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CONTENTS

FOREWORD

It is with great pleasure that we present Volume 4, Issue 1 of the Comparative Constitutional Law and Administrative Law Quarterly. The themes this issue deals with are the right to privacy, freedom of speech and the conception of 'State' in constitutional law.

One of the most controversial issues in recent times is that most media outlets display bias towards particular ideologies or political parties, in some cases displaying a visible tilt toward a certain stance, while in other cases bordering on propaganda. Sometimes, a politician will call news not favoring him 'fake news.' In ***Rethinking Freedom of Expression - Is the 'Fake News' Phenomenon Undermining the Doctrine of Free Speech***, Siddarth Jayaprakash addresses the derision by politicians of the work of various sections of the media as 'fake news' and suggests that this may amount to an undermining of free speech, despite no explicit restrictions placed on the actions of the said media outlets. (Of course, this clearly reminds one of Donald Trump though he has not been explicitly referred to in the article.) If this is so, is there a justification for restricting the speech of the politician, if the his/her assertions are demonstrably false? The essay explores the various jurisprudential theories on freedom of speech and analyses whether the said theories would be in favor of such a proposition, considering the views of Dworkin, Raz, Mill and Strass, among others. It is particularly relevant especially in light of the short lived circular issued by the Information and Broadcasting Ministry in April this year, which threatened to suspend the press accreditation of print and television journalists accused of reporting fake news. We are left to ponder the consequences of what it would mean for democracy if the government assumed to itself the power to decide what information was 'true' enough to reach citizens.

Last year, the Supreme Court in *Justice K.S. Puttaswamy (Retd.) and Anr. v Union of India* upheld the right to privacy as a fundamental right in India, a verdict that was received with much enthusiasm. The following article explores an aspect of the judgment that is not often discussed. In '**Universalist Rights and Particularistic Restrictions': Note on the *Justice K.S. Puttaswamy (Retd.) Case***, Abhijeet Singh Rawaley and J.P. Singh discuss the application of foreign jurisprudence in the judgment. Reference is made to the 'particularistic' and 'universalist' understanding of rights as explained by Suit Choudhary - the particularistic framework being one where courts are unfavorably disposed to resorting to foreign jurisprudence, and the universalist understanding which allows for 'instantaneous borrowing from foreign jurisprudence.' The article examines the various judicial opinions rendered and elaborates on how the Court drew on foreign jurisprudence to understand both the right in question as well as

what are understood as "reasonable restrictions" on the said rights. It notes that both particularistic and universalist reasoning can be found in the judgment.

The last article, ***Expanding Article 226 - Public Functions Test: Zee Telefilms v Union of India and Aftermath,*** Shrikrishna Upadhyaya takes as a starting point the judgment in Zee Telefilms v Union of India, which held that the BCCI is not 'State' under Article 12 of the Constitution, however the BCCI conducts activities that are akin to public duties or State functions and thus the aggrieved persons can approach the High Court under Article 226 to claim remedies for the violation of fundamental rights or any other rights. He proceeds to analyze several subsequent judgment and considers whether the Supreme Court's interpretation has been successful in granting citizens remedies against private bodies. This question has entered the spotlight specifically in the context of the WhatsApp case, where the petitioners challenged as unconstitutional the changes made to Whatsapp's privacy policy in August 2016. Whatsapp has more than 200 million monthly active users in India and so the awaited verdict has much significance.

I thank everybody in the editorial team for the immense effort they have put in to enable the publication of this issue. Akshay Sahay, Aashna Jain, Ankit Handa, Anmol Jain, Ayush Srivastava, Ankita Aseri, Aiswarya Murali, Gagan Singh, Kartavi Satyarthi, Subarna Saha, Shrestha Mathur, Subarna Saha and Swapnil Srivastava have all been integral to this endeavor and I thank them for their initiative, enthusiasm and dedication. I also thank the authors for their contributions and their cooperation during the editing process. We are eager to have more students, practitioners and scholars write for us and we look forward to hearing from anyone who may be interested in sharing insights from the fast developing world of comparative constitutional law. Further, we would be extremely happy to receive feedback from the authors as well as readers for the improvement of this journal. We hope that those reading this will share the journal with other interested people - this will help further our aim of advancing the discourse on comparative constitutional and administrative law.

Ragini Gupta

(Editor-in-Chief)

RETHINKING FREEDOM OF EXPRESSION – IS THE 'FAKE NEWS' PHENOMENON UNDERMINING THE DOCTRINE OF FREE SPEECH?

- **Siddharth Jayaprakash**[*]

ABSTRACT

It is no stunning revelation to assert that the cause of globalisation has taken a beating from popular political uprisings recently – part of the problem is politicians with disproportionate influence asserting that the media is untrustworthy. However, such statements are protected by traditional free speech conceptions. Is it time to rethink these traditional conceptions in favour of something new? That is what this article explores. It will conclude that while the traditional freedom of expression conceptions of JS Mill and Meiklejohn do not allow for restrictions on the politician's false speech, Langton's 'perlecutionary' and 'illocutionary' effects arguments as well as Strauss and Scanlon's arguments allow for gagging the politician in such situations. The former depends on the politician's status as an extension or mouthpiece of the government while the latter depends on the politician's statements being demonstrably untrue.

INTRODUCTION

Ever since the United States' Federal Communications Commission repealed their 'Fairness Doctrine' in 1987 – the doctrine that imposed on broadcasting stations the responsibility to report both sides of controversial issues in as objective a way as possible – the West in general has seen media outlets and newspapers rapidly acquiring distinct party biases.[1] Suddenly, it became very simple to voluntarily subject oneself to an ideological echo chamber. Arguably, recent trends in the political sphere have only exacerbated the problem – to be more precise, the trend of certain elected and contesting politicians deriding media outlets critical of them as 'fake news'. While on the one hand, they are only exercising their own freedom of expression when they make such comments, on the other hand, it is hard to shake off the feeling that these comments undermine some of what the doctrine of free speech was constructed to protect in the first place, namely the free dissemination of information of all kinds, both welcome and unwelcome. If this politician's comments result in vast sections of the public retreating further into their echo-chamber then surely that is a problem?

This article attempts to reconcile the above mentioned conflict. The basic scheme of argument is this: If freedom of expression is viewed as a category of actions that the government may not

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[1] James L. Baughman, *The Fall and Rise of Partisan Journalism*, CENTRE FOR JOURNALISM ETHICS (Jan. 25, 2018), https://ethics.journalism.wisc.edu/2011/04/20/the-fall-and-rise-of-partisan-journalism/.

restrict, then the government *'undermines'* free speech only if they prevent the citizens from performing those very actions–in which case one can do nothing to gag a politician even if he happens to be lying. However, that is too simplistic a view. Every free speech doctrine finds its justification in some quality of society that the doctrine aims to protect (e.g. the autonomy of the citizen) although sometimes, certain governmental actions harm that quality without explicitly restricting the actions that the free speech doctrine protects. Here, free speech is not undermined in the superficial sense, but *the very purpose* of the doctrine is being undermined. This essay will treat *both* as 'undermining' free speech. In Section 1, the popular justifications for the doctrine will be explored and how they pertain to the politician's assertions will be explained. In Section 2, the status quo in various jurisdictions will briefly be considered.

WHAT DO THE THEORIES HAVE TO SAY?

To answer this question, it is necessary to first understand that a politician can be operating in two capacities while making an assertion–**(I)** in his professional capacity, i.e., as a representative of the government; and **(II)** in his personal capacity, i.e., a private (albeit influential) citizen who is himself protected by the freedom of expression doctrine. This section will explore both these roles of the politician. Further, Strauss' theory *which prima facie* allows for a restriction on false speech regardless of it coming from the government or not, will be discussed in part II of this article.

I. The politician in his professional capacity

While the archetypal case of governmental intrusion is a law criminalising certain kinds of expression, there is no reason why other actions that fall short of criminalisation cannot be considered attempts to undermine freedom of speech. More specifically, the circumstances may indicate that a particular politician's assertions, far from being statements made in a private capacity, actually represent the viewpoint of the government (for e.g. official statements made in public) and hence carries with it the authority of society. This represents the instinctive idea that a politician is not just a layman expressing their opinion. He or she is a person as well as an *institution*–and as such wields power given to them by their position of authority. This might result in an undermining of free speech.

The free speech doctrines of Dworkin and Raz have been particularly relevant to this analysis. The former because he expressly contemplated this very issue and devised an argument *countering* it, and the latter because his unique take on the free speech doctrine might–on a certain reading - present an argument *supporting* it.

(a) Does Dworkin's theory allow for restricting the politician's assertion?

Dworkin's theory is based on a 'partnership' conception of democracy as opposed to the ordinary 'majoritarian' conception. To be precise, the majoritarian conception refers to the rather simplistic 'majority wins' outlook on democracy–the normative force or 'rightness' of any course of action is dictated by whether it has been arrived at by acceding to the whim of the majority. However, Dworkin preferred a different version of democracy that he labelled the partnership conception–a conception he believed encompassed all functional democracies currently existing. The partnership conception had three equally important wings–(a) popular sovereignty; (b) citizen equality; and (c) democratic discourse. These are self-explanatory as they refer respectively to the government being ultimately beholden to the public, the ability of the *individual* as a unit to take part in the democratic process as an equal with all the other units, and the power of citizens to deliberate together as individuals. The purpose of free speech is to protect and uphold these three positions.[2] Hence, in his theory, the ability of individual citizens to participate in the political process-(b) - is just as important as the power of citizens to act as the final judges in the political process–(a). Some people have argued that some kinds of expression can be restricted since they *reduce* citizen equality[3]. For instance, racist speech against Muslims reduces the ability of this minority to participate since the speech tells bystanders that their opinion counts for less than others. Similar argument has been used by Catherine Mackinnon in the context of women's rights and pornography.[4] Similarly, could it not be said that the government's assertions that the press are generally purveyors of fake news, reduces the citizen equality of these citizens who have taken the career path of journalists and political commentators since bystanders come to value their opinion less than others? If this holds to be true, then isn't the *purpose* of Dworkin's free speech doctrine–of promoting 'partnership' democracy - being undermined?

However, there are two complications: (i) as Dworkin noted, whether certain citizens are actually 'silenced' by such speech is largely an empirical matter.[5] Sociological studies done in the context of women's rights and pornography have largely been inconclusive. And (ii) Dworkin realises

[2] RONALD DWORKIN, SOVEREIGN VIRTUE: THE THEORY AND PRACTICE OF EQUALITY 364 (Harvard University Press, 2002).

[3] *Id.* at 366.

[4] CATHARINE A. MACKINNON, FEMINISM UNMODIFIED: DISCOURSES OF LIFE AND LAW 155 (Harvard University Press, 1988).

[5] Dworkin, *supra* note 2.

that most kinds of expression in some minor way 'silence' opponents such as by implying that their reasoning process is unsound and hence their opinion is in general untrustworthy.[6] It would be dangerous if the government could seize on Mackinnon's argument to thus censor most kinds of expression.

But our situation is different since the body that issues the 'silencing' speech is not a private body of citizens. Rather, it is the government itself. Regarding (i), empirically, it is not a stretch to argue that the silencing effect in a government proclamation is much more than a private citizen's – if the Ku Klux Klan issued a proclamation that African-Americans were genetically predisposed to, say, steal it could not seriously be argued that it would change to a drastic extent society's view on African-Americans. However, if later the government issued a similar proclamation, it is more likely that people will come to believe that lie because of the 'perlocutionary' force of its utterance.[7]

Regarding (ii), if the danger is that the government may seize on the argument to censor all kinds of expression, then that danger is diminished if the government may restrict only its own assertions and proclamations and not those of others. The danger is even lesser if the restrictions are only on demonstrably 'false' statements uttered by the government that reduces citizen equality. Importantly, the government's assertions have a *verdictive* 'illocutionary' force by virtue of the societal conventions that recognise the government's authority as it acts as an umpire that gives a verdict. When an umpire in a cricket game decides that a batsman is 'out', the players do not accede to his decision because of his influence or expertise, but because the social institutions and the rules of cricket recognise him as having the verdictive power to decide when a player is out. In other words, when an umpire declares a player as 'out', his decision is supreme not because his expertise or influence means that he is probably right, but because by virtue of his saying so, the batsman *becomes* out. Similarly, by its statements, the government *ranks* the press as lesser than others, and hence it truly becomes less.[8] Thus citizen equality is affected regardless of what empirical data has to say about the perlocutionary effect. By extension, free speech is undermined.

A brief note about the 'social institutions' that give him this 'verdictive power' may be pertinent here to understand the above argument. It is not a radical idea that certain things get their power

[6] *See supra* note 2.

[7] Rae Langton, *Speech Acts and Unspeakable Acts*, 22 PHILOSOPHY & PUBLIC AFFAIRS 293, 306 (1993).

[8] *Id.* at 304.

because we have all chosen, collectively, to give it that power. Similarly, our social institutions get their power to decide certain things because we have collectively chosen to give them this power – this is the essence of the idea behind Hobbes' 'social contract'.[9] Additionally, as Raz convincingly demonstrates, part of the function of our social institutions (of which the case in point is the law) is to resolve conflicts[10]. Sometimes it just becomes impossible to determine what is objectively true or valuable. Hence to get past this problem, we decide to appoint a person as arbiter and collectively agree that this person's verdict will be *taken to be true* – just so that we can resolve the stalemate and move on. Essentially, the argument laid out in the preceding paragraphs is that the umpire in our hypothetical cricket game, as well as the elected politician is instantiations of this 'arbiter'.

(b) Does Raz's conception allow for restricting the politician's assertions?

Raz believes that one of the main functions of the right to free expression is the validation of forms of life. There are two wings to his argument – (i) ways of life are validated through 'their portrayal and expression' which gives rise to a weak but broad positive right to express their culture, ideology etc. in various arenas; and (ii) purely content based censorship and criminalisation represent societal condemnation of these ways of life which gives rise to a strong but narrow negative right to not have their ways of life condemned in such a manner (Raz has mentioned that his theory did not inevitably give rise to rights – they are merely convenient).[11] With respect to (ii), it is only in 'extraordinary circumstances' that that sort of condemnation will be allowed (although Raz does not explain what these extraordinary circumstances would entail).[12]

For Raz's free speech doctrine to extend to our case (and consequently restrict the politician's assertions), two things need to be shown – (i) that the journalists were engaged in an activity that could be called a 'form of life'; and (ii) that official governmental assertions or statements that fall short of actual censorship could be called societal condemnation for the purposes of this theory. It is argued that while (i) can be clearly shown, (ii) is more complicated.

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[9] J. W. GOUGH, THE SOCIAL CONTRACT, 2 (Oxford: Clarendon Press, 1936).

[10] JOSEPH RAZ, ETHICS IN THE PUBLIC DOMAIN: ESSAYS IN THE MORALITY OF LAW AND POLITICS, 210 (Oxford University Press, 1995).

[11] Joseph Raz, *Freedom of Expression and Personal Identification*, 11 OXFORD J LEGAL STUDIES 303, 312 (1991).

[12] *Id.*

With respect to (i), it might first seem a bit of a stretch to call journalism a way of life. However, Raz explicitly directed his mind to the profession of journalism to explain how one of the main reasons censorship of political material is wrong is because it interferes with the activity or way of life of the journalist and not just because of the importance of the speech from a democratic standpoint.[13]

Regarding (ii), Raz never discussed whether anything lesser in degree than censorship or criminalisation could have the symbolic effect of 'condemning' a form of life. However, he did recognise that it is a 'factual not logical' matter whether government censorship of a particular action actually did effect in a condemnation of a particular way of life,[14] and this fact can change depending on the type of society under scrutiny – although the one constant is that the censorship must have been on purely content based grounds (i.e. censorship motivated solely by the perceived abhorrence of the content itself and not any other consideration such as the welfare of a third party). This means that it is arguable that 'censorship or criminalisation' may not be the only government activities that result in a condemnation – empirical data could reveal that people feel the same level of alienation from their community by government assertions criticising their way of life on purely content based grounds. After all, it is difficult to imagine that censorship of Islamic art by a minor official in a remote town in England would result in the same feeling of alienation among adherents of Islam in the UK as official statements (but not censorship) made by Parliament that Islamic art is inherently hateful or vulgar in some manner.

II. The politician as a private citizen

In the previous subsection we explored two free speech theories that could allow for a restriction on a politician's false assertions if the circumstances indicated that he was acting as a mouthpiece of the government. However, when his statements are made in a private capacity, the case for restricting his speech becomes weaker since the assertions do not have the special authority of the government. Although he is an influential figure, it becomes more difficult to argue that his words still have the requisite perlocutionary and illocutionary effects in his personal capacity. However, this section will explore the major theories to see if they allow for restrictions on the speech of private citizens if they are objectively or demonstrably *false* – and in that way catch him.

[13] *Id.* at 310.

[14] *Id*. at 315.

a) JS Mill and Meiklejohn: The politician is not undermining free speech

Mill's doctrine revolved around the 'discovery of truth'. He held that for such a pursuit an environment where people were allowed to exchange ideas without the intervention of the government was a necessary prerequisite. If the majority in society (through its government) attempted to curb certain ideas then it was 'assuming its own infallibility'.[15] So, the only way it could know that its own idea is true is through, as Holmes J in *Abrams v US*[16] put it, via the 'competition of the market' of ideas where the truth wins out (for a moral objectivist) or what wins out is the truth (for a moral relativist)[17]. In *Abrams v US* the defendants had distributed flyers denouncing the US government's decision to go to war with Germany and were subsequently arrested for inciting resistance to the war effort. It would be appropriate to present here a section of Holmes J's famous dicta, for it encapsulates the essence of the traditional Millian approach to freedom of expression:

> *"Persecution for the expression of opinions seems to me perfectly logical. If you have no doubt of your premises or your power, and want a certain result with all your heart, you naturally express your wishes in law, and sweep away all opposition. To allow opposition by speech seems to indicate that you think the speech impotent, as when a man says that he has squared the circle, or that you do not care wholeheartedly for the result, or that you doubt either your power or your premises. But when men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas -- that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out."*[18]

In other words, the only way someone could be truly confident that his point of view was in fact the truth, was to put it through the competition of the market. In Holmes J's eyes there is a distinct strength that a piece of information has by virtue of it being true – but this strength is not externally visible. Its only distinguishing characteristic is its ability to remain standing when other false ideas and information have been mown down by opposing points of view.

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[15] JOHN STUART MILL, ON LIBERTY, 32 (London: Longman, 4th ed, 1869)

[16] Abrams v. United States, 250 U.S. 616 (1919), ¶ 631

[17] JURGEN HABERMAS, COMMUNICATION AND THE EVOLUTION OF SOCIETY (Thomas McCarthy trans., Beacon Press 1979).

[18] Abrams v. United States, 250 U.S. 616 (1919), ¶ 631.

But having said that, since Mill's theory aimed at the 'discovery of truth', then surely his theory would allow for the restriction of demonstrably *false* speech? Mill answers this in the negative since even false statements have a role to play in his theory – specifically, they prevent the truth from being held as a mere dead dogma.[19] Hence, as we can see Mill's theory does not contemplate the possibility of a private citizen's speech, even false speech, undermining freedom of speech.

For Meiklejohn, the one overarching principle behind the American Constitution (although the essence of his argument is not limited to America) is that it represents an 'agreement' made between citizens that they will be governed by themselves, i.e. make and obey their own laws.[20] This implies that there is necessarily a certain limit to government control. If the government's actions stray over this limit, then it is conceptually not possible to say that government is still acting as an extension of the people. To explain this boundary Meiklejohn uses the example of a town hall meeting where all viewpoints are heard but certain time and place restrictions are allowed so that each speaker can express his views in an orderly fashion.[21].

Essentially, the whole point of his conception is to allow citizens to be as informed as they can, so that it can accurately be stated that they are governing themselves and are not in fact told what is best for them by the government (the paradigm case of the latter would be a world where the government restricted all viewpoints except its own). However, in our scenario, the politician's assertions are false. This could lead to the question of how demonstrably false data could help the population govern themselves. If anything, it would make their job harder and is hence undermining what the free speech doctrine is supposed to protect. Strauss raises this point about Meiklejohn's theory.[22] But it can forcefully be argued that the crux of Meiklejohn's theory is not just whether all potentially helpful information has had an opportunity to be aired (although that is important as is stressed by the 'town hall' example) , rather it is that ultimately it is *the people themselves* who decide whether the information is useful, unhelpful, false or true. This precludes government restriction on false statements, regardless of whether they come from itself.

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[19] Mill, *supra* note 12, at 64.

[20] ALEXANDER MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT 9 (Harper&Brothers Pub., 1948).

[21] *Id.* at 25.

[22] D Strauss, *Persuasion, Autonomy, and Freedom of Expression,* 91 Colum. L. Rev 334, 358 (1991).

b) Theories that might allow for restricting the politician's assertions – Strauss and Scanlon

i. STRAUSS

The wrongness of lying is at the heart of Strauss' conception. Hence it allows for restrictions to be made on demonstrably false speech meant to manipulate, regardless of whether it is made by government representatives or private citizens. Since the 'reasoning process' that an individual must participate in if he is to be considered 'autonomous' is corrupted by false speech, Strauss believes that it is in fact worse than outright coercion. In the latter a person is forced to do what he does not want to do but in the former he does not even know he is being manipulated. At least with coercion the person's 'mind is free'.[23] However, Strauss stresses that since lying is bad because it treats a person as an instrument to the liar's whim and hence denies the person's autonomy, this means that false statements made for other reasons, such as, an inadvertent lie or a lie for protecting someone's secret is not as objectionable.[24] So Strauss' conception concerns 'manipulative' lies.

The same logic as the above means that the government itself may not make false statements whose purpose is the manipulation of the citizen. But it may lie for other reasons, such as, the protection of a vital national secret – since the objective is not to keep people from thinking in a way the government dislikes. If the politician in our case can be considered a representative of the government, then it is a matter of the precise facts whether his false statement was manipulative although it is difficult to think of non-manipulative justifications he could have had in this scenario. It is true that most jurisdictions do not at present sanction the government for lying. However, Strauss explains that this is because of institutional concerns and not due to any flaw in his theory.[25] To be specific, the courts may be ill-fitted to make 'the delicate and complex inquiry' into the information that the government had (to check if its statement was inadvertent) and then to determine its reasons for the false statements.

However, it is difficult to see why these institutional concerns cannot be surmounted. In American defamation law, when the claimant is a public official, in order to win a libel suit against a private citizen (which includes the press), he must show not only that the material was

[23] *Id.* at 354.

[24] *Id*. at 355.

[25] *Id.* at 359.

false and damaging, but also that it was published with 'actual malice'.[26] It is for the claimant to show that this high threshold is crossed. In our situation, the high threshold is in favour of the government and the private citizen claiming must show not only that the government's statement is false but also that the motive was purely to manipulate. Only if this threshold is crossed will the courts punish the government, perhaps by ordering it to issue a retraction of the statement. The burden here is on the claimant and not on the court.

Another possible argument against restricting the government in this way is that it would produce a 'chilling effect' – the government would have trouble fulfilling its duties since it would be afraid at every turn that some factual inaccuracy might expose it to legal sanction. But this argument cannot stand as Strauss' principle does not punish inadvertent factual mistakes, but only intentional false statements meant to manipulate. Just as any chilling effect on the press due to the existence of libel laws have been averted by the requirement that 'actual malice' be shown, any chilling effect on the government is averted by the requirement of 'an intention to manipulate'.

Strauss' principle allows for restrictions on the politician even if he is speaking in his private capacity as manipulation is manipulation regardless of who does it, and in what capacity. However, prima facie it may seem somewhat bizarre to imagine having to live in a world where one can be in trouble with the law for something as commonplace as lying. But as already discussed, only manipulative lies are prohibited, not the more mundane kind. Further, not even all manipulative lies may be prohibited. Strauss talks about how individuals often have self-correction mechanisms in place – for instance, they might know that someone has an incentive to manipulate them and hence take their information with a pinch of salt.[27] Alternatively, the 'more speech is better than no speech' argument applies with the government and other citizens combating false assertions with their own assertions.[28]. However, neither of these mechanisms is watertight, and so it is always a question of empirical fact whether self-correction of this type actually takes place. In light of this, it is perfectly logical for a particular government to decide that such self-correction works fairly well with respect to private speech, but not so well with the government considering the latter's authoritative position in society. Hence only the latter undermines the *purpose* of the free speech doctrine – preserving the 'autonomy' of the citizen.

[26] New York Times Co. v Sullivan, 376 U.S. 254 (1964).

[27] Strauss, *supra* note 20, at 364.

[28] *Id.*

Strauss' conception is not merely in the realm of philosophy as there have been multiple cases that allude to the existence of such a doctrine. Strauss himself bases this idea on a concurring opinion of Justice Brandeis in the *Whitney v California*[29] case:

> *"[N]o danger flowing from speech can be deemed clear and present, unless the incidence of the evil apprehended is so imminent that it may befall before there is an opportunity for a full discussion."*

(Emphasis Supplied)

Here, Justice Brandeis acknowledges that the truth does not always have a certain magical quality due to which it will always prevail. He contemplates exceptions to the free speech principle where the speech is of the kind that may precipitate ill-considered action.[30]

ii. SCANLON

Scanlon famously rejected his own 'Millian principle'[31] – which he argued was an extension of JS Mill's famous theory - in favour of an approach based on the balancing of 'interests'. This is because he realised that people are not always the rational, critical beings that the Kantian 'autonomy' based viewpoint assumes they are. Rather, it is a state that must be maintained (often artificially) by the government. Often, our decisions are not just influenced but sometimes *manufactured* by many factors- e.g. subliminal advertising.[32] Hence Scanlon advocates an approach concerned not with whether certain types of speech and conduct should be protected from government regulation, but with whether an adequate balancing of all the interests involved ((a) participant, (b) audience and (c) bystander interests) calls for a right to that action in that context.[33]

First, that the specific participant interest here (like everyone else the politician also has the *general* participant interest to speak to an audience, but it is the importance of the *specific* participant interest as it pertains to the current situation that we are concerned with)[34] is the

[29] 274 U.S. 357 (1927).

[30] D Strauss, *supra* note 20 at 336.

[31] Thomas Scanlon, *A Theory of Freedom of Expression*, 1 PHILOSOPHY AND PUBLIC AFFAIRS 204, (1972).

[32] Thomas Scanlon, *Freedom of Expression and Categories of Expression*, 40 U. Pitt. L. Rev. 519, 525 (1979).

[33] *Id.* at 539.

[34] *Id.* at 521.

politician's interest in being able to (a) defend himself; and (b) discredit his opponents. Second, Scanlon argues that the central audience interest is the interest in having 'a good environment for the formation of one's beliefs and desires'[35] – the question for the community now is whether their environment will be better served by curbing false speech by persons in authority like the politician, or in being able to hear all kinds of information even if it is false. They might feel that the danger of being misled by such an influential person is more than any benefit to be gained by the absolute free dissemination of even false information. Third, the bystanders here (the press) have an interest in restricting the politician's speech since it affects their own ability to disseminate information and attract an audience – it is their credibility that is being lambasted by the politician.[36]

While balancing, it is quite possible that the community will decide that the politician's participant interest is not strong enough to outweigh the audience interest and the bystander interest in restricting the politician from making his assertions.

THE STATUS ON THE GROUND

The 1925 case of *Gitlow v New York*[37] entrenched the 'state action' doctrine in United States law. This doctrine states that as per the Fourteenth Amendment, the freedom of speech is a right that is protected only from the *states*. This means free speech applies only to restrict the government and not private citizens. Hence, none of the conceptions enunciated in Section 1.II would help us if the politician were to be an American citizen.

On the one hand, a bare perusal of cases such as *Cohen v California*[38] invalidates the restrictions on false or exaggerated speech owing to the fact that it might result in a chilling effect of even valuable speech. If this applies to private speech, it could apply to government speech as well. But on the other hand, the case law in the US is characterised by, as Barendt[39] explains, an extreme mistrust of government. In *Miami Herald v Tornillo*[40] even a statutory right of reply by

[35] *Id* at 527.

[36] *Id*. at 528.

[37] U.S. 652 (1925), ¶ 667.

[38] 403 U.S. 15 (1971).

[39] E BARENDT, FREEDOM OF SPEECH, 54 (Oxford University Press, 2007).

[40] 418 U.S. 241 (1974), ¶ 243.

private citizens to the press was invalidated by the courts since its *enforcement* would be unacceptable government intrusion. Moreover, in American defamation law, as per *New York Times Co. v Sullivan*[41], the government as a claimant must show not only falsehood but malicious intent. In such an environment, it is not inconceivable that the courts may adopt Strauss' conception to restrict government speech, especially since there are dicta o defamation cases like *Gertz v Robert Welch, Inc*[42] which point out that 'there is no constitutional value in false statements of fact'.[43]

The arguments in Section 1, subsection (II) become obsolete in the case of the United Kingdom as well. As §6(1) of the United Kingdom Human Rights Act of 1998[44] stipulates, freedom of expression only restricts 'public authorities'. While in *R (Wheeler) v Office of the Prime Minister and Secretary of State for Foreign and Commonwealth Affairs*[45] it was held that one cannot sue the government for breaking election manifesto promises. However, as cases like *Belfast City Council v Miss Behavin' Ltd*[46] indicate, there is already a tradition of balancing different interests in free speech cases. The issue in that case was whether Belfast City Council's decision not to grant a license to an adult entertainment shop in a 'family' area was an unwarranted interference with the latter's freedom of expression. Among the most interesting pieces of dicta in that case is this sentence by Baroness Hale:

> *"There are far more important human rights in this world than the right to sell pornographic literature and images in the back streets of Belfast city centre."*[47]

Here, the free speech right was given less weight since it concerned only the right to display pornography, as opposed to a more important right, say to criticise the government. With such an attitude, it is not inconceivable that given an appropriate case, the courts would adopt Scanlon's 'balancing' approach to restrict false government speech by arguing that its free speech right in this situation was outweighed by stronger concerns.

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[41] 376 U.S. 254 (1964), ¶ 255.

[42] 418 U.S. 323 (1974).

[43] Strauss, *supra* note 17, at 339.

[44] §6(1), UK Human Rights Act, 1998.

[45] [2008] EWHC 936 (Admin).

[46] [2007] UKHL 19.

[47] *Id*. at ¶ 1432.

CONCLUSION

Of all the theories, Strauss' and Scanlon's clearly decide given appropriate facts that the assertions have undermined freedom of expression, Raz's and Dworkin's *might* on a certain reading, while Mill's and Meiklejohn's certainly don't allow for that conclusion. However, one factor that has to be kept in mind is the extremely radical nature of this new extension to the free speech doctrine. No matter how conceptually sound the various arguments are , the common man's picture of the free speech doctrine is still that of being able to say anything he or she wants to say as long as it does not cause harm to someone else – in other words, the Millian approach. It is hence highly unlikely at present that any large scale ban on fraudulent lying will be a judicial invention – this means Strauss' conception in its broad form is probably not a realistic prospect. On the other hand, the extensions to Dworkin (tempered by Langton) and Raz as well as the versions of Strauss' and Scanlon's arguments– limited as they are to lies by people in elected positions – might realistically be adopted by the courts. However, it is also true that this is largely speculation. Empirical study on a very large scale basis must be done before any of these conceptions become a reality.

'UNIVERSALIST' RIGHTS AND 'PARTICULARISTIC' RESTRICTIONS: NOTE ON *JUSTICE K. S. PUTTASWAMY (RETD.) CASE*

- Abhijeet Singh Rawaley[*] & J.P. Singh[#]

ABSTRACT

This paper critiques the Supreme Court of India's application of comparative constitutional law in its judgment in Justice K. S. Puttaswamy (Retd.) & Anr. v. Union of India & Ors (recognizing privacy as a fundamental right in Indian Constitution). Using the framework provided by Sujit Choudhry cataloging the different approaches that court can take while using comparative law, this paper analyses that in the Puttaswamy case, the Court adopted an excessively 'universalistic' paradigm to exposit a fundamental right to privacy. However, it took a very 'particularistic' frame of interpretation so as to couch the imposable justificatory restrictions on such a right. This allowed the Court to interpret the right widely and the restriction narrowly. However, a factor for such universalist application of comparative materials may have been the abstract nature and scope of the adjudication in the case. While this is a theoretical understanding of the disposal of this nine-judge bench reference, a realistic understanding is posed in the conclusion where the 'motivating' reasoning behind such particularistic reading of restriction is given a make-over as its 'justificatory' reasoning.

INTRODUCTION

The terrain of comparative constitutional reasoning is characterized by a vibrant multiplicity of approaches. These approaches differ in terms of how and when national courts may resort to judgments and materials from foreign jurisdictions. However, these foreign jurisprudence do not carry with them any binding or persuasive force;[1] though the global trend to inter-link constitutional cultures across national jurisdictions has otherwise been on the rise.

Visualizing legal systems as being inherently common and uniform with an ubiquitous similarity of principles and concepts has provided a fertile ground for knowledge-based interaction(s) to take place. An overarching political philosophy espousing common ideals and values may be a factor for this. However, such understanding is coupled with underlying drawbacks. First, there is a deep-rooted ideation that constitutions constitute a particular state with their own schemas

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[1] BARAK AHARON, COMPARATIVE CONSTITUTIONAL LAW, 5 (1990).

and philosophy unfounded in other jurisdictions. This problematizes the very allusion to foreign materials in judicial opinions. Second, if judges acknowledge that they do not treat foreign material as binding, then the question is—what do they do with it? Sujit Choudhry's '*How To Do Comparative Constitutional Law in India*' specifically analyses the second prong where the High Court of Delhi in *Naz Foundation v. Union of India* perfected what is called application of comparative law through a dialogical reasoning.[2] The same work can also be used as laying down a general framework on analyzing the use of comparative materials in constitutional adjudication.

Choudhry classifies the possible approaches in comparative constitutional law as a tripartite spectrum. First is the '*particularistic*' model where courts are averse and apprehensive of resorting to any foreign jurisprudence in the garb of recognizing and giving effect to the *sui generis* identity of the domestic constitutional framework. The second model is at the other end of the spectrum where the premise of legal similarity nourishes an instantaneous borrowing from foreign jurisprudence. This is the *universalist* paradigm where constitutional reasoning is seen as being very easily amenable to easy cross-border transmission. Thirdly and most importantly, Choudhry advocates a dialogical interpretation rejecting either a wholesome affirmation or absolute rejection of foreign materials. Herein he emphasizes a better and nuanced understanding of constitutional similarities and differences through perusing foreign materials on the subject under consideration.

This paper applies this framework to the recent judgment of the Supreme Court of India (hereinafter "Court") in *Justice K. S. Puttaswamy (Retd.) & Anr. v. Union of India & Ors.*[3] (hereinafter "*Justice Puttaswamy*") where a nine-judge bench of the Court unanimously affirmed the existence of the right to privacy as a Fundamental Right in Part-III of the Constitution of India. Notwithstanding the specific factual background which gave rise to this reference to a nine-judge constitution bench, the terms of reference were very specific to the Constitution of India without any focus on factual backdrop and therefore abstract. We shall show how such adjudication in abstraction provided a fertile ground for a 'motivating'[4] a universalist understanding of 'rights.' However, the Court attempts at 'justifying'[5] a subtle and nuanced

[2] Sujit Choudhry, *How to Do Comparative Constitutional Law in India in* SUNIL KHILNANI (ED.) COMPARATIVE CONSTITUTIONALISM IN SOUTH ASIA (Oxford Scholarship Online, 2012).

[3] Justice K. S. Puttaswamy (Retd.) & Anr. v. Union of India & Ors., AIR 2017 SC 4161.

[4] JAKAB ET.AL. , COMPARATIVE CONSTITUTIONAL REASONING, 11 (Cambridge University Press, 2017).

[5] *Ibid.*

differences between the domestic legal position and foreign materials when it comes to interpreting the permissible restrictions on such rights. Hence, specific factual challenges to state-action on the ground of right to privacy may entail a more dialogical interpretation giving an equal if not more weightage to the particularistic concerns.

COMPARATIVE LAW IN *JUSTICE PUTTASWAMY*

The Court in *Justice Puttaswamy* was dealing with a reference[6] from a smaller bench as to a question of seminal and "far-reaching" constitutional significance. The Union of India (one of the respondents) in a hearing concerning the constitutionality of *Aadhar (Targeted Delivery of 53 Financial and other Subsidies, Benefits and Services) Act, 2016* had assailed the existence of privacy as a Fundamental Right protected by the Constitution of India.[7] The challenge to the very recognition of a Fundamental Right to privacy was based on judicial incongruence and doctrinal confusion resultant out of the antique 'silo'-based approach of the Supreme Court arising out of *A.K. Gopalan v. State of Madras*.[8] The treatment of different provisions in Part-III as separate silos with no interaction among them had led some to believe and the Union of India to contend that the lack of a single locus for a right to privacy meant that no such right was acknowledged by the Constitution of India. The Court in *Justice Puttaswamy* was hence tasked with deciding whether or not the Constitution of India recognizes the right to privacy as a Fundamental Right in its Part-III. The Court held in the affirmative with a unanimous majority.

While doing so, the nine judges on the bench authored six opinions. Chandrachud J. was joined by three other judges including the Chief Justice of India. While all other opinions refer to foreign jurisprudence, Sapre J.'s opinion stands out when it states that since "*the answer to the* [referral] *questions can be found in the law laid down in the decided cases of this Court alone…one may not require taking the help of the law laid down by the American Courts*."[9] This is somewhat problematic as the assailed and disputed Indian Case-law on the subject which recognizes a Fundamental Right to privacy, is itself based on much of the United States jurisprudence. The most comprehensive

[6] Order of the three-judge bench dated 11 August 2015, *See Justice Puttaswamy per* Chandrachud J. at 6.

[7] *Citizens do not have fundamental right to privacy: Centre tells SC*, Hindustan Times (Jul. 23, 2015, 1.50 P.M.), https://www.hindustantimes.com/india/citizens-do-not-have-fundamental-right-to-privacy-centre-tells-sc/story-ykRepEFYCvWteceqLNuz9O.html.

[8] A.K. Gopalan v. State of Madras, AIR 1950 SC 27.

[9] K.S. Puttaswamy v. Union of India, AIR 2017 SC 31.

opinion is that of Chandrachud, J. both generally and even in its particular treatment of comparative law where he refers to the analogous and parallel jurisprudence from the United Kingdom, United States, South Africa, and Canada apart from analyzing the decisions of supra-national courts such as the European Court of Human Rights, European Court of Justice and the Inter-American Court of Human Rights.

Hence, the judgment is one which is conducive and amenable to an analysis of its use of comparative constitutional law due to the attacked and impugned domestic jurisprudence on the right to privacy by the respondents. The approach in this paper would be to first look at the Supreme Court's exposition of a right to privacy and its content and scope. Thereafter, it shall seek to uncover the attempts of the Court to localize and familiarize the right into the Indian constitutional framework. Lastly, the paper shall look at the justifiable restrictions that the Court holds to be imposable on the constitutionally guaranteed right.

DOCTRINAL COALESCE OF THE RIGHT TO PRIVACY

The most unequivocal assertion of the universalist recognition of the right to privacy comes across in the opinion of Sanjay Kishan Kaul J. when he remarks:

> "*It is not India alone, but the world that recognizes the right of privacy as a basic human right.*"

Justice Puttaswamy exemplifies a constitutional adjudication where comparative law guides the Court to recognize a fundamental right in Indian law. The apparent gap in Indian law arose, as has been previously said, due to the doctrinal confusion resultant out of *A.K. Gopalan's* ratio that had governed the adjudication in *M.P. Sharma v. Satish Chandra*[10] and *Kharak Singh v. State of Uttar Pradesh*[11]. The Court's reasoning that privacy is an essential attribute to uphold 'liberty' of an individual through her 'dignity' is quintessentially '*motivated*' by a juxtaposition of two otherwise different constitutional philosophies. While the former finds unequivocal expression in the individual-centric constitutional ideology of the United States;[12] the latter is credited to the jurisprudence evolved by the Constitutional Court in South Africa.

[10] AIR 1954 SC 300.

[11] AIR 1963 SC 1295.

[12] Chandrachud J. in paragraph 38 of his opinion notes as follows: "The right to privacy evolved as a "*leitmotif*" representing "*the long tradition of American individualism*".

Like the Constitution of India, the American Constitution does not enlist an express right to privacy. However, Chandrachud J. notes that "*the concept of privacy plays a major role in the jurisprudence of the First, Third, Fourth, Fifth, and Fourteenth Amendments.*"[13] As early as in 1886,[14] the Supreme Court of the United States noted how the "purposes of despotic power" ought not and cannot override "the pure atmosphere of political *liberty* and personal freedom." Justice Brandeis' dissent in *Olmstead v. United States*[15] is reproduced by Chandrachud J. as a celebrated passage articulating the importance of privacy:

> "*The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness. They sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred, as against the Government, the right to be left alone – the most comprehensive of rights, and the right most valued by civilized men*…"

Thereafter a reference is made to Justice Douglas's main opinion in *Griswold v Connecticut*[16] which observed that privacy sprang from what he understood as the "penumbras", the Bill of Rights in the US, thus cumulatively giving rise to ascertainable "zones of privacy". Chelameswar J. notes like Justice Douglas as to how the Constitution of India too creates certain inviolable zones of privacy—that of '*repose'* and 'intimate decision.[17].

The most direct impact of US jurisprudence on *Justice Puttaswamy* as recorded by Chandrachud J. has been the transformation of the doctrinal position from that of '*trespass*' property-centric spatial privacy to the person-centric informational self-determination.[18] This would mean that the right to privacy no more means to sit calmly between closed doors, but implies that the person wields his or her privacy even in the public sphere in his or her relationship with the State. This ultimately finds expression in his articulation of the three-pronged privacy as recognized by the

[13] K.S. Puttaswamy v. Union of India, AIR 2017 SC 141.

[14] Boyd v. United States, 116 US 616 (1886).

[15] Olmstead v. United States, 277 US 438 (1928). The majority opinion was later overruled in Katz v. United States, 389 US 347 (1967).

[16] Griswold v Connecticut, 381 US 479 (1965).

[17] K.S. Puttaswamy v. Union of India, AIR 2017 SC 267.

[18] *See* Katz v. United States, 389 US 347 (1967) *per* Harlan J.

Constitution of India laid down by Chandrachud J. when he observes the distinct elements of the concept of privacy as "spatial control", "decisional autonomy" and "informational control."[19]

The South African experience is distinct as its Constitution expressly recognizes a right to privacy.[20] Yet, the South African Constitutional Court felt it necessary to couple or rather find a trace of this with well-worded and textual right as:

> "*Highlight[ing] the inter-relationship between privacy, liberty and dignity as the key constitutional rights which construct our understanding of what it means to be a human being. All these rights are therefore inter-dependent and mutually reinforcing.*"[21]

Chandrachud J. while noting a line of precedents from South Africa observes how such a holistic interpretative framework "may prove to have a catalytic effect on a country transitioning from an apartheid state to a democratic nation."[22]

Notwithstanding Chandrachud J.'s contextualizing remarks post every reproduction of comparative material, there does not seem to be much on ground when it comes to engaging in what Sujit Choudhry has termed as a "dialogue" between the domestic and foreign legal positions. Hence, we find it appropriate to call the resultant articulation of right to privacy in *Justice Puttaswamy* as coming together of different ideations and conceptions of privacy. Yet we must underscore the efforts of Chandrachud J.'s opinion on trying to find justifications in the Indian constitutional discourse for emphasizing liberty and dignity.

ATTEMPTS AT LOCALIZATION OF THE RIGHT TO PRIVACY

Of course, according primacy to individual autonomy buttressed with claims based on dignity from foreign jurisdictions would, by itself, have been a weak doctrinal position to recognize privacy as a fundamental right in India. Localization of foreign inputs makes the resultant legal position stronger and resilient to arraignment. Therefore, in order to fortify its reasoning, the Court had to necessarily engage with domestic materials.

The Court did so by localizing and familiarizing the Indian constitutional jurisprudence with such foreign materials. The Court observed how the Constitution of India was a promise to the

[19] K.S. Puttaswamy v. Union of India, AIR 2017 SC 201.

[20] Section 14, Bill of Rights of the South African Constitution, 1996.

[21] NM and Others v Smith and Others, 2007 (5) SA 250 (CC).

[22] K.S. Puttaswamy v. Union of India, AIR 2017 SC 172.

people to spin a 'social revolution' on a post-colonial fabric. It recounted how the constitutional framers led by Dr. B.R. Ambedkar visualized the individual to be the central focal point of the Indian constitutional model. Chandrachud J. notes

> "*The individual is the focal point of the Constitution because it is in the realisation of individual rights that the collective well being of the community is determined. Human dignity is an integral part of the Constitution. Reflections of dignity are found in the guarantee against arbitrariness (Article 14), the lamps of freedom (Article 19) and in the right to life and personal liberty (Article 21).*"[23] (Emphasis supplied)

The necessity of such a juxtaposition of a "universalist" paradigm of human liberty and dignity coupled with a "particularistic" orientation to contextualize the doctrines in the apposite understanding of Indian constitutionalism is explained by Chelameswar J. when he notes:

> "*The Constitution of any country reflects the aspirations and goals of the people of that country voiced through the language of the few chosen individuals entrusted with the responsibility of framing its Constitution. Such aspirations and goals depend upon the history of that society. History invariably is a product of various forces emanating from religious, economic and political events.*"[24] (Emphasis supplied)

Though Chandrachud J. cites two articles[25] published by the Centre for Internet and Society according to which privacy is a concept known and recognized in Islamic and Hindu law, the articulation is clearly given effect to by Bobde J. when he describes how the concept of privacy is profound even in the Indian socio-political context:

> "*Even in the ancient and religious texts of India, a well-developed sense of privacy is evident. A woman ought not to be seen by a male stranger seems to be a well-established rule in the Ramayana. Grihya Sutras prescribe the manner in which one ought to build one's house in order to protect the privacy of its inmates and preserve its sanctity during the performance of religious rites, or when studying the Vedas or taking meals. The Arthashastra prohibits entry into another's house, without the owner's consent.…Similarly, in Islam, peeping into others'*

[23] K.S. Puttaswamy v. Union of India, AIR 2017 SC 94 .

[24] K.S. Puttaswamy v. Union of India, AIR 2017 SC 19.

[25] *See* Ashna Ashesh and Bhairav Acharya , *Locating Constructs of Privacy within Classical Hindu Law*, THE CENTRE FOR INTERNET AND SOCIETY, available at https://cis-india.org/internetgovernance/blog/loading-constructs-of-privacy-within-classical-hindu-law (12 March, 2018); and Vidushi Marda and Bhairav Acharya, *Identifying Aspects of Privacy in Islamic Law*, THE CENTRE FOR INTERNET AND SOCIETY, available at https://cis-india.org/internet-governance/blog/identifying-aspects-of-privacy-in-islamic-law (12 March, 2018)

> *houses is strictly prohibited. Just as the United States Fourth Amendment guarantees privacy in one's papers and personal effects, the Hadith makes it reprehensible to read correspondence between others. In Christianity, we find the aspiration to live without interfering in the affairs of others in the text of the Bible. Confession of one's sins is a private act. Religious and social customs affirming privacy also find acknowledgement in our laws, for example, in the Civil Procedure Code's exemption of a pardanashin lady's appearance in Court.*"[26]

Hence, what is seen is a rather wholehearted recognition of the doctrinal position on privacy as against a contextualized and homegrown understanding taking the centre stage. The Court seems to be motivated to recognize a Fundamental Right to privacy for its recognition elsewhere in most corners of the democratic world instead of deriving it from the Indian socio-political context. Hence, what is displayed as an Indian perspective on the constitutional landscape texturing privacy is only a justificatory tool and ploy so as to legitimize its conclusion. In that task, it was helped by a series of judgments[27] recognizing a fundamental right to privacy in the post-*Gobind v. State of Madhya Pradesh*[28] era spanning some forty odd decades.

JUSTIFIABLE RESTRICTIONS ON THE RIGHT TO PRIVACY

There is a great constitutional convergence across jurisdictions that rights are not absolute. Restrictions can be imposed on the exercise of rights. However, of considerable debate is the nature and type of restrictions that can be imposed on these rights. Different rights can be curtailed by different justifiable forms of restraints recognized by the constitutional framework.

This understanding of the interplay between rights and restrictions makes the application of comparative constitutional law even more interesting in *Justice Puttaswamy*. While the Supreme Court may have borrowed the understanding of the scope and contents of privacy from US jurisprudence, it seemed unwilling to borrow restrictive elements on that right from the same place.[29]

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[26] K.S. Puttaswamy v. Union of India, AIR 2017 SC 21.

[27] Malak Singh v. States of Punjab and Haryana, (1981) 1 SCC 420; State of Maharashtra v. Madhukar Narayan Mardikar, (1991) 1 SCC 57; R Rajagopal v. State of Tamil Nadu, (1994) 6 SCC 632; People's Union for Civil Liberties v. Union of India, (1997) 1 SCC 301; Mr. X v. Hospital Z, (1998) 8 SCC 296.

[28] Gobind v. State of Madhya Pradesh, (1975) 2 SCC 148.

[29] K.S. Puttaswamy v. Union of India, AIR 2017 SC 246.

The Constitution of India is unique for its elaborate enlisting of restrictions alongside the available rights.[30] This is unlike the position in the United States where the courts had to invent the doctrine of 'police powers' to restrict the textually unrestricted rights.[31] The operative order of the Court which answers the reference posed to this nine-judge bench speaks the following when it comes to narrowing it down to the places where the right to privacy can be found in the Constitution of India:

> "*The right to privacy is protected as an intrinsic part of the right to life and personal liberty under Article 21 and as a part of the freedoms guaranteed by Part III of the Constitution.*"[32]

Hence, the right is recognized as a part of Articles 19 and 21 of the Constitution. While the former is sub-divided into a number of clauses detailing the scope of different forms of freedoms, the latter is a catch-all right recognizing everybody's entitlement to a dignified life.[33] Only a just, fair and reasonable law can restrict the operation of the fundamental right recognized by Article 21.[34] For rights contained in Article 19 (1) there are corresponding restrictions provided for in subsequent clauses of Article 19.

Two observations are relevant in this context. First, the repudiation of the concept of '*substantive due process*' in Indian law by Chandrachud J. alongside which he nonetheless notes:

> "*The expression 'procedure established by law' in Article 21 does not connote a formalistic requirement of a mere presence of procedure in enacted law. That expression has been held to signify the content of the procedure and its quality which must be fair, just and reasonable…. The quality of reasonableness does not attach only to the content of the procedure which the law prescribes with reference to Article 21 but to the content of the law itself… The law is open to substantive challenge on the ground that it violates the fundamental right.*"[35] (Emphasis supplied)

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[30] For instance, while Article 19 (1) delineates various freedoms available to citizens, its sub-articles 2 to 6 list out the permissible reasonable restrictions on those freedoms.

[31] *See* MP JAIN, INDIAN CONSTITUTIONAL LAW 1013, 7th Ed. (LexisNexis Publications,2014).

[32] Order of the Court in *Justice Puttaswamy*.

[33] For instance, the right to go abroad [Satwant Singh Sawhney v. D Ramarathnam APO New Delhi, (1967) 3 SCR 525 and the right to speedy trial [Hussainara Khatoon v. Home Secretary, State of Bihar, (1980) 1 SCC 81].

[34] For an account of the just, fair and reasonableness standard, reference may be made to Kartar Singh v. State of Punjab, (1994) 3 SCC 569.

[35] K.S. Puttaswamy v. Union of India, AIR 2017 SC 238.

In this regard, given the Indian constitutional history, Chandrachud J. rejects the US position where courts are empowered to test laws on substantive due process.[36] Secondly, there is variance in terms of how tests to determine the constitutionality of any infringement of privacy by a state action are articulated. Chandrachud J.'s differentiation between India's "procedure established by law" and "due process of law" is illusory as his three-pronged test of *legality*, *need* and *proportionality* to determine the constitutionality of a restriction on the right to privacy enacts a very high threshold for the State to fulfil. It is almost tantamount to a 'substantive due process' standard.

Chelameswar J.'s opinion articulates that restrictions which may be justifiably imposed on the right to privacy must be determined on a case-to-case basis. He advocates different standards for different rights.[37] For instance, if a claim of violation of privacy is brought on the pretext of Article 19 (1) (a) of the Constitution of India, then the state action must stand the test of Article 19 (2) of the Constitution of India apart from the general reasonableness standard. However, what keeps surfacing is the test propounded by Justice Brennan in *Carey v Population Services International*.[38] The US Supreme Court laid down that any infringement of privacy by the State must satisfy the test of '*compelling state interest*.' The test finds a toned-down mention in Chandrachud J.'s opinion as 'legitimate state interest'. The test was brought home in the case of *Gobind v State of Madhya Pradesh*[39] but has been critiqued by Chelameswar J. in *Justice Puttaswamy* being a concept which "does not have definite contours in the US." [40] He escapes a thorough analysis when he remarks that "only in privacy claims which deserve the strictest scrutiny is the standard of compelling State interest to be used." Rohinton J. also follows the path treaded by Chelameswar J. when he remarks that "*when it comes to restrictions on this right, the drill of various Articles to which the right relates must be scrupulously followed*."[41]

[36] Id. at 214.

[37] Id. at 41.

[38] Carey v. Population Services International, 431 US 678 (1977).

[39] Gobind v. State of Madhya Pradesh, (1975) 2 SCC 148.

[40] K.S. Puttaswamy v. Union of India, AIR 2017 SC 43.

[41] Id. at 105.

It would also be reasonable to look at the way in which the possible areas on which the right to privacy can be restricted have been articulated in the judgment. Exemplifying his '*legitimate state aim'* test, Chandrachud J.'s opinion notes as follows:

> "*The legitimate aims of the state would include for instance protecting national security, preventing and investigating crime, encouraging innovation and the spread of knowledge, and preventing the dissipation of social welfare benefits. These are matters of policy to be considered by the Union government while designing a carefully structured regime for the protection of the data.'*"[42]

Even before this, the opinion discusses the conception of the Indian state as a "*social welfare state.*"[43]In this regard, the restrictions are localized to suit the needs of the Indian constitutionalism where the idea of a limited government is not as strongly found as is in the United States. The Constitution of India is not marked by what is said for its US counterpart: a "deep distrust of power."[44]

Therefore, we see a higher degree of localization in terms of applying comparative law when it comes to determining the restrictions to the right to privacy than the right itself.

CONCLUSION

Reference to comparative materials has its own set of merits and demerits. But it must be credited for the insight that it provides in terms of understanding the divergences and convergences of one's own constitutional setting within the larger network of constitutionalism.

This paper has shown how judges can use comparative constitutional law in differing manners to delineate 'rights' and 'restrictions' thereto. While interpreting the Constitution of India to find a right to privacy, the Supreme Court seems to have been motivated to recognize a right in a wide amplitude across various articles of Part-III. To do so, it also invokes developments in foreign jurisdictions only to return to India and lay down the right in clear places within the constitutional text. However, when caught with the task of laying down the scope of restrictions that can be placed on the right to privacy, the Court localizes and familiarizes the right with the specific and particular Indian conditions. In this regard, while rights may be seen as '*universal*',

[42] . Id. at 265.

[43] Id. at 255.

[44] Uday Singh Mehta, '*Constitutionalism,*' 25 as cited in ANUJ BHUWANIA, COURTING THE PEOPLE 18 (Cambridge University Press, 2016).

justifiable restrictions upon these rights have been viewed upon as '*particularistic*.' What this in turn provides for is a broad interpretation of the right while narrowly interpreting the imposable restriction. Such deployment of comparative constitutional law is, we submit, a sound arrangement; for it recognizes the overarching similarity in terms of people and individuals across constitutions while giving effect to national differences in terms of state interests. We also opine that the cause for the '*universalist*' mode of interpreting the right to privacy was due to the abstract nature of this adjudication. It remains to be seen in the future as to whether courts will lean towards '*particularistic*' understandings when they deal with specific factual situations.

At yet another level of constitutional reasoning, we may see how the 'motivating reasons' behind a particular position may be different from the 'justificatory reasoning' used by the courts. In *Justice Puttaswamy*, the real motivating reason for the court to provide for such restrictions could be the ongoing *Aadhar* controversy which has already entailed huge expenditure in terms of time, money and effort by the state. Hence, the way in which the Supreme Court has articulated the permissible restrictions on the right to privacy may be closely tied to its covert motivation to save *Aadhar* from any constitutional infirmity. It however does this through apparently leaving a door open to justify it when it hears and adjudicates the matter on the pretext of Indian constitutionalism placing the State as a benevolent welfare actor, the limits on which are in turn very limited.

EXPANDING ARTICLE 226 – PUBLIC FUNCTIONS TEST: ZEE TELEFILMS V. UNION OF INDIA AND AFTERMATH

- **Shrikrishna Upadhyaya***

ABSTRACT

Article 226 of the Constitution of India ("Constitution") confers upon the High Courts of India expansive powers to issue writs. This power can be invoked not only for enforcement of Fundamental Rights but also for any other purpose. In Zee Telefilms v. Union of India, while holding that Board of Control for Cricket in India ("BCCI") is not State under Article 12 of the Constitution (and hence not amenable to Article 32 jurisdiction), the Supreme Court of India ("Court") introduced a new conundrum with respect to Article 226 of the Constitution. The Court held that BCCI conducts activities that are "akin to the public duties or State functions" and hence, aggrieved persons can approach the High Courts under Article 226 of the Constitution to claim remedies for violation of fundamental rights or any other rights. This interpretation was made possible by relying on the words "any person or authority" for the "enforcement of the rights conferred by Part III, and for other purposes" given under Article 226 of the Constitution. It enables the High Courts to issue writs to non-State entities as well. This interpretation has come to be known as 'private body exercising public functions test' used in determining the extent of applicability of Article 226 of the Constitution. In this paper, the author seeks to study the subsequent application and interpretation of the Zee Telefilms' ratio (post-2005) by the Court in various cases. Further, an effort is made to understand whether this interpretation has been successful in granting citizens a remedy for the violation of their rights by private bodies existing in the public domain and exercising public functions. The public functions test becomes pertinent in the context of the recent WhatsApp privacy policy case where the question arose whether writs can be issued against WhatsApp, a private entity. Hence, the author endeavors to conclude by offering comments on whether this interpretation is pragmatic and intellectually defensible.

INTRODUCTION

A writ petition by way of public interest litigation ('PIL') was filed in the Delhi High Court against WhatsApp demanding the issuance of writs mandating the mobile messaging service company to protect user details and other data of its subscribers, and prohibiting user data sharing with outsider entities, including its parent company Facebook.[1]

WhatsApp being a private entity, the pertinent question was the maintainability of a writ petition against the company. However, owing to factual reasons, the Delhi High Court did not delve into the aspect of maintainability but simply brushed it off by observing that since the terms of service (agreement between users and WhatsApp) cannot be traced back to any statutory

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[1]Karmanya Singh Sareen v. Union of India and Ors., 233 (2016) DLT 436, ¶2 (India).

provision, WhatsApp is not amenable to writ jurisdiction under Article 226 of the Constitution.[2] The matter went on appeal to the Supreme Court of India which in turn constituted a constitutional bench to hear the matter.[3] The verdict is yet to be pronounced, and it is to be seen whether the Supreme Court holds a private entity such as WhatsApp to fall within the ambit of Article 226 of the Constitution.

It is well known that Article 226 of the Constitution empowers every High Court in the country to issue orders or writs to any person or authority including Government for the enforcement of the fundamental rights guaranteed under Part III of the Constitution or for any other purpose.[4] This power resting with the High Courts is notwithstanding the power of the Supreme Court to issue writs under Article 32 of the Constitution.[5] Also, the power of the Supreme Court under Article 32 of the Constitution is restricted in the sense that writs can be issued only for enforcing fundamental rights while the jurisdiction of the High Courts extends to protecting any legal right as is manifest from the words "any other purpose" used in Article 226 of the Constitution.[6] Another key difference between the two provisions is that right to constitutional remedies under Article 32 of the Constitution is a fundamental right in itself whereas Article 226 is in the nature of a discretionary remedy provided under the Constitution.[7]

Article 226 of the Constitution is considered sacrosanct to the Constitution as evidenced by the Supreme Court ruling in *L. Chandra Kumar v. Union of India*[8] that held that the power of judicial review accorded to High Courts by Article 226 is a part of the basic structure of the Constitution. This is indicative of the importance of the role that High Courts play in upholding rights of individuals under the Indian constitutional scheme.

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[2] *Id*., ¶18.

[3] Krishnadas Rajagopal, *SC Refers WhatsApp Privacy Policy Matter to Constitution Bench*, THE HINDU (Apr. 5, 2017, 01:17 p.m.), http://www.thehindu.com/news/national/sc-refers-whatsapp-privacy-policy-matter-to-constitution-bench/article17822724.ece.

[4] INDIA CONST. art. 226: "Power of High Courts to issue certain writs –(1) *Notwithstanding anything in Article 32* every High Court shall have powers, throughout the territories in relation to which it exercise jurisdiction, to issue *to any person or authority*, including in appropriate cases, any Government, within those territories directions, orders or writs, including writs in the nature of habeas corpus, mandamus, prohibitions, quo warranto and certiorari, or any of them, *for the enforcement of any of the rights conferred by Part III and for any other purpose*" (emphasis added).

[5] *Id*. (Article 226 begins with the words "notwithstanding anything in Article 32").

[6] *Id*.; *see* Dwarkanath v. Income Tax Officer, 1965 (3) SCR 536 (India).

[7] Article 32 is a Fundamental Right guaranteed by the Part III of the Constitution of India while Article 226 is an extraordinary remedy.

[8] L. Chandra Kumar v. Union of India, AIR 1997 SC 1125 (India).

A related discussion relevant to this paper pertains to Article 12 of the Constitution and the definition of State under it.[9] After a long debate stretching over decades as to what entity constitutes *State* for the purposes of Article 12 of the Constitution, a seven-judge bench of the Supreme Court in *Pradeep Kumar Biswas v. Indian Institute of Chemical Biology*[10] ('Pradeep Kumar Biswas') laid down the test of 'functional, administrative and financial' control. In simple terms, an entity functionally, administratively and financially under deep and pervasive control of the government is said to be State under Article 12.[11] Following this, in *Zee Telefilms v. Union of India*[12] ('Zee Telefilms'), it was contested by the petitioners that Board of Control for Cricket in India ('BCCI') falls within the ambit of State under Article 12 of the Constitution.

The Supreme Court speaking through Justice Santosh Hegde rejected this argument. However, the Court made an important breakthrough with respect to Article 226 of the Constitution by holding that private bodies like BCCI can be subjected to Article 226 of the Constitution since it conducts activities that are "akin to the public duties or State functions".[13] The Court interpreted the word "authority" in Article 226 of the Constitution to mean an authority discharging public functions. This test for determining Article 226 jurisdiction is popularly known as 'private body exercising public functions test'. Thus, claims against private bodies by citizens can be entertained under Article 226 of the Constitution for violating their rights if the private entity in question satisfies the public functions test.

The scope of this paper pertains to understanding and analyzing the 'private bodies exercising public functions' test for the purposes of determining whether non-governmental or private entities are amenable to Article 226 jurisdiction of the High Courts. It follows the case-law development in this field, centered on *Zee Telefilms*, over the past decade and up till the latest WhatsApp case being contested before the Supreme Court. The question of whether any modification to the approach of the Court could be considered needful is also sought to be answered.

This paper is divided into four parts. In the *first* part of this paper, I shall be outlining the manner in which the public functions test came into being with special focus on the Supreme Court's

[9]INDIA CONST. art.12: "In this part, unless the context otherwise requires, the State includes the Government and Parliament of India and the Government and the Legislature of each of the States and *all local or other authorities within the territory of India or under the control of the Government of India*" (Emphasis added).

[10]Pradeep Kumar Biswas v. Indian Institute of Chemical Biology, (2002) 5 SCC 111 (India).

[11] For a detailed description of the test given by *Pradeep Kumar Biswas, see* Part III of this paper.

[12]Zee Telefilms v. Union of India, (2005) 4 SCC 649 (India) (majority opinion).

[13]*Id*., ¶31.

decision in *Zee Telefilms*. In the *second* part, a study of the subsequent interpretation and application of the *Zee Telefilms*' ratio (post-2005) by the Supreme Court with reference to several case laws shall be undertaken. The *third* part contains critical analysis of the Court's approach. The *fourth* part deals with the latest WhatsApp challenge and discusses necessary modifications, if any, required in the Court's use of public functions test. The *fifth* part contains concluding remarks.

PUBLIC FUNCTIONS TEST FOR PRIVATE BODIES

As pointed out earlier, the original and primary issue before the Supreme Court in *Zee Telefilms* was whether BCCI is State for the purposes of Article 12 of the Constitution. The five-judge constitutional bench led by Justice Santosh Hegde, by a majority, following the decision in *Pradeep Kumar Biswas* held that the BCCI did not fall under the definition of 'State' because it was not functionally, administratively and financially under the control of any government and there was no *deep and pervasive state control*, but only minimal regulatory control.[14] The Court noted that although there is an "element of public duty" in the functions performed by BCCI, this alone would not automatically render it State.[15]

However, implicitly noting the fact that holding powerful private bodies which perform essential public functions unaccountable might be problematic, the Court in *Zee Telefilms* attempted to work out a solution. It noted that BCCI discharges duties like selecting the cricket team to represent India, controls the activities of players and all other aspects of the game in the country. These functions, the Court said, are "akin to public duties or State functions".[16] Merely because aggrieved citizens cannot challenge the actions of BCCI does not mean the violation of rights shall go unaddressed. The Court held that remedies for violation of rights shall be available under Article 226 of the Constitution which is wider in scope than Article 32.[17]

The constitutional bench in *Zee Telefilms* relied on the ruling in *Andi Mukta Sadguru Shree Muktajee Vandas Swami Suvarna Jayanti Mahotsav Smarak Trust v. V.R. Rudani*[18] ('Smarak Trust') which held that the term "authority" found in Article 226 of the Constitution must receive a 'liberal

[14] *Id.*, ¶30.

[15] *Id.*, ¶25.

[16] *Id.*, ¶31.

[17] *Id.*, ¶33.

[18] Andi Mukta Sadguru Shree Muktajee Vandas Swami Suvarna Jayanti Mahotsav Smarak Trust v. V. R. Rudani, (1989) 2 SCC 691 (India).

meaning' unlike the same term in Article 12. It had consequently held that High Courts can issue writs to enforce both fundamental and non-fundamental rights and 'authority' under Article 226 of the Constitution is not limited to State and State instrumentalities. The Court in *Smarak Trust* had proceeded to issue a writ of mandamus against a private college because of two reasons, namely, the rights in question of an employee (petitioner in the case) were not purely of private character and the college was not purely a private entity without any concomitant public duty.[19] The following observation of the Court in *Smarak Trust* relating to what may come under "authority" under Article 226 of the Constitution were reaffirmed by the *Zee Telefilms* bench:

> "*They may cover any other person or body performing public duty. The form of the body concerned is not very much relevant. What is relevant is the nature of the duty imposed on the body. The duty must be judged in the light of positive obligation owed by the person or authority to the affected party, no matter by what means the duty is imposed.*"[20]

It is also pertinent to note that Justice Mohan's concurring opinion in the popular case of *J. P. Unnikrishnan v. State of Andhra Pradesh*[21] ('Unnikrishnan') echoed similar sentiments. He relied on the decision in *Smarak Trust* while deciding the question that whether a student can proceed against a medical college under the writ jurisdiction for violation of rights.[22] After looking at the 'nature of functions' that are carried on by the institution, Hon'ble Justice held that the educational institute in question discharged a public duty and consequently, it is required to "act fairly".[23] Hon'ble Justice went on to hold that the medical college will be subject to Article 14 of the Constitution and thus, the duty to act fairly was imposed upon a medical college since it was duly discharging public functions.[24]

Thus, after the decision in *Zee Telefilms,* the position of law is that whenever a private entity exercises public functions or discharges public obligations and duties, aggrieved persons have a remedy under Article 226 of the Constitution in addition to ordinary law remedies. Further, for the purpose of deciding what body can be considered as 'authority' for the purpose of Article 226, as held in *Smarak Trust* and reaffirmed subsequently, the *nature* of its duties is relevant and

[19] *Id*., ¶16.

[20] *Id*., ¶20.

[21] J.P. Unnikrishnan v. State of Andhra Pradesh, 1993 AIR 2178 (India) (Mohan, J., concurring).

[22] *Id*., ¶82.

[23] *Id*., ¶81-83.

[24] *Id*.

not its form.[25] Apart from these brief principles outlined here as to what constitutes public functions, the Court has proceeded with a case-specific approach and it is argued that the same has led to several inconsistencies.

INTERPRETATION OF PUBLIC FUNCTIONS TEST BY SUBSEQUENT CASES

The ratio of the decision in *Zee Telefilms* has come handy to several aggrieved petitioners who approached the High Courts against private entities. In a series of cases, the Supreme Court has applied the public functions test to private bodies to determine their amenability to Article 226 of the Constitution, albeit with few inconsistencies in doctrinal approach. The following discussion illustrates the same.

In *Ramesh Ahluwalia v. State of Punjab*[26] ('Ramesh Ahluwalia'), the petitioner challenged the termination of his service by DAV Public School, Amritsar on the basis of a Disciplinary Committee report. The respondent school was a private, unaided school managed by a Society.[27] The High Court dismissed his petition by stating that the school being private, unaided and not under the management of the State was not an instrumentality of the State.[28] Subsequently, according to the High Court, the extraordinary jurisdiction of Article 226 of the Constitution was not available to the petitioner.

In the Supreme Court, the petitioner-appellant relied on *Zee Telefilms* and contended that even if the respondent school did not qualify as State under Article 12 of the Constitution, the writ petition is valid as the Managing Committee of the school is running other schools all over India and hence is performing public function.[29] The Court upheld this contention by stating that the respondents perform public functions by running and managing schools throughout the country.[30] Moreover, the fact that they are private unaided educational institutions will not hinder the jurisdiction of High Court under Article 226 of the Constitution to hear the matter.[31] It noted a key observation that an increase in private entities affecting the rights of people in recent

[25]Zee Telefilms v. Union of India, (2005) 4 SCC 649 (India); Binny Ltd. & Anr. v. V. Sadasivan & Ors., AIR 2005 SC 3202 (India).

[26]Ramesh Ahluwalia v. State of Punjab, (2012) 12 SCC 331 (India).

[27]*Id.*, ¶8.

[28]*Id.*

[29]*Id.*, ¶13.

[30]*Id.*

[31]*Id.*, ¶11.

times demands timely judicial intervention. Technicalities in law must not come in the way of granting Article 226 remedies.[32]

In the case of *Dr. Janet Jeyapaul v. SRM University*[33] ('Dr. Janet Jeyapaul'), the maintainability of writ petition filed against the respondent University was in question. The High Court of Madras denied the petitioner remedy under Article 226 of the Constitution.[34] The Supreme Court overturned the verdict of the High Court and held that SRM University is a private body exercising public functions and falls under the writ jurisdiction of Article 226 of the Constitution.[35] It gave the following reasons: the University imparted higher education to large number of students; it discharges public functions via imparting education; it is recognised as a 'Deemed University' by the Central Government; and is subject to UGC Act and Rules which delineates how the public function of imparting education is to be carried out.[36] In fact, it went on to hold that the status of deemed University granted to SRM University brings it within the ambit of Article 12 of the Constitution and thus, is subjected to Article 226 jurisdiction.[37]

The last prong of reasoning given by Justice A. M. Sapre in *Dr. Janet Jeyapaul* suffers from incorrect application of settled law on this point. The Court used the public functions doctrine to bring SRM University within the meaning of 'State' under Article 12 of the Constitution.[38] However, the correct test for authorities under Article 12 is functional, financial and administrative control as given by the seven-judge bench decision in *Pradeep Kumar Biswas*, and not the public functions doctrine. In fact, *Pradeep Kumar Biswas* had reaffirmed the tests for Article 12 formulated by *Ajay Hasia v. Khalid Mujib Sehravard*,[39] which are, namely, whether the State owns a substantial or whole of share capital of the entity; existence of state-conferred monopoly status; functions discharged by the entity being governmental or related in nature; transfer of a governmental department(s) to the entity; extent of financial assistance by the State;

[32] *Id.*

[33] Dr. Janet Jeyapaul v. SRM University, AIR 2016 SC 73 (India).

[34] *Id.*, ¶2.

[35] *Id.*, ¶22.

[36] *Id.*

[37] *Id.*

[38] *Id.*

[39] Ajay Hasia v. Khalid Mujib Sehravard, 1981 AIR SC 487 (India).

extent of State control; and imposition of statutory duties.[40] Cumulative satisfaction of these tests must indicate that the entity is financially, functionally and administratively under deep and pervasive control of the State in order to hold it as 'State' for the purposes of Article 12 of the Constitution.[41]

Without testing SRM University against this standard, the Court in *Dr. Janet Jeyapaul* erred in holding it to fall within the definition of 'State' under Article 12. Moreover as far as the present issue before the Court was concerned, it could have simply held SRM University to be a private body exercising public functions and brought it under Article 226 jurisdiction by following the dicta given in *Zee Telefilms*. The position in *Ramesh Ahluwalia* that educational institutions discharge public functions would have also supported such a conclusion. Instead, the Court in its zealous attempt to subject SRM University to writ jurisdiction under Article 226 conflated it to come under the definition of 'State' under Article 12, in the process ignoring the direct and perhaps more legally sound route available before it.

In another case, *Ivy C. da. Conceicao v. State Of Goa,*[42] decided in 2017, the issue before the Supreme Court was whether courts can exercise judicial review over the manner of appointment of the principal in a minority institution and if yes, on what grounds. The Court made it clear that autonomy given to minority institution under Article 30[43] does not preclude judicial review of its actions. The autonomy of a minority institution does not take away the obligation to act fairly, non-discriminatorily and reasonably. Hence, the Court concluded that "exercise of power by a minority institution discharging public functions is open to judicial review"[44] and "violation of right of an individual eligible candidate by the minority institution by not adopting fair procedure, is liable to be tested in exercise of power of judicial review under Article 226".[45]

In this case, the Court did not expressly rely on the public functions test as given by *Zee Telefilms*. However, on a closer reading, the application of the same standard is implicit in the judgment. The Court recorded the nature of the minority institutions as entities which discharge public functions and hence, the doors of Article 226 are open to challenge actions of such institutions

[40]*Id.*

[41]Pradeep Kumar Biswas v. Indian Institute of Chemical Biology, (2002) 5 SCC 111, ¶90 (India).

[42]Ivy C. Da. Conceicao v. State of Goa, AIR 2017 SC 1834 (India).

[43]INDIA CONST. art. 30(1): "All minorities, whether based on religion or language, shall have the right to establish and administer educational institutions of their choice."

[44]Mrs. Ivy C. Da. Conceicao v. State Of Goa, AIR 2017 SC 1834, ¶11 (India).

[45]*Id.*, ¶15.

on the grounds of violating the rights of individuals. A direct application of public functions test would result in a similar outcome.

From the discussion so far, it can be inferred that as far as schools, universities or other educational institutes are concerned, the Supreme Court has been liberal in recognizing the public function of providing education as the element that satisfies the private bodies exercising public functions test, thus, bringing them within the folds of Article 226. The primary duty of providing education in India falls upon the welfare State and by definition is a public function.[46] As a result, we see Courts often holding private educational institutes as performing public functions and the principles laid down in *Zee Telefilms* being satisfyingly applied, directly or indirectly. However, with regard to other private entities, the line taken by the Court has not been so linear and this is depicted by the ensuing discussion.

The Supreme Court in *K. K. Saksena v. International Commission on Irrigation and Drainage*[47] ('K. K. Saksena') was tasked with determining whether writ petitions against the respondents, i.e. International Commission on Irrigation and Drainage ('ICID') are maintainable. Referring to *Zee Telefilms*, a plea was made before the Court that authority under Article 226 of the Constitution is of wider connotation and would include authorities discharging public functions or such duties of great magnitude.[48] However, the Court rejected this contention and upheld the High Court decision to dismiss the writ petition. It noted that ICID was not funded by the government, did not discharge any obligation under any statute and did not carry out functions which are similar or related to State's functions in its sovereign capacity.[49]

The Court further observed that "[e]ven if a body performing public duty is amenable to writ jurisdiction, all its decisions are not subject to judicial review… [o]nly those decisions which have public element therein can be judicially reviewed under writ jurisdiction."[50] It added that writs can be issued for enforcing only those rights which are found in the public law domain and strictly private rights of individuals will not be amenable to Article 226 jurisdiction.[51] These observations are particularly relevant for our later discussion in the next part of the paper relating to understanding the scope of public functions.

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[46]For instance, *see* INDIA CONST. art. 21A.

[47] K.K. Saksena v. International Commission on Irrigation and Drainage, (2015) 2 SCC (LS) 119 (India).

[48]*Id*., ¶30.

[49]*Id*., ¶41, 42.

[50]*Id*., 43.

[51]*Id*., 38.

The decision of the Supreme Court in *Jatya Pal Singh v. Union of India*[52] ('Jatya Pal Singh') is relevant for understanding instances where courts have applied the public functions test to hold entities unamenable to Article 226 jurisdiction. One of the primary questions before the Court was whether Videsh Sanchar Nigam Limited ('VSNL') can be an authority under Article 226. Pursuant to the filing of the case, the majority stakes in VSNL were bought by Tata companies and it was rechristened as Tata Communications Limited ('TCL').[53] It was contended that if the Government divests its functions in favour of a private body or transfers a public body to private company, the functions performed by the Government earlier to such transfer cannot become 'private functions'.[54] The much contentious dichotomy between sovereign and non-sovereign functions was also contested as non-existent.[55]

The Court answered the question of whether TCL is performing public functions in the negative. The Court relied on *R.D. Shetty v. The International Airport Authority of India*[56] ('R.D. Shetty') to hold that TCL cannot be said to perform a public function merely because the function was earlier performed by the Government unless it shows that the functions are of public importance. However, this reliance is misplaced as *R.D. Shetty's* stricter standard which requires functions exercised by the entity in question to be of public importance applies only to authorities under Article 12 because that was the context in which *R.D. Shetty* was decided.[57] The standard under Article 226 is a lower one, as given by *Zee Telefilms*.

The Court in *Jatya Pal Singh* further reasoned that "the appellant would have to prove that the body seeks to achieve some collective benefit for the public or a section of public and accepted by the public as having authority to do so"[58] for holding the body as one discharging public functions. It is later argued in this paper that this judgment fails to consider the impact of mixed economies as well as the role of private enterprises while deciding the scope of authority for the purposes of Article 226.

[52]Jatya Pal Singh v. Union of India, (2013) 6 SCC 452 (India).

[53]*Id*., 12.

[54]*Id*., ¶39.

[55]*Id*., ¶27, 52.

[56]R.D. Shetty v. The International Airport Authority of India, 1979 AIR 1628 (India).

[57]*Id*.

[58]Jatya Pal Singh v. Union of India, (2013) 6 SCC 452, ¶52 (India).

Finally, we return once again to the story of BCCI. The verdict of the Supreme Court in *Board of Control for Cricket in India v. Cricket Association of Bihar*[59] ('Cricket Association of Bihar') culminates the discussion surrounding private bodies carrying out public duties or functions. The then Chief Justice of India, Justice T.S. Thakur delivering the judgment noted that BCCI exercised full control over the game of cricket in India including careers of cricketers; the activities of BCCI incurred significant financial expenses and the State had not taken any step to dilute the monopoly enjoyed by BCCI but in fact provided necessary assistance to the Board.[60] Based on these factors, Hon'ble Justice concluded that this amounts to BCCI discharging public functions and BCCI is therefore, "answerable on the standards generally applicable to judicial review of State action".[61] The story scripted by *Zee Telefilms* metamorphosed into *Cricket Association of Bihar* wherein the Court finally brought the powerful cricketing body under judicial purview. The contribution of this judgement to our discussion on public functions test is outlined in the next part.

CRITIQUING THE PUBLIC FUNCTIONS TEST AND ITS INTERPRETATION BY COURTS

The *first* point of critique relates to enforcement of Fundamental Rights against non-state entities via the public functions test under Article 226 of the Constitution. In *Zee Telefilms* it was held that although Article 32 remedies are not available against entities which do not classify as State under Article 12 of the Constitution, Article 226 remedies can be claimed against private bodies exercising public functions. Article 226 of the Constitution empowers High Courts to issue writs for enforcement of fundamental rights. This implies that writs for enforcement of fundamental rights can also be issued against private entities. This, in terms of constitutional law, is called direct horizontality – enforcing fundamental rights against non-State entities.[62]

However, this interpretation creates a dichotomy. It would mean that the Supreme Court can issue writs for enforcing fundamental rights against the State alone (under Article 32 of the Constitution) while the High Courts can carry out direct horizontal application of fundamental rights against private bodies also. Hence, it indicates that horizontal application differs on the basis of which Court the petitioner is before. Further, it is against our Constitutional provisions

[59]Board of Control for Cricket in India v. Cricket Association of Bihar, AIR 2015 SC 3194 (India).

[60]*Id*., ¶30.

[61]*Id*.

[62]*See* Gautam Bhatia, *Horizontality under the Indian Constitution: A Schema*, INDIAN CONSTITUTIONAL LAW AND PHILOSOPHY BLOG (2015), https://indconlawphil.wordpress.com/2015/05/24/horizontality-under-the-indian-constitution-a-schema/.

which do not provide for such direct horizontal application, except for certain specific Fundamental Rights.[63] Such a reading will lead to illogical outcomes.

An alternative way to interpret the *Zee Telefilms* ratio is by arguing that judgment holds private bodies exercising public functions accountable to general public law standards of fairness, equality, non-arbitrariness etc. instead of holding them directly accountable to fundamental rights obligations.[64] Even the Court seems to have taken a similar position initially in the *Unnikrishnan* case, where it held that the school has a 'duty to act fairly' only to later add that the school is also subject to Article 14. Even if fundamental rights cannot be directly enforced against private bodies, courts can hold private bodies accountable to general standards of public law, the contents of which may at times overlap with fundamental rights.[65] For instance, *Unnikrishnan* can be read to mean that duty to act fairly (which is concomitantly found in Article 14) can be enforced against a private body as far as its performance of a public duty is concerned.[66] It is possible that these standards might overlap in content with fundamental rights but this sort of interpretation does not give rise to the dichotomy explained previously.[67] A limited application in this manner should mean that only those rights should be enforceable which are connected to the functions of the entities and the duties arising out of such functions.

The *second* point of critique against the public functions test is with respect to the interpretation of 'public functions' itself. A combined reading of the Supreme Court judgments leaves us with very little clarity as to what functions of a private body can be termed as public functions. As depicted by the cases discussed so far, the Court seems to follow quite an *ad-hoc* system of deciding the question without laying down a consistent public function standard. Additionally, as mentioned earlier, the Court has found it easy when the function of the private entity being contested against is *de facto* public, such as education. However, in other cases, such as *K.K. Saksena* and *Jatya Pal Singh*, the Court ultimately relied on the analogy for divestment of erstwhile

[63]The Part III containing Fundamental Rights under the Indian Constitution are available only against the State with specific exceptions like Articles 15(2), 17 and 23 which are available against individuals as well.

[64]Gautam Bhatia, *What is the State – V: Zee Telefilms, the Death of the Functional Approach, and an Alternative*, INDIAN CONSTITUTIONAL LAW AND PHILOSOPHY BLOG (2014), https://indconlawphil.wordpress.com/2014/08/19/what-is-the-state-v-zee-telefilms-the-death-of-the-functional-approach-and-an-alternative/.

[65]Gautam Bhatia, *The BCCI Controversy, Public Functions and Cultural Goods, and the Return (?) of the Functional Test*, INDIAN CONSTITUTIONAL LAW AND PHILOSOPHY BLOG (2016), https://indconlawphil.wordpress.com/2016/08/25/the-bcci-controversy-public-functions-and-cultural-goods-and-the-return-of-the-functional-test/,

[66]*Id*.

[67]*Id*.

State sovereign functions and similarity to State functions. This is a rather vague determinant because, *one*, the State is increasingly divesting all kinds of functions thanks to privatization and *two*, there could be new public functions which may not have been performed by State but are of a considerable degree of public importance in present times.

The Courts have also opted to use Article 12 of the Constitution time and again to enforce rights against entities under Article 226. Although this is constitutionally permitted, what is suspected is the manner in which the Court has held some of the entities as State under Article 12 of the Constitution while in effect they satisfied only elements of authority exercising public functions under Article 226 of the Constitution. To illustrate this further, in the context of stock exchanges, the Supreme Court simply affirmed the position taken by the Delhi High Court that the Delhi Stock Exchange is State under Article 12 of the Constitution and hence, is amenable to writ jurisdiction.[68] This is despite the fact that a series of rulings by different High Courts had held stock exchanges to be 'authority' for the purposes of Article 226 of the Constitution owing to the important public functions discharged by them, instead of taking the Article 12 route.[69] The contention here is that the Supreme Court did not adequately delve into the question or analyse conflicting case laws before affirming the position taken by the Delhi High Court. Also as pointed out earlier, the Court did something similar in *Dr. Janet Jeypaul* in questionably holding SRM University to be State under Article 12 of the Constitution while it could have simply subjected it to Article 226 of the Constitution by relying on public functions test. This action of the Court to jump the gun and hold entities as State under Article 12 of the Constitution instead of taking the public functions route under Article 226 can perhaps be explained by the lack of clarity as to what constitutes the latter thereby making the former an attractive route.

Moreover, in the case of *Cricket Association of Bihar,* referred to earlier, the Court listed three reasons for holding BCCI accountable under Article 226 – control over cricket, the large scale of finances and State's concurrence in allowing BCCI carry out its functions as a virtual monopoly. This analysis of the Court is incomplete as far as understanding of public functions is concerned as it pertains only to facts at hand and not a determinative public functions standard. Despite the three pronged reasoning, few questions still remain unanswered. For instance, if there is any other unregulated sphere where State has not interfered, would it amount to tacit concurrence on part of State? How it is that BCCI's financial transactions alone contain a public character? And

[68]Delhi Stock Exchange v. K. C. Sharma, 98 (2002) DLT 234 (India); K.C. Sharma v. Delhi Stock Exchange AIR 2005 SC 2884 (India).

[69]A. Vaidyanathan v. Union of India, AIR 1999 Mad 11 (India); Sejal Rikeen Dalal v. Stock Exchange, Bombay, AIR 1999 Bom 30 (India); Rajendra Rahtore v. M.P. Stock Exchange, 2000 (3) MPLJ 207 (India); Rakesh Gupta v. Hyderabad Stock Exchange Ltd., AIR 1996 AP 413 (India).

moreover, what is the degree of control over an activity which is sufficient to qualify as performing a public function vis-à-vis the activity? The Court missed out on the opportunity to unambiguously clarify the doctrinal standards for application of public functions against private bodies such as BCCI.

PUBLIC FUNCTIONS MIX-UP: SEARCHING FOR ANSWERS

In the previous part, the application and use of public functions test by the Supreme Court was critiqued on two grounds. Primarily, the content of the standards or the nature of rights that can be enforced against private entities exercising public functions is unclear with the only guiding factor being the domain in which the right exists read with the particular function of the entity. Secondly, what constitutes public functions itself is doctrinally indeterminate post analyzing major case laws, and the Court seems to rely on an ad-hoc case-by-case approach for deciding upon questions of public function. The reasoning given in *Cricket Association of Bihar* also, as shown later in this part, is inadequate as far as laying down standards in concerned.

As discussed briefly in the beginning of this paper, the question regarding what constitutes public functions is highly relevant when viewed from the lens of latest challenge against WhatsApp currently pending before a five-judge constitution bench.[70] The privacy policy of WhatsApp which enables user data sharing with its parent company Facebook is under challenge on the grounds of violation of users' right to privacy and other constitutional guarantees. However, a key ancillary question in the case that is needed to be answered is whether the High Court can exercise jurisdiction under Article 226 of the Constitution against WhatsApp.

The High Court had decided the issue in negative and it is under consideration in the Supreme Court. However, the manner in which the High Court decided this question is devoid of any substantial reasoning. It merely noted that any statute does not back the agreement between WhatsApp and its users and thus, WhatsApp is not amenable to Article 226 jurisdiction.[71] Despite acknowledging that it does not have jurisdiction to pronounce upon the writ petition, the High Court went ahead to issue specific directions to WhatsApp,[72] which were eventually complied with by the latter.[73] The moot question is how the High Court could even issue directions when as per its own decision it lacks jurisdiction. Thus, elsewhere this decision of the

[70]Karmanya Singh Sareen v. Union of India, SLP(C) No. 0804 of 2017 (India) (pending).

[71]Karmanya Singh Sareen v. Union of India and Ors., 233 (2016) DLT 436, ¶18 (India).

[72]*Id*., ¶20.

[73]Sourav Dan, *Privacy Matters!! The Case of WhatsApp's New Privacy Policy,* THE SCC ONLINE BLOG (2016), http://blog.scconline.com/post/2016/12/02/privacy-matters-the-case-of-whatsapps-new-privacy-policy/.

High Court has been described as self-contradictory since the Court had lost powers to make orders after conceding jurisdiction.[74]

Here, undoubtedly the nature of the right claimed, i.e. the right to privacy falls within the domain of public law rights.[75] As far as the core question of public functions is concerned and as per the decisions in *Cricket Association of Bengal* and its predecessor *Zee Telefilms*, it is to be determined whether the nature of communication services delivered by WhatsApp is a public good and whether WhatsApp exercises significant control over the good for it to be regarded as performing a public function. There is no doubt that in today's world, communication services have public utility and are indispensable public goods. WhatsApp has argued that it is not the sole provider of this service and users are free to not enter into contract with WhatsApp. The question of whether WhatsApp exercises control over this public good of instant communication service is debatable. Further, the proceedings before the constitution bench has come to a halt owing to the Government's promise of bringing in a data protection law which covers all aspects of data collection, retention and sharing.[76] Thus, the jury is out on whether we will witness a judicial pronouncement on the question of writ maintainability against WhatsApp anytime soon.

Regardless, it is felt that this sort of determination of what constitutes public goods on the basis of control is highly contextual. It is argued elsewhere that if tomorrow the government decides to outsource entire water supply to private companies,[77] can an argument be made that citizens are free to change water suppliers and hence no company exercises control over the public good of water? We cannot allow that because it is imperative that the private body supplying water adheres to standards of non-discrimination and fair access. Similar examples could be the State deciding to leave the functions of policing or prison maintenance to private parties.[78]

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[74] *Id*.; Prashant Reddy, *Whatsapp with Privacy and How Not to Deal with Frivolous PILs,* SPICYIP BLOG (2016), https://spicyip.com/2016/10/whatsapp-with-privacy-and-how-not-to-deal-with-frivolous-pils.html.

[75] *See* Justice K. S. Puttuswamy (retd.) v. Union of India, AIR 2017 SC 4161(India).

[76] LIVE LAW, *SC's Privacy Judgment Casts Its Shadow Over WhatsApp's Data Sharing Policy Case*, (Sept. 6, 2017, 9:01 p.m.), http://www.livelaw.in/scs-privacy-judgment-casts-shadow-whatsapps-data-sharing-policy-case/.

[77] *See* Gautam Bhatia, *What is the State – V: Zee Telefilms, the Death of the Functional Approach, and an Alternative*, INDIAN CONSTITUTIONAL LAW AND PHILOSOPHY BLOG (2014), https://indconlawphil.wordpress.com/2014/08/19/what-is-the-state-v-zee-telefilms-the-death-of-the-functional-approach-and-an-alternative/.

[78] *Id*.

A likely solution can perhaps be found in the judgment of *Jatya Pal Singh* discussed earlier. Here the Court had dealt with an argument made by the petitioner who relied on the proposed meaning of 'public functions' given in the United Kingdom's Human Rights Act, 1998 (Meaning of Public Function) Bill, 2008.[79] This Bill, although has not seen the light of the day, is helpful in understanding what functions are public in nature. Section 1 of the Bill gives a list of factors which can be taken into account while determining whether an authority carries out public functions. These are, chiefly, the role and responsibility assumed by the State in discharging that particular function; nature and extent of public interest as well as statutory duty or power involved in the exercise of the function; the extent of State supervision and regulation over the performance of function; and the *extent of risk improper performance of the function in question will have upon certain rights of individuals* enumerated in the Convention on Human Rights.[80]

The striking importance of this indicative yet comprehensive list is that it inculcates the risk that 'improper performance' of the function might cause to an individual's right protected under the statute and convention. This is a strong basis of determining public nature of functions contemplated by private bodies. If we are to go by this interpretation of public functions, it is necessary for the judiciary to shift tracks. This in effect would also imply a direct horizontality against private bodies as any violation of specified citizens' rights, under Constitution or otherwise, by private bodies would be open to challenge before the High Courts of India.

Therefore, a shift from defining public functions by looking at the nature of functions of the organization to defining it by taking into account the manner in which it can affect constitutional, statutory or public rights of individuals is desirable. For example, WhatsApp can be subject to writ jurisdiction under Article 226 on the basis of the impact it bears on the right to privacy of its users, regardless of whether it is performing a public function as per the traditional tests or not. This also gives scope for severability between actions of entities affecting public rights of individuals and private rights within the entity itself.

Evolving principles of writ jurisdiction which strongly accounts for rights violation by private bodies is needful in the modern mixed economy where the role of State is shrinking to a mere governance agent and the State is shedding the performance of important functions which used to fall within the sovereign domain. Courts continuing to hold on to a descriptive baseline of what constitutes public functions will result in the domain of fundamental rights becoming smaller and smaller in face of a gradual movement towards privatization of government

[79]Jatya Pal Singh v. Union of India, (2013) 6 SCC 452, ¶48 (India).

[80]Human Rights Act, 1998 (Meaning of Public Function) Bill, 2008, §1 (UK.).

functions wherein rights of individuals are held hostage by private bodies. Hence, the suggested interpretation of public functions will enable the Courts to expand their jurisdiction and consequently expand the protection of rights. This will in turn strengthen rights enforcement of individuals that are currently threatened in a landscape characterized by impunity of private bodies having significant bearing on the rights.

CONCLUSION

Courts have grappled with interpreting private bodies exercising public functions test for determining Article 226 jurisdiction. *Zee Telefilms* breathed life into the test and reaffirmed its stature in Indian constitutional jurisprudence. The test has gained relevance and recognition as evidenced by later decisions of the Supreme Court. To answer the initial question on the effectiveness of this test, the interpretation of 'authority' under Article 226 has partly been successful in securing citizens' rights against private entities. The test is not devoid of shortcomings. There exists confusion in the nature of obligations that befall upon a private body held to be exercising public functions. This can be overcome by not enforcing rights given under Constitution directly against private bodies, rather by locating the substance of these rights under general public law standards and enforcing the same. The second problem relates to the meaning of the phrase 'public functions' itself. It is argued that a rights-based approach for determining public functions is necessary in today's times as State functions increasingly get transferred to private entities in modern economies. Such an approach will prevent loss and slow degradation of individual rights by according them with constitutional writ remedies under Article 226 of the Constitution. It is felt that this interpretation given to public functions will complement and solidify the Court's liberal approach of granting Article 226 remedies. It is also the most pragmatic approach which is defensible in terms of protecting individual rights.