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## Enforceability of the Fundamental Rights against Private Entities under the Indian Constitution: Through the Lens of Right to Privacy and Protection of Informational Privacy

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*The enforceability of Fundamental Rights against Private Players remains a contentious debate in the Indian Jurisprudence. This article posits that Indian Courts should persist in and institutionalise the practice of enforcing Fundamental Rights against private players, emphasising this urgency through the lens of Article 21's<sup>1</sup> Right to Privacy. This paper entails to conduct an analysis of major judgements that note this judicial shift accentuating its importance in the contemporary digital age where major functions previously performed by the government are now privatised. Further drawing comparative insights from the South African Constitution, which was passed amidst global privatisation and has effectively incorporated provisions to hold private entities accountable, safeguarding their citizens. Thus far, Indian Courts have demonstrated a proactive approach to protecting individual rights. However, it is now imperative to standardize this practice to ensure violators of Fundamental Rights are consistently held accountable. This will help not only enhance the protection of individual rights but also re-enforce the judiciary's role in adapting to changing socio-economic conditions, additionally, re-instilling people's faith in the system amidst evolving landscapes.*

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<sup>1</sup> Constitution of India 1950, art 21

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## INTRODUCTION

It has been a matter of great debate and a substantial question of uncertainty whether or not the Fundamental Rights [‘FR’] enshrined in Part III of the Indian Constitution can be enforced against a breach by private parties. As provided under Article 12<sup>2</sup>, fundamental rights can only be enforced against the ‘State’, so it becomes a focal point of interest to understand how the answer to what constitutes ‘State’ has broadened through various precedents. Further, the discussion on expanding the scope of FRs to be adhered to by private entities as well becomes vitally important.’ especially in the context of ‘Privacy’, recognised as a fundamental right under the ambit of Article 21<sup>3</sup> of the Constitution and is a growing concern in today’s day and age.<sup>4</sup> This article delves into how fundamental rights should be enforced against private actors, who bear a certain degree of responsibility to the general public and examines possible ways to determine it through the lens of the Right to Privacy to examine the same.

### **Article 12: Rationale and Implementation for Private Entities**

Articles 12-35<sup>5</sup> lay down the Fundamentals Rights, which are intended to safeguard individuals from arbitrary state action. Under Article 12’s<sup>6</sup> definition, the State consists of the Government, Parliament, the Government and Legislature of each of the States, and local and other authorities within the territory of India. Even though the ‘State’ prime facie consists of only these bodies, judicial interpretation has played a pivotal role in extending the applicability of fundamental rights.

In the case of *Zee Telefilms Ltd. v Union of India*,<sup>7</sup> the application of fundamental rights against private parties was determined by whether the private body engaged in the performance of any ‘public functions.’ The case held that ‘violator of a constitutional right could not go scot-free merely because it is not a State’. Social media, shopping, banking

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<sup>2</sup> Constitution of India 1950, art 12

<sup>3</sup> Constitution of India 1950, art 21

<sup>4</sup> *Justice KS Puttaswamy (Retd) & Anr v Union of India & Ors* (2017) 10 SCC 1

<sup>5</sup> Constitution of India 1950, arts 12-35

<sup>6</sup> Constitution of India 1950, art 12

<sup>7</sup> *Zee Telefilms Ltd. v Union of India* (2005) 4 SCC 649

platforms, search engines, and health care providers among many others handle and regulate substantial amounts of information about individuals daily, many of which are sensitive and confidential. In such cases it becomes essential to safeguard privacy, Consequently, it can be said that these platforms are carrying out functions that have a public dimension.

The original thinking of the courts that FRs are only enforceable against the state is changing over time, The transformation was from ‘State’ to ‘Authorities’ to ‘Instrumentalities of State’ to ‘Agency of the Government’ to impregnation with Governmental character to enjoyment of monopoly status conferred by State to deep and pervasive control to the nature of the duties/functions performed.<sup>8</sup> This progression ultimately led to an indirect inclusion of private entities within its ambit provided they meet this criteria.

The case of *Justice KS Puttaswamy (Retd) & Anr v Union Of India & ors*<sup>9</sup> highlighted the significance of ‘informational privacy’ amidst the era of easy access, transfer, storage and mining of data. It emphasised that such dangers can not only originate solely from the state but also from non-state actors. Today, private players enjoy the power of being the providers of various services. Thus, infringement of the right to privacy is mostly by private players. The court said, ‘If fundamental rights cannot be enforced against non-state actors, the right will go for a toss.’<sup>10</sup> Additionally, the State also has a positive obligation to protect the rights of citizens under Article 21<sup>11</sup>, whether the violation is by its own functionaries or private person. It is manifest that the courts acknowledge the increasing role of private players in the lives of people in today's day and age, citing an example of the case of *People's Union for Civil Liberties (PUCL) v UOI*<sup>12</sup> a case about telephone tapping, where the court explained how this was during the time state monopoly still prevailed, preceding the emergence of private entities as dominant intermediaries and service providers, a transformation that has since become a reality, further emphasizing why private entities should not be excluded from the ambit of Article 12<sup>13</sup>.

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<sup>8</sup> *Kaushal Kishor v State of U P* (2023) 4 SCC 1

<sup>9</sup> *Justice KS Puttaswamy (Retd) & Anr v Union Of India & Ors* (2017) 10 SCC 1

<sup>10</sup> *Kaushal Kishor v State of U P* (2023) 4 SCC 1

<sup>11</sup> Constitution of India 1950, art 21

<sup>12</sup> *People's Union for Civil Liberties (PUCL) v Union of India* (1997) 1 SCC 301

<sup>13</sup> Constitution of India 1950, art 12

## **EXPANDING THE SCOPE OF FUNDAMENTAL RIGHTS: HORIZONTAL APPROACH**

The courts in many instances have applied the FR to privacy horizontally against private actors. For instance, in the case of *Jeeja Ghosh v Union of India*,<sup>14</sup> the court granted compensation to the petitioner against the private airlines reasoning that despite being a private player they ought not to violate the FR's. In the case of *M.C. Mehta v Kamal Nath*,<sup>15</sup> the Supreme Court awarded damages against non-state actors for violation of Article 21.<sup>16</sup> In the case of *Janet Jeyapaul v SRM University*,<sup>17</sup> the private university was found to have violated FR despite being a private university, because discharging 'public functions', by imparting educational services.

Privacy in itself encompasses a spectrum extending facets such as bodily integrity, personal autonomy, informational self-determination, protection from state surveillance, dignity, confidentiality, compelled speech and freedom to dissent or move or think.<sup>18</sup> Therefore, the court's application unequivocally demonstrates that excluding private entities from its purview would jeopardize the privacy of countless citizens who trust these platforms, leaving no resource for the victims while allowing breaching entities to act with impunity.

The provisions of the constitution, especially FR have no determinate meaning and are imbued with content through judicial interpretation over time. As Hidayatullah J. observed "More freedom exists in the interpretation of the Constitution than in the interpretation of ordinary laws. ... in the domain of constitutional law, there is, again and again, the novelty of situation and approach."<sup>19</sup> Consequently, the scope of FR is dynamic, and constantly adapts to reflect the change in the current era.

During the analysis of privacy in the *Puttaswamy* case<sup>20</sup>, it was put forward that, 'privacy, in its simplest sense, allows each human being to be left alone in a core which is inviolable...' while also acknowledging the 'overarching presence of State and non-state entities in regulating

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<sup>14</sup> *Jeeja Ghosh v Union of India* (2016) 7 SCC 761

<sup>15</sup> *M.C. Mehta v Kamal Nath* (1997) 1 SCC 388

<sup>16</sup> Constitution of India 1950, art 21

<sup>17</sup> *Janet Jeyapaul v SRM University* (2015) 16 SCC 530

<sup>18</sup> *Justice KS Puttaswamy (Retd) & Anr v Union Of India & Ors* (2017) 10 SCC, para 235

<sup>19</sup> *Ashok Tanwar v State of H.P.* (2005) 2 SCC 104, para 124

<sup>20</sup> *Justice KS Puttaswamy (Retd) & Anr v Union Of India & Ors* (2017) 10 SCC 1, paras 107-108

aspects of social existence which bear upon the freedom of the individual.’ It held that ‘Privacy includes at its core the preservation of personal intimacies, the sanctity of family life, marriage, procreation, the home and sexual orientation and also connotes the right to be left alone, it safeguards individual autonomy and recognises the ability to control vital aspects of his/her life.’<sup>21</sup> The case exemplifies, how the likes of Uber, Facebook, Airbnb and other private entities have extensive data about individuals, including location, social connections, shopping habits and travel plans. Our society is increasingly relying more on such digital services and leaving behind digital footprints. Anyone who holds the key to such information would be in an extremely powerful position. Hence, individuals have to be protected even against private entities.<sup>22</sup>

To illustrate the above-mentioned, social media is widely used by the citizens of India. Most of the platforms incorporate within themselves features such as the ‘current location’ of the user (location-sensitivity) or the time gap between sending and receiving messages (time-sensitivity). Consequently, information about individuals is out there, regardless of its accuracy, and may pose serious harm or threaten their personal autonomy and dignity. In this era of a rising digital ecosystem, it has become a necessity to develop ways to address issues such as data protection, digital privacy, and cybersecurity. This signifies the importance of its application against private entities in preserving the privacy of individuals, especially in today’s digital landscape when it is private entities that possess extensive knowledge of our activities and are entrusted with its regulation. Thus, the body/entity/ person must be demonstrated to bear a duty or obligation, thereby involving a ‘public law element.’ With the advent of privatisation, private entities have taken over of majority critical functions of daily life such as health care, food, and medicines therefore, concern arises because these private platforms retain and manage the private data of their users, who repose trust in the platform that confidentiality shall be upheld and that their data is in safe hands.

## **INSTANCES WHERE THE COURTS HAVE APPLIED THE RIGHT TO PRIVACY AGAINST PRIVATE ENTITIES**

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<sup>21</sup> *Justice KS Puttaswamy (Retd) & Anr v Union Of India & Ors* (2017) 10 SCC 1, para 109

<sup>22</sup> *Ibid*, paras 236, 589

In the case of *Vasunathan v Registrar General*<sup>23</sup>, the petitioner's daughter wanted her name to be removed from search in the public domain because it was affecting her relationship with her husband and the reputation that she has in society. This was held to be in line with the rule of the Right to be Forgotten [‘RTBF’], highlighting the state’s affirmative duty to apply it to cases involving women, and highly sensitive matters affecting their modesty and reputation. Similarly, in the case of *Zulfiqar Ahman Khan v Quintillion Business Media (P) Ltd*,<sup>24</sup> the petitioner sought that, articles critical of him published on Quint (a private limited co.) be taken down, citing concerns that they would tarnish his reputation permanently. The right to be Forgotten was acknowledged as an essential element of individuality. In the case of *X v YouTube*,<sup>25</sup> the plaintiff was entitled ‘to be left alone’ and ‘to be forgotten’. She was entitled to protection from intrusion by strangers into her privacy

‘The court has to draw a balance between the right to access information, in general on the one hand and the petitioner’s well-being, mental health, career prospects and prospects in life and family on the other hand.’<sup>26</sup> There has been a surge in instances where private information, pictures and videos of individuals have been leaked, causing severe stress and mental agony to the victims, therefore it is not only essential to make such offences punishable but also to hold platforms accountable where such leaks occur and spread. This accountability would compel these platforms to feel more responsible and implement stricter regulations of their use. Therefore, it is indisputably evident that the courts have not hesitated to apply fundamental rights, especially the Right to Privacy against private players, and even have gone a step further in providing the Right to be Forgotten to the victims in many cases and observed above.

Turning to the Constitution of South Africa Chapter 2 which is the Bill of Rights, Section 14<sup>27</sup> of the same provides for the Right to Privacy, Section 8(2)<sup>28</sup> of the same Chapter provides that the Bill of Rights shall bind natural or juristic persons, making private players answerable for any such breaches. This right in today’s age of privatization where the majority of roles that were once performed by the Government and its agencies are now in the hands of private parties, it becomes crucial to protect individuals from unwarranted intrusions in their personal lives and

<sup>23</sup> *Vasunathan v Registrar General* 2017 SCC OnLine Kar 424, paras 6-9

<sup>24</sup> *Zulfiqar Ahman Khan v Quintillion Business Media (P) Ltd*. 2019 SCC OnLine Del 8494, para 9-11

<sup>25</sup> *X v YouTube* 2021 CS(OS) 392, para 18-19

<sup>26</sup> *S Jorawar v Union of India* (2023) 2 HCC (Del) 520, para 7

<sup>27</sup> Constitution of the Republic of South Africa 1997, ch s 14

<sup>28</sup> Constitution of the Republic of South Africa 1997, ch 2 s 8(2)

to make them adhere to Constitutional standards, and India can draw inspiration from South African Constitution in this regard.

## CONCLUSION

Privacy concerns have proliferated more than ever today, a notable portion of it originating from private entities. One potential solution could be the enactment of a plethora of sector-specific laws or amendments tailored to regulate these platforms to ensure the protection of individual privacy in various industries. This can potentially be a very time-consuming process and thus, a more comprehensive and effective approach would be to incorporate private entities within the scope of Article 12<sup>29</sup>. This holds for the enforcement of other fundamental rights against private entities as well. The courts have also attempted to enforce constitutional provisions against private parties ‘indirectly’ by imposing an obligation on the state to perform duties that ‘prevent or prohibit a private act.’<sup>30</sup> This implies that private entities cannot evade the scope of FR merely because they are not explicitly mentioned within the Article. In instances where there is a lack of adequate private law remedy, the constitutional courts have granted relief in cases by ‘evolving law’ like in the case of *Vishaka v State of Rajasthan*,<sup>31</sup> the Supreme Court formulated a framework for safeguarding women against sexual harassment in the workplace drawing upon the guidelines from Convention on the Elimination of All Forms of Discrimination against Women [‘CEDAW’].<sup>32</sup>

The future poses heightened challenges with the emergence of newer technology such as Artificial Intelligence, and biometrics which facilitate easier breaches of privacy. While the Digital Personal Data Protection Act, 2023<sup>33</sup> does exist, perpetrators may circumvent penalties by contesting its constitutionality and causing delays. Therefore, citizens might not have any real effective recourse if their privacy has been breached by a private entity, which is why courts have to step in to fill this gap. Therefore, it is incumbent upon the courts to consistently enforce fundamental rights against private entities as they have been through judicial activism.

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<sup>29</sup> Constitution of India 1950, art 12

<sup>30</sup> Dhananjay Dhondhak, ‘Right to be Forgotten: Privacy v. Freedom’ *The Indian Express* (August 04, 2021) <<https://indianexpress.com/article/opinion/right-to-be-forgotten-privacy-vs-freedom-ashutosh-kaushik-7438554/>> accessed 16 February 2024

<sup>31</sup> *Vishaka v State of Rajasthan* (1997) 6 SCC 241, paras 12-13

<sup>32</sup> Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) 1981, art 11

<sup>33</sup> Digital Personal Data Protection Act 2023