INDIA'S SUPREME COURT UPHOLDS THE HORIZONTALITY OF THE FUNDAMENTAL RIGHT OF FREEDOM OF SPEECH – IMPLICATIONS ON DATA PRIVACY

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Last month, the Constitutional Bench of the Supreme Court (SC) delivered an important ruling in the matter of *Kaushal Kishor v. State of U.P.* (Writ Petition (Criminal) No. 113 of 2016). This judgment has delved into the longstanding debate on the horizontality of fundamental rights, and the SC held that Article 19 (Right to freedom of speech) and Article 21 (Right to life and personal liberty) of the Constitution of India are enforceable against persons other than the State or its instrumentalities.

In this article, we specifically explore the impact of the verdict on the enforceability of the right to data privacy against private individuals.

Overview

The judgment arises from a special leave petition and a writ petition that were tagged together and placed before the Constitutional Bench. Both dealt with the misuse of the right of freedom of speech and expression, as provided under Article 19(1)(a) of the Constitution, by public functionaries who made distasteful remarks against certain individuals who were the victims of a crime. The SC assessed whether a fundamental right under Article 19 or Article 21 can be claimed other than against the "State" or its instrumentalities and whether the State is duty-bound to affirmatively protect the rights of a citizen under Article 21, even when the threat against the citizen's liberty is by the acts/ omissions of another person or private agency. Both the foregoing issues were answered in the affirmative by the SC in a 4:1 majority ruling.

The majority ruling

The moot question before the SC was whether fundamental rights bear a "vertical" or a "horizontal" effect. A "vertical" effect denotes that they can only be enforced against the State and its other functionaries, and a "horizontal" effect makes them enforceable even against private individuals. The majority noted that some fundamental rights (such as, the right to equality, the right to equality of opportunities in matters of public employment, and the right to education) are textually directed against the State, whereas some (such as, the abolition of untouchability, the prohibition of human trafficking and forced labor, and the prohibition of employment of children in factories or mines) have no reference to the State.

The SC then did a historical analysis (see below) and held that, over time, the judiciary has become more open to the horizontal operation of fundamental rights, despite having some initial reservations in doing so.

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In *P.D. Shamdasani v. Central Bank of India Ltd.* (1952 SCR 391), the SC refused to operate Article 19 and Article 21 against private individuals due to their language and structure. This was reiterated in *Smt. Vidya Varma v. Dr. Shiv Narain Varma* (AIR 1956 SC 108).

However, in *Bodhisattwa Gautam v. Subhra Chakraborty (Ms.)* ((1996) 1 SC 490), the SC enforced Article 21 horizontally against a lecturer to order payment of compensation to a student. Further, in the epic environmental law case of *M.C. Mehta v. Kamal Nath* ((2000) 6 SCC 213), the SC awarded damages against non-State actors for the violation of Article 21.

In *Zee Telefilms Ltd. v. Union of India* ((2005) 4 SCC 649), it was held by the SC that the Board of Control for Cricket in India (the "**BCCI**") did not come under the definition of "State" as defined under Article 12. Therefore, a remedy under Article 32 (the right to move a writ to the SC to enforce fundamental rights against a violator qualifying as "State") was not available against the BCCI. However, it was observed that the aggrieved party could still seek remedy either before the ordinary courts, or by way of writ petition under Article 226 before the concerned High Court. It was noted that Article 226 protects people's rights not just against the "State" but also against "any person or authority," which discharges public functions, which the BCCI was held to do.

Furthermore, in *Justice K.S. Puttaswamy v. Union of India* ((2017) 10 SCC 1), which serves as a guidance tool to deal with such cases, the SC held that a right is either a common law right or a fundamental right. Common law rights operate horizontally and can be proceeded against in ordinary courts. Constitutional and fundamental rights operate vertically in that their violation must be by the "State" or by public officials bearing the powers of the State. Therefore, both rights may be similar in their nature and content but different in terms of the incidence of the duty to respect them and their redressal forum. In addition, it is possible for an interest to be both, a common law right and a fundamental right. Depending on the violator, it will either be claimable as a violation of fundamental right, or as an action at common law.

On this basis, the majority noted that the right to privacy under Article 21 is in the nature of a common law and a fundamental right, and it was held by the majority that a fundamental right under Articles 19 and 21 can be enforced against persons other than the State or its instrumentalities.

Dissenting opinion

As per the dissent, fundamental rights under Articles 19 and 21 are justiciable horizontally only if they have been statutorily recognised. While recognising that a writ of Habeas Corpus can be sought against a private person before a Constitutional court, the dissent clarified that a universal operation of fundamental rights against all persons, including a private body performing a private function, would negate all the jurisprudential efforts taken by past courts in expanding the scope of the term "State" under Article 12 to hold liable private entities under the control of the State. It also noted that, generally, a writ court does not take up writs when alternate and efficacious remedies exist under common

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law or statutory law or gets into disputed questions of fact (which are inevitably going to be there in disputes between private entities).

Our comments

In our view, the majority judgment is unclear and slightly broad brushstrokes in its approach.

After delving into various historical rulings, the majority goes against the decisions of *P. D. Shamdasani (id.)* and *Vidya Varma (id.)* bearing the same SC bench strength. Further, it has not given weightage to the SC decision in *Zee Telefilms (id.)*, where horizontality was extended to entities who perform public functions and have a public character. In this case, while the BCCI was held not to be a "State" entity under Article 32, the SC held that it could be regarded as an "authority" under Article 226 and be subject to the writ jurisdiction of the concerned High Court.

Additionally, *Justice K.S. Puttaswamy (id.)* does not appear to have been interpreted correctly because although the ratio treats the rights under Articles 19 and 21 as common law and fundamental rights, it permits enforceability against private individuals only as common law rights. Therefore, the actual redressal forum in such cases is an ordinary court and not the SC.

If fundamental rights, especially under Articles 19 and 21, can be enforced against all private individuals directly under Article 32 (before the SC) and under Article 226 (before the concerned High Court), it will be a huge jurisprudential shift, which ideally should be backed by a critical in-depth analysis of all past verdicts directly in relation to Articles 19 and 21.

The observations of the dissent are also notable with respect to the practical limitations of horizontality, especially when common law or statutory law remedies are available. We would like to point out that, recently, in the case of *Maharashtra State Board of Wakfs v. Shaikh Yusuf Bhai Chawla*, (Civil Appeal Nos. 7812-7814 of 2022), it was clarified that the existence of an alternate remedy by itself does not divest the High Court's writ jurisdiction.

Data privacy rights

Data privacy violations can be redressed via common law remedies such as damages and injunctions, and statutory remedies under the Information Technology Act, 2000, the Indian Penal Code, 1860, the Information Technology (Reasonable Security Practices and Procedures and Sensitive Personal Data or Information) Rules, 2011, etc. Although the SC ruling in *Kaushal Kishore* seems to permit the horizontal application of Articles 19 and 21, the availability of the aforesaid alternate remedies may deter writ courts from entertaining writ petitions. At best, a writ can be issued against the State for failing in its positive obligations of legislating on the subject. The ongoing SC and Delhi High Court cases challenging WhatsApp's 2016 and 2021 privacy policies are relevant here. As of now, it is doubtful whether WhatsApp can qualify as "State" under the tests of Article 32 and Article 226.

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Until the issue is conclusively settled by a larger SC bench, the position of law will remain uncertain.

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