IV. FROM PUBLIC TO PRIVATE: EXPANDING THE SCOPE OF 'STATE' IN INDIAN CONSTITUTIONAL JURISPRUDENCE

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Abstract

The Constitution of India, through Article 12, defines the term 'State'. After mentioning a few terms like the Government, Parliament, Legislature of the States and local authorities, Article 12 enumerates Other Authorities. There has been a great amount of confusion over-interpreting this phrase. Traditionally, this framework was understood as limited to include entities created through statutes or those under the control of the government; however, with the evolving jurisprudence and judicial opinion on this, its scope has been expanded to include agencies and instrumentalities under the purview of 'State' in specific circumstances. This chapter explores this dynamic expansion, evaluates its impact on constitutional law and governance, and analyses the constitutional rationale and practical implications of including private entities within the ambit of 'State' to enforce fundamental rights. It interrogates whether the expansion of Article 12 dilutes the distinction between State and private actions or serves as a necessary corrective in the era of privatization and corporate dominance. Additionally, the chapter considers whether this trend reinforces the transformative potential of the Indian Constitution, ensuring that private power does not escape the safeguards meant to protect individual freedoms and social justice. By contextualizing

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this expansion within the broader constitutional theory, this chapter argues that the expansion of 'State' strikes a delicate balance between protecting fundamental rights and recognizing the changing socio-economic landscape. Including private entities under constitutional scrutiny ultimately fosters accountability and extends the reach of constitutional governance into previously shielded private domains.

Keywords: *State, Fundamental Rights, Public Function, Privatization, Private Entities.*

I. INTRODUCTION

"The Constitution…should, wherever possible, be so construed as to apply to arbitrary application of power against individuals by centres of power."[1]

Due to the dynamic nature of society, the conflict between the rights of an individual and the 'State' has been quite obvious. There has been a constant struggle on the part of Statesmen to strike a balance between them.[2] Modern democratic States frequently use the tactic of enshrining supreme and fundamental rights of man in their Constitution and securing their inviolability through the legislative and executive branches as a means of achieving this goal. "The guarantee of

[1] KK Mathew, J, in *Sukhdev Singh v Bhagatram Sardar Singh Raghuvanshi* (1975) 1 SCC 421.
[2] J S Mill, *On Liberty* (1859) <https://socialsciences.mcmaster.ca/econ/ugcm/3ll3/mill/liberty.pdf> accessed 21 November 2022.

fundamental rights is essentially a device whereby the autonomy of an individual is protected from encroachment by those who have power and capacity to do the same."[3] Since the possibility of encroachment has traditionally been from the State therefore the fundamental rights are those inalienable rights of individuals or unavoidable duties of the State that are intended to safeguard individual liberties and create favourable circumstances for the holistic development of a nation. They protect individuals and minority groups from arbitrary and unjust 'State action'. But the model that granted fundamental rights against the State, which held significant powers, underwent much change in the mid-20th century due to the shift in the conception of the State.

This shift allowed private parties to shape their economic relations while providing essential public goods such as education, healthcare, transport, and commodities. The dynamic of the individual-State relationship has been transformed by the processes of globalisation and privatisation. The impact of neoliberalism has prompted a reassessment of the status and execution of fundamental rights, as well as the responsibilities of private entities, in response to worldwide changes and the corresponding growth of private influence. The Indian legal system is also subject to the aforementioned global transformation. Hence, it can be observed that the conventional notion of the State, as elucidated in Article 12[4] of the Constitution of India, is undergoing a

[3] Udai Raj Rai, 'Reach of Fundamental rights' (1994) 36(3) Journal of the Indian Law Institute <https://www.jstor.org/stable/43952346> accessed 21 November 2022.
[4] The Constitution of India, 1950 art 12.

persistent transformation. The assertion and implementation of fundamental rights vis-à-vis the State is primarily motivated by the latter's exercise of power over the individuals, which confers upon it the capacity to regulate access to basic human necessities (including the right to life). Likewise, in light of changes in the concept of Statehood, in cases where non-State entities or private entities possess and exert such authority, arguably they must also be subjected to similar standards as the State. Thus, this chapter examines the cases which endorse the desirability of expanding the scope of Statehood to private entities in light of neoliberal policies of globalisation, privatisation, and divestment.

II. EMERGING CONCERNS WITH NEO-LIBERAL POLICIES

The phenomenon of Globalisation and Privatisation has led to a reduction in the prominence of the welfare state, an increase in the commodification of individuals, and a decrease in the regard for human rights and the erosion of democratic procedures.[5] The potential privatization, either in whole or in part, of profit-generating public sector units is being considered as a means of generating funds to alleviate the government's significant debt burden. There is hardly any domain of economic progress where the participation of private enterprises is forbidden. India no longer prioritises the social ownership

[5] VN Shukla, *Constitution of India* (MP Singh ed,13th edn, Eastern Book Company 2013) 214.

of the commanding heights of the economy as a goal. In summary, India has moved away from the Nehruvian approach to development, despite claims to the contrary.[6]

With the growth of private entities and thereby private-public interaction and participation, the role of the State has undergone a paradigm shift. The state is now a "service facilitator" rather than a "service provider."[7] Gavin W. Anderson highlights the significance of neo-liberalism as a political concept in the definition of economic globalisation. Neo-liberalism accentuates the benefits of the free market and the drawbacks of large government.[8] The Constitutional provisions pertaining to equality and distributive justice, specifically Articles 14, 15, 16, and 38, are being disregarded, resulting in a lack of adherence to social justice principles.

This phenomenon may arise due to several factors, including (i) government involvement and nexus with private enterprise; (ii) the consolidation of economic power in the hands of private corporations; (iii) the control of a vital resource or service by a private entity, necessary for the basic needs of individuals; or (iv) the undertaking of a task by a private entity that has traditionally been the sole

[6] Udai Raj Rai (n 3).
[7] G Bertucci and A Alberti, 'Globalisation and the Role of the State: Challenges and Perspectives' (2003) <https://www.academia.edu/2087689/Globalization_and_the_Role_of_the_State_Challenges_and_Perspective> accessed 26 April 2023.
[8] ibid.

responsibility of the government.[9] The aforementioned categories serve as examples and are not comprehensive.

Contemporary observations suggest that certain marginalised groups within society are excluded from the dominant trajectory of neoliberal development strategies and planning initiatives. One significant consequence of globalisation is the gradual diminution of labourers' entitlements to minimum compensation and social welfare benefits, which has resulted in labour disputes. The disinvestment in the public sector and subsequent privatisation have had a detrimental impact on the rights of workers, as there are no legal provisions to hold private entities accountable to constitutional obligations. The current legal framework of the nation is inadequate in addressing these challenges. Despite the utilisation of public funds through public financial institutions by the private sector, affirmative action policies are absent in place for underrepresented groups within the private sector.[10]

The issue of displacement resulting from the establishment of Special Economic Zones and other developmental initiatives warrants consideration in this context.[11] The privatisation of education and medical facilities is an indication of the transfer of welfare

[9] Kumar Kartikey, *Article 12 Meaning Scope and Emerging Judicial Trends* (Yogesh Pratap Singh ed, 1st edn, EBC 2020).
[10] Sanu Rani Paul, 'The Need for Horizontal Application of Fundamental rights in India with reference to State Action Doctrine in Context of Globalisation' (2013) 2(1) Christ University Law Journal 89.
[11] G. Bertucci and A. Alberti (n 7).

responsibility to private entities. The evolving circumstances have raised significant concerns regarding the implementation and effectiveness of fundamental rights. These concerns are primarily rooted in the fact that the non-State actors or private entities assume a greater role such that they are in the position to perform functions that were previously performed by the State. As the role of the welfare State diminishes, these private players are more likely to infringe upon the fundamental rights of individuals.

Thus, it is clear that these non-State actors or private entities should not be allowed to violate the fundamental rights of individuals at any cost.

III. PRIVATE ENTITIES AND THE STATE UNDER ARTICLE 12

The present inquiry pertains to the potential inclusion of private entities within the purview of the term "the State" as stipulated in Article 12, and the consequent imposition of fundamental rights oversight upon them. Notably, the assurance of fundamental rights serves as a mechanism to safeguard an individual's independence against infringement by those who possess the authority and capability to do so. Given that the State holds the governing power, it has been conventionally recognised that the potential for infringement primarily emanates from the State.[12] But under certain circumstances, the actions

[12] VN Shukla, *Constitution of India* (MP Singh ed, 13th edn, Eastern Book Company 2013) 214.

of a private entity may bear resemblance to those of a public authority, blurring the line between them.[13] A private entity may exert control over the lives of others in significant ways. Consequently, it is logical to propose that in such situations, the private entity should adhere to the same standards as a public authority. It is appropriate to consider the private party as equivalent to the State and subject them to the regulations outlined in fundamental rights.

IV. APPLICATION OF TESTS ENUNCIATED BY THE COURT TO PRIVATE ENTITIES

The Judges of the Supreme Court have articulated various tests that can be utilised to determine if private entities fall under the purview of the term "the State" and are consequently subject to limitations on fundamental rights. These tests are formulated in a manner that enables their application to private entities.

A. *Entities on which powers are conferred by law*

Bhargava, J, in the case of *Rajasthan SEB* case[14], has contended that the term "other authorities" mentioned in Article 12 encompasses all constitutional or statutory authorities that have been bestowed with powers by law.[15] The aforementioned statement suggests that a private entity could potentially be included in this observation as long as it is

[13] ibid.
[14] *Rajasthan SEB v Mohan Lal* AIR 1967 SC 1857.
[15] ibid 1863.

granted legal powers, which need not necessarily be sovereign in nature as previously assumed.

B. *The Agency Instrumentality Test*

Mathew J's concurring opinion in *Sukhdev Singh v Bhagatram*[16] outlines the criteria for ascertaining whether an entity constitutes an agency or instrumentality of "the State," is phrased in a manner that is sufficiently inclusive to encompass private entities within the purview of Article 12.[17] According to him,

> *'The Constitution, therefore, should, wherever possible, be so construed as to apply to arbitrary application of power against individuals by centres of power… the corporate organisations of big business and labour are no longer private phenomena; that they are public organisms and that constitutional and common law restrictions imposed upon State agencies must be imposed upon them…The emerging principle appears to be that a public corporation being a creation of the State is subject to the constitutional limitation as the State itself.'*

However, it is important to note that he explicitly refrained from expressing any stance on the relevance of these criteria to private

[16] *Sukhdev Singh v Bhagatram Sardar Singh Raghuvanshi* (1975) 1 SCC 421.
[17] Kumar Kartikey (n 9).

corporations or analogous organisations. In his opinion, the Constitution must be interpreted in a manner that curbs the arbitrary exercise of power by centres of authority against individuals, to the fullest extent feasible. To meet the criteria of State action, the entity or organisation doesn't need to exert authority in the manner of issuing commands in the Austinian sense or possessing sovereign power to promulgate laws or regulations with the force of law.[18]

C. The Public Function Test

This forms the basis for the functional approach which adopts an individual-centric viewpoint, wherein the guaranteed rights of the individual serve as constraints on the sovereign authority of the State. This means that the entities that possess the ability to impact said rights in a manner akin to that of the State are equated with the State.

The cases of the *Airport Authority of India*[19] and the *Ajay Hasia*[20] shifted the focus to the "nature of functions" carried out by the authority. Bhagwati, J, acknowledged that "the public nature of the function, if impregnated with governmental character or "tied or entwined with Government" or fortified by some other additional factor, may render the corporation an instrumentality or agency of Government."[21]

[18] *Sukhdev Singh* (n 16) 452.
[19] *Ramana Dayaram Shetty v International Airport Authority of India* (1979) 3 SCC 489.
[20] *Ajay Hasia v Khalid Mujib Sehravardi* (1981) 1 SCC 722.
[21] *Ramana Dayaram Shetty* (n 19) 510.

In the case of *BCCI v Cricket Assn. of Bihar,*[22] even when the Court did not call the body State under Article 12, it made it amenable to writ jurisdiction under Article 226. In doing this, the Court emphasized 'public functions' performed by the private body.[23]

Given the circumstances, it is posited that private enterprises can be encompassed within the purview of "the State", particularly in instances where a private enterprise is involved in carrying out activities that are essential to society and are inherently significant enough to be regarded as governmental functions.

D. Oleum Gas Leak Case

The Supreme Court of India has provided positive indications regarding the inclusion of private corporations under Article 12 in the case of *M.C. Mehta v Union of India*.[24] The court has examined the matter of whether a private entity that performs significant public functions can be regarded as the State. The case originated from the writ petitions instituted against *Shriram Foods and Fertilisers Ltd.* under Article 32 of the Constitution, after the occurrence of leakage of Oleum gas from one of its factories. The primary matter at hand for the Court pertained to the maintainability of a writ petition under Article 32, which alleges the infringement of rights under Article 21 of the Constitution, against a private enterprise, namely *Shriram Foods and*

[22] *BCCI v Cricket Assn. of Bihar* (2015) 3 SCC 251.
[23] ibid. 282.
[24] *MC Mehta v Union of India* (1987) 1 SCC 395.

Fertilisers Ltd (hereinafter, *Shriram*). To resolve this matter, it was imperative to first determine whether *Shriram* qualified as the State under Article 12.

The Court examined the Industrial Policy Resolution, 1956 and the industries (Development and Resolution) Act, 1951. It was observed that *Shriram*, the respondent, primarily engaged in the production of fertilizers and chemicals. The government deemed this activity to be of significant public interest, and therefore, the government needed to carry out this activity.[25] However, Shriram was allowed to carry it under the government's control during the interim period. Aids like loans, land, and other facilities were also granted to it by the government. The Court determined that the respondents were involved in what can be referred to as governmental functions. Then the Court analyzed the implications of implementing the State Action doctrine, as articulated by the US Supreme Court. However, it refrained from rendering a determination regarding the potential applicability of said doctrine in India.[26] The Court acknowledged the applicability of the principle that State aid, control, and regulation can imbue an activity with the characteristics of State action, even in the context of India.[27]

D.1 The Court's determination of the specific issue

The Court while deciding on the functional criteria noted,

[25] *MC Mehta* (n 24) 416.
[26] *MC Mehta* (n 24) 417.
[27] ibid.

> *' Whilst deliberating on the functional criteria, namely, that the corporation is carrying out a governmental function, the court emphasised that classification of a function as governmental should not be done on earlier day perceptions but on what the State today views as an indispensable part of its activities. '*[28]

It further reiterated *R.D. Shetty's case*,[29] Mathew, J's, opinion in *Sukhdev Singh*[30] that;

> *' Institutions engaged in matters of high public interest or performing public functions are by virtue of the nature of the functions performed by government agencies. Activities which are too fundamental to the society are by definition too important not to be considered government functions. '*[31]

The Court observed that the power of the States as an economic agent, entrepreneur, and allocator of economic benefits is subject to fundamental rights limitations. Therefore, it questions why a private corporation, which is under the functional control of the State and engaged in a hazardous activity, which the State ultimately proposes to exclusively run this activity under its industrial policy, that affects

[28] *MC Mehta* (n 24) 412.
[29] *Ramana Dayaram Shetty* (n 19).
[30] *Sukhdev Singh v Bhagatram Sardar Singh Raghuvanshi* (1975) 1 SCC 421.
[31] *MC Mehta* (n 24) 412.

public health and safety and is imbued with the public interest, should not be subject to the same limitations.[32] The Court noted that,

> *"... constitutional guarantees ... should not be allowed to be emasculated in their application by a narrow and constricted judicial interpretation. The courts should be anxious to enlarge the scope and width of the fundamental rights by bringing within their sweep every authority which is an instrumentality or agency of the Government or through the corporate personality of which the Government is acting, so as to subject the Government in all its myriad activities, whether through natural persons or through corporate entities, to the basic obligation of the fundamental rights."*[33]

The Court has stated that it broadened the scope of Article 12 with the primary objective of instilling reverence for human rights and social consciousness within the corporate framework. The objective of expansion has not been to undermine the *raiso d'etre* of establishing corporations but rather to promote the development of human rights jurisprudence.[34] The advancement of human rights jurisprudence in our nation has been achieved to a significant degree through imaginative interpretation and daring innovation. The progress of the human rights movement must continue unabated, despite the baseless

[32] ibid.
[33] *MC Mehta* (n 24) 413.
[34] *MC Mehta* (n 24) 418.

concerns articulated by those who wish to maintain the current state of affairs.[35]

The aforementioned observations of the Court serve as a distinct indication that the Court made an effort to encompass *Shriram*, within the scope of Other Authorities in the definition of the State under Article 12, in its capacity as a private entity performing governmental functions and subject to government oversight. Strangely, the Court did not provide a conclusive statement regarding whether *Shriram*, a private corporation, would fall within the ambit and scope of Article 12, citing insufficient time as the reason.

D.2 Limitations of the Court's determination of the specific issue

The Court conducted a thorough examination of the status of *Shriram* to determine whether it falls under the purview of the State as defined in Article 12. However, it did not provide any definitive statement regarding this matter. Certain authors have posited that the query of whether *Shriram* qualified as the State under Article 12 was intentionally left unresolved by the Court in order to forestall a flood of writ petitions that would endeavour to subject private enterprises to writ proceedings, alleging violations of fundamental rights.[36]

[35] ibid.
[36] Kumar Kartikey (n 9).

The present scenario pertains to a case where the Court exceeded its jurisdictional limits.[37] The Court's decision to entertain the writ petition under Article 32 was premature as it did not first determine whether *Shriram* qualified as the State under Article 12. A judicial order lacking jurisdiction or failing to adhere to the pertinent provisions of the Constitution is *per incuriam* and not legally enforceable.[38]

E. Union Carbide Case

Ranganath Misra, CJ, (concurring) in *Union Carbide Corpn. v Union of India*,[39] while dealing with the review petition regarding the propriety and fairness and the conscionability of the settlement of the claims of victims, interpreted:

> *' In M.C. Mehta case no compensation was awarded as this Court could not reach the conclusion that Shriram (the delinquent company) came within the meaning of "State" in Article 12 so as to be liable to the discipline of Article 21 and to be subjected to a proceeding under Article 32 of the Constitution. Thus what was said was essentially obiter.*'[40]

F. Bichhri Village Case

[37] Kumar Kartikey (n 9).
[38] ibid.
[39] *Union Carbide Corpn. v Union of India* (1991) 4 SCC 584.
[40] ibid. 607.

This case of *Indian Council for Enviro-Leal Action v Union of India*[41] originated from a petition submitted under Article 32 before the Supreme Court, alleging that the pollution control authorities were permitting the uncontrolled persistence of environmental pollution caused by private industrial units situated in and around the Bichhri village of Udaipur district in Rajasthan. The situation is alleged to violate Article 21 of the residents of the area. The respondents argued that they were not considered as the State under Article 12 and hence were not subjected to proceedings under Article 32, citing Misra, CJ's remarks in the *Union Carbide Corpn*[42] case.

However, the Court did not agree with the observations of Mishra, CJ, in the *Union Carbide*[43] case and it noted that,

> *"We on our part find it difficult to say, with great respect to the learned Chief Justice, that the law declared in Oleum Gas Leak case is obiter. It does not appear to be unnecessary for the purposes of that case. Having declared the law, the Constitution Bench directed the parties and other organisations to institute actions on the basis of the law so declared."*[44]

It was further observed that the present writ petition is not primarily intended to obtain a suitable writ order or directives against the respondents. Rather, it is directed towards the Union of India, the Government of Rajasthan, and the RPCB to mandate them to fulfil their

[41] *Indian Council for Enviro-Legal Action v Union of India* (1996) 3 SCC 212.
[42] *Union Carbide Corpn.* (n 39).
[43] ibid.
[44] *Indian Council for Enviro-Legal Action* (n 41) 242.

statutory obligations as prescribed by the different legislations.[45] The basis for this petition is the contention that the failure of these entities to discharge their statutory duties is significantly impeding the right to life of the inhabitants of Bichhri village and the affected region, which is guaranteed by Article 21 of the Constitution. If the aforementioned authorities are found to have neglected their legal obligations and that their lack of action poses a threat to the right to life of the citizens of the nation or any particular group therein, it is incumbent upon this Court to intercede.[46]

F.1 Limitations of the decision in the Bichhri Village Case

The decision, in this case, raises an intriguing point of similarity with *M C Mehta v Union of India*,[47] such that the Court refrained from definitively determining whether private entities meet the criteria for inclusion in the definition of the State under Article 12 of the Constitution. Despite expressing the opinion that the pronouncements made by Bhagwati, J, regarding the status of a private corporation in the case of *MC Mehta v Union of India,* were not merely obiter dicta but rather an accurate statement of the law, the outcome was still unfavourable. It is contended that in the *Bichhri Village* case, the Court endeavoured to employ the approach utilised in *MC Mehta v Union of India*, wherein a party is held accountable without rendering a verdict on a crucial issue necessary for determining the liability being imposed.

[45] *Indian Council for Enviro-Legal Action* (n 41) 238.
[46] ibid.
[47] *MC Mehta* (n 24).

G. SRM University Case

The education sector in India has experienced significant growth, positioning it as a key player in the global education market. Universities in India are either established through the enactment of legislation by State Legislatures or have been granted the status of a deemed university by the UGC, as per Section 3 of the UGC Act.

The case of *Dr. Janet Jeyapaul v SRM University*[48] pertains to the maintainability of a writ petition against SRM University, which is classified as a deemed university under Section 3 of the UGC Act. The petitioner submitted a writ petition alleging the unjust termination of her employment by the University. This termination of the petitioner was overturned by the single Judge of the Madras High Court. Subsequently, the University contested the ruling of the initial Judge through an appeal, and the Division Bench of the Madras High Court, upon overturning the ruling, determined that a Deemed University does not qualify as the State or an authority within the meaning of Article 12 of the Constitution. Therefore, it is not subject to the writ jurisdiction of the High Court under Article 226 of the Constitution to scrutinise the legality and accuracy of the dismissal order. The petitioner, dissatisfied with the aforementioned verdict, sought recourse with the Supreme Court.

Due to the notable legal implications at hand, the Supreme Court sought the assistance of Mr. Harish Salve as an *amicus curie* to

[48] *Dr Janet Jeyapaul v SRM University* (2015) 16 SCC 530.

facilitate a thorough understanding and resolution of the pertinent issues in the case. Based on his assistance, the Court observed,

> *"…while deciding the question as to whether the Writ lies under Article 226 against any person, juristic body, organization, authority etc., the test is to examine in the first instance the object and purpose for which such body/authority/organization is formed so also the activity which it undertakes to fulfil the said object/purpose…there has been a consistent view…that the approach of the Court while deciding such issue is always to test as to whether the concerned body is formed for discharging any "public function" or "public duty" and if so, whether it is actually engaged in any public function or/and performing any such duty…If the aforesaid twin test is found present in any case then such person/body/organization/authority, as the case may be, would be subjected to Writ Jurisdiction of the High Court under Article 226."*[49]

The Supreme Court has overturned the ruling of the Division Bench of the High Court and has instructed the Division of the High Court to reconsider the respondent's appeal based on the question of whether the single Judge's decision to allow the writ petition on its merits was justified. The Court, in this case, blurred the differentiation between a

[49] ibid 533-534.

body that is endowed with a specific legal status under a statute and a body that is established by the statute. As per the ruling of the Supreme Court, the petition was deemed maintainable under Article 226 of the Constitution. This was because SRM University had been established to carry out a "public function" and was actively engaged in doing so. In doing so, the Court made a unique observation,

> *"…being a "Deemed University", all the provisions of the UGC Act are made applicable to Respondent 1, which inter alia provides for effective discharge of the public function, namely, education for the benefit of the public…once Respondent 1 is declared as "Deemed University" whose all functions and activities are governed by the UGC Act, alike other universities then it is an "authority" within the meaning of Article 12 of the Constitution. Lastly, once it is held to be an "authority" as provided in Article 12 then as a necessary consequence, it becomes amenable to writ jurisdiction of the High Court under Article 226 of the Constitution."*[50]

G.1 Limitations of the findings of the Supreme Court

It is humbly submitted, the appropriate assessment for ascertaining whether a specific entity falls under the purview of Other Authority as stipulated in Article 12 involves evaluating whether it is subject to the State's "functional, financial and administrative" control. The

[50] ibid 538.

determination of a body's legal status by a statute does not guarantee nor is it the sole criterion for its inclusion in Article 12. In this instance, it appears that the Supreme Court has determined that the inclusion of SRM University under the UGC Act results in its classification under Article 12, without conducting an assessment of whether the control test has been met.

The Public Function test is deemed adequate for invoking Article 226, in contrast to the more rigorous Control test stipulated under Article 12. The entirety of the argument, in this case, centres around the concept of "public function," and without any further examination of relevant legal precedents, a conclusion is drawn regarding Article 12. The rationale behind the Supreme Court's need to delve into Article 12 remains ambiguous. The reasoning of the Court has elicited apprehension regarding the prospective trajectory of legal developments in this regard.

H. Kaushal Kishore Case

The Supreme Court's Constitution bench issued a verdict in January 2023, in the matter of *Kaushal Kishor v State of Uttar Pradesh*.[51] One of the issues presented before the Court pertained to the justiciability of fundamental rights enshrined in Articles 19 and 21 of the Constitution vis-à-vis non-state entities or their instrumentalities. The

[51] *Kaushal Kishor v State of Uttar Pradesh* (2023) 4 SCC 1.

inquiry pertained to the scope and constraints of Article 12 of the Constitution. Remarkably, it was held by the majority of 4:1 that:

> *"A fundamental right under Articles 19/21 can be enforced even against persons other than the State or its instrumentalities."*[52]

H.1 The majority opinion on the issue

The ruling of the majority, which includes Nazeer, Gavai, Bopanna, and Ramasubramanian, JJ, is based on three distinct reasons. The first being, the Supreme Court conducted a theoretical review of legal practises concerning horizontality in foreign jurisdictions, such as the United States, Ireland, South Africa, and the European Union.[53] A discernible pattern has been identified in international courts with regard to the implementation of legal entitlements against non-State actors. Secondly, the provisions outlined in Part III of the Constitution, pertaining to fundamental rights, are not exclusively designed to be enforceable against the State and its instrumentalities. As exemplified, the language employed in Article 17 does not pertain to the endorsement or involvement of untouchability by the State, thereby allowing for the enforcement of the right against untouchability on private entities/individuals as well.[54] Thirdly, the Supreme Court conducted a thorough analysis of its prior rulings to demonstrate that there exists a longstanding precedent of enforcing fundamental rights

[52] ibid 113.
[53] ibid 92-101.
[54] ibid 101-105.

against private individuals.[55] With regard to Article 12, the majority viewpoint is that the test conducted pursuant to Other Authority under Article 12 has been diluted as a result of judicial rulings throughout time.[56]

H.2 The dissenting opinion on the issue

In her dissent, Nagarathna, J, observed that the rights enshrined in Part III of the Constitution were intended to regulate the relationship between the State and its citizens, rather than between two private individuals or citizens. From her perspective, the reason for the definition of the State in Part III can be attributed to this particular relationship. The sole exception to this rule pertained to the implementation of the writ of *habeas corpus*, which is applicable against private individuals who have unlawfully detained or confined somebody.

The learned judge made an important observation with respect to the distinction between a fundamental right and common law right and the corresponding remedy:

> *'Though the content of the fundamental right may be identical under the Constitution with the common law right, it is only the common law right that operates horizontally except when those fundamental rights have been transformed into statutory rights under specific*

[55] ibid 105-113.
[56] ibid 113.

> *enactments or where the horizontal operation has been expressly recognised under the Constitution.'*[57]

For the status of the violator of the rights, she observed:

> *'Where the interference with a recognised right is by the State or any other entity recognised under Article 12, a claim for the violation of a fundamental right would lie under Articles 32 and 226 of the Constitution before this Court or before the High Court, respectively. Where interference is by an entity other than State or its instrumentalities, an action would lie under common law and to such extent, the legal scheme recognises horizontal operation of such rights.'*[58]

The judge identified three concerns regarding the majority's decision: Firstly, if there exists an alternative and efficacious remedy for enforcing common law rights, which overlap with fundamental rights under Articles 19 and 21, then providing a remedy under the writ powers of the Supreme Court may be futile; Secondly, disputes regarding rights violations may involve intricate factual questions, which a Constitutional Court is not authorised to address; and Thirdly, the notion of Part III regulating the relationship between the State and its citizens, as indicated by the presence of Article 12 in Part III, is

[57] ibid 193.
[58] ibid 192.

undermined since Articles 19 and 21 are inherently designed to govern such a relationship.

H.3 The limitations of the judgment with respect to the specific issue

The majority has demonstrated a progressive approach towards the implementation of fundamental rights against private entities. Nevertheless, the Supreme Court has utilised relatively loose reasoning to reach its conclusion. It is submitted that the majority holding of the issue suffers from the following limitations.

H.3.1 Ignorance of the important precedents

The majority of individuals have selectively disregarded other rulings that have rendered contradictory decisions. For instance, the case of *PD Shamdasani v Central Bank of India Ltd*.[59] supports the argument that non-state entities cannot be held accountable under Article 21.[60] In this case, the Apex Court held that the phrase 'procedure established by law' as stated in Article 21, which is defined under Article 13 as a 'law', can only be brought into effect by the State (except for customs which may be uncodified). This interpretation precludes the possibility of non-state entities being subject to Article 21. Nonetheless, in *Kaushal Kishor* Court fails to provide any rationale for disregarding the binding precedent and not adhering to it.

[59] *PD Shamdasani v Central Bank of India Ltd* 1951 SCC 1237.
[60] *Kaushal Kishor* (n 51) 193.

Similarly, the decision in *Zoroastrian Cooperative Housing Society Limited v District Registrar*.[61] This case pertains to the challenge against the bye-laws of a society located in Mumbai on the grounds of contravention of Article 19(1) of the Constitution of India. The impugned bye-laws were challenged on the basis that they allowed solely the members of the Parsi community to qualify as eligible members of the association. The Supreme Court has ruled that the challenge in question is not valid, as a cooperative society does not fall under the definition of the State as per Article 12. Therefore, the enforcement of rights such as movement, association, and trade, which are guaranteed under Article 19(1), cannot be carried out against a cooperative society through a writ under Article 32. Thus, it disapproved of the horizontal operation of fundamental rights.[62] The verdict in *Kaushal Kishor* has however made Article 19(1) has been implemented horizontally, without taking into account the mentioned case.

H.3.2 The erroneous reliance on several precedents

This case analysed a series of cases that purportedly expanded the scope of fundamental rights to non-state actors, as determined by the majority. The text proceeds to provide a comprehensive summary of sixteen cases, encompassing those that pertained to positive obligations

[61] *Zoroastrian Cooperative Housing Society Limited v District Registrar* (2005) 5 SCC 632.
[62] *Kaushal Kishor* (n 51) 194.

such as *Vishaka v State of Rajasthan*[63]; those that dealt with the interpretation of the term "the State" as in *Zee Telefilms*[64]*;* those that concerned direct horizontality like *Indian Medical Association v Union of India*[65], and those that were not germane to the issue at hand, such as *Society for Unaided Private Schools for Rajasthan v Union of India*.[66] After analysing these judgments, the majority acknowledges that these decisions demonstrate the Court's application of the horizontal effect on a case-by-case basis, taking into account the violated right's nature and the violator's obligation. It is noteworthy that the decisions rendered by the Supreme Court, which emphasise the evolving nature of law by underscoring the purported judicial inclination towards the horizontal enforceability of fundamental rights, are not germane to the present case. This is because they are predicated on distinct contexts, with some involving the notion of positive obligation and others about the instrumentality of the State.

Moreover, the majority opinion draws upon the significant ruling of the Court in the case of *Justice KS Puttaswamy (Retd.) v Union of India*.[67] However, it has been noted that the majority opinion contains an unusual error, as pointed out by Nagarathna, J, in her dissent. Specifically, the majority opinion cites a paragraph from the aforementioned case that contradicts the decision reached by the

[63] *Vishaka v State of Rajasthan* (1997) 6 SCC 241.
[64] *Zee Telefilms Ltd v Union of India* (2005) 4 SCC 649.
[65] *Indian Medical Association v Union of India* (2011) 7 SCC 179.
[66] *Society for Unaided Private Schools for Rajasthan v Union of India* AIR 2012 SC 3445.
[67] *Justice KS Puttaswamy (Retd.) v Union of India* (2017) 10 SCC 1.

majority itself. In the case of *KS Puttaswamy*, SA Bobde, J, explicitly ruled that:

> *'Fundamental rights…provide remedy against the violation of a valued interest by the "State", as an abstract entity, whether through legislation or otherwise, as well as by identifiable public officials, being individuals clothed with the powers of the state."*[68]

The statement explicitly indicates that common law rights possess horizontal applicability, whereas fundamental rights possess vertical applicability. But in *Kaushal Kishor*, the conclusion has been made that a fundamental right under Article 19/21 can be enforced against entities other than the State or its instrumentalities, without providing any explanation for the reasoning behind this conclusion.

H.3.3 Endorsement of "Unbounded" Direct Horizontality

It is evident that not every violation of Articles 19 and 21, as well as other constitutional provisions, may necessarily result in a constitutional remedy through writ proceedings. For instance, In the scenario where X has entered into a contractual agreement with Y and subsequently fails to remunerate Y for services provided, the appropriate legal recourse would be to pursue action against X under the purview of contract law. It would not be viable to pursue legal action against X for violating one's right to livelihood as enshrined in

[68] ibid 539.

Article 21.[69] Upon examining Part III of the Constitution, it becomes apparent that the Constitution explicitly designates the application of fundamental rights horizontally in instances where it is intended to do so (as evidenced by Articles 15(2), 17, 23, and 24). It can be inferred that horizontal application does not apply to other rights. The majority in *Kaushal Kishor* did not engage with this argument.

H.3.4 Total disregard of Article 12

Although the test under Article 12 is recognised (where the court commented about the changing jurisprudence concerning the scope of Article 12)[70], the majority's engagement with it is lacking in substance.

Firstly, the majority posits that judicial rulings have diluted the potency of the examination conducted pursuant to Article 12. However, this assertion is not supported by the reality. The ruling in *Ajay Hasia*[71] has led to the establishment of specific criteria that a body must meet in order to be considered as the State under Article 12. This standard has been further clarified in subsequent cases, including *Pradeep Kumar Biswas*.[72] Consequently, the examination conducted in accordance with Article 12 has become more stringent.

[69] Gautam Bhatia, 'Kaushal Kishor, Horizontal Rights, and Free Speech: Glaring Conceptual Errors' (*Indian Constitutional Law and Philosophy*, 27 January 2023) <https://indconlawphil.wordpress.com/2023/01/27/kaushal-kishor-horizontal-rights-and-free-speech-glaring-conceptual-errors/> accessed 30 April 2023.
[70] *Kaushal Kishor* (n 51).
[71] *Ajay Hasia v Khalid Mujib Sehravardi* (1981) 1 SCC 722.
[72] *Pradeep Kumar Biswas v Indian Institute of Chemical Biology* (2002) 5 SCC 111.

Secondly, the ultimate conclusion arrived at by the majority contradicts this recognition. In the event that private entities are held accountable for upholding fundamental rights, the assessment of their eligibility for such enforcement under Article 12 would become redundant. This raises the question as to whether the extensive legal principles that the courts have established over several decades in defining the boundaries of the State under Article 12 were ultimately futile.

The conclusion drawn by the majority not only assumes the absence of a test but also disregards the entirety of Article 12. It is thus submitted that there is a clear gap of reasoning in justifying the aforementioned logical leap from the presence of a certain test to the non-existence of any test.

To date, any assertions pertaining to violations of Articles 19 and 21 have necessitated that the infringer satisfies the prerequisites outlined in Article 12. Eliminating such a condition would result in a significant increase in private disputes that would be brought before the writ courts. Apart from imposing an excessive burden on the writ courts, these private conflicts would necessitate the writ courts to settle contentious factual issues. This would represent a significant deviation from the long-standing convention of writ courts refraining from considering such inquiries.

IV. CONCLUSION

The *Zee Telefilms*[73] case sparked an adequate discussion in the field of constitutional law regarding whether or not private organizations can be included among the Other Authorities under Article 12 in order to carry out public functions or the functions that the State has historically and solely performed and has divested in favour of such organizations. The neoliberal culture has compelled us to reconsider the status and application of fundamental rights as well as the liabilities of private entities, given that the role of the welfare state is waning and that these private players are more likely to violate individuals' fundamental rights. As discussed above, the Supreme Court examined the propriety of expanding the scope of the traditional concept of Statehood to private entities. Notably, every inquiry concerning applying fundamental rights to private entities must first pass the test under Article 12. Since there has been no decision in definite terms by the Supreme Court in this regard, and even the case of direct horizontality in the case of *Kaushal Kishore*[74] suffers from limitations in many aspects. One of the aspects is that if private entities are held accountable for upholding fundamental rights, assessing their eligibility for such enforcement under Article 12 would become redundant. In the words of Bhagwati J, *"The attempt of the court should be to expand the reach and ambit of the fundamental rights rather than attenuate their meaning and content by a process of judicial construction."*[75] As a

[73] *Zee Telefilms Ltd* (n 64).
[74] *Kaushal Kishor* (n 51).
[75] Bhagwati, J, in *Maneka Gandhi v Union of India* (1978) 1 SCC 248.

result, it is critical that the view of fundamental rights as negative rights be reconsidered and affirmative duties be imposed on all centers of authority to ensure that constitutional promises are effectively and emphatically met. Private entities should be held accountable for safeguarding fundamental rights crucial to the Constitution's basic ideas. The constitutional provisions should not be taken as simply legal precepts. The makers of the clauses hoped to foster the spread of a new constitutional culture. If we exclude the rapidly expanding private sector from the purview of these rights, the growth of this constitutional culture will be limited and incomplete.