

IN THE HIGH COURT OF DELHI AT NEW DELHI

WP (C) No. /2021

IN THE MATTER OF:

CHAITANYA ROHILLA

...PETITIONER

V/s

UNION OF INDIA & Ors.

...RESPONDENTS

PETITION UNDER ARTICLE 226 OF THE CONSTITUTION OF INDIA FOR THE ISSUANCE OF A WRIT OF MANDAMUS INTER ALIA DIRECTING THE RESPONDENT No. 1 TO LAY DOWN GUIDELINES IN EXERCISE OF ITS POWERS UNDER SECTION 79 (2) (C) READ WITH SECTION 87 (2) (ZG) OF THE INFORMATION TECHNOLOGY ACT, 2000

HON'BLE THE CHIEF JUSTICE AND HIS COMPANION JUDGES OF THE HON'BLE HIGH COURT OF DELHI AT NEW DELHI

MOST RESPECTFULLY SUBMITTED:

1. That the Petitioner is a law abiding citizen of India. The Petitioner is a practicing Advocate, enrolled with the Bar Council of Delhi. In the year 2017, the Petitioner joined and started using the services of Respondent No. 2 (WhatsApp) with Mobile No. _____.
2. That Respondent No. 1 is the Ministry of Electronics and Information Technology (Government of India). The Ministry inter-alia seeks to promote e-Governance and enhance India's role in Internet Governance. It is also the nodal ministry for policy

matters relating to information technology, the internet and matters relating to Cyber laws, administration of the IT Act and other IT related laws. It is submitted that as such, the Ministry is also responsible for ensuring that arbitrary and illegal actions of an intermediary (such as Respondent No.2) do not result in the infringement of the fundamental rights of an individual.

3. That the Respondent No. 2, WhatsApp is an instant messaging service provider Application. More than 2 billion people in over 180 countries use WhatsApp to stay in touch with work, friends and family, anytime and anywhere. As per its Website, "With WhatsApp, you'll get fast, simple, secure messaging and calling for free*", available on phones all over the world." WhatsApp is free, it uses internet connection via WiFi or Data connection, and offers messaging and calling, available on phones all over the world. WhatsApp is an effective alternative to SMS and has grown its root deep into the society. Their product supports sending and receiving a variety of media: text, photos, videos, documents, and location, as well as voice calls.
4. That Respondent No. 3, Facebook Inc. is an American online social media and social networking service based in Menlo Park, California, and a flagship service of the company Facebook, Inc. Facebook can be accessed from devices with Internet connectivity, such as personal computers, tablets and smartphones. After registering, users can create a profile revealing information about themselves. They can post text, photos and multimedia which is shared with any other users that have agreed to be their "friend", with any reader. Users can also use various embedded apps, join common-interest groups, buy and sell items or services on Marketplace, and receive notifications of their Facebook friends' activities and activities of Facebook pages they follow. Facebook claimed that it had more than 2.3 billion monthly active users as of December 2018, and it

was the most downloaded mobile app of the 2010s globally. In February, 2014, Facebook acquired WhatsApp. WhatsApp is now a subsidiary company of Facebook.

5. That WhatsApp has become an important mode of communication amongst the citizens of India and is also being used to aide multiple Governmental functions as well. So much so that even the Hon'ble Supreme Court of India, vide Order dated 10.07.2020 in *Suo Moto Writ Petition (C) No. 3/2020 in 'Re: Cognizance For Extension of Limitation'* had allowed the service of summons via electronic mode including WhatsApp. This substantiates to the fact that WhatsApp is discharging a Public Function despite being a private entity. In the prevalent Covid-19 pandemic times, Confidential proceedings such as that of the mediations is being conducted by WhatsApp. For instance, the District Legal Services Authority, Mediation and Conciliation Centre, Gurugram, uses WhatsApp to conduct mediation proceedings (Video Conference) through WhatsApp.
6. Over the years, WhatsApp use has become indispensable in the day to day affairs of citizens and also in Government and Judicial functionaries. At the outset, WhatsApp cannot be allowed to go berserk at its whims and fancy.

BRIEF FACTS:

7. That recently, WhatsApp changed its Privacy Policy (annexed as Annexure-A), herein after referred as Policy, in most arbitrary manner and had made it compulsory for its users to accept its terms and conditions, failing which the accounts and services would be terminated after 08.02.2021 for the respective user. Upon bare perusal of this Policy, it can be seen that the Policy violates the Right to Privacy of the citizens of India. The Right to Privacy is a fundamental right guaranteed in the Part-III of the Constitution of India and also has been affirmed by the Hon'ble Supreme Court of

India in '*Justice K.S. Puttaswamy and Ors. Vs. Union of India (UOI) and Ors.*'(AIR2017 SC 4161).

ISSUES WITH THE PRIVACY POLICY

8. That WhatsApp has included certain clauses in the New Policy, which directly hit the fundamental rights of the individual. These clauses in the New Policy are reproduced herein below:

(‘We’ stands for ‘WhatsApp’ and ‘you’ stands for ‘the user’)

A. **“Device and Connection Information.** We collect device and connection-specific information when you install, access, or use our Services. This includes information such as hardware model, operating system information, battery level, signal strength, app version, browser information, mobile network, connection information (including phone number, mobile operator or ISP), language and time zone, IP address, device operations information, and identifiers (including identifiers unique to Facebook Company Products associated with the same device or account).”

B. **“Location Information.** We collect and use precise location information from your device with your permission when you choose to use location-related features, like when you decide to share your location with your contacts or view locations nearby or locations others have shared with you. There are certain settings relating to location-related information which you can find in your device settings or the in-app settings, such as location sharing. Even if you do not use our location-related features, we use IP addresses and other information like phone number area codes to estimate your general location (e.g., city and country). We also use your location information for diagnostics and troubleshooting purposes.”

C. **“Businesses On WhatsApp.** Businesses you interact with using our Services may provide us with information about their interactions with you. We require each of these businesses to

act in accordance with applicable law when providing any information to us. When you message with a business on WhatsApp, keep in mind that the content you share may be visible to several people in that business. In addition, some businesses might be working with third-party service providers (which may include Facebook) to help manage their communications with their customers. For example, a business may give such third-party service provider access to its communications to send, store, read, manage, or otherwise process them for the business. To understand how a business processes your information, including how it might share your information with third parties or Facebook, you should review that business' privacy policy or contact the business directly.”

D. **“Third-Party Services.** We allow you to use our Services in connection with third-party services and Facebook Company Products. If you use our Services with such third-party services or Facebook Company Products, we may receive information about you from them; for example, if you use the WhatsApp share button on a news service to share a news article with your WhatsApp contacts, groups, or broadcast lists on our Services, or if you choose to access our Services through a mobile carrier's or device provider's promotion of our Services. Please note that when you use third-party services or Facebook Company Products, their own terms and privacy policies will govern your use of those services and products.

E. **“Third-Party Service Providers.** We work with third-party service providers and other Facebook Companies to help us operate, provide, improve, understand, customize, support, and market our Services. We work with these companies to support our Services, such as to provide technical infrastructure, delivery and other systems; market our Services; conduct surveys and research for us; protect the safety, security and

integrity of users and others; and assist with customer service. When we share information with third-party service providers and other Facebook Companies in this capacity, we require them to use your information on our behalf in accordance with our instructions and terms.”

F. **“Third-Party Services.** When you or others use third-party services or other Facebook Company Products that are integrated with our Services, those third-party services may receive information about what you or others share with them. For example, if you use a data backup service integrated with our Services (like iCloud or Google Drive), they will receive information you share with them, such as your WhatsApp messages. If you interact with a third-party service or another Facebook Company Product linked through our Services, such as when you use the in-app player to play content from a third-party platform, information about you, like your IP address and the fact that you are a WhatsApp user, may be provided to such third party or Facebook Company Product. Please note that when you use third-party services or other Facebook Company Products, their own terms and privacy policies will govern your use of those services and products.”

G. **“How We Work With Other Facebook Companies.** As part of the Facebook Companies, WhatsApp receives information from, and shares information (see here) with, the other Facebook Companies. We may use the information we receive from them, and they may use the information we share with them, to help operate, provide, improve, understand, customize, support, and market our Services and their offerings, including the Facebook Company Products. This includes:

- helping improve infrastructure and delivery systems;
- understanding how our Services or theirs are used;

- promoting safety, security and integrity across the Facebook Company Products, e.g., securing systems and fighting spam, threats, abuse, or infringement activities;
- improving their services and your experiences using them, such as making suggestions for you (for example, of friends or group connections, or of interesting content), personalizing features and content, helping you complete purchases and transactions, and showing relevant offers and ads across the Facebook Company Products; and
- providing integrations which enable you to connect your WhatsApp experiences with other Facebook Company Products. For example, allowing you to connect your Facebook Pay account to pay for things on WhatsApp or enabling you to chat with your friends on other Facebook Company Products, such as Portal, by connecting your WhatsApp account.”

H. **“Our Global Operations.** WhatsApp shares information globally, both internally within the Facebook Companies and externally with our partners and service providers, and with those with whom you communicate around the world, in accordance with this Privacy Policy. Your information may, for example, be transferred or transmitted to, or stored and processed in, the United States; countries or territories where the Facebook Companies’ affiliates and partners, or our service providers are located; or any other country or territory globally where our Services are provided outside of where you live for the purposes as described in this Privacy Policy. WhatsApp uses Facebook’s global infrastructure and data centers, including in the United States. These transfers are necessary to provide the global Services set forth in our Terms. Please keep in mind that the countries or territories to which your information is transferred may have different privacy laws and

protections than what you have in your home country or territory.”

9. The above-mentioned excerpts from the Policy of WhatsApp clearly depicts how WhatsApp has made a mockery out of our fundamental right to privacy while discharging a public function in India, besides jeopardizing the National Security of the country by sharing, transmitting and storing the users data in some another country and that data in turn will be governed by the laws of that foreign country. There remains a possibility that that foreign country might be a hostile country to India. Brazenly, WhatsApp has also made it mandatory for its users to accept this Policy by 08.02.2021 or else the services and accounts of the respective users would be terminated. This type of arbitrary behaviour and brow beating can not be accepted in a democracy and is completely ultravires and against the fundamental rights as enshrined in the Constitution Of India.
10. WhatsApp's updated privacy policy, which was made known on January 4, essentially takes away the choice users had until now to not share their data with other Facebook-owned and third-party apps. WhatsApp through the Policy is clearly trying to share its users data to the parent company and other companies which will eventually use that data to serve their vested interests. WhatsApp has put a damocles sword upon its users, compelling them to share their data to them and ultimately other companies. This type of dissemination of information about an individual involves high risk of missuse of that data. There remains no clarity as to what all companies that data would be shared to, when it will be shared, to what extent that data will be shared and what will be done with all that sensitive data of users. It's quite clear that WhatsApp is integrating greater into Facebook so that Facebook, WhatsApp and Instagram (another subsidiary of Facebook) all become part of one package.

11. It virtually gives a 360-degree profile into a person's online activity. This level of insight into a person's private and personal activities is done without any government oversight at present or regulatory supervision. Moreover, in the absence of a data protection authority, it leaves the users with a company's own assurances and privacy policies. And if WhatsApp is stating that it is now going to use the users data and share it with the largest social network in the world, which is embedded on every second website and collect data from there as well, the integration of this data will essentially mean that the user is perpetually under the surveillance of the Facebook group of companies.
12. With its advent in 2011, WhatsApp provided a unique platform of communication to the general public and made them habitual of it to such an extent that it has become an indispensable part of life. Even the Government functionaries and to some extent, the functioning of Judiciary also depended on it. By entering into the life of a common man, such deep, that they crossed the threshold of private functionaries and they entered the sacrosanct domain of public functions.

13. Public Function:

That under Article 226, a writ can be issued to "any person or authority", including private bodies. Further, it can be issued for the enforcement of fundamental rights or "for any other purpose." The words "any person or authority" used in Article 226 are not to be confined only to statutory authorities and instrumentalities of the State. They may cover any other person or body performing public duty. A Writ can be issued for the performance of a public duty that may be imposed by statute, charter, common law, custom or even contract. The same has been established by the Supreme Court in *Andi Mukta Sadguru Shree Muktajee Vandas Swami Suvarna Jayanti Mahotsav Smarak Trust v. V.R. Rudani*, (1989) 2

SCC 691; Janet Jeypaul v SRM University and Ors., (2015) 16 SCC 530].

An activity/function of a body can be said to be a public function, for the purposes of scrutiny by a writ court when it seeks to achieve some collective benefit for the public or acts in furtherance of social or economic affairs in the interest of the public. [See *Binny Ltd. v. V. Sadasivan, (2005) 6 SCC657, Also see BCCI v Cricket Association of Bihar and Ors, (2015) 3 SCC 251]*

14.Social Media as a Public Function

That the Internet has the potential to empower, educate and create global communities. It offers the means for any individual to participate in a free flow of information and ideas with others across the world. Social media includes web-based sites for sharing and sending instant messages social networking and micro-blogging, through which users can create communities to share information ideas, personal messages etc. Unlike any other medium of communications (such as radio, television and printed publications), which are based on one-way transmission of information, platforms such as WhatsApp, facilitate participatory information sharing and collaboration. By enabling individuals to exchange information and ideas instantaneously and inexpensively across national borders, social media sites allow access to information and knowledge that was previously unattainable. This, in turn, contributes to the progress of society as a whole. This has been recognized by the Human Rights Council of the UN General Assembly (“HRC”). The aforesaid observations go to show the use and importance of social media today. It is pertinent to note that WhatsApp users including the Petitioner, use the platform to directly communicate with public representatives and government officials. Officials also provide ‘e-governance services’, including the publication of public policy, press releases etc. This is recognized in the “Framework and Guidelines for Use

of Social Media by Government Departments” issued by the Department of Electronics and Information Technology, Ministry of Electronics and Information Technology, Government of India.

The guidelines note:

*“Given its characteristics to potentially give “voice to all”, immediate outreach and 24*7 engagement, Social Media offers a unique opportunity to governments to engage with their stakeholders especially citizens in real time to make policy making citizen centric. Many governments across the world as well many government agencies in India are using various social media platforms to reach out to citizens, businesses and experts to seek inputs into policy making, get feedback on service delivery, create community based programmes etc.”*

It is further submitted that Respondent No. 2’s previous Privacy Policy read, “Respect for your privacy is coded into our DNA. Since we started WhatsApp, we’ve aspired to build our Services with a set of strong privacy principles in mind”. Over the years, WhatsApp has emerged as one of the largest media of communication across the world with more than 2 billion people in over 180 countries use WhatsApp to stay in touch with work, friends and family, anytime and anywhere. Even the Judiciary has been a user of WhatsApp for the purpose of sending summons to the parties in the matter. It is clear from the above that WhatsApp serves as a medium for citizens, the Petitioner to communicate their grievances and concerns with government representatives. It serves as a source of news and information - as the “marketplace of ideas”, that was alluded to in Justice Holmes dissent in *Abrams v. United States*, 250 US 616 (1919) and subsequently by the Indian Supreme Court in *Shreya Singhal v. Union of India*, (2015) 5 SCC 1. It therefore performs a public function and is amenable to the jurisdiction of this Court under Article 226.

15.Privacy Policy: India vis-à-vis Europe

The updated Privacy Policy introduced by WhatsApp won't be applicable for the European Region owing to the data protection law in place there. WhatsApp is legally bound to not share data with Facebook in the European Region because it's a contravention of the provisions of the General Data Protection Regulation (GDPR). GDPR is a regulation in the European Union law on data protection and privacy in the European Union and the European Economic Area. WhatsApp and in turn Facebook is trying arbitrarily and in most monopolistic way to enforce it in India as they see vulnerability in the absence of any comprehensive law in this subject.

16. Violation of fundamental right under the Constitution:

The updated Privacy Policy directly attacks the fundamental Right of Privacy, guaranteed under Part-III of the Constitution of India. This has been affirmed by the Hon'ble Supreme Court of India in '*Justice K.S. Puttaswamy and Ors. Vs. Union of India (UOI) and Ors.*' (AIR2017 SC 4161). Relevant portions of the Judgement are reproduced herein:

“(i) Privacy has always been a natural right: The correct position in this behalf has been established by a number of judgments starting from Gobind v. State of M.P. MANU/SC/0119/1975:(1975) 2 SCC 148. Various opinions conclude that:

- (a) privacy is a concomitant of the right of the individual to exercise control over his or her personality.*
- (b) Privacy is the necessary condition precedent to the enjoyment of any of the guarantees in Part III*
- (c) The fundamental right to privacy would cover at least three aspects –*
 - (i) intrusion with an individual's physical body,*
 - (ii) informational privacy, and*
 - (iii) privacy of choice.*

(d) One aspect of privacy is the right to control the dissemination of personal information. And that every individual should have a right to be able to control exercise over his/her own life and image as portrayed in the world and to control commercial use of his/her identity.”

Justice R.F. Nariman while explaining the aspects of Right of Privacy said:

“521. In the Indian context, a fundamental right to privacy would cover at least the following three aspects:

- Privacy that involves the person i.e. when there is some invasion by the State of a person's rights relating to his physical body, such as the right to move freely;*
- Informational privacy which does not deal with a person's body but deals with a person's mind, and therefore recognises that an individual may have control over the dissemination of material that is personal to him. Unauthorised use of such information may, therefore lead to infringement of this right; and*
- The privacy of choice, which protects an individual's autonomy over fundamental personal choices. For instance, we can ground physical privacy or privacy relating to the body in Articles 19(1)(d) and (e) read with Article 21; ground personal information privacy Under Article 21; and the privacy of choice in Articles 19(1)(a) to (c), 20(3), 21 and 25. The argument based on "privacy" being a vague and nebulous concept need not, therefore, detain us.”*

Justice S.K. Kaul, in his judgement stated:

“646. If the individual permits someone to enter the house it does not mean that others can enter the house. The only check and balance is that it should not harm the other individual or affect his or her rights. This applies both to the physical form and to technology. In an era where there are

wide, varied, social and cultural norms and more so in a country like ours which prides itself on its diversity, privacy is one of the most important rights to be protected both against State and non-State actors and be recognised as a fundamental right. How it thereafter works out in its inter-play with other fundamental rights and when such restrictions would become necessary would depend on the factual matrix of each case. That it may give rise to more litigation can hardly be the reason not to recognise this important, natural, primordial right as a fundamental right.”

It is the law of the land that wherever and whenever the Privacy of an individual is at stake, be it against the state or private entity, it would be a violation of the rights guaranteed by the Constitution.

It is most humbly submitted that the updated Privacy Policy of WhatsApp is clear cut attack on the users' personal data, which is being shared to third parties and Facebook for their personal gains. This illegal, arbitrary behavior cannot be entertained.

17. Privacy laws: India vis-à-vis International Treaties

That it is humbly submitted that India is a signatory to the ICCPR. Article 17 of the ICCPR (*International Covenant on Civil and Political Rights*) states:

“1. No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks upon his honour and reputation.

2. Everyone has the right to the protection of the law against such interference or attacks.”

In its General Comment 16, the Human Rights Committee has stated that Article 17 of ICCPR requires legal implementation of essential data protection guarantees in both the public and private sectors. In the words of the Committee:

“The competent public authorities should only be able to call for such information relating to an individuals’ private life the knowledge of which is essential in the interests of society as understood under the Covenant. [...] The gathering and holding of personal information on computers, databanks and other devices, whether by public authorities or private individuals and bodies, must be regulated by law. Effective measures have to be taken by States to ensure that information concerning a persons’ private life does not reach the hands of persons who are not authorized by law to receive, process and use it, and is never used for purposes incompatible with the Covenant. In order to have the most effective protection of his private life, every individual should have the right to ascertain in an intelligible form, whether, and if so, what personal data is stored in automatic data files, and for what purposes. Every individual should also be able to ascertain which public authorities or private individuals or bodies control or may control their files. If such files contain incorrect personal data or have been collected or processed contrary to the provisions of the law, every individual should have the right to request rectification or elimination””.

At the apex of international human rights instruments lies the Universal Declaration of Human Rights of 1948. Its provisions dealing expressly with privacy are set out in Article 12, which states:

“No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation. Everyone has the right to the protection of the law against such interference or attacks”.

Whereas the above provisions are framed essentially in terms of a prohibition on “interference with privacy”, the equivalent provisions of Article 8 of the ECHR (European Convention on

Human Rights) are framed in terms of a right to “respect for private life”:

“1. Everyone has the right to respect for his private and family life, his home and correspondence.

2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others”.

The above-mentioned Articles goes to show that the State has a positive obligation to ensure that the right to privacy is not impeded due to the conduct of private parties. The Hon’ble Supreme Court has consistently held that in the absence of any law to the contrary, rights under international instruments have to be read into the Fundamental Rights guaranteed by the Constitution.

18. G R O U N D S

A. That private bodies which perform a public function are amenable to the jurisdiction of this Hon’ble Court under Article 226 of the Constitution. A Writ can be issued for the performance of a public duty that may be imposed by statute, charter, common law, custom or even contract. Reliance is placed on Judgments of the Hon’ble Supreme Court in *Andi Mukta Sadguru Shree Muktajee Vandas Swami Suvarna Jayanti Mahotsav Smarak Trust v. V.R. Rudani*, (1989) 2 SCC 691. The Court therein has held:

“20.....The words “any person or authority” used in Article 226 are, therefore, not to be confined only to statutory authorities and instrumentalities of the State. 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, if a positive obligation exists mandamus cannot be denied.”

The Court went on to hold:

“22. Here again we may point out that mandamus cannot be denied on the ground that the duty to be enforced is not imposed by the statute. Commenting on the development of this law, Professor de Smith states: “To be enforceable by mandamus a public duty does not necessarily have to be one imposed by statute. It may be sufficient for the duty to have been imposed by charter, common law, custom or even contract.” [Judicial Review of Administrative Action, 4th Edn., p. 540] We share this view. The judicial control over the fast expanding maze of bodies affecting the rights of the people should not be put into watertight compartment. It should remain flexible to meet the requirements of variable circumstances. Mandamus is a very wide remedy which must be easily available “to reach injustice wherever it is found. Technicalities should not come in the way of granting that relief under Article 226.”

Similar observations were made by the Hon’ble Supreme Court in *Binny Ltd. v. V. Sadasivan*, (2005) 6 SCC 657. The Court therein held:

“At the same time, there are private bodies also which may be discharging public functions. It is difficult to draw a line between public functions and private functions when they are being discharged by a purely private authority. A body is performing a “public function” when it seeks to achieve some collective benefit for the public or a section of the public and is accepted

by the public or that section of the public as having authority to do so. Bodies therefore, exercise public functions when they intervene or participate in social or economic affairs in the public interest”

- B. That a Division Bench of this Hon’ble Court in *Dr. Sangamitra Acharya and Anr v State (NCT of Delhi) and Ors, WP (Crl) 1804 of 2017* has held fundamental rights are enforceable horizontally. An aggrieved person can invoke constitutional remedies to seek the protection and enforcement of such rights against invasion by a non-state actor as well.

Similarly, the US Supreme Court in *Marsh v. Alabama (326 U.S. 501 (1946))* held that a privately-owned company town was subject to First Amendment principles even though it was private.

The Court held:

“The more an owner, for his advantage, opens up his property for use by the public in general, the more do his rights become circumscribed by the statutory and constitutional rights of those who use it.”

Marsh has been cited with approval by the Hon’ble Supreme Court of India in *Sukhdev Singh v. Bhagatram Sardar Singh Raghuvanshi, (1975) 1 SCC 421* and *Board of Control for Cricket in India v. Cricket Association of Bihar, (2015) 3 SCC 251*.

- C. That the Respondent No. 2 is performing a Public Function. It enables users to participate in a free flow of information and ideas with others across the world. WhatsApp users can create communities/groups to share information, ideas, personal messages etc. Unlike any other medium of communication (such as radio, television and printed publications), which are based on one-way transmission of information, platforms such as WhatsApp, facilitate participatory information sharing and collaboration. Users are not only recipients, but active publishers of information.

D. That the updated Privacy Policy of WhatsApp is an absolute violation of the fundamental Right of Privacy of the Petitioner and every other user in India. It is further submitted that the sharing of users' data by WhatsApp to third parties and Facebook is in itself illegal because WhatsApp can only use the information for purposes that are reasonably linked to the purpose for which the information was given. A user who has signed up to WhatsApp because they want to communicate. Users' provide their data to WhatsApp for this, whereas WhatsApp is using this data and sharing it with third-part services and Facebook to run their own businesses. It emphatically implies that the purpose that WhatsApp is using the information for is not reasonably connected to the purpose for which the user is giving that information to WhatsApp. Furthermore, making the updated Privacy Policy mandatory for the users' to accept is completely arbitrary and against the fundamental rights affirmed by the Constitution of India.

E. That the Hon'ble Supreme Court of India in '*Justice K.S. Puttaswamy and Ors. Vs. Union of India (UOI) and Ors.*' (AIR2017 SC 4161) had declared that the Right to Privacy is a Fundamental Right guaranteed under Part-III of the Constitution of India. The Apex Court went on to establish:

"646. If the individual permits someone to enter the house it does not mean that others can enter the house. The only check and balance is that it should not harm the other individual or affect his or her rights. This applies both to the physical form and to technology. In an era where there are wide, varied, social and cultural norms and more so in a country like ours which prides itself on its diversity, privacy is one of the most important rights to be protected both against State and non-State actors and be recognised as a fundamental right. How it thereafter works out in its inter-play

with other fundamental rights and when such restrictions would become necessary would depend on the factual matrix of each case. That it may give rise to more litigation can hardly be the reason not to recognise this important, natural, primordial right as a fundamental right.”

The Hon’ble Apex Court further held:

“256...The same instinctive resentment is evident in the present day as well. For instance, the non-consensual revelation of personal information such as the state of one's health, finances, place of residence, location, daily routines and so on efface one's sense of personal and financial security.

In District Registrar and Collector v. Canara Bank MANU/SC/0935/2004:(2005) 1 SCC 496 at 48, this Court observed what the jarring reality of a lack of privacy may entail: ...If the right is to be held to be not attached to the person, then "we would not shield our account balances, income figures and personal telephone and address books from the public eye, but might instead go about with the information written on our 'foreheads or our bumper stickers'.”

“431. We are in an information age. With the growth and development of technology, more information is now easily available. The information explosion has manifold advantages but also some disadvantages. The access to information, which an individual may not want to give, needs the protection of privacy. The right to privacy is claimed qua the State and non-State actors. Recognition and enforcement of claims qua non-state actors may require legislative intervention by the State.”

“437. These digital footprints and extensive data can be analyzed computationally to reveal patterns, trends, and associations, especially relating to human behavior and interactions and

hence, is valuable information. This is the age of 'big data'. The advancement in technology has created not just new forms of data, but also new methods of analysing the data and has led to the discovery of new uses for data. The algorithms are more effective and the computational power has magnified exponentially.

A large number of people would like to keep such search history private, but it rarely remains private, and is collected, sold and analysed for purposes such as targeted advertising....”

That in the absence of any law that gives data protection for the citizens of India, WhatsApp is trying to go beyond the purview of data collection by sharing it with third parties and Facebook. There remains no clarity as to for what purposes the data so collected would be used for and till what extent. The boundaries that people establish from others in society are not only physical but also informational. There are different kinds of boundaries in respect to different relations. Most of the information about individuals can fall under the phrase "none of your business". WhatsApp has given an option of 'take it or leave it'. Such arbitrary behavior of Application collecting and using the data of its users and then further sharing it is unacceptable. On information being shared, the same may be said to be in confidence and any breach of confidentiality is a breach of the trust. This is more so in the professional relationships such as with doctors and lawyers which requires an element of candor in disclosure of information. An individual has the right to control one's life while submitting personal data for various facilities and services. It is but essential that the individual knows as to what the data is being used for with the ability to correct and amend it. The hallmark of freedom in a democracy is having the autonomy and control over our lives which becomes impossible, if

important decisions are made in secret without our awareness or participation.

F. That Article 17 of the ICCPR (*International Covenant on Civil and Political Rights*) states:

“1. No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks upon his honour and reputation.

2. Everyone has the right to the protection of the law against such interference or attacks.”

At the apex of international human rights instruments lies the Universal Declaration of Human Rights of 1948. Its provisions dealing expressly with privacy are set out in Article 12, which states:

“No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation. Everyone has the right to the protection of the law against such interference or attacks”.

Whereas the above provisions are framed essentially in terms of a prohibition on “interference with privacy”, the equivalent provisions of Article 8 of the ECHR (European Convention on Human Rights) are framed in terms of a right to “respect for private life”:

“1. Everyone has the right to respect for his private and family life, his home and correspondence.

2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others”.

The Hon'ble Supreme Court while declaring the Right of Privacy as a Fundamental Right relied on the provisions of UDHR and stated that it was the duty of the state to protect and implement the domestic laws in accordance with the internal treaties that it is party to. The updated Privacy Policy of WhatsApp is in absolute violation of the international treaties i.e. ICCPR, UDHR. The Hon'ble Supreme Court has consistently held that in the absence of any law to the contrary, rights under international instruments have to be read into the Fundamental Rights guaranteed by the Constitution. In this light, the Petitioner submits that there exists a positive obligation on the State to ensure that private parties such as Respondent No. 2 do not impede the exercise of fundamental rights.

- G. That brazenly, in dire contrast to other jurisdictions, especially in the Europe this updated Privacy Policy has not been made applicable by WhatsApp because of their strict GDPR laws. In fact, fines have been imposed on Facebook for integrating WhatsApp data, which were one of the conditions under which Facebook was permitted to purchase and operate WhatsApp by the Competition Commissions of certain European countries.
- H. Because the State has a positive obligation to ensure that Fundamental Rights of citizens are not infringed by non-state actors. The Hon'ble Supreme Court has noted that there exists a positive obligation on the State to aid the exercise of Fundamental Rights. [*See Himat L K. Shah and Mazdoor Kisan Shakti Sangathan (supra), Also see Ramlila Maidan Incident, In re, (2012) 5 SCC 1*].
- I. That it is submitted that arbitrary sharing of data with third parties and Facebook have a chilling effect on Privacy. The power to regulate the same is provided in the IT Act. Section 79 (2) (c) read with Section 87 (2) (zg) of the Information Technology Act,

2000 authorizes the Central Government to prescribe guidelines to intermediaries.

19. That the Petitioner has no other efficacious remedy left except the present one.
20. That the Petitioner has not filed any such petition either before this Hon'ble Court or before any other Court or before the Hon'ble Supreme Court of India for the same relief.
21. That this Hon'ble Court has adequate territorial jurisdiction to issue directions, orders and writs given the cause of action in whole and in part arises within the territories in which it exercises jurisdiction.

IT IS THEREFORE. MOST RESPECTFULLY, PRAYED TO THIS HON'BLE COURT TO KINDLY

- a. Issue a writ of Mandamus directing the Respondent No. 1 to lay down guidelines in exercise of its powers under Section 79 (2) (c) read with Section 87 (2) (zg) of the Information Technology Act and under Constitution of India to ensure that Respondent No. 2 does not share any data of its users with any third party or Facebook and its companies for any purpose whatsoever.
- b. Issue a writ of Mandamus for Injunction against the updated Privacy Policy by Respondent No. 2 with immediate effect.
- c. Issue guidelines or directions to ensure that any change in Privacy Policy by Respondent No. 2 is carried out strictly in accordance with the Fundamental Rights guaranteed in Part-III of the Constitution till such time as rules/guidelines are framed by Respondent No.1
- d. Pass any writ, order or direction that this Hon'ble Court may deem fit and proper in the facts and circumstances of the present case.

Cost of this petition may also be allowed in favour of the Petitioner and against the Respondents.

**AND FOR THIS THE HUMBLE PETITIONER SHALL EVER
PRAY.**

DATED: 13.01.2021

NEW DELHI

PETITIONER

THROUGH

MANOHAR LAL, ADVOCATE

