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WhatsApp Privacy Case: Does WhatsApp Perform A 'Public Function' Under Article 226 Of The Constitution?

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Recently, a writ petition has been filed before the Delhi High Court **[i]**, challenging the constitutionality of WhatsApp's new privacy policy **[ii]**, which would allow WhatsApp to share certain personal data collected by it with its parent company, Facebook. Amongst other things, the petition states that WhatsApp is discharging a 'public function' in spite of it being a 'private entity'.

This post intends to analyze whether the petition's contention that WhatsApp's services can be treated as a 'public function' by judicial authorities is legally sustainable.

Examining The Scope Of 'Public Interest'

As per the text of Article 226 of the Indian Constitution, High Courts are empowered to issue writs against "*any person or authority*" for the enforcement of fundamental rights, or "*any other purpose*". **[iii]** In view of established constitutional law cases such as *Janet Jeyapaul v. SRM*

University (2015) **[iv]**, the power of High Courts to issue writs under Article 226 is much broader than the Supreme Court's powers under Article 32. **[v]** Indeed, the term "authority" must receive a *liberal construction*, as held in cases including *Dwarka Nath v. Income Tax Officer* (1964)**[vi]**and *Andi Mukta Sadguru v. V.R. Rudani* (1989) **[vii]**. As established by us elsewhere **[viii]**, this is owing to the fact that Article 226 by its design uses a wide language to enable High Courts to mould reliefs to meet the Indian landscape's peculiar cases, while also empowering them to issue writs *other than* prerogative writs the Supreme Court can decree under Article 32.

The 'public function' test, i.e., the proposition that private entities discharging functions characterized as 'public' are covered under Article 226, is a product of such a liberal construction. As established by Khamroi and one of us, "*every individual retains their right to privacy over personal information, even though that information exists only on a virtual space.*" **[ix]**However, the question as to whether this right to privacy can be enforced through writs against a private entity such as WhatsApp depends on establishing that WhatsApp performs a 'public function'. It must be cautioned that no judgment has crystallized any clear definition of when a function has a 'public' character. Instead, courts have made this assessment on a case-to-case basis, considering factual peculiarities.

Thus, the Apex Court's view that the BCCI indeed performs a public function vis-a-vis Article 226 merits consideration, in its holdings in *BCCI v. Cricket Association of Bihar* (2015). [x] As Sethia explains, one of the factors accorded great weight in this case was the 'scale' of the BCCI's functions. [xi] Cricket is the most prevalent and influential sport in the Indian sub-continent. Thakur, J.'s judgment continually emphasized the fact that the BCCI exercised unparalleled control over its regulations, thus impacting "*millions of cricket lovers*". Following this, the BCCI's role in regulating cricket was classified as a public function. Moreover, earlier in *Sukhdev v. Bhagatram* (1975), exploring when a function performed by a private entity can be 'public', the court had remarked that activities which are "*too fundamental…to society are by definition*" too important not to be covered by this term. **[xii]**

The language adopted in the petition suggests a tacit reliance on these observations since it seeks to highlight the pervasiveness of WhatsApp's usage as a "*mode of communication*". Implicitly, illustrating WhatsApp's use in legal proceedings as indicative of its importance, it argues that facilitating communication is a function that has a 'public' character. Indeed, even WhatsApp's 'About' section states its aim to allow communication "*anywhere in the world without barriers*". **[xiii]**If we accept the petitioner's argument vis-a-vis facilitating communication, or at least *virtual* communication specifically, it is undeniable that WhatsApp has a significant influence thereto since it has over two billion users globally **[xiv]**, with 400 million from India **[xv]**(the highest worldwide **[xvi]**). Internationally, it began to secure a daily increase of over a million users as early as 2018-19. **[xvii]** It is even reported that as high as 47 million downloads of WhatsApp were made in India during February 2020, just before the lockdown was announced. **[xviii]**

Reportedly, a greater percentage of the urban Indian population uses WhatsApp, with the youth population being WhatsApp's largest number of users. **[xix]** No doubt, there is merit in arguing that virtual communication has indeed become "too fundamental" to Indian society, especially in the present times where other forms of communication have indefinitely come to a halt. Reading this with the 'scale' of WhatsApp's coverage, one might be inclined to conclude in view of *BCCI* (supra)that WhatsApp indeed discharges a 'public' function, and therefore, is covered under Article 226.

This view, however, would be mistaken, at least insofar as reliance on *BCCI* (supra)is concerned, for failing to account for various other considerations that led to the court's conclusion. The Apex Court had emphasized not that the BCCI carried a *strong* or *extremely* influential control over cricket. Instead, the BCCI had "*complete sway over the game of cricket*" in India. **[xx]** The BCCI exercised *exclusive* or 'monopolistic' control over cricket, which was also tacitly (and often, actively) approved and supported by the State. **[xxi]** As Johorey rightly contends, although the court visibly diluted the standard for what may constitute a 'public' function, it simultaneously set a high threshold ('exclusivity') for when a private entity may be characterized as discharging it.**[xxii]**

In fact, to this day, there has never been any instance in India where a private entity was held to discharge a public function *merely* because its activities are 'fundamental', important, or 'public'. **[xxiii]** The entity in question must discharge said function fully *exclusively*. Evidently, this is not the case with WhatsApp, since there are several other similar social media apps which Indian users rely on, including those not owned by its parent company Facebook. [xxiv] Even if WhatsApp is taken to be a 'dominant' entity in the social media landscape, its influence or control over virtual communication does not have a 'monopolistic' character, not in the least comparable to the BCCI's over cricket.

Given the foregoing fact, WhatsApp cannot be characterized as discharging a 'public' function for the purposes of Article 226. Consequently, and unfortunately, there are strong reasons to conclude that this petition may not be maintainable.

Suggestions And Comments

If the court holds that WhatsApp indeed performs a public function, then one would have to be cognizant that this would be an expansion, not a reiteration of existing principles concerning Article 226. Although such an expansion would surely be welcome in this case considering the risks of WhatsApp's new policy **[xxv]**, its legal sustainability would remain open to debate.

Recognizing the constraints of the existing contours of the 'public function' test, Upadhyaya has argued in favor of a novel doctrinal expansion. **[xxvi]** A 1998 Human Rights Bill in the United Kingdom proposed it to be factor in assessing whether entities performing a 'public function': "*the extent of the risk that improper performance of the function might violate an individual's Convention right*" [Section 1(h)]. **[xxvii]** Upadhyaya argues that the Indian judiciary must adopt a shift towards this standard, thus focusing not strictly on the nature of the private entities, but on the *impact* or harm they can have on guaranteed rights.

We find 'pragmatic' merit in his contention, since as evident from this case as an illustration, WhatsApp's policy indeed carries great potential for mischief which can harm its users' privacy greatly. Although such an expansion might find support in judicial tendencies to 'liberally' construct Article 226's scope, it remains unclear whether enforcing such direct horizontality of rights could be legally sustainable based on its text. Perhaps, the Legislature ought to take cue and make appropriate amendments to further *textually* expand such jurisdiction as the absence of horizontality makes constitutional protections meaningless. Otherwise, our legal system may prioritize markets and private profits over constitutional values, which is arguably against the socialist conception of the Constitution as intended by its framers. [xxviii]

However, even absent jurisdiction under Article 226, and even until binding data protection law remains pending **[xxix]**, WhatsApp's policy is not necessarily immune from judicial review. As argued by Sen and one of us, a much more palatable route to counter WhatsApp's

external data sharing would be to have it declared "opposed to public policy" **[xxx]**, and thus, void under the Indian Contract Act.**[xxxi]** This is because WhatsApp and its users have 'unequal' bargaining power in reaching the terms of its privacy policy, leading to 'unfairness'.

Reportedly, the Delhi High Court recently remarked that users always have the option to delete WhatsApp if they have apprehensions regarding data-sharing, and thus, its policy is not objectionable. **[xxxii]** The route in favor of 'meaningful' consent as demonstrated above through Section 23 can potentially counter this observation, since all that matters vis-à-vis 'public policy' is that the parties must enjoy equal bargaining power in *devising* their contractual terms. Other arguments countering the policy may also be possible with the creativity of new litigators. **[xxxiii]** In any event, one remains in great anticipation of how the Delhi High Court shall proceed with this petition.

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[i] Aditi Singh, *Absolute violation of Right to Privacy: Petition filed before Delhi High Court against new WhatsApp privacy policy*, Bar & Bench (Jan. 14, 2021, 06:14 PM IST), https://www.barandbench.com/news/litigation/petition-filed-before-delhi-high-court-against-new-whatsapp-privacy-policy (Last Visited on February 4, 2021).

[ii] *WhatsApp Privacy Policy*, WhatsApp LLC (Jan. 4, 2021), https://www.whatsapp.com/legal/updates/privacy-policy/?lang=en (Last Visited on February 4, 2021).

[iii] Indian Const. art 226.

[iv] *See* Janet Jaypaul v. SRM University, (2015) 16 SCC 530, ¶¶ 27-31.

[v] Indian Const. art 32.

[vi] *See* Dwarka Nath v. Income Tax Officer, Special Circle, D-Ward, Kanpur and Anr., AIR 1966 SC 81, ¶ 4.

[vii] *See* Andi Mukta Sadguru Shree Muktajee Vandas Swami Suvarna Jayanti Mahotsav Smarak Trust and Ors. v. V.R. Rudani and Ors., (1989) 2 SCC 691, ¶ 20.

[viii] *See* Anujay Shrivastava & Abhijeet Shrivastava, *Is The PM CARES Fund Open To Writ Litigation Challenges?*, Constitutional Law Society, NUJS (Aug. 12, 2020), https://wbnujscls.wordpress.com/2020/08/12/is-the-pm-cares-fund-open-to-writ-litigation-challenges/ (Last Visited on February 4, 2021).

[ix] Anubhav Khamroi & Anujay Shrivastava, *Analysing The Practical Implications Of A Right To Privacy: State Surveillance And Constitution*, 8 Indian Constitutional Law Review 99, 108 (2019).

[x] *See* Board Of Control For Cricket In India v. Cricket Association Of Bihar & Ors., (2015) 3 SCC 251, ¶ 26.

[xi] Aradhya Sethia, *The BCCI Case on "Public Function" and its Implications on Sports Governance*, Blog of the International Journal of Constitutional Law (Mar. 21, 2015), http://www.iconnectblog.com/2015/03/bcci-case-on-public-function/ (Last Visited on February 4, 2021).

[xii] *See* Sukhdev Singh v. Bhagatram Sardar Singh Raghuvanshi, (1975) 1 SCC 421, ¶ 102.

[xiii] *About WhatsApp*, WhatsApp LLC, https://www.whatsapp.com/about/ (Last Visited on February 4, 2021).

[xiv] Shubham Verma, *WhatsApp now has over 2 billion users worldwide, CEO says encryption is important*, India Today (Feb. 13, 2020, 04:05 PM IST), https://www.indiatoday.in/technology/news/story/whatsapp-now-has-over-2-billion-users-worldwide-ceo-says-encryption-is-important-1645979-2020-02-13 (Last Visited on February 4, 2021).

[xv] *WhatsApp now has 400 million active users in India*, Indian Express (Jul. 26, 2019, 09:11 PM IST), https://indianexpress.com/article/technology/social/whatsapp-now-has-400-million-active-users-in-india-confirms-company-5854881/ (Last Visited on February 4, 2021).

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[xvii] Abigail Mitchell, *Whatsapp is everywhere*, Chief Executive Officer (Dec. 19, 2018), https://www.ceo-na.com/business/innovation-business/whatsapp-is-everywhere/ (Last Visited on February 4, 2021).

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[xix] Sanjay Kumar & Pranav Kumar, *How widespread is WhatsApp's usage in India?*, Live Mint (Jul. 18, 2018, 09:27 AM IST), https://www.livemint.com/Technology/O6DLmIibCCV5luEG9XuJWL/How-widespread-is-WhatsApps-usage-in-India.html (Last Visited on February 4, 2021).

[xx] *See* Board Of Control For Cricket In India v. Cricket Association Of Bihar & Ors., (2015) 3 SCC 251, ¶ 33.

[xxi] *See* Board Of Control For Cricket In India v. Cricket Association Of Bihar & Ors., (2015) 3 SCC 251, ¶ 33.

[xxii] Praharsh Johorey, *Social Media, Public Forums and the Freedom of Speech – II*, Indian Constitutional Law and Philosophy (Jan. 28, 2020), https://indconlawphil.wordpress.com/2020/01/28/guest-post-social-media-public-forums-and-the-freedom-of-speech-ii/ (Last Visited on February 4, 2021).

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[xxxi] Indian Contract Act, 1872 § 23.

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