

NO ONE KILLED ARTICLE 12: A LEGAL ANALYSIS UNDER INDIAN CONSTITUTION

Sanskriti Madhukar Kale and Harshal Chhabra***

Abstract: The scope of application of Fundamental Rights and jurisdiction of the term “State” was quite a brewing issue in the Constituent Assembly concerning the phrase “other authorities.” However, Dr Ambedkar emphatically addressed it by saying, “Other authority” refers to any entity possessing either authority to make laws or having discretionary power vested in it. Indian Judiciary has spent decades deciphering how and against whom, the fundamental rights can be exercised. However, in an unexpected move on January 3, 2023, the Supreme Court of India unsettled the established norms and introduced a new aspect to Article 12 through the Kaushal Kishore Judgment. Thus, this article aims to comprehensively analyse the issue of the Horizontal Application of Fundamental Rights and the consequent impact on Article 12 as discussed in the aforesaid case. This analysis includes a comparative examination of other countries, a definitional and historical analysis of Article 12, and a multidisciplinary evaluation of entities from various sectors that currently are not but should be considered in the context of Part Three of the Constitution. The Kaushal Kishore Judgment is a focal point for this discussion based on which, the authors have explored the current settled scenario, identified loopholes, and presented a forward-looking perspective. The article strives to decipher the reasoning provided by the Supreme Court and the underlying intention behind the judgment.

Keywords – Article 12, Horizontal effect, Alternate Efficacious Remedy, Kaushal Kishore Case.

I. INTRODUCTION

“This is the way the world ends, not with a bang but a whimper”

– T.S. Eliot.

In the past few decades, the Indian Judiciary has devised several tests to check the constitutional validity of whether an entity can be considered a State, thus, determining the ambit of Article 12 of the Constitution of India. Judicial and Legal forums in the country have relied upon several documents around the globe, analyzed, re-analyzed, revised, and revisited their stances on the matter with great caution to come to any conclusion. Ranging from *Ujjambai v UOI*¹ to *Ajay Hasia*² and *Pradeep Kumar Biswas*,³ Article 12 Jurisprudence is vast, detailed, and at the very same time, a true testimony to the diligent mindfulness displayed by Indian courts.

* Second Year BSW.LLB Student at Gujarat National Law University.

** Second year BA.LLB Student at Gujarat National Law University.

¹ *Ujjambai v. State of U.P.*, (1963) 1 SCR 778.

² *Ajay Hasia v. Khalid Mujib Sehravardi*, (1981) AIR SC 487.

³ *Pradeep Kumar Biswas v. Indian Institute of Chemical Biology*, (2002) 5 SCC 111.

However, very recently, the Supreme Court (hereinafter called as SC) delivered a judgment named *Kaushal Kishore v. State of Uttar Pradesh*,⁴ where it was categorically held that the part III of the Constitution of India could be exercised horizontally. The SC had formed “five hazy questions” to adjudicate upon the *Bulandshahr Rape Case* and the concomitant controversy. Not just that, the SC also haphazardly dealt with the global, comparative analysis of the “Horizontal effect” – one of the most intricate issues in modern constitutionalism – in this case.

The Jamaican *Tomlinson v. Television case*⁵ and the South African *Khumalo v. Holomisa*⁶ judgments garnered considerable interest due to the raised issues about horizontality and freedom of speech. As a consequence, the respective judiciaries developed their jurisprudence on this subject. However, such an issue was irrelevant in the *Kaushal Kishore Case*. The deliberation, and the reasoning employed by the SC to come on the verdict, needs to be studied meticulously.

Therefore, firstly, the paper at hand analyzes Article 12 based on its definition, followed by an overview of the several Tests formulated by judicial forums over the years and comments upon their relevance and application concerning the facts of the *Kaushal Kishore Case*.

Secondly, the paper also considers the preponderant increase of involvement of private persons and businesses to carry out the functions that, majorly, used to be performed by State entities, in the recent times. Hence the paper attempts to find logical answers to the questions such as, “If private entities are given the public duties of handling railways, toll collections, banking, telecom sector, etc. then shouldn’t they be made responsible for upholding the Fundamental Rights? Moreover, be held liable for the violation of the same?”

Thirdly, the authors have tried to decipher the intent and reasoning employed by the SC to deliver a judgment like *Kaushal Kishore vis-à-vis WhatsApp Facebook litigation*, followed by a critical comment upon the judgment and how it failed to exhaust other constitutionally feasible alternatives.

This paper addresses significant issues such as how, with a single judgment, the Court has opened floodgates for a deluge of cases that will aid and abet the already clogged judiciary and has nullified the entire jurisprudence of Article 12. The gist of this paper, however, lies in the

⁴ *Kaushal Kishore v. State of U.P.*, (2023) SCC OnLine SC.

⁵ *Tomlinson, Maurice Arnold v Television Jamaica Ltd., CVM Television Ltd and the Public Broadcasting Corporation of Jamaica*, (2013) JMFC Full 5.

⁶ *Fred Khumalo v. Bantubonke Harrington Holomisa*, (2002) SCC OnLine ZACC 14.

fact, that the authors firmly believe that the judgment was well-intentioned but terribly written, thus made susceptible to exploitation.

II. WHAT IS A STATE? – ANALYSIS OF THE ARTICLE 12 JURISPRUDENCE

Article 12 of the Constitution of India, 1950 provides a specific definition of the term “State” that has far-reaching implications. According to this article, “*The term State includes not only the Central Government and the State Governments but also the Parliament of India and the State Legislatures, all local authorities, and other authorities within the territory of India or under the control of the Central Government.*”⁷

However, the definition of “State” in Article 12 is not limited to entities explicitly mentioned in the constitutional provision. In reality, the definition incorporates a much broader perspective, encompassing all authorities under the Government’s extensive and pervasive oversight.⁸

This definition of “State” is essential because it establishes the basis for the State’s powers and responsibilities. The Preamble to the Constitution of India defines India as “a sovereign, socialist, secular, democratic republic.”⁹ In practical terms, this means that the State is entrusted with the responsibility to implement socioeconomic measures which aim to advance the well-being of the citizens within this republic. These measures draw inspiration from Part IV of the Constitution of India, 1950, which outlines the Directive Principles of State Policy. Accordingly, the State is empowered to undertake various endeavours, such as education, healthcare, housing, and employment, to foster the welfare of the populace. This comprehensive definition aligns with the constitutional framers’ intention, as reflected in Part IV of the Constitution of India, which obligate the State to undertake socio-economic measures aimed at promoting the welfare of the people.¹⁰

III. TEST FOR DETERMINATION OF “STATE”

The Indian SC has established several tests to determine whether an organization can be considered a “State,” using the concepts of functional, financial, and administrative dominance

⁷INDIA CONST. art. 12.

⁸Som Prakash Rekhi v. Union of India, (1981) 1 SCC 449.

⁹INDIA CONST. Preamble.

¹⁰Ramnath, Kalyani., *Guarding the Guards: The Judiciary as State within the Meaning of Article 12 of the Constitution*. STUDENT BAR REVIEW, vol. 18, no. 2, (2006) pp. 75–94. JSTOR, (last visited Apr. 1, 2023) <http://www.jstor.org/stable/44306656.html>

as well as deep and pervasive control. The SC in *Ajay Hasia v. Khalid Mujib Sehravardi*¹¹ by relying on *R.D. Shetty's case*¹² laid down parameters or guidelines for identifying whether a body within the definition of “other authorities” in Article 12. They are as follows:

- (1) “If the entire share capital of the Corporation is held by Government, it would go long way towards indicating that the Corporation is an instrumentality or agency of Government.”
- (2) “Where the financial assistance of the State is so much as to meet almost entire expenditures of the Corporation, it would afford some indication of the Corporation being impregnated with governmental character.”
- (3) “It may also be a relevant factor whether the corporation enjoys monopoly status, which is State conferred or State protected”
- (4) “Existence of deep and pervasive State control may afford an indication that the Corporation is an agency or instrumentality.”
- (5) “If the functions of the Corporation are of public importance and closely related governmental functions, it would be a relevant factor in classifying the corporation as an instrumentality or agency of government.”
- (6) “Specifically, if a department of government is transferred to a corporation, it would be a strong factor supportive of the inference of the Corporation being an instrumentality or agency of Government.”

Further, in *Pradeep Biswas v. Indian Institute of Chemical Biology case*, a set of tests was laid down for the determination of State, which include an evaluation of the financial, operational, and administrative control of the government over the organization.¹³ In the ratio, the SC recognized that a Democratic, Socialist, Republic requires government involvement in social and economic operations and acknowledged the advantages of using corporations for commercial and economic activities. However, it was noted that the court cannot allow the government to use corporate entities as an excuse to avoid their duty to protect citizens’ fundamental rights. If the government could simply assign corporations to conduct business, it would undermine the constitutionally guaranteed rights of citizens.¹⁴

Augmenting the decision in *Pradeep Kumar Biswas, G. Bassi Reddy v. International Crops Research Institute case* ruled that an organization that was neither established by the government nor is it a government agency cannot be considered a State. The Court established a series of tests that apply in all situations to determine whether a body or authority can be

¹¹ *Ajay Hasia v. Khalid Mujib Sehravardi*, (1981) AIR SC 487.

¹² *Ramana Dayaram Shetty v. International Airport Authority of India*, (1979) 3 SCC 489.

¹³ *Pradeep Kumar Biswas v. Indian Institute of Chemical Biology*, (2002) 5 SCC 111.

¹⁴ *Other Authorities within the Meaning of Article 12 of the Constitution*, (1986) 4 SCC J-1.

considered a state. One of these tests involves examining whether the government has financial, operational, and administrative dominance or control over the body or authority. This control must be deep and far-reaching, not just superficial. Additionally, if control is regulatory in nature, the body or authority cannot be considered a state according to Article 12.¹⁵

The *Zee Telefilms Ltd. v. Union of India* case provided further clarification on the types of bodies that can fall under the “other authorities” category, including those engaged in trading, research and development, and private organizations discharging a public responsibility or a positive obligation of public nature. The court also identified several important considerations for determination of State in the form of “hybrid bodies.” In this case, the SC of India ruled that the Board of Control for Cricket in India (BCCI) is not a state under Article 12 of the Constitution of India, 1950, because the government’s influence over BCCI was just regulatory and not pervasive. The court made a clear and unambiguous declaration that in cases where a private entity voluntarily undertakes State activities or public duties that are not prohibited by law, then it may be considered as functioning as a state instrumentality.¹⁶

IV. RELEVANCE OF THE KAUSHAL KISHORE CASE

In the case of *Kaushal Kishore v. Union of India*, On July 29, 2016, during their journey from Noida to Shahjahanpur via National Highway 91 to attend a relative's funeral, the petitioner and his family encountered a group of individuals. The petitioner alleges that this group, through coercive means, forcefully deprived them of their belongings, including cash and jewellery. Moreover, the petitioner's wife and young daughter were subjected to the heinous act of gang rape by the said group. In response to the gangrape charges in Bulandshahr, Azam Khan, a Member of Parliament from Uttar Pradesh and the state’s minister for Urban Development, they made remarks alleging that the accusations were false and politically motivated. The victims feeling that these dismissive comments by a person of authority had interfered with the ongoing investigation approached the SC seeking its intervention and action against the minister. They also expressed concerns about a fair and unbiased investigation in Uttar Pradesh and requested the case transfer to another jurisdiction.

To address the situation, the SC appointed Fali Nariman as the amicus curiae for the case and halted the ongoing probe. Mr. Nariman emphasized the need for the court to fulfil its constitutional duty of strengthening the justice system and instilling public confidence in the

¹⁵ G. Bassi Reddy v. International Crops Research Institute, (2003) 4 SCC 225.

¹⁶ Zee Telefilms Ltd. v. Union of India, (2005) 4 SCC 649.

fairness of trials by addressing both the police investigation and the derogatory remarks made by a public servant towards the victims. The amicus curiae's queries were initially presented to a three-judge bench but subsequently referred to a constitutional bench for further consideration.

Simultaneously, a Special Leave Petition (SLP) arising from a Kerala High Court ruling was heard by a three-judge panel. The panel determined that the grounds raised in the SLP were identical to those presented in the writ petition and, thus, consolidated the two cases. The petitioners had filed two writ petitions wherein they made multiple requests. The first petition sought the establishment of a code of conduct for Ministers who have taken the constitutionally mandated oath of office and urged the Chief Minister to take appropriate action against Ministers failing to uphold the said oath. The second petition sought action against a Minister for his statements. However, the Kerala High Court dismissed both petitions, stating that the requests made by the public interest petitioners pertained to moral principles and that the Court lacked jurisdiction to determine whether the Chief Minister should establish a code of conduct for cabinet members. Consequently, one of the petitioners filed a Special Leave Petition challenging the common order.

The three-judge bench combined the petitions as they involved substantially similar issues and referred them to a constitutional bench of five judges. This referral was made because a "substantial question of law" had arisen. Additionally, the constitutional bench formulated five specific questions to be addressed in order to decide the case. These inquiries encompass persistently disputed, complex, and multi-dimensional legal issues. Below are the questions –

- a. "Are the reasons listed in Article 19(2), in regard to which reasonable restrictions on the right to free expression may be imposed by legislation, exhaustive, or may other fundamental rights be invoked to impose restrictions on the right to free speech on reasons not included in Article 19(2)?"
- b. "Can a basic right protected by Article 19 or Article 21 of the Constitution of India be asserted against parties other than the State or its instrumentalities?"
- c. "Whether the State has a responsibility to actively defend a person's rights under Article 21 of the Constitution of India, even if that citizen's freedom is threatened by the actions or inactions of another citizen or private organisation?"

- d. “Is it possible to vicariously attribute to the government itself a statement made by a minister that relates to any matters of state or is made to protect the government, especially in light of the principle of collective responsibility?”
- e. “Can a Minister’s remark, which conflicts with a citizen’s rights under Part Three of the Constitution, amount to a violation of those rights and give rise to a claim for Constitutional Tort”.

**V. HORIZONTAL APPLICATION OF FUNDAMENTAL RIGHTS:
RELEVANCE IN THE KAUSHAL KISHORE CASE**

From a common citizen’s perspective, the Constitution of India serves as an empowering and emancipating instrument, while for the State, it acts as a constraining force. Undoubtedly, empowerment does not equate to bestowal. Instead, it acknowledges the inherent rights of the citizen. It provides a comprehensive framework to safeguard these rights, thus establishing itself as a credible source of these powers that might otherwise remain nebulous. Without articulation and enumeration of these rights, the traditional notion of State sovereignty could go unchecked, potentially infringing upon the powers of the citizens. As a political entity, the Constitution places limitations on the State, setting boundaries - a metaphorical Lakshman Rekha - that the State is not permitted to transgress. Each branch of the State thus has obligations to fulfil, burdens to bear, conventions to uphold, and objectives to achieve. This is called as verticality.

However, in the Indian context, as the State’s functions expanded, it opened avenues for private entities to collaborate as partners in its endeavours. These private entities are authorized to carry out governmental functions or public duties, thereby becoming subject to constitutional obligations. This phenomenon which involves the extension of constitutional compulsions to these private actors is called as Horizontality.¹⁷

In its most basic sense, the term “horizontal effect” is a concept frequently invoked by legal scholars to elucidate the circumstance wherein constitutional rights, notably fundamental rights enshrined in the Constitution of India, have an impact on interactions between private individuals. This legal principle delves into how these constitutional guarantees permeate the horizontal plane of legal relationships, navigating beyond the traditional vertical interaction between the State and its citizens.

¹⁷ Shree Krishna Education Society v. State of Maharashtra, (2019) SCC Bom 767.

Like its counterparts in the United States, Canada, South Africa, and Germany, the Indian SC¹⁸, notes the learned author and columnist Gautam Bhatia.¹⁹ Mr. Bhatia has had occasions to engage with horizontality, and to craft various kinds of remedies in such cases. According to him, the horizontality is achieved through different devices:

(1) Functional Test: through this device, the private player is assimilated under the rubric of “other authorities”, as mentioned in Article 12 of the Constitution.

(2) Positive Rights Enforcement: The courts have transcended the traditional conceptual boundaries of fundamental rights through judicial interpretation, redefining them as more than mere negative restrictions. In this transformative process, fundamental rights have evolved into affirmative duties and positive obligations imposed on the State.

(3) Indirect Horizontality: In this method, as discussed earlier, the fundamental or “basic fundamental rights radiate outwards beyond the Constitution, in a manner that affects private law and private adjudication.”

(4) Direct Horizontality: under this method, the Fundamental Rights are directly enforced against non-state players. In fact, the Constitution has a couple of provisions under Chapter III that apply across the board, to all citizens: Articles 15(2), 17, and 23.

These are four distinct approaches which should be kept in mind while applying the constitutional principles to private, non-state entities. However, unfortunately, by consistently mashing up the aforementioned ideas, together, the Apex Court, in *Kaushal Kishore case*, commits a simple yet a galactically consequential blunder, one which could potentially assassinate the well-founded jurisprudence of article 12.

While assessing the answer to the second of the five questions, the SC comparatively analysed the concept of “Horizontal application of Fundamental Rights” in several other jurisdictions. It was observed that the said concept was introduced in the judgment by drawing upon US legal precedent of *Shelley v. Kraemer*,²⁰ where the issues raised involved state action and with the judiciary being considered to be state. The Civil Rights Case, which addresses the crucial issue

¹⁸ Id.

¹⁹Bhatia, Gautam., *Horizontality Under the Indian Constitution: A Schema*, (2015), <https://indconlawphil.wordpress.com/2015/05/24/horizontalityunder-the-indian-constitution-a-schema/en.html>

²⁰ *Shelley v. Kraemer McGhee*, (1948) SCC OnLine US SC 59.

of state action and *New York Times v. Sullivan*,²¹ which offers a solution to the indirect horizontality issue and comments upon the Civil Rights Case was also noted.

In the 61st paragraph of the Kaushal Kishore Judgement, the majority discussion on South African constitutional law mixes horizontality under the Constitution with horizontality under statute was considered. However, the SC of India referred to the South African cases only up to the year 2011. Here, it is essential to note that there have been more recent South African judgements on horizontality, including the SC of South Africa's decision in 2021. Additionally, the majority argues that the South African Constitutional Court in *Juma Masjid* "extended horizontal effect to an extreme."²² However, the *Juma Masjid* ruling is conservative and places horizontal rights below vertical rights against the State. Furthermore, in paragraphs 66 to 70 of the Kaushal Kishore Judgement, the Court mentions instances from the UK and the ECHR. However, all the examples used by the Court are positive requirements, rather than horizontality.

The majority then turns to Indian law, which is also plagued with ambiguities. In paragraph 76, the majority claims that it will examine various situations that expanded the application of fundamental rights to non-state actors. The subsequent section lists sixteen decisions, some of which relate to positive obligations, such as the *Vishaka* case,²³ while others deal with the definition of "State," like the *Zee Telefilms* case. Some decisions relate to direct horizontality, such as the *IMA* case, while others have nothing to do with the subject at hand, like the *RTE* judgment. Moreover, in the 77th paragraph of the judgement, after analysing all the previous decisions, the majority notes that "on a case-to-case basis, there is an obligation on the part of the violator," and the funny part is, all this unfolds without referencing to a single Constitutional Assembly Debate.

It is pertinent to note that the judgement at hand did not indicate a shift from a "purely vertical approach" to a "horizontal approach", rather it adjudicated to permit a disastrous shift from an approach where "*vertical effect and horizontal effect was exercised with respect to the circumstances of the case and consistency with the Constitution*" to a "*purely horizontal approach*".

²¹ *New York Times Company v. United States*, (1971) SCC OnLine US SC 147.

²² *Kaushal Kishore v. State of U.P.*, (2023) SCC OnLine SC.

²³ *Vishaka v. State of Rajasthan*, (1997) 6 SCC 241.

By the end, the majority went on to cite, how, “*No Jurisdiction in the world appears to be adopting, at least as on date, a purely vertical approach or a wholly horizontal approach*”, not realising that they have done absolutely contradictory.

VI. WHAT WAS THE COURT THINKING? DECIPHERING THE SC’S REASONING

Decades ago, the concept that one must be a state employee or instrumentality in order to perform public tasks ceased to exist. This is due to the fact that private persons and businesses perform the majority of State activities. Hence, there’s a dire need for a re-evaluation of the assumption that only government personnel undertake public service. Society has definitely made tremendous strides, the role of the State and government authorities in the lives of the people has reduced and changed correspondingly, with a simultaneous increase in the activities performed by private parties.²⁴ With due consideration to the change attributed to the increasing roles of private non-state entities, it becomes very pertinent to address a question i.e., Suppose private entities are entrusted with performing public duties such as managing railways, toll collections, banking, the telecom sector, and other similar functions. Should they be held accountable for upholding and safeguarding Fundamental Rights with respect to the same? Furthermore, should they be held liable for any violations of these rights that may occur during their operations?

The majority opinion endorses the idea of integration and expansion of the boundaries of Article 12 of the Constitution. The Court effectively acknowledges that strictly confining the scope of Fundamental Rights to the “State and its instrumentalities” is inappropriate. However, despite this acknowledgment, the wording used in the opinion implies a contradictory approach. Expressly, the majority’s view can be understood from statements such as “This Court used to be cautious about extending the enforcement of fundamental rights against private individuals. However, this reluctance has changed over time.” This indicates the majority’s recognition of the shift in legal interpretation, whereby the threshold under Article 12 has been relaxed through judicial decisions over the years.

However, contrary to the suggestion made in the majority opinion, the actual reality is quite the opposite. Precedents such as *PK Biswas* and *Ajay Hasia* have established stringent criteria for an organization to be considered a “State” under Article 12 of the Constitution. These cases

²⁴ *The Idea of State vis-a-vis Non-State Entities*. <http://www.scconline.com/DocumentLink/ER3zru88.html>

indicate that the majority is aware of the existence and significance of the Article 12 test, regardless of the norm being applied. However, the conclusion reached in the present case contradicts this acknowledgment. If fundamental rights are deemed applicable to all private entities, then the evaluation of their qualification under Article 12 becomes unnecessary. The majority's conclusion assumes that no such test exists, thereby rendering Article 12 meaningless. Here, this logical leap is problematic and needs more justification.

If we take a more lenient perspective on the court's intention in reaching such an overarching conclusion of absolute horizontal application of Fundamental Rights, it could be reasonably attributed to the notion that non-state entities should be subjected to legal proceedings by individuals whose fundamental rights have been violated.²⁵ This would expand the scope to encompass entities not qualifying as a state under Article 12. However, the crucial question that needs to be addressed is whether the approach and language employed by the majority align with the validity of the conclusion stated in the judgment.

The majority opinion may have considered non-state entities like significant social media intermediaries. In recent litigation involving WhatsApp and Facebook, the data-sharing agreement between the two platforms is being challenged on the grounds of violating users' right to privacy and freedom of expression. This raises the question of whether these rights can be enforced against non-state actors. While many argue in favour of enforcing these rights, application of the two-part criterion mentioned earlier leads to a different conclusion. Neither Facebook nor WhatsApp are independent private entities subject to government oversight regarding finance, administration, or operations. Since they do not meet the requirements of Article 12, we need to move on to the following analysis stage. We must consider whether the nature and exclusivity of the functions performed by Facebook and WhatsApp make them susceptible to legal action under Article 226 of the Constitution. It is clear that expression and communication, which are the services provided by both platforms, are of significant public importance. However, other companies offer similar services, so the element of exclusivity does not apply. Therefore, neither Article 32 nor Article 226 provide an effective remedy against these corporations.

²⁵ SCC, *Changing Judicial Discourse on State vis-a-vis Fundamental Rights*, <http://www.sconline.com/DocumentLink/5ebnclHO.html>

It is important to note that the majority overlooked a crucial question regarding under-the-table transactions involving non-state entities. When the state intentionally incentivizes an exclusive private entity to perform a public function while simultaneously disadvantaging a state entity in the same field by providing funds and maintaining control over its administration, the private entity, even if it does not qualify as a state instrumentality under Article 12, should still be held accountable for violations of individuals' fundamental rights. This accountability gap is widely recognized, but unfortunately, the majority did not consider it. Instead, they took an unnecessary and extravagant step by extending the application of fundamental rights horizontally.

VII. THE ROAD NOT TAKEN: A CONSTITUTIONALLY FEASIBLE ALTERNATIVE

The SC has used various terms and criteria to determine if an entity can be considered a part of the state. These terms include “authorities,” “instrumentalities of State,” “agency of the Government,” “impregnation with Governmental character,” “enjoyment of monopoly status conferred by State,” “deep and pervasive control,” and the “nature of the duties/functions performed.” Based on these statements from the judgment, it can be concluded that the SC acknowledges the existence of a test to determine whether an entity has state-like characteristics. However, despite recognizing this test, the Court fails to engage with it meaningfully.

As highlighted by the esteemed Justice B.V. Nagarathna in her dissenting opinion, it is essential to acknowledge and address a particular aspect at the beginning of the discussion,²⁶ i.e., before resorting to court's intervention through writ jurisdiction, it is essential to first consider if there are any other existing legal remedies available. This principle emphasizes the need to thoroughly examine alternative remedies that effectively address violating rights. If such remedies are adequate and effective, then the court may not need to exercise its writ jurisdiction. Considering this constraint, the utilization of writ jurisdiction under Article 226 of the Constitution of India by the high court necessitates a comprehensive evaluation i.e., whether legislative remedies are available for the alleged conduct that violates fundamental rights. The court can only exercise its authority under Article 226 against the entity accused of violating fundamental rights if no alternative legislative remedies are applicable.

²⁶ Kaushal Kishore v. State of U.P., (2023) SCC OnLine SC 261, 269, 279.

Constitutionally speaking, there are at least two feasible alternatives that need to be taken into consideration when it comes to claiming recourse even under article 32 of the Constitution of India i.e., Writ jurisdiction of the SC. First, any question concerning the protection of rights under Articles 19 and 21 against any individual or entity must be answered by determining whether the individual or entity falls within the scope of Article 12.²⁷ To prove this point, the most significant test concerning the entire legal development of Article 12 would certainly be the test established in the case of *Pradeep Biswas v. Indian Institute of Chemical Biology*. Simply put, the court ruled that a thorough examination of the unique factual context of each case is necessary to determine if a body or authority is financially, functionally, and administratively controlled by the government or under its influence.²⁸ Suppose the respective authority fulfils the criteria set forth by the test. In that case, it can be deemed a State entity under Article 12, rendering it susceptible to claims under Article 32 of the Constitution of India in cases involving the infringement of fundamental rights.

Even if the concerned authority doesn't satisfy the test and cannot be conferred with the status of State, there still exists another feasible alternative in the form of Article 226 of the constitution i.e., writ jurisdiction of the high court. The High Court is empowered to exercise its jurisdiction by issuing orders and writs under Article 226 of the Constitution to “*any person or authority for the enforcement of any of the rights conferred by Part III, and for other purposes.*”²⁹ This implies that even if an entity does not qualify as a state instrumentality under Article 12, it can still be held accountable for a substantial violation of fundamental rights, even without resorting to Article 32. Therefore, a claim alleging a violation of a fundamental right can be brought against an entity, regardless of its classification as a state entity under Article 12.³⁰

As evidenced in the Zee Telefilms case, the SC ruled that the Board of Control for Cricket in India (BCCI) does not qualify as a state entity under Article 12 of the Constitution of India. The court determined that although the government exerts regulatory control over BCCI, it does not possess extensive and pervasive control over its operations. The court emphasized that if a private organization voluntarily assumes functions or duties that are typically performed

²⁷ Singh, Yogesh Pratap, *Concurring opinions enriching constitutional discourse?* JOURNAL OF THE INDIAN LAW INSTITUTE, vol. 61, no. 1, (2019) pp. 97–117. JSTOR, <https://www.jstor.org/stable/27097352>. (Accessed Apr 3, 2023).

²⁸ Pradeep Kumar Biswas v. Indian Institute of Chemical Biology, (2002) 5 SCC 111.

²⁹ INDIA CONST., art. 226.

³⁰ Singh, Satyaveer., *Tracing the Ambit of State under Article 12*, 2.2 JCLJ (2022) 190.

by the state and not prohibited by law, it may be deemed an instrumental entity of the state. Despite the Court's finding that BCCI did not fall within the purview of "State" under Article 12, it was held that the affected party could pursue remedies under Article 226 due to the substantial public significance of BCCI's functions. Additionally, the Court endorsed the utilization of Article 226 in this instance as BCCI had exclusive responsibility for these functions.

In a recent legal matter, the highest court of India determined that although the Board of Control for Cricket in India (BCCI) does not meet the criteria of being a "State" as defined in Article 12 of the Constitution of India, it remains subject to the jurisdiction of writs under Article 226 of the Constitution of India. This ruling was based on the BCCI's significant influence and monopoly position in Indian cricket. The court arrived at this decision despite the absence of factors such as statutory creation, government share capital, financial assistance from the government, or transfer from a government-owned corporation.³¹

The BCCI is responsible for creating all cricket-related regulations, rules, standards, and norms in India. They have control over selecting national team members, umpires, and coaches. Additionally, they can disqualify players and have a significant influence on their careers. The BCCI invests significant sums in development, maintenance, and construction of infrastructure, including stadiums, cricket academies, and State sports organizations. They also hire coaches, trainers, and physicians to help the players. The Board of Control for Cricket in India (BCCI) receives support from the State Government and the Government of India, who thoroughly know the BCCI's activities and provide their complete endorsement. Even though the BCCI is a private organization founded under the Tamil Nadu Registration of Societies Act,³² They have a significant obligation to govern cricket in India under the concepts of fairness and good faith. This obligation is crucial to the public's interests. Although not financially, operationally, or administratively controlled by the government, the BCCI is still subject to the writ jurisdiction of the Constitution of India, 1950, under Article 226.

Hence, it becomes very pertinent to mention that the majority instead of acting hastily and prematurely, should have tried to satisfy the above-mentioned ingredients and to summarise, should have asked to questions:

³¹ Raj, Rishav., Case Comment: ZEE Telefilms Ltd. v. Union of India: Can BCCI be called a 'State' under Article 12 of the Constitution of India?, 2.4 JCLJ (2022) 310.

³² Tamil Nadu Registration of Societies Act, 1975.

Whether or not the entity against which a substantive part III violation has been claimed has been conferred the status of a state?

If the answer to the above question is not in affirmation, does the desired entity perform a significant public function and that too exclusively so as to make it amenable to writ jurisdiction under article 226?

Regrettably, the majority has failed to address these critical questions adequately, and instead, they hastily expand the horizontal application of fundamental rights without providing a well-reasoned and thorough analysis.

VIII. CONSEQUENCES AND WAY FORWARD

According to a recently published report by the Ministry of Law, the judge-to-population ratio in India, based on the sanctioned strength of judges, was 21.03 judges per million population as of December 31, 2021. It is noteworthy that as of March 4, 2023, approximately 6,047,034.³³ cases are pending in the 25 High Courts throughout the country and as on 1st February, 2023, there are 69,511³⁴ cases pending in the honourable SC. In such circumstances, where the Indian judiciary is unimaginably clogged with cases from all walks of the nation, this, well-intentioned but badly written and badly read Judgement is going to bring nothing but a cascade of umpteen cases to the Apex Court. This will not only overburden the court with cases under article 32 and article 226 of the Constitution of India, but will also give birth to a tussle of numerous more hazy questions, as, whether the court can or cannot adjudicate upon matters pertaining to the violation of fundamental rights by Private entities, because, it is pertinent to note that, Writs do not entertain cases where contentious question of facts is concerned. Yet, relying upon the Judgement, the Courts will have some kind of obligation to adjudicate upon the cases of aforementioned nature, looking into the merits of the case.

Additionally, as highlighted by the dissenting opinion, if an appropriate remedy is available under common law or statutory law to address the alleged violation, there is no need to resort to Article 32 or Article 226. Adopting such an approach would render numerous legislations and enactments pertaining to specific legal matters redundant, undermining the extensive efforts made by lawmakers in formulating those remedies.

³³ National Judicial Data Grid, *Drill Down*, (last visited Apr 2, 2023). <https://njdg.ecourts.gov.in/hcnjdgnew.html>

³⁴ Supreme Court of India, *Statistics*, (last visited Feb 13, 2023). <https://main.sci.gov.in/statistics.html>

One more catastrophic consequence of the Judgement is, it brashly invalidates the long-standing stance of the Courts pertaining to the availability of alternate efficacious remedy. Time and again, Judicial forums around the nation, have strongly emphasized on approaching competent authorities which are developed to adjudicate upon specific matters and redress the grievances through the means of appropriate alternate efficacious remedies. Therefore, post the Kaushal Kishore Judgement, it is quite challenging not only for the competent authorities but also for the aggrieved parties to determine, which forum should they approach for the violation of their rights. Lastly, as the title of the Paper suggests, this Judgement which went on to discuss five cardinal aspects of modern constitutionalism, it, unconsciously, unintentionally, disproved all the tests and doctrines evolved to determine whether or not a particular entity can be considered as “state” under article 12.

More than a consequence, an apprehension that has been given birth to, by this Judgement is that, in the near future, there will come a day, when we’ll say, No One Killed Article 12!

While attempting to unravel the reasoning employed by the SC in its determination of this complex issue, which has left legal forums worldwide perplexed, it is strongly asserted that the judgment was well-intentioned but poorly drafted and consequently, misinterpreted. It is therefore essential to adopt a forward-looking perspective wherein the Court provides elucidation on its rationale behind allowing the horizontal application of fundamental rights and addresses the identified deficiencies highlighted by the authors. Furthermore, it is imperative for the legal community to interpret the judgment inclusively and utilize it cautiously until clarity is furnished by competent authorities.