian context. While not all fundamental rights can be applied in the same way, unless the wording of the fundamental right itself calls for direct horizontality,<sup>113</sup> in which private actors are directly subject to fundamental rights, indirect horizontality should be employed in other cases. Under this framework, Courts will be bound to interpret statutes (including private laws)<sup>114</sup> and even matters of public policy<sup>115</sup> in a way that is concordant with Part III of the Constitution. Furthermore, horizontal operations that impose positive obligations on the State can continue to be adopted when the State has failed in its constitutional, statutory, or common law duties, as in *Vishakha* and *Kamal Nath*. In this manner, Writ Courts will be bound to interfere only when any prevailing statute, common law, custom, or usage is in conflict with Constitutional values, thus fortifying the fundamental rights of the citizens. But at the same time, the Courts will be able to eschew using their writ jurisdiction for private disputes, thereby maintaining the normative difference between private law and public law.

## CONCLUSION

In an age where some private parties, like large multinational corporations, are increasingly accumulating power equivalent to that of the state,<sup>116</sup> the

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<sup>111</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-aidc.org/2023-posts/2023/1/31/indian-supreme-courts-judgment-on-horizontal-application-of-fundamental-rights-an-unconstitutional-informal-constitutional-change>.

<sup>112</sup> Anujay Shrivastava, *Mapping 'Unconstitutional Informal Constitutional Changes' by Constitutional Courts – A Comparative Study of Supreme Courts in India, Bangladesh, Honduras and the USA*, 7(1) COMP. CONST. L. & ADMIN L. J., 42-94 (2022).

<sup>113</sup> See generally *Indian Medical Association v. Union of India*, (2011) 7 SCC 179 [Horizontal applicability of art. 15(2)]; *M.C. Mehta v. State of Tamil Nadu*, (1996) 6 SCC 756 [Horizontal applicability of art. 24].

<sup>114</sup> See generally *Githa Hariharan v. Reserve Bank of India*, (1999) 2 SCC 228.

<sup>115</sup> See generally *Central Inland Water Transport v. Brojo Nath Ganguly*, (1986) 3 SCC 156.

<sup>116</sup> J.H. Knox, *Horizontal Human Rights Law*, 102 AM. J. INT'L LAW 1, 19 (2008).

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majority in *Kaushal Kishor* may have been, through their opinion, trying to meet the ideals of Martin Loughlin, according to whom the modern state exists to protect the interests of right-bearing individuals through constitutional arrangements.<sup>117</sup> However, in an attempt to do so, they may have opened a Pandora's Box of practical infeasibility and judicial uncertainty. It does not suffice merely to acknowledge that a degree of horizontality is needed in order to accommodate fundamental rights in a modern social setting.<sup>118</sup> The Court has thus missed an invaluable opportunity to explicate the jurisprudence on the varying degrees of horizontality with respect to different fundamental rights. Thus, along with tackling the issues presented in the previous part, the Supreme Court and the High Courts are now tasked with developing this new avenue of jurisprudence, which is still in its incipient stage in India. For e.g., the Courts have always struck a balance between fundamental rights and the State's imperative to abrade these rights for the purposes of remedying a greater evil.<sup>119</sup> However, under a direct horizontal jurisprudence, will individuals have an absolute claim to fundamental rights against other individuals, and if not, how will the interests of one individual be assessed in relation to the rights of others in a setting where "state action" has become unnecessary? Also, for fundamental rights mandating direct horizontality, questions such as what types of private actions give rise to violations of fundamental rights, whether and how such actions should be punished, and what are the limits of subjecting private interactions to fundamental rights remain to be further explored and developed.<sup>120</sup>

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<sup>117</sup> MARTIN LOUGHLIN, FOUNDATIONS OF PUBLIC LAW 342-343 (Oxford University Press, 1st ed., 2010).

<sup>118</sup> Frantziou, *supra* note 107.

<sup>119</sup> See generally *State of Madras v. V.G. Row*, (1952) 1 SCC 410; *Mohd. Subrati v. State of West Bengal*, (1973) 3 SCC 250; *Director General, Directorate General of Doordarshan v. Anand Patwardhan*, (2006) 8 SCC 433.

<sup>120</sup> Frantziou, *supra* note 107.