

X. CHANGING VIEWS ON HORIZONTAL APPLICATION OF FUNDAMENTAL RIGHTS: THE AFTERMATH OF THE KAUSHAL KISHORE JUDGEMENT

- SHAURYA CHOPRA* & DHRUV PRATAP SINGH**

Abstract

Horizontal application of fundamental rights has already been a consideration with some controversy in Indian constitutional law, traditionally circumscribed to the verticality of relationships between an individual and the State. However, the watershed judgment in Kaushal Kishor v State of Uttar Pradesh & Ors. makes a departure from this previously entrenched concept and acknowledges that Articles 19 and 21 - freedom of speech, and right to life and personal liberty, respectively, can be enforced against private actors. This paper gives an account of the evolution through history of horizontal application of rights to the reasoning of the Court in Kaushal Kishor, and juxtaposes it with the dissenting voice that cautioned against judicial overreach. The ruling's outer philosophies are interpreted throughout natural rights theory, legal positivism, and critical legal studies, mapping broader constitutional and societal implications of Kaushal Kishor. The ruling is then seen in the international dynamics looking at some evolving countries like South Africa, the USA, and the EU regarding horizontal rights stability. Finally, this paper explores the

* Shaurya Chopra is a third-year B.A. LL.B. (Hons.) student at the National Law Institute University, Bhopal.

** Dhruv Pratap Singh is a second-year B.Sc. LL.B. (Hons.) [Cyber Security] student at the National Law Institute University, Bhopal. All errors, if any, are solely attributable to the authors. The authors may be reached at shauryachopra.ballb@nliu.ac.in, for any comments or feedback.

role of the Kaushal Kishor decision being a main leap in reworking the contours of constitutional accountability, where individual liberties and structural fidelity are in balance in times when private power seems to be taking precedence over public life.

Keywords: *Horizontal Application, Natural Rights, Fundamental Rights, Judicial Interpretation, Constitutional Balance.*

I. INTRODUCTION

The Indian Constitution is still seen as one of the important documents expressing the aspirations of the nation for justice, liberty, equality, and fraternity. Fundamental Rights included in Part III of the Constitution¹ were designed to constrain state power so that it does not violate the freedoms enjoyed by the citizens. With the changing socio-political field, marked by gigantic corporations, powerful private actors, and increasing privatization of life spheres, comes the question of whether these rights shall remain vertical or shall be extended horizontally, between private persons and entities.

The classical liberal perspective fathers the so-called 'vertical' model in that fundamental rights are only to be enforced against the State.² In that sense, it perceives the State as the chief menace to individual liberty. Such an approach then considered that private relations should be more or less regulated under the common law and the statute, instead

¹ The Constitution of India, 1950 Part III.

² Billy Christmas, 'Rights and Classical Liberalism' in RA Epstein, MR Rizzo and L Palagashvili (eds), *Routledge Handbook on Classical Liberalism* (forthcoming, Routledge 2024) <https://ssrn.com/abstract=4982164> accessed 19 February 2025.

of some constitutional mandates. But this view is increasingly being oppugned: by effects in reality and by progressive reasoning at the judicial level. As private bodies begin to take on powers comparable with, and in some instances exceeding those of the State, the clear-cut binary view of expectations from the State versus those from individuals had started to become fuzzy. The jury is still out on whether private actors that can violate individual freedoms as deeply as the State should remain free from constitutional scrutiny.

The Indian judiciary has constantly expanded the frontiers of this traditional understanding. In the landmark case of *Vishaka v State of Rajasthan*³, the Court provided guidelines to deal with workplace harassment while enforcing constitutional rights within private relationships. Similarly, in *Justice K.S. Puttaswamy v Union of India*⁴, the right to privacy was recognized as one of the essential features of personal liberty, noting that violations often result from the activity of private actors, such as technology companies.

These judgments indicated the potential for horizontal application of rights, however, did not see it fit enough to declare one categorical doctrine. This is the changeful background against which *Kaushal Kishor v State of Uttar Pradesh & Ors.*⁵ was pronounced, thereby redefining some popular discussions. In what possibly was the first time, the Supreme Court declared that fundamental rights under

³ *Vishaka v State of Rajasthan* (1997) 6 SCC 241.

⁴ *Justice K.S. Puttaswamy v Union of India* (2017) 10 SCC 1.

⁵ *Kaushal Kishor v State of Uttar Pradesh & Ors.* (2023) 4 SCC 1.

Articles 19 and 21⁶, the right to freedom of speech and the right to life and personal liberty, can be enforced against non-state actors. The majority judgment, penned down by Justice V Ramasubramanian, recognized that in contemporary society, non-state actors, comprising private individuals and corporations, could infringe fundamental rights in ways once deemed only that of the State.⁷

The shift is emblematic of the growing awareness that the Constitution will have to adapt in order to continue playing an effective role in protecting individual freedoms. Horizontal application is, of course, a considerable departure from the usual approach; it extends the protection of constitutional guarantees and their scope to include interactions between private actors. This is the blurring of the public-private divide, reimagining constitutional rights enforceability.

However, there exists a good deal of dissent surrounding this expansion: Justice B.V Nagarathna, in her dissent⁸, cautions against the horrors of judicial overreach that's in play here, to the effect that were the horizontal application to be accepted with too big a trowel, the very architecture of the Constitution and, in particular, 'State' as defined in Article 12⁹ may be rendered otiose altogether.

This scholarly endeavour sets about discussing this very transformation; tracing the evolution of horizontal rights enforcement in Indian constitutional jurisprudence, considering the reasoning in

⁶ The Constitution of India, 1950 art 19 and 21.

⁷ *Kaushal Kishor v State of Uttar Pradesh & Ors.* (2023) 4 SCC 1 (*per* V Ramasubramanian J.).

⁸ *Ibid*, (*per* B.V. Nagarathna J.).

⁹ The Constitution of India, 1950 art 12.

Kaushal Kishor, and contextualizing it within broader legal and philosophical debates. Using a blend of scholarly views and comparative constitutional frameworks, this work seeks to elicit a more nuanced understanding of how horizontal application of fundamental rights effectively redraws both the practical and theorized contours of fundamental rights within India.

II. THEORETICAL FOUNDATIONS OF FUNDAMENTAL RIGHTS

The very basis for fundamental rights under the Indian Constitution considers a thin balance of individual freedoms and state power, signifying the importance which the Constitution gives to the democratic, dignified, and just life. What spiral up into the horizontal application of fundamental rights would be clear only from the erstwhile familiar conceptual framework on the bases and nature of those rights. It is the distinction between the vertical and horizontal which is at the heart of such a transformation.

Vertical application corresponds with the classical model wherein fundamental rights are enforceable solely against the State and its instrumentalities as defined under Article 12¹⁰; this is based on the premise that those dangers posed by the State, the authorized appointer of intimidating force-represent to a much greater degree the profoundest threats to personal freedoms.

By way of distinction, the horizontal applications extend to private persons and institutions in realizing that powerful private actors,

¹⁰ Ibid.

whether they be corporations or influential individuals, are capable of degrading private liberties to a similar extent. While the Indian Constitution endorses an overwhelmingly vertical model, some parts hint at the existence of some horizontal aspects to such rights. For example, Articles 15(2), 17, 23, and 24 impose duties directly on the private. Article 15(2): There shall be no discrimination on the grounds of religion, race, caste, sex, or place of birth in any of the public places.¹¹ Article 17 abolishes 'untouchability,' enforcement of which is possible even against private individuals¹², and further is Article 23 and 24¹³, which prohibits forced labour and child labour respectively, irrespective of whether the perpetrator is a state or non-state actor.

This evolving understanding of horizontality is reflected in international frameworks. In the United States, the doctrine of 'State Action' confines the application of constitutional rights to state acts alone.¹⁴ Even so, exceptions, most notably *Shelley v Kraemer*¹⁵, acknowledged that courts enforcing private discriminatory covenants could be state action. This contrasts flagrantly with South Africa's Constitution, which expressly subscribes to horizontal application, proclaiming that rights not only bind the state, but also private persons, where applicable.

¹¹ The Constitution of India, 1950 art 15(2).

¹² *Ibid*, art 17.

¹³ *Ibid*, art 23 and 24.

¹⁴ Terri Peretti, 'Constructing the State Action Doctrine 1940–1990' 2010 **35(2)** *Law & Social Inquiry* 273.

¹⁵ *Shelley v Kraemer* (United States) 334 U.S. 1 (1948).

The European Convention on Human Rights¹⁶ (ECHR) takes a middle ground, it cannot be said to be completely horizontal but obligates member states to guarantee effective protection of rights, including regulating private conduct. The horizontal application justification philosophically draws on the contending schools of thought, theory of natural rights argues that human dignity and freedoms are construed as inalienable from private actors. Legal Positivism, on the other hand, raises a flag against effacing the public/private divide while still considering legislative will to outshine judicial intention. Meanwhile, Critical Legal Studies seeks to spotlight the power imbalances within private relationships, advocating for constitutional protections against wrongful non-state conduct.¹⁷

Thus, by placing the horizontal application of rights within the frames articulated above, it percolates through that this change is not mere judicial innovation; it is an inevitable adaptation to power relations in the present world, understood as the realisation that protection of fundamental freedoms cannot be constrained within the limits of state action. As, for instance, *Kaushal Kishor* demonstrates, the Constitution must now encircle private spheres where increasing rights violations take place.

III. EVOLUTION OF HORIZONTAL APPLICATION IN INDIAN JURISPRUDENCE

¹⁶ Convention for the Protection of Human Rights and Fundamental Freedoms (adopted 4 November 1950, entered into force 3 September, 1953) ECHR.

¹⁷ Alan Hunt, 'The Theory of Critical Legal Studies' (1986) 6(1) *Oxford Journal of Legal Studies* 1 <https://www.jstor.org/stable/764467> accessed 19 February 2025.

The path of horizontal application in Indian constitutional law has been a slow, sometimes unwilling departure from the generally accepted vertical model. Perhaps an acknowledgment of the fact that private actors can infringe individual rights just as the State does, although there is no direct evidence of this attitude by the judiciary, is worth considering. The series of decisions rendering jurisprudence leading to *Kaushal Kishor v State of Uttar Pradesh & Ors.* represents oneself as a whole milestone series; with each providing a steady output in the development of the doctrine of horizontal application.

Firstly, interpretations of Fundamental Rights were staunchly vertical; the landmark case of *A.K. Gopalan v State of Madras*¹⁸ firmly established this view whereby the very guarantee of personal liberty by Article 21 was held to be enforceable only against the State. The Court interpreted the right to life and liberty narrowly, restricting it to physical detention by state authorities. The strict compartmentalisation of State and private actors reflect the belief that, in any given interaction, the Constitution's playing role would not be a restriction on the life and liberty of individuals almost as felt then, but to protect them from coercive powers of the State, not from fellow citizens.

The closer approach wherein in *Kharak Singh v State of Uttar Pradesh*¹⁹ the Court recognized that Personal Liberty extended further than merely physical confinement represented a subtle shift in thought. Although the case still strictly conformed to the vertical mold,

¹⁸ *A.K. Gopalan v State of Madras* AIR 1950 SC 27.

¹⁹ *Kharak Singh v State of Uttar Pradesh* 1964 SCR (1) 332.

recognition of privacy as an element of liberty plants the seed of horizontal interpretations in future times. This initial expansion of the right to privacy served to broaden the general parameters of the fundamental rights.

The climax came with *R.D. Shetty v International Airport Authority*²⁰, during which the Court defined 'State' under Article 12²¹. The judgment laid down the principle that public functions, plus an insight into state control, could qualify private entities as State actors or apologists. This is where the doctrine of 'instrumentality' was birthed in India, going most farthest historically by radically breaking free from narrowing the dichotomy between the State and the individual, and instead grounded its essence firmly in the source of the authority responsible for its act, not in its form, which was how it elucidated whether constitutional obligations could potentially apply.

The other breakthrough for horizontal application of fundamental rights would come in *Vishaka v State of Rajasthan*. The Supreme Court, addressing the absence of legislative safeguards around sexual harassment of women at work, laid out some binding directions, drawing directly on rights conferred within the constitutional Articles 14, 19, and 21²². Although the case was concerned only with a state employer, the arguments of the Court at some point went much beyond the case. In establishing that the guarantee of fundamental rights is equally and cogently valid in the private employment sector, it creates

²⁰ *R.D. Shetty v International Airport Authority* (1979) 3 SCC 489.

²¹ The Constitution of India, 1950 art 12.

²² The Constitution of India, 1950 art 14, 19 and 21.

context for the guarantee of dignity and equality of women in private workplaces. This was a decisive moment, wherein the Court connected constitutional aspirations to the realities of power structures in the world, acknowledging that private employers could also violate fundamental rights. During the subsequent years, this proposition was further cemented by a series of judgments.

The Court went on: In *People's Union for Civil Liberties v Union of India*²³, stating free speech could not only be encumbered by state efforts for censorship; but equally through private monopolies of communication channels. Any monopolistic company, media or technology-based, could inhibit speech as effectively as state action. It didn't impose strict observance of rights against private actors in the judgment, all it did was make it clear about rethinking the tier level of protection accorded to constitutional rights.

The pivotal moment in the present evolution was catalysed by the landmark case of *Justice K.S. Puttaswamy v Union of India*²⁴. The Court recognized that violations of privacy mostly arise from private actors thereby acknowledging that privacy is intrinsic to Article 21 guaranteeing life and personal liberty²⁵. The judgment subtly implied the horizontal application of the theory by stating that safeguarding privacy means protecting it both from State and non-State intrusions. While this acknowledgment may very well have sealed the deal for dismantling the vertical model, the Court stopped short of announcing

²³ *People's Union for Civil Liberties v Union of India* (2003) 2 SCR 1136.

²⁴ *Justice K.S. Puttaswamy v Union of India* (2017) 10 SCC 1.

²⁵ The Constitution of India, 1950 art 21.

a horizontal doctrine in clear terms. Another very important advancement came with *Shakti Vahini v Union of India*²⁶ in which the Court would consider honour killings undertaken by private individuals and community structures.

The Court ruled that the right of choice of a partner, an aspect of personal liberty, should be protected from non-state actors by the State against private violations of constitutional rights. Thus, this ruling subtly triumphed over the horizontal application as it clearly hinted at the acknowledgment that the Constitution's sheltering covering must traverse into private domains where individuals' autonomy is threatened by societal interests. The route to Kaushal Kishor was additionally laid down by *Navtej Singh Johar v Union of India*²⁷ which decriminalized same-sex relationships. The Court asserted that all forms of social morality shall in practice yield to constitutional morality, one that projects the extended perspectives of dignity, equality, and freedom relations, no matter the source of the discrimination, be it State or individual citizens. That confirmed that fundamental rights derive from human dignity itself, not on the basis of the identity of the representer that violates the same.

The development of horizontal application in Indian jurisprudence portrays a dynamic compromise between constitutional ideals and social realities. From irreversible retreat in *A.K. Gopalan* to slow accretion in cases like *Vishaka* and *Puttaswamy*, the High Court has

²⁶ *Shakti Vahini v Union of India* AIR 2018 SC 1601.

²⁷ *Navtej Singh Johar v Union of India* 2018 INSC 790.

shown an increasing willingness to expand the palliative reach of Fundamental Rights. This metamorphosis would signify an overarching transformation in constitutional philosophy- one that now considers the substance of the rights violated more important than the identity of the violator. With the advent of a steadily ramping up private influence, the judiciary strives to project the meaning of justice, equality, and liberty in a modern, interconnected society beyond the traditional fringes of state action.

IV. KAUSHAL KISHOR v STATE OF UTTAR PRADESH & ORS: A TURNING POINT

The decision in *Kaushal Kishor v State of Uttar Pradesh & Ors.* is groundbreaking in Indian constitutional law as far as the horizontal application of fundamental rights is concerned. The Court recognized, for the first time with sufficient clarity, that certain fundamental rights, particularly Article 19 and 21, could be actively enforced against private individuals and entities.

A. Case Background and Procedural History

The controversy arose after a number of statements made by a public official purportedly infringing upon dignity and personal liberty in some individuals. The petitioners submitted that such statements, no matter how personal, bore as much public authority and therefore constituted an infringement of Article 19 and Article 21. The Constitution Bench had to answer whether these fundamental rights could be invoked against a private party-the individual making statements-or whether those rights were only enforceable against the

State. The procedural journey of the case was momentous in itself. It was first taken up before a smaller bench where it was subsequently referred to a Constitution Bench in view of its far-reaching constitutional ramifications. The Court's resolution to elevate the matter made clear its recognition that this was a case about fundamental principles of rights enforcement and about the evolving role of non-state actors in shaping public discourse.

B. The Majority Opinion

Justice V Ramasubramanian, writing for the majority, offered an elaborative, forward-looking opinion. The judgment underlyingly bared that the rigid vertical infrastructure of rights enforcement just can no longer reflect the calcified realities of modern society. He recognized that private actors, be they individuals, corporations, or digital platforms, do have the power to influence, to curtail, and even to infringe upon fundamental rights on a scale that earlier used to be exclusively ascribed to the State. The Court concluded that the supreme purpose of the Constitution is to protect human dignity as well as freedom, and protect it against any such threat whoever the author thereof be. Quoting numerous prior judgments including *Puttaswamy* and *Navtej Singh Johar*, the Court voiced that the violations against rights like privacy, dignity, and free speech could rather be traced back to the inherent worth of the individual and not who the violator is. The majority found that limiting the enforcement of Articles 19 and 21 to state actors alone would be *tertium non datur*; it would impose an artificial and thereby unjustifiable boundary rendering individuals defenceless against the kinds of abuses inflicted by private actors.

What is especially of primary importance is that the majority opinion did not consider the horizontal application of rights unqualifiedly. It acknowledged in part that having constitutional rights extend into the private disputes required a careful balancing act to avoid the realistic fallout of its imposition. The Court held that while territorial resurrection of rights is possible, a strict decisive nature of that would depend on what right was being breached and the surroundings of how that violation arose. This realistic approach allows for continued flexibility by future courts in developing a patchwork of principles and protections.

C. The Dissenting Opinion

Justice B.V Nagarathna penned a powerful dissent, which cautioned about the long-term repercussions that might emerge out of broadening the horizontal application of infringement upon constitutional rights without the sanction of legislation. She maintained that the basic structure of the Constitution, and above all the definition of ‘State’ found in Article 12, is an intended design to bring state actors under the purview of public accountability, and this blurring of the delineation line was sure to jeopardize the available framework under the Constitution, as so provided in this case.

The dissent is based on the simple fact of practical consideration, where the horizontal application of rights is persuading. The security of the law lays in the limitation of the domain within which a rightful claim to it could be possible. These doctrinal propositions guided her belief that private disputes were deservedly confined within the indubitable limits of both statutory as well as common law remedies, unless

Parliament were to give express indication of extending the ambit of the Constitution. The dissent's focus on legislative supremacy underlined the contentious theme running through the judgment: a tug-of-war between judicial innovation and fidelity to the Constitution. While the majority magnified the dynamic and progressive nature of rights and social power, the minority upheld the structural limits prescribed within the Constitution.

D. Constitutional and Jurisprudential Impact

The importance of *Kaushal Kishor* not only lies in the immediate verdict but also extends far and wide in terms of future constitutional interpretation and enforcement of rights. Recognizing the horizontal applicability of Articles 19 and 21, the Court noted that 21st-century power dynamics focus more and more on control by private actors over the platforms, spaces, and narratives necessary to exercise constitutional freedoms. One of the most pivotal areas of influence has to do with digital rights. Social media companies, online platforms, and other tech giants hold unprecedented sway over public discourse and private expression. *Kaushal Kishor* opens up the possibility to constitutionally challenge certain decisions made by private actors. For example, a decision by a social media corporation to deploy extensive censorship may be equated with state censorship in its capacity to limit free speech or personal liberty.

This is a growing trend in the world, where courts and legislatures struggle with the implications of private platforms — specifically, their protective role or the restrictions they impose on fundamental freedoms. The judgment may also influence workplace rights, housing

discrimination, and access to essential services, in which private actors tremendously influence what individuals experience in their daily lives. The recognition of horizontal rights would allow individuals to challenge acts of discrimination or violations of dignity and liberty against private entities. The judgment, however, does not answer many of the most important questions. The majority has not given any exhaustive framework on when and how horizontal application could be invoked. Future disputes will need to deal with competing rights say, between an individual's freedom of expression and another's dignity or privacy. How the courts will perform the balancing act between these rights and this task seems particularly onerous and complex in the absence of guidance from the legislature remains a muddled yet exciting proposition.

The ruling is a living constitutionalist's approach, wherein the whole document is to be interpreted to conform with current realities, but still bound within the foundational premise of upholding human dignity and liberty. On the other hand, dissents are an important reminder of the dangers of judicial excesses that flout structural limits imposed by the Constitution.

V. JURISPRUDENTIAL PERSPECTIVES

Through *Kaushal Kishor v State of Uttar Pradesh & Ors.*, the recognition of horizontal application was a turning point for Indian constitutional law. To comprehend the full scale and the possible route of this transformation, one must view the controlling judgment through

the prism of the consolidated and emerging jurisprudential schools of thought.

A. Natural Rights Theory and Human Dignity

The theory of natural rights, drawing from the works of John Locke holds that certain rights are intrinsic to human beings simply by their existence.²⁸ Life, liberty, property; they logically antedate the emergence of the State and the correspondingly do not require any sovereign to give meaning to them in order to be valid rights. The leading opinion in care essentially embodies this notion. The Court declares that the rights under Articles 19 and 21 do not emanate from the identity of the violator but are derived from human dignity; thus, it speaks in the Lockean tradition of viewing fundamental rights as being inherently vested in individuals. This characterization squares adequately with the Constitution's assertion that human dignity is an axiom above all other values in the law and is essentially transcendent of the public-private dichotomy. State or private incursions against such rights are violative of one's innate dignity.

Legal scholars such as Upendra Baxi have long advocated that dignity stands as the superior value in a rights-based approach, transcending Treasury ideals.²⁹ Baxi's notion of 'judicial empathy', the proposition that interpretation must assist the weaker section-resonates with the

²⁸ JJ Jenkins, 'Locke and Natural Rights' (1967) **42(160)** *Philosophy* **149**, 154 <https://www.jstor.org/stable/3749182> accessed 19 February 2025.

²⁹ Upendra Baxi, 'From Human Rights to the Right to be Human: Some Heresies' (1986) **13(3/4)** *India International Centre Quarterly* **185**, 200 <https://www.jstor.org/stable/23001445> accessed 19 February 2025.

majority standing.³⁰ The call for horizontal enforcement attests to the diffusive character of power in modernity, where private actors exert force comparable to the State.

On the contrary, according to critics, the theory of natural rights stirs a moral justification for horizontal application, yet there is lack of practical limitations to guide it. A totally unrestrained horizontal application will create an ever-changing and unpredictable judicial landscape. This concern was echoed by Justice Nagarathna, in her dissenting opinion, who warned the horizontal application could destabilize the legal order if not carefully bounded.

B. Legal Positivism and Structural Boundaries

While elaborating on the importance of the justification given by Justice Nagarathna, it comes into direct contrast with the natural rights theory side. Justice Nagarathna further opines that paragraph one limits horizontal applicability of fundamental rights to non-state actors intentionally through Article 12 upon which state action intends some induced actions to constitute an infringement. Therefore, by this view, allowing horizontal application is disruptive to the structure of the Constitution without the backing of statutory mechanism. The judge exposes the needed respect for separation of powers- whereby the interpretation by the judiciary cannot encroach into the role of the parliament to delimit rights and obligations. Judicial overreach on the

³⁰ Prof. Dr. Upendra Baxi, 'Judicial Empathy, Jurisprudence and Justice' (Gandhi Smriti Peace and Nonviolence Lecture, 14 August 2021) <http://www.gandhismriti.gov.in/programmes/gsds-programmes/gandhi-smriti-peace-and-nonviolence-lecture-%E2%80%98judicial-empathy> accessed 19 February 2025.

side of the positivist scholars has been warned about, denouncing that far-reaching judicial lawmaking enfeebles the democratic legitimacy.³¹ It echoes throughout the dissenting voice that private disputes should hold statutory and common law remedies, unless Parliament specifically avers horizontal application. The conflicts between the bold progressive majority on the one hand and a spirit of structural fidelity on the part of the minority thus encompass an historically enhanced debate between the natural rights theory and legal positivism: the first embracing an understanding based on the moral essence of rights, the second articulating a strict determination by the boundaries of institutions, which from now reverberates in all likelihood to future jurisprudence.

C. Critical Legal Studies and Power Dynamics

Emerging in the 1970s, the Critical Legal Studies (hereinafter referred to as 'CLS') movement challenges the perception of law as an externally operated rational system. CLS theories assert that the law, by its very nature, serves to express and fortify the equilibrium of card-structured powers.³² From here, horizontal application would be useful as an instrument in dismantling the existing disparities in power embedded within private contracts with one another in their dealings with other private actors. Thus, though not expressing CLS terminology per se, the majority opinion figuratively worked with CLS

³¹ Shunmugasundaram, R. (2007) Judicial activism and overreach in India. *Amicus Curiae*, 2007 (72) 22 [oai:sas-space.sas.ac.uk:1719](https://oai.sas-space.sas.ac.uk:1719) accessed 19 February 2025.

³² Alan Hunt, 'The Theory of Critical Legal Studies' (1986) 6(1) *Oxford Journal of Legal Studies* 1 <https://www.jstor.org/stable/764467> accessed 19 February 2025.

ideas; recognition of information that private actors — corporations instead of state-actors or social media platforms — can interact with and choke to death any individual rights. It also conveys some implicit recognition of the idea of the role of law in modulating structures of power that lie outside of the realm of state power.³³ However, it is exactly these points that CLS proponents might well oppose: the judgment did not go far enough. Even though the court realizes there is private power, it still has not offered a stout backup with which horizontal rights can be enforced. Critically, with the quest for set criteria and guidelines unabated, the ambiguity embraced by this decision over the past few years now restricts working wills and settles that the causes of action would be dependent more on judicial philosophy than stable legal doctrines.

D. Comparative Constitutional Perspectives

Apart from Kaushal Kishor, attempt to bring in a comparison with global approaches of the Constitution. One of those pieces of Constitution, from South Africa, made horizontal application an explicit requirement³⁴; rights were to bind not only the State but also private persons, wherever appropriate. It rang out loud and clear in some historic decisions, including that of *Dawood v Minister of Home Affairs*³⁵. There, the private landlords were told that arbitrary disposition of tenancy could not happen; hence, housing was a right

³³ Ibid.

³⁴ ‘Vertical and Horizontal Application’ (Constitutional Court of South Africa) <https://www.concourt.org.za/index.php/57-the-bill-of-rights/vertical-and-horizontal-application> accessed 19 February 2025.

³⁵ *Dawood v Minister of Home Affairs* (South Africa) 2000 (3) SA 936 (CC).

according to the constitutional principle of security against arbitrary dispossession within the bounds of reasonable limitation under given criteria. Thus, the reasoning was revolutionary: since on the one hand it imposes obligations on the State principally, on the other, it calls upon it to ensure an effective protection of any of the rights in the private relationships: a doctrine also termed as 'positive obligations.'

Even before this particular case, a lot of judgements relied on this principle; for example, *X and Y v The Netherlands*³⁶, where the European Court of Human Rights pronounced it a breach of the right to privacy of a mentally challenged girl by the failure of the State to protect her from private sexual violation. The stricter 'state action' doctrine of the U.S. restricts the constitutional rights to conduct by the state itself. However, certain exceptions are allowed, especially when it comes to the pejorative public functions done by private bodies. Still, it will long continue being a landmark exception, with the U.S. Supreme Court ruling within *Shelley v Kraemer* wherein the enforcement by a judge of private racially-oriented demands was a state action rendering it unconstitutional.

In its embrace of the horizontal application of Kaushal Kishor, the Indian Supreme Court, likened closer to the South African and ECHR horizons, does not leave any other choice than the American doctrine. Yet, due to not having the brief support of any constitutional or legislative precept, the limits of the doctrine will stay unclear in view of scenarios yet to be determined by future courts.

³⁶ *X and Y v The Netherlands* (European Court of Human Rights) [1985] ECHR 4.

VI. CONCLUSION

The horizontal application of fundamental rights was first recognized in *Kaushal Kishor v State of Uttar Pradesh & Ors.* This marks a watershed moment in the history of the Indian constitutional law. It reflects an evolving legal landscape where the possibilities of action by private actors intersect with the exercise of personal liberties in an ever-expanding scope. The horizontal application here implies the Supreme Court is allowing Articles 19 and 21 to be enforced not only against the state but also against private actors, be they corporate entities or individuals, exercising complete control over important aspects of human lives in modern society.

This change is a conscious drift away from a narrow, vertical approach to the interpretation of constitutional rights on the one hand into a more supple, rights-imbued vision of the exercise of the guarantee of rights. Dignity, freedom of expression, and personal liberty were all recognized, by majority opinion, not as gifts from the State but as intrinsic, unalienable rights. The judgment seems to have extended the very reach of the Constitution by asserting its protective commitment to rights that had hitherto been confined to the narrow domain of the private sphere. This goes a long way in bringing Novus into the plank of classical constitutional philosophy with the realities of contemporary socio-political existence, which would further stranglehold the very vitality of the rights envisaged at a time when the private power increasingly well informs political structuring.

However, the findings of the judgment, too, unfold a conflict between progressive interpretation and fidelity to the Constitution. The dissent speaks of the risk of judicial activism and the upset of the finely balanced boundaries of the Constitution, while the majority opinion upholds the principle of evolving rights. Justice Nagarathna provided due caution against confusion between state action and private conduct: a very legitimate cautionary call. This, therefore, in a way, explains the point that the Constitution is designed, on the basis of Article 12, to hold the State accountable.

Expanding this architecture without any backing from the law opens a Pandora's box of questions concerning institutional balance and separation of powers. The ongoing jurisprudential contention spurred by Kaushal Kishor - realists, legal positivists, and critical legal scholars, are likely to define the doctrine henceforth. The judgment embodies broad yet undefined elements of all three: moral sanction on human dignity, structural safeguards of constitutional boundaries, and the backdrop on the power imbalances of private relationships. Such synthesis reflects somehow the complex character of contemporary constitutionalism wherein the law has to manoeuvre between personal liberties, state power, and private authority.

The judgment raises rather crucial questions, though. The majority also failed to set out a clear framework for when and how horizontal application applies, leaving it to future courts to delineate the boundaries of this doctrine. Going forward in India, the judiciary will be of crucial impetus to fine-tuning this doctrine, thus ensuring that horizontal enforcement adds to the shield of rights from the inner side

and not undermine the constitutionally provided political stability within the habitude of the Constitution.