

Horizontality and Hohfeld: Locating the Right to Freedom of Expression in the Analytical Framework

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Abstract

The right** to freedom of speech and expression under Article 19(1)(a) of the Indian Constitution has been viewed traditionally as a vertical right, *i.e.*, a right enforceable in cases of unreasonable interference of the State. However, the Supreme Court of India in *Kaushal Kishor v State of Uttar Pradesh* recognised the horizontal effect of this right. Although constitutional rights have been enforced horizontally in different jurisdictions, the Supreme Court adopted a direct horizontal approach, attracting widespread criticism.

Wesley Hohfeld's widely influential analytical framework seeks to disambiguate the notion of a "right". Constitutional rights involving multifarious Hohfeldian entitlements and correlates are not unusual, given that the protection of these rights is both complex and content specific. This paper analyses three such legal relationships involved in

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** I use the term "right" here to refer to the everyday usage of the word, including as it appears in Part III of the Constitution of India, 1950. Subsequently, I use the term "claim-right" to refer to the Hohfeldian legal entitlement as expounded in his work, see Wesley Newcomb Hohfeld, 'Some Fundamental Legal Conceptions as Applied in Judicial Reasoning' (1913) 23(1) Yale Law Journal 16.

the protection of the right under Article 19(1)(a), to discern whether the broad-brushed recognition of horizontality is firmly grounded in theory.

First, it will explicate the traditional vertical relationship placing citizens as holders of Hohfeldian immunities, and legal governmental officials as bearers of Hohfeldian disabilities, to question whether direct horizontality can be accommodated within this legal relationship. Second, it will examine direct horizontality through the constitutional structure placing citizens as holders of Hohfeldian claim-rights and relevant private actors as Hohfeldian duty-bearers, wherein the latter actors ought not engage in conduct that disturbs the enjoyment of rights of citizens. Third, by construing the right under Article 19(1)(a) as a Hohfeldian liberty, the paper will study whether direct horizontality results in limiting this liberty owing to the co-existence of the duty of non-interference. The three inquiries seek to understand the analytical structure of the horizontal effect of the right to freedom of expression, which is critical to determine the legal obligations of both State and private actors, if any, with respect to the right.

Introduction

The extensive power of the Indian Supreme Court under Article 32 of the Constitution of India¹ to issue directions, orders and writs

¹ Constitution of India, 1950, art 32.

pertaining to fundamental rights in Part III² has been used to interpret these rights in ways that a plain reading of the text could perhaps never yield. While joint readings of rights and expansive interpretations have undeniably enhanced rights protections under the Constitution in several instances,³ there are some interpretative endeavours and adventures of the court that have left the purported constitutional protection in disarray.⁴ One such is the recognition of the direct horizontal effect of the fundamental right under Article 19 of the Constitution⁵ in *Kaushal Kishor v State of Uttar Pradesh* [*“Kaushal Kishor”*],⁶ where the majority concluded that enforcement of the right is permitted even against “persons other than the State or its instrumentalities”.⁷

² *ibid* part III.

³ This is particularly true in cases interpreting Article 21 of the Constitution of India, 1950. See, for example, *Consumer Education & Research Centre v Union of India* (1995) 3 SCC 42 [holding that the right to life has a wide meaning which includes the right to livelihood, better standard of living, hygienic conditions in the workplace and leisure]; *M.C. Mehta v Kamal Nath* (2000) 6 SCC 213 [establishing the right to clean water as a facet of right to life]; *People’s Union for Civil Liberties (Night Shelter Matters) v Union of India* (2011) 14 SCC 129 [the right to life covers the right to shelter, food and basic amenities]; *Devika Biswas v Union of India* (2016) 10 SCC 726 [recognising the right to health and reproductive freedom of persons as a part of right to life]; *K.S. Puttaswamy v Union of India* (2019) 1 SCC 1 [privacy as an intrinsic component of the right to life and personal liberty under Article 21].

⁴ The recognition of socio-economic rights such as the right to food or the right to shelter as a facet of the right to life under Article 21 can be considered as judicially created inchoate rights, since their enforceability as independent rights is questionable. In this context, see Desmond M Clarke, ‘Unenumerated Rights in Constitutional Law’ (2011) 34 *Dublin ULJ* 101.

⁵ Article 19 provides for the “protection of certain rights regarding freedom of speech etc.”. Clause 1, paragraph (a) specifically accords to all citizens “the right to freedom of speech and expression”. See Constitution of India, 1950, art 19, cl 1, para a.

⁶ *Kaushal Kishor v State of Uttar Pradesh* (2023) 4 SCC 1.

⁷ *ibid* para 78.

As the Court notes in *Kaushal Kishor*, this is not the first case where a question of horizontality has come before the Court. In *Vishaka v State of Rajasthan*, for instance, the Supreme Court issued guidelines that imposed duties upon public and private employers “not to violate the fundamental rights guaranteed to working women under Article 14, 15, 19(1)(g) and 21”.⁸ Further, in respect of the right against exploitation under Article 24 of the Constitution, the Supreme Court in *People’s Union for Democratic Rights v Union of India*⁹ noted that the right is enforceable against everyone, including private parties. Admittedly, these findings embody different forms of horizontality,¹⁰ which the Court does not adequately discuss in its decision.

Kaushal Kishor came before the constitution bench of the Supreme Court as a result of a writ petition referred by a smaller bench and a separate special leave petition tagged with this reference.¹¹ The two separate cases tagged together in *Kaushal Kishor* concerned sets of statements by governmental officials – one which was outrageous to the modesty of victims of rape, and the other which was highly derogatory to women.¹² In the former case, the Minister for Urban Development of the Government of Uttar Pradesh, in a press conference, termed the ghastly incident of rapes of two women as a

⁸ *Vishaka v State of Rajasthan* (1997) 6 SCC 241.

⁹ *People’s Union for Democratic Rights v Union of India* (1982) 3 SCC 235.

¹⁰ For a detailed discussion on the types of horizontality, see Gautam Bhatia, *Horizontal Rights: An Institutional Approach* (Hart 2023) 46-70.

¹¹ *ibid* paras 5-7.

¹² *ibid* paras 5, 6.

political conspiracy.¹³ In the latter, the Minister for Electricity in the State of Kerala issued certain statements were highly derogatory of women in respect of which no action was taken.¹⁴ These cases revolving around ministerial statements became the basis for formulating five questions relating to the interpretation of the Constitution, given that these were uttered by persons holding public office.¹⁵

The second of these five questions pertained to whether rights under Articles 19 and 21 have horizontal effect, particularly because the right under Article 19 has always been construed as a vertical right, *i.e.* enforceable only against the State and its instrumentalities, and the language of Article 19 does not indicate the possibility of horizontal effect. To arrive at an answer to this question, the court referred to decisions from different jurisdictions including the United States, South Africa and the United Kingdom, establishing the horizontal effect of various human and constitutional rights.¹⁶ Subsequently, after examining several Indian cases relating to the evolution of the interpretation of Article 12 (as to the persons and entities against whom fundamental rights are enforceable), and fundamental rights more generally, the court reached its conclusion.

¹³ *ibid* para 5.

¹⁴ *ibid* para 6.

¹⁵ *ibid* para 7.

¹⁶ *ibid* para 3.

The conclusion reached by the majority expectedly attracted widespread criticism for obfuscating the role of the examination under Article 12¹⁷ before concluding that a fundamental right has been violated,¹⁸ conflating notions of the State action doctrine, positive State obligation, indirect and direct horizontality,¹⁹ and for violating the texts of Articles 19 and 21 of the Constitution in a way that results in an unconstitutional informal constitutional change.²⁰ These criticisms also point to the fact that the mere recognition of the horizontality of rights does not mean much when there is no indication as to how the same will be operationalised.

This is not to suggest that there is no value at all in recognizing the horizontal effect of constitutional rights. Undeniably, with the increasing ability of private actors to affect the rights guaranteed under the Constitution, there is growing discourse to hold private actors

¹⁷ Article 12 of the Constitution of India provides the definition of the State for the purposes of Part III. In cases involving alleged violations of fundamental rights under Part III, the Court first examines whether the alleged violator of rights is an entity that is covered under the Article 12 definition. See Constitution of India, 1950, art 12; R. D. Shetty v International Airport Authority of India (1979) 3 SCC 489; Ajay Hasia v Khalid Mujib (1981) 1 SCC 722; Zee Telefilms Ltd. v Union of India (2005) 4 SCC 649.

¹⁸ Ishika Garg and Abinand Lagiseti, 'Who Killed Article 12? – Horizontal Rights and the Judgment in Kaushal Kishor' (Indian Constitutional Law and Philosophy Blog, 10 January 2023) <<https://indconlawphil.wordpress.com/2023/01/10/guest-post-who-killed-article-12-horizontal-rights-and-the-judgment-in-kaushal-kishor/>> (accessed 25 May 2025).

¹⁹ Gautam Bhatia, 'Kaushal Kishor, Horizontal Rights, and Free Speech: Glaring Conceptual Errors' (Indian Constitutional Law and Philosophy Blog, 27 January 2023), <<https://indconlawphil.wordpress.com/2023/01/27/kaushal-kishor-horizontal-rights-and-free-speech-glaring-conceptual-errors/>> (accessed 25 May 2025).

²⁰ Sujith Nair, 'Horizontal Application of Fundamental Rights: Benign or Misconceived?' (2023) 7 Comparative Constitutional Law and Administrative Law Journal 76.

accountable for infringing constitutional protections.²¹ In this vein, a normative argument could be carved out for constitutional rights protection against dominant private actors.²² Such a normative argument, however, is beyond the scope of this paper.

Instead, I adopt an analytical lens to examine the consequences of *Kaushal Kishor* in particular, and the direct horizontality of the right to freedom of speech more generally, going beyond the debate regarding horizontality in the constitutional interpretative domain. Using Wesley Hohfeld's highly influential analytical framework of legal relationships, I will explicate the legal theoretical limitations on the interpretations of the constitutional court. Since this article seeks to apply the Hohfeldian framework to assess horizontal rights, it does not have justificatory aims. The Hohfeldian framework does not provide normative justifications for rights, but allows for clarifying issues in litigation and discerning the scope of right in question.

With this background, *Section I* provides an overview of the Hohfeldian framework, setting the context for analysing the nature of fundamental constitutional rights. Considering that the right to freedom of expression has traditionally been viewed as a vertical right, *Section II* explores the dimensions of vertical rights in public law, drawing from decided cases in India and the United States. In light of the new

²¹ Gautam Bhatia, 'Horizontal Rights, Political Economy, and the Limits of Constitutional Adjudication' (June 15, 2023).

²² For an extensive analysis on the normative argument, see Jean Thomas, *Public Rights, Private Relations* (OUP 2015).

developments in *Kaushal Kishor* and the recognition of horizontality in different forms in other jurisdictions, *Section III* evaluates the nature of constitutional rights when they are recognised as having direct horizontal effect. This changes the positions of constitutional right-holders from having protective Hohfeldian immunities in a system where only vertical effect is recognised. Two Hohfeldian entitlements are considered as potential alternatives, with the right under Article 19(1)(a) envisaged as: *first*, conferring upon citizens Hohfeldian claim-rights; and *second*, conferring upon citizens Hohfeldian liberties, both *vis-à-vis* non-State, private parties. These variations allow for the consideration of whether the recognition of horizontality ultimately results in the overall reduction of rights protection afforded to individuals under Part III of the Constitution.

I. A Brief Overview of Hohfeld’s Analytical Framework of Jural Relationships

Wesley Hohfeld’s analytical framework, developed in two of his articles in 1913 and 1917,²³ has proved to be a useful tool to analyse the distribution of entitlements and their correlatives in legal systems.²⁴ While Hohfeld limited his examples and illustrations to private law, scholarship post the publication of his articles has expanded the scope of the application of his framework to public law.²⁵ In particular, the Hohfeldian analysis can be insightful in identifying the stakes involved in rights-based litigation.

Hohfeld explicated eight positions that form the basis of legal relations, as jural correlatives and jural opposites:²⁶

Table 1.1 Jural Correlatives			
Claim-right ²⁷	Privilege	Power	Immunity

²³ Wesley Newcomb Hohfeld, ‘Some Fundamental Legal Conceptions as Applied in Judicial Reasoning’ (1913) 23(1) *Yale Law Journal* 16 (1913); Wesley Newcomb Hohfeld, ‘Fundamental Legal Conceptions as Applied in Judicial Reasoning’ (1917) 26 *Yale Law Journal* 710.

²⁴ Luís Duarte d’Almeida, ‘Fundamental Legal Concepts: The Hohfeldian Framework’ (2016) 11(10) *Philosophy Compass* 554-69.

²⁵ In this context, Donohue notes that “Kramer’s scholarship advances the analytical value of the Hohfeldian framework”. See Laura K. Donohue, ‘Correlation and Constitutional Rights’ in Mark McBride and Visa A. J. Kurki (eds), *Without Trimmings: The Legal, Moral, and Political Philosophy of Matthew Kramer* (OUP 2022).

²⁶ Hohfeld 1913 (n 23).

²⁷ In his original work (*ibid*), Hohfeld uses the term “right” as opposed to “claim-right”.

Duty	No-right	Liability	Disability
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Table 1.2 Jural Opposites			
Claim-right ²⁸	Privilege	Power	Immunity
No-right	Duty	Disability	Liability

Hohfeld's purpose in delineating these positions was to disambiguate the notion of rights, particularly since everyday usage of the word "right" had led to the obfuscation of various types of entitlements typically operating in any legal system.²⁹ He used the notions of claim-right, privilege, power and immunities (which are collectively referred to as Hohfeldian entitlements), which in a capacious sense may be considered as being typically beneficial to the holder of such entitlements.³⁰

However, in subsequent scholarly work in relation to the analytical framework, the term "claim-right" is used to indicate the legal entitlement in the Hohfeldian sense, whereas the term "right" is used in an everyday sense (including in this essay, for example, while referring to fundamental rights under Part III of the Constitution of India). See, for example, Matthew H. Kramer, *Rights and Right-Holding* (OUP 2024).

²⁸ *ibid.*

²⁹ Hohfeld 1913 (n 23); Hohfeld 1917 (n 23).

³⁰ Hohfeld 1913 (n 23) 38. On this point, also see, Kramer 2024 (n 27) 18.

In Table 1.1 above, Hohfeldian entitlements occupy the first row, with their jural correlates placed directly below in the second row. A key thesis advanced by Hohfeld is the notion of correlativity³¹ – that entitlements and correlates are related to one another in a way that one entails the other in any given situation. An explanation of the entitlements and their correlates is warranted here to come to grips with the Hohfeldian correlativity axiom. In his work, though Hohfeld referred to “claim-rights” (as indicated above) simply as “rights”, he noted that the word “claim” would serve as the best description, since the holder of such an entitlement is endowed with deontic protection against interference by other persons.³² The correlative to such an entitlement is a duty, which would contain the same content as the claim-right, but would impose upon the bearer of such duty a particular course of conduct, or make impermissible a certain course of conduct. A privilege, often referred to as a liberty by Hohfeldians, is the negation of a duty.³³ This means that the holder of a Hohfeldian liberty is not under a duty to act or refrain from acting in a particular way, and therefore is permitted to act a certain way that is the absence of a duty to act in a certain way.³⁴ The correlative no-right is a negation of this liberty.³⁵

³¹ Matthew H. Kramer, ‘Rights without Trimmings’ in Matthew H. Kramer, Nigel Simmonds and Hillel Steiner (eds), *A Debate over Rights* (OUP 2000).

³² Kramer 2024 (n 27).

³³ Hohfeld 1913 (n 23).

³⁴ Kramer 2024 (n 27).

³⁵ Matthew H. Kramer, ‘On No-Rights and No Rights’ (2019) 64(2) *American Journal of*

While the claim-right/duty and liberty/no-right relationships on the left-hand side of the table pertain to modes of conduct of subjects, the nature of power/liability and immunity/disability relationships on the right-hand side is different.³⁶ A Hohfeldian power can be described as an ability a subject possesses to modify or alter other legal relations, thereby presupposing the existence of certain jural relations. In his writings, Hohfeld describes this entitlement as a legal *ability* to effect changes.³⁷ This ability is exercised through *volitional conduct*,³⁸ which need not necessarily involve an *intention* to bring about changes or alterations in legal relations.³⁹ What is of interest to us in the present context are public powers, which are held by the State as exercised through the acts of legal-governmental officials, for enacting laws and regulations. Correlative to a power is a liability, which Hohfeld describes as being closest in meaning to *subjection* or *responsibility*.⁴⁰ A position of liability entails that the Hohfeldian subject is susceptible to having their position in respect of jural relations changed because of the exercise of a Hohfeldian power, resulting in shifts or reductions in their entitlements generally.⁴¹

Jurisprudence 213.

³⁶ This distinction between first-order jural relations and second-order jural relations is explained in more detail in the following paragraphs.

³⁷ Hohfeld 1913 (n 23).

³⁸ Visa A. J. Kurki, *A Theory of Legal Personhood* (OUP 2019).

³⁹ Visa A. J. Kurki, 'Legal Competence and Legal Power' in Mark McBride (ed), *New Essays on the Nature of Rights* (Hart Publishing 2017).

⁴⁰ Hohfeld 1913 (n 23).

⁴¹ Kramer 2024 (n 27).

Hohfeldian immunities are particularly important in discussions of constitutionally guaranteed fundamental rights. A subject endowed with a Hohfeldian immunity occupies a place of insusceptibility.⁴² Hohfeld elegantly describes an immunity as “one’s freedom from the legal power or ‘control’ of another as regards some legal relation”.⁴³ Both these descriptions indicate that a holder of immunity is not exposed to changes *vis-à-vis* the exercise of any Hohfeldian power, thereby having their position secure. The correlative is quite plainly a position of having no Hohfeldian power to change or alter any legal positions covered by the immunity.⁴⁴ The relationships between legal powers, immunities, liabilities and disabilities form a crucial part of clarifying the restrictions on legislative powers of the State in respect of fundamental rights and freedoms.

In addition to the correlativity in jural positions explained by the table, the left half of Table 1.1, consisting of the first two columns, indicates first-order jural relations, and the right half of the table, consisting of the third and fourth columns, indicates second-order jural relations. This distinction is representative of the nature of entitlements, wherein second-order entitlements can exist only if first-order entitlements are held by a Hohfeldian subject.⁴⁵ This means that a subject may hold a

⁴² *ibid.*

⁴³ Hohfeld 1913 (n 23).

⁴⁴ Kramer 2024 (n 27).

⁴⁵ Visa A. J. Kurki, ‘Hohfeldian Infinities: Why Not to Worry’ (2017) 23 *Res Publica* 137.

Hohfeldian power or immunity only when they are already endowed with either a Hohfeldian claim-right or privilege. This also implies that while first-order jural relations may exist without the existence of any of the second-order entitlements or their correlates, complex legal systems will typically involve the operation of second-order jural relations for securing meaningful protection of first-order entitlements. Whether first-order claim-rights are necessarily accompanied by second-order powers is a debate that ensues between Interest and Will theorists to date.⁴⁶ This debate, however, is not critical to understanding horizontality under the Hohfeldian framework,⁴⁷ since it is the correctness of the Hohfeldian correlativity axiom to which theorists in both camps generally agree, that is of utmost importance to the present analysis.

This brief overview of the Hohfeldian analytical framework of legal relationships indicates the complexities in legal relations in any legal system, that is often brushed aside owing to the excessive focus on the right-duty relationship. While several written constitutions refer to

⁴⁶ Will theorists argue that holders of claim-rights are endowed with paired Hohfeldian powers that allow such holders to exercise their will to keep the claim-right in existence or extinguish it. Interest theorists dispute this claim, arguing that claim-rights are not necessarily accompanied by paired powers of this kind. On this debate, see L. W. Sumner, *The Moral Foundations of Rights* (Clarendon Press 1987); James Penner, 'Legal Powers and the Will and Interest Theories of Rights' in Mark McBride (ed), *New Essays on the Nature of Rights* (Hart Publishing 2017); James G. Dwyer, 'Clarifying questions about the nature of rights' (2021) 12 *Jurisprudence* 47.

⁴⁷ Hohfeld's analytical framework is neutral between the Interest and Will Theorists. See Andrew Haplin, 'The Value of Hohfeldian Neutrality when Theorising about Legal Rights' in Mark McBride (ed), *New Essays on the Nature of Rights* (Hart Publishing 2017). There are, however, certain interest theorists, like Joseph Raz, who do not agree with the correlativity axiom. See Joseph Raz, *The Morality of Freedom* (OUP 1988) ch 7.

entitlements afforded to citizens as fundamental “rights”, or in some cases fundamental “freedoms”, it must be clarified that these are only commonplace usages of words. An analysis of how they are protected in these legal systems through the Hohfeldian lens will uncover their true nature,⁴⁸ serving as solutions to “concrete problems in litigation”.⁴⁹ What follows in the subsequent sections of this paper is an inquiry of this kind – to elucidate the operation of vertical and horizontal constitutional rights in the Indian constitutional system, with the help of the analytical framework of legal relationships.

⁴⁸ Nicholas Bamforth, ‘Hohfeldian Rights and Public Law’ in Matthew H. Kramer (ed), *Rights, Wrongs, and Responsibilities* (Palgrave Macmillan London 2001).

⁴⁹ Hohfeld 1913 (n 23).

II. Vertical Constitutional Rights in Hohfeld's Framework

In *Kaushal Kishor*, to determine whether the direct horizontal effect of Articles 19 and 21 may be recognised, the Supreme Court undertook an elaborate exercise of examining the texts of the provisions in Part III of the Constitution, to assess if the language of these provisions indicated the possibility for holding non-State actors as violators of fundamental rights. The conclusion of this examination was fairly simple – some provisions are straightforwardly enforceable against non-State or private actors since they make direct reference to such parties.⁵⁰ However, several other provisions, most notably the right to equality under Article 14,⁵¹ the right against discrimination under Article 15(1),⁵² and the prohibition of discrimination in public employment under Article 16(1),⁵³ contain explicit mandates to the State. Interestingly, both Articles 19 and 21, which were the subject of the question before the court, only declared rights conferred upon persons, with no explicit indication as to the corollary obligation upon the State in respect of the entitlements.

⁵⁰ *Kaushal Kishor* (n 6) paras 72-75. These include, for instance, Article 17 that abolishes the practice of untouchability, making it a punishable offence, and Article 23(1) that prohibits human trafficking, begar and forced labour, making these acts offences punishable under law. These provisions in Part III are enforceable against all persons and entities, and are thus considered horizontal rights.

⁵¹ Article 14 states: "The State shall not deny [...] equality [...]." See Constitution of India, 1950, art 14.

⁵² Article 15(1) states: "The State shall not discriminate against any citizen [...]." See Constitution of India, 1950, art 15 cl 1.

⁵³ Article 16(1) states: "There shall be equality of opportunity for all citizens in matters relating to employment or appointment to any office under the State." See Constitution of India, 1950, art 16 cl 1.

The absence of such an explicit mandate to the State under Article 19, however, has not previously resulted in any interpretation imposing mandates upon private or non-State actors.⁵⁴ This is evidenced in a plethora of cases involving the invocation of the right under Article 19, where the Supreme Court exercised its power under Article 32 to declare various laws, orders or policies introduced by the State as unconstitutional, for imposing unreasonable restrictions on the freedom of speech and expression.⁵⁵ Since the protection of the right under Article 19 has been guaranteed against the State in these cases, it is reasonable to say that the declarations of unconstitutionality are essentially indicative of the restrictions on the power of the State (comprising both legislators and administrators endowed with the authority to make laws, promulgate orders or formulate policies). Framing the consequences of the decisions of the Supreme Court in this manner, flowing from the application and interpretation of the written constitutional text,⁵⁶ allows for the rights, liberties, powers, and immunities debate to be viewed through Hohfeld's framework.

⁵⁴ For example, in the case of *P D Shamdasani v. Central Bank of India*, the Supreme Court noted that "the language and structure of Article 19 and its setting in Part III of the Constitution clearly show that the article was intended to protect those freedoms against State action other than in the legitimate exercise of its power to regulate private rights in the public interest." [emphasis added] See *P D Shamdasani v Central Bank of India AIR 1952 SC 59*.

⁵⁵ Some examples include: *Bennett Coleman & Co. v Union of India* (1972) 2 SCC 788 [restrictions under the Import Order 1955, Newsprint Order 1962, and Newsprint Policy of 1972-73 were declared unconstitutional for being violative of Article 19(1)(a) of the Constitution]; *Indian Express Newspapers v Union of India* (1985) 1 SCC 641 [the customs duty imposed on newspapers under the Customs Tariff Act 1975 was declared an unreasonable restriction of the freedom and speech and expression]; *Shreya Singhal v Union of India* (2013) 12 SCC 73 [a provision of the Information Technology Act was declared unconstitutional for imposing a vague and indiscriminate restriction on the freedom of speech and expression].

⁵⁶ The Supreme Court declares laws as unconstitutional owing to the explicit restriction on

Hohfeld's analysis indicates that the protection of rights may take place through the conferment of different kinds of entitlements. The vertical enforcement of constitutional rights is one stark example of this conclusion. In the context of the First Amendment to the United States Constitution,⁵⁷ Kramer uses the Hohfeldian framework to illustrate that the rights accorded to citizens are immunities in the Hohfeldian sense,⁵⁸ since these entitlements result in the imposition of restrictions on the law-making power of the State, which are nothing but Hohfeldian public powers.

This conceptual analysis is straightforwardly applicable to the Indian constitutional context. Let us consider the example of a legislation “*L*”. In the case of a statute enacted by the Indian Parliament, the power to enact legislation “*P(L)*” is derived from Articles 245 and 246 of the Constitution.⁵⁹ This power to make legislation, when exercised, results in the *alteration* of normative positions, since any legislation would either expand or diminish entitlements of the subjects “*S*” that are covered under the scope of *L*. The power to legislate, therefore, is a

the law-making power of the State under Article 13 of the Constitution of India. Clause 2 to Article 13 prohibits the State from making any law that abridges rights provided under Part III. See Constitution of India, 1950, art 13 cl 2.

⁵⁷ The First Amendment to the U.S. Constitution guarantees fundamental freedoms to citizens by prohibiting the Congress from making laws that curtail freedoms of religion, expression, assembly, etc. See US Const amend I.

⁵⁸ Matthew H. Kramer, ‘Rights in Legal and Political Philosophy’ in Keith Whittington, Daniel Kelemen and Gregory Caldeira (eds), *The Oxford Handbook of Law and Politics* (OUP 2008) 414-27.

⁵⁹ Article 246 of the Constitution of India provides for the exclusive “power” of the Parliament to make laws in respect of subject-matter covered by the Union List, and such law, pursuant to Article 245, such laws may be made for the whole or any part of the territory of India. See Constitution of India, 1950, arts 245, 246.

Hohfeldian power.⁶⁰ When exercised in a manner that is consistent with any limitations under the Constitution,⁶¹ the set S consists of holders of liabilities.⁶²

It is through an analytical examination of cases where the exercise of the power by Parliament is inconsistent with constitutional limitations that the nature of the fundamental right under Article 19, or any other right under Part III, becomes clear. Let us examine a situation where the Supreme Court declares that L is unconstitutional since it is violative of the rights of citizens “ R ” under Article 19. In doing so, it applies the restriction under Article 13(2) of the Constitution, which prohibits the State from enacting any law that abridges rights conferred in Part III. Such a ruling implies that $P(L)$ is not an unrestricted power, and that entitlements flowing from R are the kind that confer a perimeter of insusceptibility. This denotes that R confers Hohfeldian immunities upon citizens, which disallows certain exercises of powers. Put differently, a declaration of unconstitutionality is a recognition of the Hohfeldian disabilities imposed upon the State, since the Parliament is disabled from exercising $P(L)$ in a manner that takes away R . In this case, the set S consists of subjects endowed with Hohfeldian

⁶⁰ Leif Wenar, ‘The Nature of Rights’ (2005) 33(3) *Philosophy & Public Affairs* 223.

⁶¹ Apart from subject-matter limitations imposed in the power-conferring provisions of the Constitution, the only codified restriction to the law-making power of the Parliament is found in Article 13(2) of the Constitution of India. See Constitution of India, 1950, art 13, cl 2.

⁶² It is important to note that liabilities, in this context, is not used as a term that is of detriment to their holders. In cases of legislation that expands the freedoms of citizens, for instance, the imposition of liabilities through the exercise of public powers is a beneficial entailment.

immunities, leading to the conclusion that the restriction under Article 13(2) is an imposition of Hohfeldian disabilities upon the State.

To describe the operation of these jurial relations more concretely, let us consider the decision of the Indian Supreme Court in *Shreya Singhal v. Union of India* [*“Shreya Singhal”*]⁶³ as an illustrative example. *Shreya Singhal* involved a constitutional challenge to Section 66A of the Information Technology Act 2000,⁶⁴ on grounds that the provision imposed a vague, and consequently unreasonable, restriction on the right to freedom of speech and expression guaranteed under Article 19(1)(a) of the Constitution. Since it was clear that the contested provision interfered with the right, the question before the court was whether it constituted a reasonable restriction under Article 19(2). On this question, the Court concluded that no appeal could be made to the ground of protection of public order owing to a lack of proximate relation to this aim, since the provision imposed an indiscriminate restriction on all forms of electronic communication. Consequently, the Supreme Court declared that Section 66A was unconstitutional, striking down the provision in the legislation.

From the preceding analysis of a hypothetical legislation *L*, we can clearly understand the operation of entitlements in *Shreya Singhal*.

⁶³ *Shreya Singhal v Union of India* (2013) 12 SCC 73.

⁶⁴ Section 66A of the Information Technology Act, 2000 allowed the government to make arrests to protect “against annoyance, inconvenience, danger, obstruction, insult, injury, criminal, intimidation, or ill-will from information shared online.” See Information Technology Act, No 27, Act of Parliament, India (2000) s 66A.

Undeniably, the Parliament has the legal power to pass legislation such as the Information Technology Act, 2000. Now, Section 66A of the Act altered the entitlements of citizens of India (since the legislation was operative throughout the territory of India) in a way that diminished their freedom to communicate on the internet (Hohfeldian privileges or liberties). The exercise of a Hohfeldian legal power by Parliament thus resulted in the imposition of a Hohfeldian liability upon Indian citizens that reduced the extent of Hohfeldian liberties they possessed.

This exercise of Hohfeldian power would have been correct in law had there been no immunities that accompanied the liberties in question. At this juncture, the nature of protection of the right under Article 19(1)(a) becomes relevant. In its consideration of the case, the court in *Shreya Singhal* essentially examined if the Hohfeldian immunities entrenched in the Indian Constitution as against State action comprised of the same content as the Hohfeldian liberties curtailed. By examining the scope of permissible reasonable restrictions that may be imposed by law under Article 19(2), the court sought to analyse the scope and content of immunities held by citizens, and thereby, the scope and content of the correlative disabilities imposed upon the State. In its conclusion, the court found that the State was disabled, in the Hohfeldian sense, from exercising its legal power to alter entitlements in relation to the liberty of speech and expression that is protected by Hohfeldian immunities. By recognising Indian citizens as both holders of Hohfeldian liberties and immunities, the Supreme

Court declared the exercise of law-making power as unlawful or unconstitutional.

Even when one prescind from the complexities of the Hohfeldian analytical discussion, it is quite clear that through declarations of unconstitutionality, the constitutional court reminds the legislative body of its limitations in the exercise of powers under the Constitution. Unsurprisingly, this corresponds to the traditional notion of human rights and vertical enforceability of constitutional rights, both of which perceive the role of the State as a negative one, *i.e.* to refrain from interfering in the enjoyment of rights endowed upon individuals and citizens.⁶⁵ The negative obligation presupposes the existence of the rights of individuals as well as the ability (or power) of the State to affect the enjoyment of these rights.

The analysis of vertical constitutional protection of rights by courts through the lens of the analytical framework highlights the critical issue that led to Hohfeld formulating the framework in the first place – that the term “right”, be it in constitutional texts, bills of rights or statutes, is often comprised of various types of entitlements.⁶⁶ In the absence of the analytical framework, one would conclude that constitutional

⁶⁵ David P. Currie, ‘Positive and Negative Constitutional Rights’ (1986) 53 *The University of Chicago Law Review* 864; Johan V. Wibe, ‘Reviving the Distinction between Positive and Negative Human Rights’ (2022) 35(4) *Ratio Juris* 363; Johan V. Wibe, ‘Beyond Acts and Omissions – Distinguishing Positive and Negative Duties at the European Court of Human Rights’ (2022) 23 *Human Rights Review* 479.

⁶⁶ Quentin du Plessis, ‘A Hohfeldian Analysis of the Bill of Rights’ (2022) 139(3) *South African Law Journal* 577.

“rights” are always Hohfeldian “claim-rights” that impose duties upon State officials. However, such an understanding would be mistaken, as it is inconsistent with the decisions of courts protecting these rights as Hohfeldian immunities. This is true in the case of the First Amendment to the US Constitution, as well as several rights under Part III of the Indian Constitution, where the protections of rights occur through the entrenchment of immunities against deprivation of the content of rights. This further illustrates that the protection of rights in any complex legal system often occurs through the translation of rights, as understood in an ordinary sense, into different kinds of entitlements that best secure the content of these rights.

III. Direct Horizontal Constitutional Rights in Hohfeld's Framework

Admittedly, *Kaushal Kishor* failed to set out the operationalisation of the direct horizontal right to freedom of speech and expression in the Indian constitutional scheme. The shoddily reached conclusion complicates the analytical inquiry, since it is unclear as to how writ jurisdiction may be invoked in a case against a private party, what kind of remedy may be granted by constitutional courts in cases involving violations of this direct horizontal constitutional right, and whether the same restrictions under Article 19(2) would apply to a violation of Article 19(1)(a) by a private party.⁶⁷ Much of the analysis that follows is thus based on assumptions as to how direct horizontality may come to be operationalised.

While the analysis of the protection of vertical constitutional rights in the Indian legal system led us to the conclusion that the vertical right under Article 19 is a Hohfeldian immunity, it is amply clear that the same analysis would not hold good in case of a purported direct horizontal right under the provision. *First*, apart from the involvement of the State in enforcing any such horizontal right, both the holder of the consistent entitlements and the holder of the correlative position in relation to the right are private parties. *Second*, there is no

⁶⁷ The third of these is particularly problematic because Article 19(2) is worded in a manner that allows the State to impose reasonable restrictions. This is quite straightforwardly an extension of viewing the right under Article 19(1)(a) as a vertical right, that is capable of being interfered with by the State. Replacing the State with a private party, no matter its size or reach, is a complicated endeavour, since private parties may not have in place laws, regulations or policies in the same way as a State would.

involvement of Hohfeldian public powers in the case of a relationship of direct horizontality since private parties are not conferred with law-making powers of this kind.⁶⁸ *Third*, the jural relations created as a result of the recognition of direct horizontality, would, at some stage, require State intervention for such recognition to be meaningful, or for them to be enforceable and not suffer from being hollow. These considerations further drive home the point that conduct-related entitlements and correlates are of particular importance while examining horizontality.

Consequently, I consider two possibilities in this Section. *First*, by framing the horizontal right to freedom of speech and expression as a Hohfeldian claim-right, I examine the correlative duty that is entailed. What is also of interest here is how these claim-rights are protected in a legal system, considering the possibilities of accompanying Hohfeldian entitlements to make the claim-right genuine. *Second*, by envisaging the horizontal right to freedom of speech and expression as a Hohfeldian liberty, I analyse the no-right entailed as a correlate. *Third*, by contrasting these two forms of entitlements underlying the direct horizontal right, I present some concluding observations of the effect of the recognition of direct horizontality on the overall rights protections under the Indian constitutional scheme.

⁶⁸ It might be contended that large private parties, including social media corporations, have the ability to use powers to affect the freedom of speech through their content regulation policies. However, the distinction between private usage policy making power and public law making power is important, as noted in above in footnote 67.

(A) The right under Article 19(1)(a) as a Hohfeldian claim-right

Hohfeldian correlativity demands that the existence of a claim-right with one being implies a duty upon another to give effect to such a claim-right, either through acting in a certain way or refraining from acting in a particular way.⁶⁹ This implies that the relationship between a claim-right holder and duty-bearer is such that a particular course of conduct is either made obligatory or impermissible upon the latter, thereby endowing deontic protection to the former. Since mere deontic protection is not enough, most legal systems are designed to extend other related Hohfeldian entitlements in conjunction with claim-rights to ensure that the protection afforded by the original claim-right is meaningful.

Let us consider two private parties “*P1*” and “*P2*” to apply this understanding of a claim-right/duty relationship that comes into operation when a horizontal right to free speech between them is recognised. Considering that *P1* is a citizen of India, *P1* is endowed with a right under Article 19(1)(a). The conduct of engaging in free speech “*C(FS)*” is protected under the said provision. Pursuant to the decision in *Kaushal Kishor*, the right under Article 19(1)(a) is recognised as against *P2*, a private party who may interfere with the exercise of the right *P1* possesses. The potential conduct resulting in interference by *P2*, “*C(I)*”, is prevented according to the decision. Consequently, in

⁶⁹ Kramer 2024 (n 27).

Hohfeldian terms, we can conclude that *P1* holds a claim-right against *P2* such that *P2* is under a duty not to pursue the course of conduct *C(I)*.

Such a duty of non-interference may be a general duty until the law in the legal system identifies specific duties flowing from it.⁷⁰ In such a case, the Hohfeldian claim-right proves to be relational,⁷¹ as horizontal constitutional rights result in the creation of a claim-right/duty relationship between two individual private parties. Even in case of private parties such as Facebook or Instagram, for instance, which have the capacity to constrain the right to speech and expression on the internet, Kramer's supplementation of Hohfeld's theory to extend the correlativity axiom in cases of collectivities⁷² allows for recognising the horizontal relationship within the Hohfeldian framework in this manner.

To explain this analysis in more concrete terms, let us use the factual matrix of the case of *Maurice Arnold Tomlinson v. Television Jamaica Ltd., CVM Television Ltd and the Public Broadcasting Corporation of Jamaica* [*“Maurice Arnold”*],⁷³ which concerned the alleged violation of the freedom of expression by a private party. In *Maurice Arnold*, two of the

⁷⁰ *ibid.*

⁷¹ Jason Taliadoros, 'Revisiting Rights-Talk in Magna Carta: Applying Hohfeld to the Problem' (2023) 32 *William & Mary Bill of Rights Journal* 179.

⁷² Kramer 2024 (n 21) 104-9.

⁷³ *Maurice Arnold Tomlinson v Television Jamaica Ltd., CVM Television Ltd and the Public Broadcasting Corporation of Jamaica* [2020] JMCA Civ 52.

respondent companies refused to air the appellant's video. This refusal, the appellant contended, violated their right to freedom of expression under Section 13(3)(d) of the Charter of Fundamental Rights and Freedoms (Constitutional Amendment) Act, 2011. The respondent companies argued, and this is significant for our consideration of the horizontal effect, that considering their right to freedom of expression and editorial control and judgement over what ought to be broadcasted,⁷⁴ the Court could not compel them to air the appellant's video.

Without considering the decision of the Jamaican Supreme Court of Appeal and the outcome on horizontality, I will elucidate the Hohfeldian jural relations described in the hypothetical above. Thus, instead of examining the nature of the entitlement in Section 13(3)(d) of the Charter, my analysis focuses on applying the Indian law post *Kausbal Kisbor* to this set of facts. Here, the appellant is *P1*, and the respondent companies are *P2*. By virtue of Article 19(1)(a), *P1* is entitled to air a video on television, as it is protected as a facet of expression. The conduct of airing the video is thus *C(FS)*. Now, the only way *P1* can exercise this entitlement is by approaching broadcasting channels that provide a platform for showcasing videos. Since *C(FS)* necessarily involves the role of companies such as *P2*, there is potential for interference in *C(FS)* by *P2*. The course of conduct adopted by *P2* companies by refusing to air *P1*'s video is *C(I)*. In a legal system that recognises a direct horizontal right to freedom

⁷⁴ *ibid* para 41.

of speech and expression, the appellant *P1* is the holder of a Hohfeldian claim-right that entails a duty on *P2* companies to air *P1*'s video, since the course of conduct of not airing the video is prohibited under the scope of this duty.

While this explains the Hohfeldian jurial relations underlying the factual matrix, the important question is how *P1* may enforce this claim-right. As we saw in the case of vertical rights, it is Hohfeldian immunities held by citizens that protect their right to freedom of speech and expression by imposing a disability upon State action. Without the existence of such immunities, the right conferred under Article 19(1)(a) is meaningless. In case of horizontality as described above, while deontic protection is afforded by the recognition in *Kausbal Kishor*, it is unclear as to how a constitutional court can enforce the claim-right in the absence of a law stipulating that a court may strike down policies adopted by private parties that restrict freedom of speech and expression. This results in what Kramer calls a hollowly nominal claim-right, that is not accompanied by a Hohfeldian immunity that makes the right a genuine claim-right.⁷⁵ Therefore, a mere declaration of direct horizontality might result in the creation of claim-rights and correlative duties, but since the protection afforded by such a claim-right is meagre, it tends to be hollow in the legal system.

(B) The right under Article 19(1)(a) as a Hohfeldian liberty

⁷⁵ Matthew H. Kramer, 'Looking Back and Looking Ahead: Replies to the Contributors' in Mark McBride and Visa A. J. Kurki (eds), *Without Trimmings: The Legal, Moral, and Political Philosophy of Matthew Kramer* (OUP 2022); Kramer 2024 (n 27) 97-98.

Hohfeldian liberties (or privileges, used interchangeably by Hohfeld) are in the form of deontic freedoms or permissions,⁷⁶ that entail correlative no-rights that prevent the thwarting of these liberties. Unlike Hohfeldian claim-rights, liberties do not offer deontic protection by imposition of a course of conduct upon the subject holding the correlative no-right. Rather, the existence of any liberty indicates the absence of any duty to act in a specified manner. Consequently, the conferment of a Hohfeldian liberty in respect of a particular course of conduct operates as an *exemption* from a duty mandating the same content of conduct.⁷⁷ Still, however, a Hohfeldian liberty is concerned with the conduct of its holder, which is why the direct horizontal right may be framed as such.⁷⁸

Now, let us consider two different private parties “*P3*” and “*P4*”. Similar to the previous hypothetical situation, we assume that *P3* is an Indian citizen, endowed with a horizontal right under Article 19(1)(a), which *P4*, as a private entity, cannot interfere with, per the law in *Kaushal Kishor*. Yet again, *P3*’s conduct of engaging in free speech “*C(FS)*” is protected. Furthermore, all private parties, including *P4* are disallowed from preventing *C(FS)*. If we were to consider the direct horizontal right to freedom of speech and expression as a Hohfeldian

⁷⁶ Kramer 2024 (n 27).

⁷⁷ Wenar 2005 (n 60).

⁷⁸ In this context, see Ian Leigh, ‘Horizontal Rights, the Human Rights Act and Privacy: Lessons from the Commonwealth?’ (1999) 48(1) *The International and Comparative Law Quarterly* 57.

liberty, it would mean that *P3* is *permitted* under law to exercise such right. This implies that *P3* has the liberty to engage in *C(FS)*, and consequently, *P4* is imposed with a Hohfeldian no-right that *P3* refrain from *C(FS)*.

Applying this analysis to the facts in *Maurice Arnold*,⁷⁹ the appellant (now *P3*) has the liberty to air the video in furtherance of their freedom of speech and expression. Not only are the respondent companies (now *P4*) bearers of no-rights, but are also holders of Hohfeldian liberties to broadcast videos they wish on their channels. In the absence of direct horizontal effect, *P4* companies are, in essence, holders of two types of liberties that are paired: *first*, the liberty to broadcast the video, and *second*, the liberty not to broadcast the video. When such paired liberties exist, the conduct of *P4* in respect of broadcasting videos is optional.⁸⁰ It is only when the liberties of *P4* companies to broadcast videos are combined with Hohfeldian duties imposed upon *P4* companies to not interfere with *C(FS)* that the protection of the original liberty held by *P3* is meaningful.

It is not necessary, however, that a legal system pairs or combines the liberties and duties of *P4* companies as explained above. A legal system may choose, for example, to prioritise the liberties held by *P4* companies, and not recognise the duty not to interfere with *C(FS)*.⁸¹ In

⁷⁹ Maurice Arnold (n 73).

⁸⁰ See generally Kramer 2000 (n 31).

⁸¹ Here, it must be emphasised that a liberty does not entail a claim-right against interference of the conduct protected by such liberty. The converse is also true. On this matter, see

such a case, there exists no claim-right, but only a liberty in respect of the horizontal right held by *P3*, which is in opposition to the liberty held by the *P4* companies. The decision on these conflicting liberties may ultimately be decided based on a balancing test. This conclusion highlights some further shortcomings in *Kausbal Kisbor*. A declaration of horizontality is of no utility when there exists no law clarifying the prioritisation, and the court provides no balancing test to resolve the conflicts between competing liberties as illustrated above.

(C) Some Observations

Classifying the direct horizontal right as a Hohfeldian claim-right and subsequently a Hohfeldian liberty has allowed us to contemplate the modes of enforceability of such a constitutional right. At this juncture, some concluding observations on the consequences of these classifications are warranted.

First, if direct horizontal rights confer claim-rights as entitlements, then it also imposes burdens upon private parties, since they are duty-bound to pursue the course of conduct entailed by these claim-rights. By increasing the obligatoriness under the law through defining impermissible conduct *vis-à-vis* private parties that did not exist in a system enforcing only vertical rights, the law on horizontality results in the reduction of existing permission. However, by conferring claim-rights upon private parties against other private parties, the scope of

Kramer 2000 (n 22).

deontic protection enjoyed by the holders of claim-rights is enhanced as a result of horizontality.

Second, if liberties are conferred as a consequence of the recognition of direct horizontal rights, then no private party can compel or forbid another private party's speech. But since each private party is endowed with liberties that can affect the liberties protecting the direct horizontal right, the onus lies upon the legal system to frame laws or design court mechanisms, to prioritise one liberty over another. In the absence of such prioritisation, conflicting cases might be brought before courts since the law recognises both liberties separately, but makes no effort to reconcile them, or prioritise one over the other.

Third, it is evident now the court in *Kaushal Kishor* failed to understand the various types of entitlements that may be conferred through the declaration of horizontal effect. It is not without reason that in different jurisdictions, legislation has been designed to recognise some forms of horizontality or prescribe tests to balance conflicting entitlements under the law. In the absence of such carefully thought-out legislation, the confusion created by *Kaushal Kishor* is emblematic of the very confusion Hohfeld sought to resolve, that rights are often comprised of different forms of entitlements allowing for its enforceability and guaranteeing its protection. A decision that fails to come to grips with these complexities results in the creation of hollow entitlements that bear no meaning in a legal system.

Considering the non-justificatory character of the Hohfeldian framework, the test for balancing entitlements cannot be drawn from it. In theoretical terms, these questions depend on the understanding of the normative force of rights and the considerations involved in resolving conflicts between rights.⁸² In case any normative conflicts are found, they are often decided in a jurisdiction-specific manner, and this might involve balancing between two competing individual rights or reconciling them.⁸³

⁸² Theorists have adopted differing views on the normative force of rights. While Dworkin argues that rights are trumps, thereby overriding any other considerations, Raz argues that conflicts between rights are possible and must be resolved. See Ronald Dworkin, 'Rights as Trumps' in Jeremy Waldron (eds), *Theories of Rights* (OUP 1984); Joseph Raz, 'Rights and Politics' (1995) 71(1) *Indiana Law Journal* 27-44; Raz (n 47).

⁸³ Frank Iacobucci, "Reconciling Rights" the Supreme Court of Canada's Approach to Competing Charter Rights' (2003) 20 *Supreme Court Law Review* 137.

Conclusion

Although one cannot deny the expansive powers of interpretation that the Supreme Court possesses, the declarations and conclusions reached in some of these interpretative exercises showcase the lack of contemplation regarding their usefulness. By declaring in *Kaushal Kishor* that Article 19 would be enforceable against non-State actors, the Supreme Court committed one such mistake, failing to comprehend that the mechanism for enforceability would differ based on the actors against whom such enforceability is sought. The Hohfeldian analysis of the purported direct horizontal right to freedom of speech and expression undertaken in this paper explains why this failure is fatal. The Supreme Court neither specified the operationalisation of a direct horizontal right, nor directed Parliament to pass legislation to create legislation to flesh out the mode of operation, ignoring the sundry entitlements protecting constitutional rights in the legal system, even though these very entitlements work in tandem to ensure that right-holding is genuine in the system.