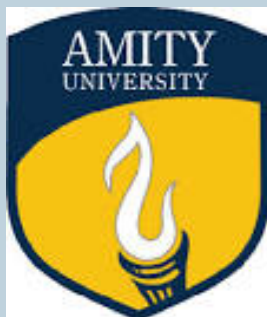


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# MISUSE OF RAPE LAW: WITH SPECIAL REFERENCE TO LIVE-IN RELATIONSHIPS

*Dr. Ravinder Kumar\* and Tanya Bansal\*\**

## ABSTRACT

*Rape is considered to be the most heinous offence against mankind. It is not only physical assault but has the effect of destructing the 'entire personality of victim'. While an assailant annihilates the body of victim, a rapist debases the very soul of woman. And in order to curb this dreadful offence, the rape provisions under Section 375, IPC have been made much stricter. The testimony of prosecutrix even if not corroborated by medical evidence is considered sufficient enough to convict the accused. Such is an inclination of law towards woman and the weight attached to the testimony of prosecutrix. However, what is more scornful is the gross misuse of this rape law. On one hand, it has the capacity to punish the perpetrators. On the other hand, it has the potential to ruin one's life embroiled in cobweb of false allegations. Rape laws are used as an instrument by few women to achieve their mercenary objectives. This is mostly happening in live-in relationship where female partners manipulate the consent requirement of rape law to harass their male partners. It has also been found that when relationship turns sour and partners agree to part their ways, some women partners slap rape accusations on male partners on the*

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*ground that they obtained consent for sexual intercourse on pretext of marriage. This marriage promise is used as a shield to prove that sexual intercourse as not consensual rather driven by lust and thus, women has been raped. It is pertinent to note that consent here falls under the provisions of Section 90, IPC which requires that consent should be given without fear and misconception. Even the Supreme Court has taken a firm view on this aspect and has upheld that making a 'false promise' to marry is wrong. It is indifferent that whether this false promise comes from men or women. But this does not imply that in a prolonged live-in relationship, sexual intercourse between individuals would be categorised as rape. The paper aims to critically analyse this misuse of rape law in live-in relationship and throw light on the position maintained by apex court on it.*

**Keywords:** *Live-in Relationships, Rape Law, Misuse, Breach of promise, False Promise*

## 1. INTRODUCTION

With time society transforms and so is its customs and institutions. Earlier institution of matrimony was given much importance but now there has been a growing inclination towards live-in relationships. These are not so widely accepted in society but metropolitans seem to be changing. There are arguments on whether such an association should be treated similar to marriage.

They run contrary to the institution of matrimony, a freedom and limited restriction in several aspects, and even culturally, marriages stand on much firmer ground.<sup>1</sup> But in some ways, the problems faced by these couples are very similar to those placed in matrimony, and they require similar rights and protections.<sup>2</sup>

The legitimacy of live-in relationships is itself so questionable in India and there are numerous instances where it is coupled with false and heinous rape charges which happens to be most dreadful offence. The question is what impact will it have on the mental, social, physical and economic well-being of a man? In the way rape degrades the soul of a woman, false rape accusations degrade the very existence of a man. Even after acquittal or discharge from the charges, the society attaches stigma to him. He becomes a suspect in every individual's eyes. He is punished for an offence which he never committed and ironically not by the Court but by the society. And where these charges are levelled to furnish personal vendetta, it is actually accomplished. Because the Court may relieve you from the burden of an offence by giving punishment but society does not allow an individual, who is just a suspect, to assimilate back into the society. With that man suffers his entire family. And pitifully, law has no remedy for it. It is essential to understand the gross violations of rights attached with false accusations and especially in cases

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<sup>1</sup>Bill Atkin, 'The Legal World of Unmarried Couples: Reflections On "De Facto Relationships"', In *Recent New Zealand Legislation*, *13<sup>th</sup> World Conference of the International Society of Family Law*, 2008, available at: <http://www.victoria.ac.nz/law/research/publications/vuwlr/prev-issues/pdf/vol-39-2008/issue-4/legal-world-atkin.pdf> (last visited April 27, 2017).

<sup>2</sup>Ibid.



of rape. A very famous saying and principle of law is “no person should be punished for an offence which he has not done”, but who will teach society this principle? Who will implement this principle when that man will try to get back to his life? Answer is no one. Then why should law allow any individual to get through this agony of false accusations? The paper aims to bring forth this aspect that how rape law is being misused and mental agony attached to it.

## 2. LEGISLATIVE FRAMEWORK

There are no clear legislations legitimizing live-in relationships in India, but certain provisions have been interpreted by the Court in a liberal and forward manner. A provision in the Evidence Act stating, “Court may presume existence of certain facts”<sup>3</sup> was interpreted by the Court to give legitimacy to the children born out of a live-in relationship where the association had lasted long enough for society to consider the two individuals as married.<sup>4</sup>

The 2003 Malimath Committee Report on “Reforms in the Criminal Justice System” suggested that the word “wife” be amended within the provision of Section 125 of the Cr.P.C. to include such woman who

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<sup>3</sup> Indian Evidence Act, 1872 (Act 1 of 1872), s. 114.

<sup>4</sup>*S.P.S. Balasubramanyam v. Suruttayan*, 1992 Supp (2) SCC 304.

“living in” with a man for a “reasonable period”.<sup>5</sup> However, no such change was made and the definition remains the same.

The Domestic Violence Act 2005 was essentially the first legislation recognizing the woman’s rights in a live-in relationship being subject to violence, and protections thereunder.<sup>6</sup> While this was a progressive step, other laws did not reform accordingly. As per our law thus far, a child is considered legitimate only if he or she was born during the continuance of a valid marriage between his or her parents.<sup>7</sup> Accordingly, children borne out of a live-in relationship are not considered legitimate. In a progressive decision, however, the Supreme Court opposed this trend and belief.<sup>8</sup>

### **3. MISUSE OF RAPE LAWS IN LIVE-IN RELATIONSHIPS**

There are multiple reasons which either provide room for levelling false accusations or allow manipulation of provisions in such a way to accomplish personal vendetta. The ambiguities in law, interplay of elements such as consent, false promise, breach of promise to marry and so on and so forth results into a cobweb which entangles the man so catastrophically that he succumbs to this entanglement. Few essential

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<sup>5</sup> Government of India, Ministry of Home Affairs, Committee on Reforms of Criminal Justice System, March 2003, *available at*: [http://www.mha.nic.in/hindi/sites/upload\\_files/mhahindi/files/pdf/criminal\\_justice\\_system.pdf](http://www.mha.nic.in/hindi/sites/upload_files/mhahindi/files/pdf/criminal_justice_system.pdf) (last visited April 27, 2017).

<sup>6</sup> Protection of Women from Domestic Violence Act, 2005 (Act 43 of 2005), s. 20(1)(d).

<sup>7</sup>Supra note 3 at 3.

<sup>8</sup>*Tulsa v. Durghatiya*, (2008) 4 SCC 520.

elements have been identified by the author and has tried to explain how much pivotal role they play in essaying the false accusations.

### **3.1 Deficiency in Laws**

Due to the lack of clarity of law in the matter, the courts are faced by the problem of female partners accusing their cohabiter of rape when the relationship does not culminate in marriage. The law needs to clearly specify that live-in relationships stand on a different footing than marriage, and willingly entering into such an association will have consequences that an informed adult must be ready to face.

In 2016, Delhi High Court commented that there has been an increase in rape cases due to a careless youth getting involved in more and more live-in relationships unthinkingly.<sup>9</sup> When marital rape is a pressing concern, it can also not be denied that there may also sometimes be genuine cases of sexual violence in non-marital intimate relationships of cohabitation.<sup>10</sup>

An India Today survey may give some indication that Indian society's association of respect associated with sex after marriage alone can be a factor that Indian women put large number of rape charges under 'false

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<sup>9</sup>Indo-Asian New Service, 'Rape on rise due to failure of live-in relationships: Delhi High Court', *available at*: <http://www.india.com/loudspeaker/rape-on-rise-due-to-failure-of-live-in-relationships-delhi-high-court-79869/> (last visited April 27, 2017).

<sup>10</sup>Catherine Salmon and Todd K. Shackelford, *The Oxford Handbook of Evolutionary Family Psychology*, 173-175 (Oxford University Press, 2011).

promise to marry'.<sup>11</sup> This is a very strong and sensible argument, and a very potent reason for a large number of such cases.

### **3.2 Issue of Consent**

Consent is the mighty element of these cases. Its presence could save the accused and absence could lead him behind bars. Consent as delineated under Indian Penal Code as “an act of reason coupled with deliberation”. It underlines as well as signifies “an active will in the mind” of the individual to permit the act which is complained of.<sup>12</sup>

The offence of rape has been enshrined in Section 375, IPC which enumerates six descriptions when the offence of rape is said to be committed. The first clause contains the expression ‘against the will’ of the woman and second clause talks about ‘without the consent’ of the woman. The offence is committed against the will of the woman where she is in her complete senses and thus, in a position to give consent but the act is committed against her will. It means that the act has been committed despite the opposition of the woman. In the second case it is done without her consent. The third, fourth and fifth clause enumerates the cases where the element of consent is present, but this consent is not free and thereby is not enough to exonerate the accused of his crime. In the above stated clauses, the consent is obtained by either threatening the

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<sup>11</sup>Shefalee Vasudev, ‘Sex and the Indian women’, India Today, available at: <http://indiatoday.intoday.in/story/india-today-sex-survey-most-indian-women-find-premarital-and-extramarital-sex-unacceptable/1/206292.html> (last visited April 27, 2017).

<sup>12</sup>*Dhruvaram Murlidhar Sonar v. The State of Maharashtra*, AIR 2019 SC 327.

woman with fear of death or injury or any other person in whom she is interested.

Apart from Section 375, what does not constitute a valid consent is enumerated under section 90, IPC. The section states that “a consent is not a consent as required by the provisions of the Code if such consent is obtained by putting the person granting consent under fear of injury or misconception of fact. Consent may be express or implied, coerced or misguided, obtained willingly or through deceit.” And where consent is given under ‘misconception of fact’, it vitiates the consent. For the purpose of Section 375, the consent is considered to be given only when there is voluntary participation. Furthermore, this voluntary participation is done not only after exercising due diligence considering the importance and morality of the committed act but also after fully exercising the conscious choice between the ‘resistance and assent’.<sup>13</sup> Therefore, whether the consent was given or not and the nature of consent given, all have to be examined in light of relevant circumstances and it depends upon case to case.

In *Deelip Singh alias Dilip Kumar v. State of Bihar*<sup>14</sup>, the Supreme Court had two questions before it on the issue whether there was consent or not. These were: -

“(1) Is it a case of passive submission in the face of psychological pressure exerted or allurements made by the accused or was it a

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<sup>13</sup>Ibid.

<sup>14</sup> (2005) 1 SCC 88.

conscious decision on the part of the prosecutrix knowing fully the nature and consequences of the act she was asked to indulge in?”

“(2) Whether the tacit consent given by the prosecutrix was the result of a misconception created in her mind as to the intention of the accused to marry her”?

Therefore, the driving factor here is whether consent was given by prosecutrix solely on promise of marriage or due to her love and inclination towards the accused. This position can be well understood by *Uday*<sup>15</sup> case. In this case the prosecutrix was a 19 years old girl. She fell in love with her neighbour and both developed physical intimacy. She later became pregnant. There was a promise for marriage but whether it was the sole driving force can be concluded from the fact that both belonged to different castes. And girl had sufficient intelligence that marriage may not happen at later stage due to overwhelming opposition from their families and consequently, she kept it a ‘secret’ as long as she could. Thus, girl was fully aware of the morality of act she is indulging into and what could be future ramifications. In light of these circumstances, it cannot be held that she had consented being under the misconception of fact that accused would tie knot with her. There were more factors attached with this consent and hence, offence of rape cannot be made out. The Court observed that “it generally happens in such cases that two young persons are madly in love and they promise to each other several times no matter what will happen, they will get married. In such

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<sup>15</sup>*Uday v. State of Karnataka*, (2003) 4 SCC 46.

circumstances this promise loses all significance, particularly when they overcome with these emotions and passion and find themselves in situations and circumstances where they actually are and in a weak moment, succumb to the temptation of having sexual relationships.”<sup>16</sup>

### **3.3 False Promise And Breach Of Promise: A Stark Difference**

The Court has opined that there is a stark difference between ‘false promise and breach of promise’. Where false promise of marriage is made only to induce woman to enter into physical relationship, the accused person will be liable for rape. However, where the promise of marriage was genuine and both individuals consensually entered into physical relationship, it cannot be later termed as rape. Every case has to be tested and tried on the grounds of its facts and circumstances. For instance, in *Shivashankar v. State of Karnataka*<sup>17</sup> the relationship was existing from past 8 years and complainant has herself admitted that they were living like husband and wife. Now in such circumstances the court opined that this is difficult to hold the ‘sexual intercourse’ happened in course of this relationship of 8 years as ‘rape’.

In another case<sup>18</sup> the Court explained the difference between false promise, breach of promise and not fulfilling the promise. Where from the very inception the accused did not intend to marry the woman and promise of marriage was made solely to induce her to enter into sexual relationship and to gratify his lust, it is an apparent case of rape.

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<sup>16</sup>Ibid.

<sup>17</sup> Criminal Appeal No.504 of 2018, disposed of on 6th April, 2018, Supreme court.

<sup>18</sup>*Dhruvaram Murlidhar Sonar v. The State of Maharashtra*, AIR 2019 SC 327.

However, where the promise of marriage was not made by the accused only with intention to seduce the woman into sexual intercourse, it cannot be termed as rape. This is because there may be circumstances when woman engaged into sexual acts due to her 'love and passion' for accused and not solely because of misconception cropped by accused that he would marry her. For instance, in *Deepak Gulati v. State of Haryana*<sup>19</sup>, the complainant was a 19 years old girl who had inclination towards the accused. She was assured by accused that he would marry her. Thereafter, she left her home voluntarily to get married to accused and they met at pre-decided place and indulged into sexual intercourse. Further, she travelled to Kurukshetra with accused and stayed at his relatives' home and continued to maintain physical intimacy. She continued to move with accused from one place to another and finally the accused was arrested by police at Ambala bus-stop. The Court opined that scrutinising the whole series of events and circumstances of the present case, it nowhere appears that there has been deceit and rape. Since the woman did not at any stage signified her resistance to accused while she was with him for several days.

The Supreme Court reiterated its position that when there is an acknowledged sexual relationship between the individuals, it does not amount to rape within the provisions of section 376, IPC. In *Dhruva ram Murlidhar Sonar v. The State of Maharashtra*<sup>20</sup> case the Court took note of the facts that complainant had agreed that she and accused were in

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<sup>19</sup> (2013) 7 SCC 675.

<sup>20</sup> AIR 2019 SC 327.



love affair and they both decided to live together. They sometimes stayed at the house of complainant and sometimes at accused's premises. They both enjoyed each other's company and it was only after when complainant discovered that accused had married another woman, that she filed a case against him. It has been admitted by the complainant that there was not forcible sexual intercourse. It was her conscious decision after application of mind and more importantly it was not a case of 'passive submission' in face of any 'psychological pressure' exerted. Also, it was a tacit consent and such tacit consent was given by her without being under any misconception. And thus, no case of rape can be made out.

#### **4. JUDICIAL APPROACH TOWARDS RAPE ALLEGATIONS ON FAILURE OF LIVE-IN RELATIONSHIPS**

##### **4.1 The Indian Judicial Stand**

A pressing issue now recurrently appearing before the Courts of India is the question whether a woman can take the plea that she has been subjected to sexual intercourse without her consent under a false promise to marry in cases of live in relationships. In *Jayanti Rani Panda v. State of West Bengal &Anr.*,<sup>21</sup> Calcutta High Court categorically stated that "if a fully grown up girl consents to the act of sexual intercourse on a promise of marriage and continues to indulge in such activity until she becomes pregnant it is an act of promiscuity on her part and not an act

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<sup>21</sup> (1984) Cri.L.J.1535.

induced by misconception of fact and Section 90 IPC cannot be invoked unless the court can be assured that from the inception accused never intended to marry her. ”Clearing out the responsibility of the prosecutrix, in *Deelip Singh Alias Dilip Kumar v. State of Bihar*<sup>22</sup> the court took a view on consent stating, “It must also weigh the evidence keeping in view the fact that the burden is on the prosecution to prove each and every ingredient of the offence, absence of consent being one of them.”

An alternative stand based on circumstances was given in *Yedla Srinivasa Rao Vs State of A.P.*,<sup>23</sup> where Hon’ble Justices A.K. Mathur &Altamas Kabir of Supreme Court opined that, “...we are satisfied that the consent which had been obtained by the accused was not a voluntary one which was given by her under misconception of fact that the accused would marry her but this is not a consent in law.”

Stating capability of female to understand the situation, in *Uday v. State of Karnataka*<sup>24</sup> Court took the following view: “Prosecutrix was quite aware that they belonged to different castes and proposal of their marriage would be opposed by their family members. Yet the prosecutrix started cohabiting with the accused consciously and became pregnant. On the charge of rape, the Court held that the consent given by the prosecutrix for cohabitation cannot be said to be given under misconception of fact. She had sufficient intelligence to understand the significance and moral quality of the act she was consenting to. That is

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<sup>22</sup> 2005 (1) SCC 88.

<sup>23</sup>(2006) 11 SCC 615.

<sup>24</sup>2003 Cri LJ 1539 SC.

why she kept it a secret as long as she could. ”In *Pradeep Kumar Verma v. State of Bihar*,<sup>25</sup> the Court again gave a very clear explanation of knowledge of the accused: “If a full-grown girl consents to the act of sexual intercourse on a promise of marriage and continues to indulge in such activity until she becomes pregnant it is an act of promiscuity on her part and not an act induced by misconception of fact. Section 90 IPC cannot be called in aid in such a case to pardon the act of the girl and fasten criminal liability on the other, unless the court can be assured that from the very inception the accused never really intended to marry her.”

Taking a stern stand on *malafide* proceedings by women, the Court in *Alok Kumar Vs. State &Anr*<sup>26</sup> said that “where criminal proceeding is manifestly attended with mala fide and where proceeding is maliciously instituted with an ulterior motive for wrecking vengeance on the accused and with a view to spite him due to private and personal grudge, the FIR can be quashed.” Further, it was held in *Deepak Gulati vs State of Haryana*<sup>27</sup> that though the apex court directs to very carefully analyse *malafide* intention in such cases, this case clearly portrayed that, “...the prosecutrix had left her home voluntarily, of her own free will to get married to the appellant. She was 19 years of age at the relevant time and was, hence, capable of understanding the complications and issues surrounding her marriage to the appellant.” In *Kaini Rajan vs. State of*

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<sup>25</sup>2007 IV Cri.LJ 4333 (SC).

<sup>26</sup> 2010 (4) JCC 2385.

<sup>27</sup>(2013) 7 SCC 675.

*Kerala*<sup>28</sup>Court again highlighted the responsibility on the prosecutrix to be able to show a genuine case.

The Court, however, distinguishes between cheating a woman to extract sexual favours from a relationship that has gone wrong. “A woman’s body is not a man's plaything and he cannot take advantage of it in order to satisfy his lust and desires by fooling a woman into consenting to sexual intercourse simply because he wants to indulge in it. The accused in this case has committed the vile act of rape and deserves to be suitably punished for it.”<sup>29</sup>

The Delhi High Court’s 2015 judgment *Anil Dutt Sharma v. Union of India & Ors*<sup>30</sup> is of great relevance wherein Court laid down that :“As far as the relief sought, of keeping the live-in-relationships outside the purview of Section 376 of the IPC is concerned, the same would amount to giving the live-in-relationships, the status of matrimony and which the Legislature has chosen not to do. In another petition, also filed in public interest, before this Court today, the challenge is to the exclusion of sexual intercourse or sexual interaction with wife being not under 15 years of age, from the definition of rape. We are of the view that such aspects are better left to the domain of the Legislature and the decision thereon is not for the Courts. All that we can observe is, that a live-in-relationship constitutes a distinct class from marriage. It is also not as if

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<sup>28</sup>2013 (9) SCC 113.

<sup>29</sup>*State of U. P. v. Naushad*, MANU/SC/1188/2013.

<sup>30</sup>2015 SCC OnLine Del 7615.

the defence of consent would not be available in such cases to the accused.”

The case of *Prashant Bharti v. State of NCT of Delhi*<sup>31</sup> again highlighted that “A consensual relationship without any assurance, obviously will not substantiate the offence under Section 376 of the IPC alleged against accused.” Similarly in *State v. Satish Dhawan*<sup>32</sup> the Delhi District Court gave the ruling that where no indication of lack of consent is present, a rape charge cannot be filed later. *Tilak Raj vs. The State of Himachal Pradesh*<sup>33</sup> was another decision where emotional maturity was held to be a sufficiently valid ground to be able to understand that sexual intercourse may not culminate in marriage.

In *Pramod Suryabhan Pawar v. State of Maharashtra*<sup>34</sup> the Supreme Court laid down two tests to ascertain whether consent was given under ‘misconception of fact’ or was it a valid consent. The court observed that for the purpose of Section 375, IPC a valid consent must involve an ‘an active and reasoned deliberation’ towards the proposed act. However, where it has to be established that consent was vitiated by ‘misconception of fact’ arising out of a promise to marry, it has to establish two propositions— (a) the promise of marriage was given in bad faith and was a false promise and there was no intention to adhere to that promise

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<sup>31</sup> MANU/SC/0063/2013.

<sup>32</sup> Delhi, SC No. 108/15, FIR No. 1542/14.

<sup>33</sup> MANU/SC/0010/2016.

<sup>34</sup> (2019) 9 SCC 608.

when it was given, (b) this promise of marriage should have direct nexus and bearing on woman's consent to engage in sexual relations.

This position was reiterated by Supreme Court in *Maheshwar Tigga v. State of Jharkhand*<sup>35</sup> and it was observed by the Court that no false promise was made by appellant or any intentional misrepresentation of marriage which would lead to intimate relationship amidst the parties. The prosecutrix was very well aware that since they both belong to different religions, the marriage may not be solemnised. An engagement ceremony was also done to assure that these societal and religious obstacles will be overcome, but ultimately marriage could not happen. And therefore, it cannot be held that from the very inception the promise of marriage was false and was made only with intention to maintain sexual relations with prosecutrix. On the aspect of section 90, IPC for the purpose of consent, Court remarked that "a consent given under misconception of fact is no consent" within the meaning of this provision. But this 'misconception' has to be in 'proximity of time' to the occurrence and it cannot be 'spread over a prolonged period' of time. In the present case it was spread over a period of four years. The consent, thus, on part of appellant was a conscious and informed choice made by her after due deliberation which was spread over a long period of time and without a conscious positive action of protest.

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<sup>35</sup>Crl. Appeal No. 635 of 2021 arising out of SLP (Crl.) No. 393 of 2020.

*Sonu @ Subhash Kumar v. State of Uttar Pradesh*<sup>36</sup>, the Court applied the above tests. In this case the parties had intimate relations and were involved in a love affair. The appellant had promised the respondent that he would marry her. For marrying her, he called her to his hometown Jhansi. But afterwards the marriage did not take place as the family members of appellant interrupted. While deciding upon the allegations of rape, the Court observed that firstly there was no allegation levelled by respondent on appellant that promise to marry was false at inception. Rather the contents of FIR revealed that accused/appellant subsequently refused to marry respondent. And thus, the consent was not vitiated by misconception of fact.

The Kerala High Court while relying on the rationale held by Supreme Court in *Pramod Suryabhan Pawar case*<sup>37</sup> has held in *Navaneeth N. Nath v. State of Kerala*<sup>38</sup> that for converting an intimate relationship between man and woman as rape on the ground of defeating of the promise to marry, it is pertinent that woman's decision to engage into intimate relationship is based on this promise. And fake promise can be deduced from the fact that maker had no intention to marry the prosecutrix from the very beginning and promise was made to induce the woman to succumb to the advances of maker. Thus, there should be direct nexus between the promise to marry and physical union.

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<sup>36</sup>CrI. Appeal 233/2021 [arising out of SLP (CrI. No. 11218 of 2019), SC.

<sup>37</sup>(2019) 9 SCC 608.

<sup>38</sup>MANU/KE/2026/2022.

In *Ramachandra v. State of Kerala*<sup>39</sup> the division bench of Kerala High Court observed that while engaging in sexual activity, if both the parties have understood the nature of such act, consent is implicit in such relationship. Further, the Court took note of the fact that rape laws in India are not gender neutral and in case if a woman induces a man to engage into sexual activity on pretext of marriage and breaches the promise thereafter, she will not be penalised for the same. However, it is not so in the case of a man and thus, there is a 'fictitious' assumption that man is always in a capacity to subjugate the will of the woman. And therefore, consent of a woman in such cases is always an enigma.

Further in *Mallikarjun Desai Goudar v. State of Karnataka*<sup>40</sup>, the Karnataka High Court opined that the consent of a woman to engage into physical intimacy on premise of promise is always an enigma. While quashing all charges of rape against the petitioner, the Court observed that 'consent' in the present case was not for days or months but it was spread for a span of five years. And all along these five years it cannot be said that consent obtained from woman to engage into sexual activity, was against her will. The length of the relationship and the acts in that period of relationship erodes the rigor of ingredients of offence of rape. Further, the parties were in love and had known each other for past 12 years and were in relationship for past 5 years. The complainant has herself admitted that petitioner did made efforts to marry her but could not due to caste equation.

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<sup>39</sup>2022 SCC Online Ker 1652.

<sup>40</sup>2023 SCC OnLine Kar 8.



## 4.2 Foreign Jurisprudence on the Issue

Under early English common law, a male could not be convicted of rape if the female had at any point consented to the activity.<sup>41</sup> Legally valid consent in the law of rape charges and other sexual abuse ranges from desire to despair to defeat to death. Desire, presumably, can be present even if sexual assault is later charged, although its marks are very rarely perceptible in the facts of cases.<sup>42</sup>

Consent has been found to be present and valid when sex has occurred in a wide range of unequal circumstances. Classically, one reason rape in marriage was not a crime, for example, was because the victims were deemed permanently consenting to the act of sex with the men they married.<sup>43</sup> This is greatly similar to the sexual aspect of a consensual relationship, though it can never have the blanket protection that marriage does. 'Consent' often arises practical legal problems beyond its inherent logic in a socially unequal setting. If we speak socially, where sex previously happened, or where a woman had ever had sex willingly before, especially with the accused, her consent is effectively forever assumed. She has to disprove her consent. In unequal societies in which women are sexually defined, it is a social burden of proof women enter

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<sup>41</sup>Carolyn Cocca, *Jailbait: The Politics of Statutory Rape Laws in the United States* 10 (SUNY Press, 2004).

<sup>42</sup>See David Lisak et al., 'False Allegation of Sexual Assault: An Analysis of Ten Years of Reported Cases', 16 *Violence Against Women* 1318, 1318 (2010).

<sup>43</sup>Sir Matthew Hale, *The History Of The Pleas Of The Crown* 629 (Sollom Emlyn ed., 1778).

into the law of sexual assault already carrying. The setup, social and legal, is: you need to prove your resistance or lack of consent.<sup>44</sup>

The European Court of Human Rights held in *M.C. v. Bulgaria* that “equality principles require that consent should become the very core of rape law, despite the considerable physical and other gender-based force used to effectuate the rapes in question”. The fourteen-year-old M.C., who had never been engaged in such acts before, accepted a ride home one night from three unknown men. They abducted her to an isolated lake area where she was raped as the terrified girl conveyed all forms of lack of consent, attempted ineffectively to resist. The Court held that “*Bulgaria failed to enforce its own law in violation of M.C.’s human rights and that an equality approach required putting consent at the core of rape’s definition.*”<sup>45</sup>

On similar lines, the CEDAW Committee,<sup>46</sup> that adjudicates cases brought under the Optional Protocol to CEDAW, opined that consent is the ‘core of an equality approach to sexual assault’ in *Vertido v. Philippines*.<sup>47</sup> At the international justice level, *Kunarac* mandated a two-pronged lack-of-consent requirement, namely the victim’s consent that is given voluntarily as a result of the victim’s free will, and the perpetrator’s knowledge that penetration occurs without consent. It

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<sup>44</sup> Catharine A. MacKinnon, ‘Rape Redefined’, Harvard, *available at*:[http://harvardlpr.com/wpcontent/uploads/2016/06/10.2\\_6\\_MacKinnon.pdf](http://harvardlpr.com/wpcontent/uploads/2016/06/10.2_6_MacKinnon.pdf) (last visited April 27, 2017).

<sup>45</sup> *M.C. v. Bulgaria*, 2003-XII Eur. Ct. H.R. at 8–9. 119.

<sup>46</sup> Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women, G.A. Res. 54/4 (Oct. 15, 1999).

<sup>47</sup> *Vertido v. Philippines*, U.N. Doc. CEDAW/C/46/D/18/2008, ¶¶ 3.3–3.5.8 (July 16, 2010)

opined that “*consent must be assessed in the context of the surrounding circumstances.*”<sup>48</sup>It has been studied in United Kingdom that false allegations and charges of rape are very often given on grounds of revenge, hurt or expectations not being met, and in such cases, the woman making the allegations must be made liable.<sup>49</sup>

## 5. CONCISE EVALUATION OF JUDICIAL PRECEDENTS

### 5.1 Observing the Trend

The following table highlights how the Indian judiciary has been deciding upon matters of relations turned sour and false promises to marry, delineating the key reasons for it.

Name Of Case	Year	Court	Conviction	Reason
<i>Uday v. State of Karnataka</i>	2003	SC	No	Girl had sufficient reason to assume marriage was unlikely.
<i>Yedla Srinivasa Rao v. State of A.P</i>	2004	SC	Yes	Girl was misled and sexual relationship was purely on the condition to marry; deceived the victim.
<i>Deelip Singhv. State Of Bihar</i>	2005	SC	No	Breach of ‘promise to marry’ is not equivalent to false

<sup>48</sup>*Prosecutor v. Dragoljub Kunarac, Radomir Kovac and Zoran Vukovic*, Case No. IT-96-23-A and IT-96-23/1-A, 12 June 2002.

<sup>49</sup> P. Rumney, ‘False allegations of rape’, 65 (1) *The Cambridge L. J.*, (2006) 125 -158. ISSN 1469-2139 available at: <http://eprints.uwe.ac.uk/6478> (last visited April 27, 2017).

				promise to marry.
<b><i>Pradeep Kumar Verma v. State of Bihar</i></b>	2007	SC	Yes	False promise from the inception, improper consent in such a case.
<b><i>Deepak Gulati v. State of Haryana</i></b>	2013	SC	No	While cases need to be examined carefully, consent given out of love and passion in such relationships cannot be doubted.
<b><i>Kaini Rajan v. State of Kerala</i></b>	2013	SC	No	Not a false promise to marry when female acted with full consent and knowledge.
<b><i>State of U.P. v. Naushad</i></b>	2013	SC	Yes	Deceived and misled prosecutrix, engaged in such relationship with no intention to marry.
<b><i>Prashant Bharti v. State of NCT of Delhi</i></b>	2013	Delhi HC	No	No question of rape in consensual relationships.
<b><i>Anup K. Paul v. State of Rajasthan AndOrs</i></b>	2015	Rajasthan HC	No	Accused had made no express indication of promise, prosecutrix acted out of her own volition.
<b><i>Anil Dutt Sharma v. Union of India</i></b>	2015	Delhi HC	No	Live-in relationships should be outside the purview of S. 376 of IPC.

<b><i>Tilak Raj v. The State of Himachal Pradesh</i></b>	2016	SC	No	Prosecutrix was 40 years old informed lady, allegation seems unlikely; distinction between consensual involvement and rape.
<b><i>Shivashankar @ Shiva v. State of Karnataka &amp; Anr</i></b>	2018	SC	No	Relationship continued for 8 years and parties lived as husband and wife. Not permissible to hold sexual intercourse committed during such a long time as 'rape'
<b><i>Dhruvaram Murlidhar Sonar v. The State of Maharashtra</i></b>	2018	SC	No	Not a case of a 'passive submission' in the face of any psychological pressure exerted. a tacit consent was present and tacit consent not the result of a 'misconception' created in prosecutrix mind.
<b><i>Pramod Suryabhan Pawar v. State of Maharashtra</i></b>	2019	SC	No	Laid down two tests to ascertain whether the consent arise out of misconception of fact of marriage— (a) false promise of marriage from inception, (b) promise to marry and consent for sexual relations has direct nexus.

<b><i>Maheshwar Tigga v. State of Jharkhand</i></b>	2020	SC	No	Misconception be present in 'proximity of time to the occurrence' and it cannot be spread over a prolonged period of time.
<b><i>Sonu @ Subhash Kumar v. State of UttarPradesh</i></b>	2021	SC	No	There was 'breach of promise' to marry and not 'false promise' to marry. Woman consciously consented to sexual relations. Engagement also happened but marriage could not take place.
<b><i>Navaneeth N. Nath v. State of Kerala</i></b>	2022	Kerala HC	Bail Granted (Matter pending)	Direct nexus between the promise to marry and physical union should be there to establish rape
<b><i>Ramachandra v. State of Kerala</i></b>	2022	Kerala HC	No	Rape laws are not gender neutral; Fictitious assumption that man always subjugates the will of woman; time spread of physical relationship is important
<b><i>Mallikarjun Desai Goudar v. State of Karnataka</i></b>	2023	Karnataka HC	No	Parties were in physical relationship for five years; all along five years absence of consent cannot be said; length of the relationship and the acts in that

				period of relationship erodes the rigor of ingredients of offence of rape.
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**Table 4.1: Grounds for conviction or acquittal**

## 5.2 Grounds for Deciding the Matter

An analysis of the aforementioned judgments and foreign trends gives us an understanding of what might be the factors that turn the matters for or against the accused in a particular case.

### *(A) Grounds For Conviction*

#### **1. The consent was fraudulently obtained**

In cases where a woman is misled or made to believe that the sexual intercourse is going to culminate in a marital contract, and there is no ground for her to doubt the same, a conviction lies.<sup>50</sup>

#### **2. There existed an exploitation of a misinformed woman**

A woman continues to be vulnerable and exploited in society, and advantages can be taken, especially in rural and conservative areas, of

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<sup>50</sup>*Yedla Srinivasa Rao Vs State of A.P.*, (2006) 11 SCC 615, *Pradeep Kumar Verma v. State of Bihar*, 2007 IV Cri.LJ 4333 (SC).

innocent and unsuspecting women giving consent without being fully informed, and the state must step in to protect them.<sup>51</sup>

*(B) Grounds For Acquittal*

**1. The prosecutrix was sufficiently mature**

A woman above the age of consent, educated and experienced in life to be able to make other informed decisions of importance, cannot allege rape if a sexual relationship does not eventually materialize into one of marriage.<sup>52</sup> This is now one of the strongest grounds in cases in metropolitans.<sup>53</sup>

**2. It was a relationship within the context of a modern-day ‘live in’**

Such relationships are to be kept completely out of the purview of rape allegations and Delhi Courts have been following this principle clearly for approximately half a decade now since large number of cases are being filed in cities on such grounds.<sup>54</sup>

**3. There was sufficient indication that marriage wasn’t likely/definite**

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<sup>51</sup>*State of U.P. v. Naushad*, MANU/SC/1188/2013.

<sup>52</sup>*Tilak Raj v. The State of Himachal Pradesh*, MANU/SC/0010/2016, *Kaini Rajan v. State of Kerala*, 2013 (9) SCC 113.

<sup>53</sup>*Prashant Bharti v. State of NCT Of Delhi*, MANU/SC/0063/2013, *Anil Dutt Sharma v. Union of India* (*supra* note 26).

<sup>54</sup>*Ibid.* Also observed much earlier in *Deepak Gulati vs State of Haryana*, (2013) 7 SCC 675.



Where at the outset, the accused has given no clarity or inclination towards marriage,<sup>55</sup> or it is sufficiently visible from his conduct,<sup>56</sup> no conviction lies.

#### **4. Prosecution was an act of vengeance**

After the relationship not ending in marriage or any other unfavorable outcome, women may use the laws which are tilted in their favor to frame the man they were consensually sexually active with.<sup>57</sup> This is a factor that courts need to be very weary of.

### **6. CONCLUSION**

An analysis of judicial pronouncements suggests that courts though not in all cases but in some of them, rely on some of the following aspects to decide whether a crime of false promise to marry (most commonly in live-in relationships) resulting in rape has been committed:

- Clarity of intention of the accused (if circumstances or no express promise indicate marriage is unlikely, there will be no conviction).
- Maturity of the prosecutrix (her age, background and position in social strata is used to decide this matter)
- Level of consent (where a clear consensual relationship exists, allegations of rape on its culmination will not hold).

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<sup>55</sup>*Supra* note 38.

<sup>56</sup>*Uday v. State of Karnataka*, (2003) 4 SCC 46.

<sup>57</sup>Found as a common cause for *malafide* litigation, *supra* note 35.

- Time period for which consent was present. It cannot be said that for a prolonged period the woman was under misconception.
- Specific circumstances (there is no blanket formula in such cases and each case has to be examined carefully based on its own merit).

Live-in relationships can often not culminate in marriage. Thus, a societal acceptance of this fact and lessened number of rape charges following the same will occur if the legislature grants a different, less strict form of legitimacy than marriage to these relationships. The social structure of India and taboo associated with pre-marital sex has to be kept in mind. It cannot be denied that such allegations are more common in conservative societies like India where women still hold a weaker position in society, and improper westernization mixed with Indian conservative practices is creating a hypocritical youth. While it is difficult to evolve a society overnight, legislative action can definitely be taken faster.

# CRIMINAL PROCEDURE IDENTIFICATION ACT OF 2022: A PANACEA OR SETBACK

*Dr. Sandeep Mennon Nandakumar\**

## ABSTRACT

*Legislations, especially in the realm of criminal justice administration, are aimed at ensuring that the culprits are brought to justice, but most of the legislations are also particular about ensuring fair treatment not just to victims of crime, but also to accused. Fair trial, being enshrined in the Constitution of India as a fundamental right, ensures that both the complainant and the accused are treated in a fair and equitable manner during investigation and trial. However, drafting such provisions and implementing them in an appropriate manner in such a way that the above mentioned objectives are secured and fulfilled are not that easy. One such legislation that has attracted severe criticisms from its inception is the Criminal Procedure Identification Act, 2022 which replaced the earlier Identification of Prisoners Act, 2020. This paper is an effort to trace out the significant challenges faced by the Criminal Procedure Identification Act, 2022 in respect to safeguarding the rights of the accused. This research also traces the underlying reasons for a new legislation replacing the Identification of Prisoners Act, 2020, the changes brought about by the new legislation, the challenges faced by it and a critical analysis of the new legislation on the basis of rights of the accused guaranteed under the Constitution of India. It also aims to*

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*examine the challenges posed by the new legislation due to the inadequacies of laws protecting right to privacy in the country.*

**Keywords:** *Criminal Procedure Identification Act, Identification of Prisoners Act, Self-incrimination, Biological samples, Investigation, Data protection, Privacy.*

## I- INTRODUCTION

We belong to a country where police torture and custodial violence are common and it continues to be progressing every year regardless of the interventions made by the judiciary. Many a times, the Supreme Court of India have termed police torture, third degree methods and custodial violence to be violations of fundamental rights, but the trend continues to be in favour of these violations. It is equally shocking to note that the law enforcement machineries have not been successful to curb the use of excessive police force on the accused or witnesses even after repeated infamous instances of police brutality. At the same time, in the event of a crime, it is the police who is to take the blame irrespective of whether the investigation is in the right track or not. This, in no way, supports police inhumaneness, but it should also be borne in mind that the Indian criminal justice administration even allows the victim to sabotage the whole investigation by requesting the court to order reinvestigation by another agency, even if the investigation is in the right track. This is often cited as the lack of motivation for police officers to be involved in a thorough investigation as there are higher probabilities for the final stages of investigation to be taken over by another agency. Though it is true that the police officials should be prevented from violating Article 20(3) of the Constitution of India, it is also true that there should be appropriate

mechanisms in place so as to ensure the fact that police officials do have some powers to establish the guilt of the accused and expose the culprits before the courts. The law that scientific tests such as narco analysis and polygraph could only be done with the consent of the accused<sup>1</sup> does not help the police either. It is not intended to argue that the police should be given blatant powers over the accused which would even violate the basic tenets of 'rights of the accused'. The intention here is only to highlight that certain provisions should also be made in such a way that would assist the investigating agency to establish the guilt of the offenders.

However, any statutory provisions relating to criminal law should pass the test of securing the rights of the accused and in this context, this article attempts to analyze the implications of the Criminal Procedure Identification Act of 2022 on our criminal justice administration. The Criminal Procedure Identification Act of 2022, which is one of the latest additions/replacements to the existing Indian criminal justice administration has received a lot of criticisms and to a certain extent it cannot be denied that the legislation suffers from a few challenges. Hence, it is extremely important to critically examine the legislative intentions behind the statute, significant provisions of the Act, the necessity of such a legislation and also its challenges and shortcomings. This article is an effort to trace the above mentioned factors by weighing the benefits and inadequacies posed by this legislation.

## **II- SCHEME OF THE LEGISLATION**

The Criminal Procedure Identification Act of 2022 has been one of the most debated legislations in recent times in India. The new legislation has been

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<sup>1</sup> *Selvi v. State of Karnataka*, AIR 2010 SC 1974

brought in repealing the Identification of Prisoners Act, 1920. The Identification of Prisoners Act, 1920 authorized taking measurements and photographs of persons convicted of any offence punishable with rigorous imprisonment for a term of one year or upwards or ordered to give security for his good behaviour under section 118 of the Code of Criminal Procedure, 1973.<sup>2</sup> The term ‘measurements’, though inclusive was restricted to collecting finger impressions and foot-print impressions.<sup>3</sup> It is to be noted that various states have brought respective amendments to the provisions of the 1920 Act. For instance, the State of Tamil Nadu Identification of Prisoners (Tamil Nadu Amendment) Act, 2010 enlarged the scope of the legislation by including collection of ‘blood samples’ along with photographs and measurements.<sup>4</sup> The person authorized to take measurements, as per the 1920 Act, was the police officer and the police officer was also authorized to take measurements of any person who has been arrested in connection with an offence punishable with rigorous imprisonment for a term of one year or upwards.<sup>5</sup> As per the Act, the Magistrate of the first class had also been invested with the power of directing a person who has, at some time, been arrested in connection with an investigation to allow his measurements or photograph to be taken, if the same was necessary for such investigation.<sup>6</sup> Any resistance to allow photographs or measurements to be taken was considered as an offence and the provisions also sanctified use of force to secure the taking of such

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<sup>2</sup> The Identification of Prisoners Act, 1920, s 3

<sup>3</sup> The Identification of Prisoners Act, 1920, s 2(a)

<sup>4</sup> The Identification of Prisoners (Tamil Nadu Amendment) Act 29 of 2010

<sup>5</sup> The Identification of Prisoners Act, 1920 s 4

<sup>6</sup> The Identification of Prisoners Act, 1920, s 5

photographs or measurements. Though the provision that persuades the police officers to use any means to secure measurements of convicts or arrested persons seem to be alarming, the Act also had necessary safeguards in place regarding retention/destruction of already collected measurements or photographs. The Act ensured destruction of all measurements and photographs once the person is released without trial or discharged or acquitted.<sup>7</sup> But the same was not applicable if the court has directed otherwise by recording the reasons for the same and where the person was previously convicted of an offence punishable with rigorous imprisonment for a term of one year or upwards.

There was a time when even provisions of the Identification of Prisoners Act, 1920 was considered to be unconstitutional given the fact that there existed provisions such as section 6 that allowed the use of force to ensure that measurements and photographs of convicts or persons or accused were allowed to be taken by the police. Section 6 of the Act was also questioned in comparison with section 96 of the Code of Criminal Procedure, 1898 which authorised the court to issue a search warrant to produce the document.<sup>8</sup> It has also been argued that where section 96 of the Code of

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<sup>7</sup> The Identification of Prisoners Act, 1920, s 7

<sup>8</sup> The Code of Criminal Procedure, 1898, s 96 - When search warrant may be issued: Where any Court has reason to believe that a person to whom a summons or order under Section 94 or a requisition under Section 95, sub-section (1), has been or might be addressed, will not or would not produce the document or thing as required by such summons or requisition, or where such document or thing is not known to the Court to be in the possession of any person, or where the Court considers that the purposes of any inquiry, trial or other proceeding under this Code will be served by a general search or inspection, it may issue a search-warrant; and the person to whom such warrant is directed, may search or inspect in accordance therewith and the provisions hereinafter contained. (2) Nothing herein contained shall authorise any Magistrate other than a District Magistrate or Chief

Criminal Procedure, 1989 enabled the court to apply its mind and issue a search warrant to produce a document which could be used against the suspect, section 6 of the Identification of Prisoners Act, 1920 compelled the accused to testify against himself by requiring to accede to the demand of the police officials regarding photographs and measurements, which was a violation of Article 20(3) of the Constitution of India.<sup>9</sup> Though this seems to be true in light of the judgment of the Supreme Court in *M.P. Sharma v. Satish Chandra*<sup>10</sup>, this argument may not be valid especially in the light of judgments such as *State of Bombay v. Kathi Kalu Oghad*<sup>11</sup> and *Selvi v. State of Karnataka*<sup>12</sup>. The court in *State of Bombay v. Kathi Kalu Oghad*<sup>13</sup> vehemently stated that thumb impressions, signatures, hand writing samples etc. come outside the scope of application of protection against self-incrimination as contained under Article 20(3) of the Constitution of India. But in *Selvi v. State of Karnataka*<sup>14</sup>, the Supreme Court took a progressive approach in holding that administration of neuroscientific tests without the consent of the accused amounted to testimonial compulsion and hence is a violation of the rule against self-incrimination guaranteed under Article 20(3). It is in this context that the Criminal Procedure Identification Act of

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Presidency Magistrate to grant a warrant to search for a document, parcel or other thing in the custody of the Postal or Telegraph authorities.

<sup>9</sup> Ram Krishna Saran Deb, 'Constitutional Validity of Identification of Prisoners' Act, 1920 and Section 94 of the Criminal Procedure Code', Cr LJ 1955, <<https://www.aironline.in/legal-articles/Constitutional+Validity+of+Identification+of+Prisoners%E2%80%99+Act%2C+1920+and+Section+94+of+the+Criminal+Procedure+Code>> accessed 3 August 2022

<sup>10</sup> A.I.R. 1954/SC 300

<sup>11</sup> AIR 1961 SC 1808

<sup>12</sup> *Selvi* (n1)

<sup>13</sup> *Kathi Kalu Oghad* (n11)

<sup>14</sup> *Selvi* (n1)



2022 seems controversial. The Criminal Procedure Identification Act of 2022 appears to have provisions that have more scope and application when compared to the provisions of the Identification of Prisoners Act, 1920. The next part of this paper focuses on a comparison between the two legislations namely the Identification of Prisoners Act, 1920 and the Criminal Procedure Identification Act of 2022 so as to analyse the extent of modification or deviation between the two and also to evaluate whether the said modifications or deviations are in tune with or against the judgments of the Supreme Court on rule against self-incrimination.

In comparison with the Identification of Prisoners Act, 1920, the Criminal Procedure Identification Act of 2022 has enlarged the scope of authorized persons to take measurements, the persons who could be subjected to the provisions of the Act and has given an all-encompassing definition for the term 'measurements'. The Criminal Procedure Identification Act of 2022 primarily seeks to authorize taking measurements of convicts for identification and investigation in matters related to crime. In fact, the application of provisions of the legislation is not just to convicts, but also to other persons such as those who have been ordered to give security for good behaviour or maintaining peace under the provisions of the Code of Criminal Procedure, 1973.<sup>15</sup> Even those who have been arrested under any law and those detained under preventive detention laws do come under the purview of this legislation.<sup>16</sup> It is also to be noted that prison officers in addition to police officers are also authorized to take measurements which is, in fact, an addition when compared to the earlier legislation that existed.

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<sup>15</sup> The Criminal Procedure Identification Act of 2022, s 3

<sup>16</sup> *ibid*

The definition of the word ‘measurements’ has also been enlarged to include finger-impressions, palm-print impressions, foot-print impressions, photographs, iris and retina scan, physical, biological samples and their analysis, behavioural attributes including signatures, handwriting or any other examination referred to in section 53 or section 53A of the Code of Criminal Procedure, 1973.<sup>17</sup> In this context, it is to be noted that palm-print impressions were recommended to be brought under the scope of Identification of Prisoners Act, 1920 by the Law Commission in its 87<sup>th</sup> report on Identification of Prisoners Act, 1920 in 1980. The National Crime Records Bureau has been authorised to collect, store, preserve, process and share and disseminate records of measurements. It has also been given the power to retain the measurements in digital or electronic form for a period of seventy-five years from the date of collection of such measurement.<sup>18</sup> The only exception to this is in the case of persons who have not been previously convicted of an offence punishable under any law with imprisonment for any term is released without trial or discharged or acquitted by the court. In such cases, the measurements taken would be destroyed from records.

### **III- THE SHIFT IN LEGISLATIVE THINKING**

The Law Commission of India in its 87<sup>th</sup> report in 1980 had recommended several amendments to the Identification of Prisoners Act, 1920. This included addition of ‘palm impressions’ under the definition of ‘measurements’, enlarging the scope of section 3 by including offence under the Dangerous Drugs Act, 1930, amendment of section 4 so as to include taking of ‘photographs’ by police officers and to bring persons arrested

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<sup>17</sup> The Criminal Procedure Identification Act of 2022, s 2(b)

<sup>18</sup> The Criminal Procedure Identification Act of 2022, s 4(2)

under various other statutory provisions<sup>19</sup> under its ambit, amendment of section 5 so as to authorise Magistrates to direct taking of specimen signature or writing and voice, and consequential changes in other provisions. A perusal of the whole list of amendments suggested by the Law Commission undoubtedly suggested the possibility of a change in the legislative thinking to repeal the existing legislation and create a new one.

The Supreme Court in *State of UP v. Ram Babu Misra*<sup>20</sup> remarked on the possibility of a legislation on the lines of Identification of Prisoners Act, 1920 so as to ensure that Magistrates are invested with the power to issue directions to persons to give specimen signatures and writings. The Court's remark came in the light of the fact that s.5 of the Identification of Prisoners Act, 1920 only permitted Magistrates to direct persons to give photographs, finger impressions and foot-print impressions and not specimen signatures and writings. It may not be incorrect to state that the judgment in *State of UP v. Ram Babu Misra*<sup>21</sup> also had effect in the minds of the law makers to broaden the definition of 'measurements' as the definition of 'measurements' under the Criminal Procedure Identification Act of 2022 include signatures and handwriting.

More scientific advancements in criminal investigation meant more inclusions in the definition of 'measurements' and it is undoubtedly true that the provisions in the Identification of Prisoners Act, 1920 were not capable of addressing all the scientific developments. This also could be attributed

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<sup>19</sup> Dangerous Drugs Act, 1930, Drugs and Magical Remedies (Objectionable Advertisements) Act, 1954, Suppression of Immoral Traffic in Women and Girls Act, 1956, etc.

<sup>20</sup> AIR 1980 SC 791

<sup>21</sup> *ibid*

as the reason for the shift in the legislative thinking to draft a fresh legislation in this area by replacing the existing Identification of Prisoners Act, 1920. Even Justice Malimath Committee on Reforms of Criminal Justice System<sup>22</sup> had recommended amendments to the Identification of Prisoners Act 1920 so as to authorise Magistrates to take finger prints, foot prints, photographs, blood sample for DNA, finger printing, hair, saliva or semen etc.<sup>23</sup> This recommendation was to ensure that a strong case against the accused was founded upon forensic evidence.<sup>24</sup>

#### **IV-CRIMINAL PROCEDURE IDENTIFICATION ACT OF 2022 A THREAT TO CRIMINAL JUSTICE ADMINISTRATION**

Identification of persons in criminal trials assists in identifying offenders and establishing previous convictions. Criminal Procedure Identification Act of 2022 that came into effect on August 4, 2022 has already attracted severe criticisms especially due to the main reason that it has enlarged the power of the authorities in relation to taking measurements of convicts and arrested persons. When the Identification of Prisoners Act, 1920 restricted to taking measurements of persons convicted of any offence or arrested in connection with an offence punishable with rigorous imprisonment for a term of one year or upwards<sup>25</sup>, the Criminal Procedure Identification Act of 2022 has no

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<sup>22</sup> 'Justice Malimath Committee on Reforms of Criminal Justice System', vol 1, 2003, <[https://www.mha.gov.in/sites/default/files/criminal\\_justice\\_system.pdf](https://www.mha.gov.in/sites/default/files/criminal_justice_system.pdf)> accessed 16 August 2022

<sup>23</sup> It was recommended to be amended on the lines of Section 27 of POTA 2002.

<sup>24</sup> 'Justice Malimath Committee on Reforms of Criminal Justice System', vol 1, 2003, para 7.36.1 <[https://www.mha.gov.in/sites/default/files/criminal\\_justice\\_system.pdf](https://www.mha.gov.in/sites/default/files/criminal_justice_system.pdf)> accessed 16 August 2022

<sup>25</sup> Along with exceptions under s 5 of the Act.

such restrictions. It authorizes the police and prison officers to take measurements of convicts and arrested persons even for petty offences. The rationale for the same is hardly understood from the provisions or objectives of the legislation. Allowing for measurements to be taken for all offences including petty ones would not just be detrimental to the rights of the accused, but also may lead to burdening of systems employed for collection of such measurements.

Protection of liberty depends upon protection of national security and in this context, it is highly important to prevent commission of crimes and hence there is a very strong argument in favour of the provisions of Criminal Procedure (Identification) Act, 2022. There could be endless reasons for supporting the fact that measurements of convicts need to be taken, but it seems unjustifiable to collect, preserve and process the data of accused persons. In this context, it should be noted that the court has been given the power to direct retention of data of persons who have not been previously convicted of an offence punishable under any law with imprisonment for any term and is released without trial or discharged or acquitted by the court.<sup>26</sup> The only condition imposed on the court is to record reasons in writing.

Allowing an agency to retain the measurements taken under the Criminal Procedure Identification Act of 2022 may be justified for future investigation and in the context of security of life and property. However, the fact that this country does not have a data protection law makes matters more complex. Any attempt towards mass surveillance without the

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<sup>26</sup> The Criminal Procedure (Identification) Act, 2022, proviso to s 4

protection of a data protection law could be an immense challenge. India is not just infamous for not having an adequate legislation on data protection, but also for not being able to pass a Bill on data protection irrespective of several attempts made towards the same. One of the major drawbacks of the Personal Data Protection Bill, 2019 was the fact that none of the provisions of the Bill, aimed at securing the rights of data principal, applied to any agency of the Government in respect of processing of such personal data.<sup>27</sup> If the attempts towards creating a new legislation on data/personal data protection is also aimed at exempting the agencies of the government from following necessary safeguard while processing the data, then data retention for a period of 75 years authorised by the Criminal Procedure Identification Act of 2022 could become challenging. In this context, it should be noted that the data authorised to be collected under this Act need not be related to the evidence required for the purpose of investigation or trial. Even under section 53 of the Code of Criminal Procedure, examination is done so as to ascertain the facts which may afford evidence of commission of crime. More clarifications on data sharing or restrictions on the same are to be provided and a mandate to NCRB for safe keeping the data should also be provided in the Act.<sup>28</sup> There could be instances of violation of principle of purpose limitation<sup>29</sup> if the authorities decide to share the data other than for

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<sup>27</sup> The Personal Data Protection Bill, 2019 (already withdrawn), s 35

<sup>28</sup> Neerav Merchant, 'Does the Criminal Procedure (Identification) Act, 2022 impinge on the privacy of accused?', (May, 2022) <<https://www.barandbench.com/view-point/the-viewpoint-does-the-criminal-procedure-identification-act-2022-impinge-on-the-privacy-of-accused>> accessed 9 August 2022

<sup>29</sup> The General Data Protection Regulation (GDPR), Art 5(1)(b): Personal data shall be collected for specified, explicit and legitimate purposes and not further processed in a manner that is incompatible with those purposes; further processing for archiving purposes

criminal investigations and for preventing further crimes.<sup>30</sup> But it is not even clear whether such issues could be challenged as there are no laws currently on personal data protection in India.

Though refusal to allow taking of measurements is considered to be an offence under IPC, the Act lacks clarity on the measures that could be adopted by the police and prison officials to compel taking of measurements. The use of coercive measures would go against the basic tenets of criminal justice administration. Even the pending DNA Technology (Use and Application) Regulation Bill, 2019 requires consent in writing from the person arrested for an offence other than an offence punishable with death or imprisonment for a term exceeding seven years for bodily substances to be taken.<sup>31</sup> It is true that DNA collection, use and retention is permitted in other jurisdictions including US<sup>32</sup> and UK<sup>33</sup>. Though some of the jurisdictions allowed retention of data even after acquittal, interference by higher courts have ensured that data of innocent are not retained in the database.<sup>34</sup> Provisions providing for use of coercive measures in cases where persons refuse to allow for measurements to be taken and making refusal to allow the taking of measurements an offence

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in the public interest, scientific or historical research purposes or statistical purposes shall, in accordance with Article 89(1), not be considered to be incompatible with the initial purposes ('purpose limitation')

<sup>30</sup> 'Why the Criminal Procedure (Identification) Act Is Being Challenged in Court,' <<https://thewire.in/law/explainer-why-the-criminal-procedure-identification-act-is-being-challenged-in-court> > accessed 2 August 2022

<sup>31</sup> The DNA Technology (Use and Application) Regulation Bill, 2019, s 21

<sup>32</sup> 34 U.S. Code § 40702 - Collection and use of DNA identification information from certain Federal offenders

<sup>33</sup> Criminal Justice Act 2003

<sup>34</sup> *S and Marper v. UK*, [2008] ECHR 1581

under section 186 of the Indian Penal Code sounds a death knell for established principles of the Constitution of India. These provisions are against individual autonomy and right to fair trial.<sup>35</sup>

It should be noted that the Identification of Prisoners Act, 1920 was enacted and continued to be force when the country's constitutional system has not become matured enough to recognise right to privacy. It was only post *Puttaswamy v. UOI*<sup>36</sup> that right to privacy came to be recognised as implicit in Part III of the Constitution of India. The fact that involuntary administration of investigative techniques/tests were held to violative of Article 20(3) of the Constitution of India as decided by *Selvi v. State of Karnataka*<sup>37</sup> was also recognised in *Puttaswamy v. UOI*. The court, in this regard held thus:

*“The right not to be compelled to speak or to incriminate oneself when accused of an offence is an embodiment of the right to privacy... The theory of interrelationship of rights mandates that the right against self-incrimination should also be read as a component of “personal liberty” under Article 21.”*

Although *per se* there may not be severe challenges on the above mentioned ground of violation of protection against self-incrimination, the use of terms in the definition of ‘measurements’ such as ‘analysis of biological samples’ and ‘behavioural attributes’ may lead to the conclusion that data processing

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<sup>35</sup> Shaoni Das, ‘The Criminal Procedure (Identification) Act, 2022 Violates Various Constitutional Mandates’ (May, 2022) <<https://theleaflet.in/the-criminal-procedure-identification-act-2022-violates-various-constitutional-mandates/>> accessed 7 August 2022

<sup>36</sup> (2017) 10 SCC 1

<sup>37</sup> *Selvi* (n1)



may be involved rather than mere recording of measurements.<sup>38</sup> Moreover retention of data for a period of 75 years could also be difficult to be justified in the context of the third test of *Puttaswamy's judgment*<sup>39</sup>. With regard to the constitutionality of the Criminal Procedure Identification Act of 2022, the first test of legality is satisfied as there is currently a law on this matter. The second test of legitimate aim is also satisfied as the objectives are clearly to facilitate investigation and prevention of crime. But, as stated earlier, it is difficult to satisfy the third test namely 'proportionality', as there are no adequate justifications found for retention of data for an unreasonable period of time and for the application of the legislation even for petty offences. Taking of measurements of persons who are neither convicts or accused but detained seems to be disproportionate and certainly does not qualify the test of proportionality.<sup>40</sup>

The definition of 'biological samples' is yet to be made clear and it is also uncertain whether 'behavioural attributes' will include voice samples.<sup>41</sup> Collection of DNA samples *per se* is not prohibited under the Act.<sup>42</sup> It is difficult to ascertain whether 'brain mapping' and 'narco analysis' come within the purview of the Act. The definition of 'measurements' under the Act is also vague and so is the application of the Act as it is not clear as to

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<sup>38</sup> Trishee Goyal, 'What is the Criminal Procedure (Identification) Act, 2022?', *The Hindu* (12 August 2022) <<https://epaper.thehindu.com/Home/ArticleView>> accessed 12 August 2022

<sup>39</sup> *Puttaswamy* (n 36)

<sup>40</sup> Avneet Toor Gupta, 'The Criminal Procedure (Identification) Act, 2022 and the Right to Privacy', (May 2022) <<https://www.lexology.com/library/detail.aspx?g=b80efba0-72e4-4fc0-9e06-0f6b066e1b19>> accessed 11 August 2022

<sup>41</sup> <https://prsindia.org/billtrack/the-criminal-procedure-identification-bill-2022>

<sup>42</sup> *ibid*

what is meant by ‘analysis of biological samples’. This vagueness have been highlighted by critics as a ‘black hole’<sup>43</sup> that transgresses basic precepts of law. Testimonial compulsion through ‘compelled psychiatric evaluation’ which may be allowed due to the ambiguities in the definition of ‘measurements’ would lead to violation of Article 20(3) of the Constitution of India.<sup>44</sup>

It is also doubtful whether the safeguard provided in the form of proviso to section 3 would survive in the context of section 5 of the Act. Though proviso to section 3 states a person arrested for an offence except for an offence committed against a woman or a child or for any offence punishable with imprisonment for a period not less than seven years may not be obliged to allow taking of his biological samples, the power given to Magistrates under section 5 to direct any person to give measurements under this Act for the purpose of any investigation or proceeding under the Code of Criminal Procedure, 1973 or any other law for the time being in force seems to have the effect of nullifying such a safeguard.

## V- CONCLUSION

A law which is more intrusive than the existing legislations on the subject with minimum safeguards to prevent its abuse is always a threat to citizen’s privacy and it is not wrong to hope that this piece of legislation will not turn into a menace to the rights of citizens. The constitutionality of this legislation cannot be examined only on the basis of the national

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<sup>43</sup> Prof. (Dr.) G.S. Bajpai and Sahajveer Baweja, ‘Questioning the feasibility of the Criminal Procedure (Identification) Act, 2022’ (May, 2022) <<https://www.scconline.com/blog/post/2022/05/31/questioning-the-feasibility-of-the-criminal-procedure-identification-act-2022/>> accessed 17 August 2022

<sup>44</sup> n 31.

developments that have happened over decades. It is equally significant to check whether the provisions in this Act that pose a threat to individual autonomy goes against the commitment made by India to the international community through conventions and treaties.

Several concerns regarding the provisions of the Act could have been remedied if the Bill was sent to the Select Committee and the fact that it was not done still remains a major concern regarding the Act. Only time could tell the approach that could be taken by the Delhi High Court where a public interest litigation has been filed challenging the constitutional validity of the provisions of the Criminal Procedure Identification Act of 2022. The Identification of Prisoners Act, 1920 was a necessity as there was a need to ensure that developments in recording evidence such as finger impressions and foot print impressions are utilised in the realm of criminal justice administration. The legislation was a legal backing that authorised police officials to collect evidence which could have otherwise been refused by the culprits. Similar legislations in other jurisdictions also ensured the fact that the Identification of Prisoners Act, 1920 was implemented without much criticisms.<sup>45</sup>

If technological advancements were the reasons for the enactment of the Identification of Prisoners Act, 1920 so that such developments could be used for criminal investigation, the same reason is applicable in the case of enactment of the Criminal Procedure Identification Act of 2022. Even after 1920, the scientific advancements that could assist in criminal investigation have only progressed. Those scientific developments have been now made a

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<sup>45</sup> The Magistrates Courts Act, 1952, s 40(1), The Prisons Act, 1952 s 16, The Criminal Justice Act, 1967 of UK, s 33; The Police Offences Act, 1953 of Australia, s 81(4), etc

part of the Criminal Procedure Identification Act of 2022 under the definition of the term ‘measurements’. The amendments suggested to the Identification of Prisoners Act, 1920 recommended by the Law Commission of India in 1980 and the judgment in *State of UP v. Ram Babu Misra*<sup>46</sup> also could be possible reasons for exploring the possibilities of a new legislation in this context. However, the Criminal Procedure Identification Act of 2022, due to apprehensions related to protection of fundamental rights, might need a relook.

Vesting more powers with the police, especially in a country infamous for periodic custodial torture and deaths is certainly not a welcome move, but this Act probably has just done the same especially in the context of use of coercion to submit the person to give ‘measurements’. The role of the state is not just restricted to ensuring national security. There is a negative duty cast on the state from interfering in rights secured to individuals through various provisions of the Constitution of India. If the collection and subsequent public publication of photographs and measurements result in denial of livelihood of innocent persons, then the state would be miserably failing towards its duty as a welfare state. Unnecessary victimisation of innocents cannot be ruled out as it is an accepted fact that biometrics technology cannot be 100% accurate.<sup>47</sup> The following observation in *Puttaswamy v. UOI*<sup>48</sup> proves the same:

*“Biometric technology does not guarantee 100% accuracy and is fallible, with inevitable false positives and false negatives that are*

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<sup>46</sup> *Ram Babu Misra* (n 20)

<sup>47</sup> Prof. (Dr.) G.S. Bajpai (n 43)

<sup>48</sup> (2019) 1 SCC 1

*design flaws of such a probabilistic system, especially because biometrics also change over time.”*

It is true that the Criminal Procedure (Identification) Act, 2022 may not be an immediate threat to Indian criminal justice administration, but it is yet to be seen as to whether the combined application of the provisions of Criminal Procedure (Identification) Act, 2022, DNA Technology (Use and Application) Regulation Bill, 2019 and other laws such as Passenger Name Record Information Regulations, 2022<sup>49</sup> will be a severe blow to the rights of the accused.

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<sup>49</sup> Stipulates that all international airlines should share details of all international passengers with the customs department.

# **FUTURE OF HOLISTIC LEGAL ECOSYSTEM IN INDIA: ITS USAGE, IMPACT AND DEVELOPMENT IN THE LIGHT OF THE PANDEMIC**

*Dr. Sameera Khan\**

## **ABSTRACT**

*The COVID-19 Pandemic has not only impacted the lives of the general public but also posed a great challenge before the Indian Judicial System while delivering its judicial functions. Throughout of the wake of the Pandemic, 'access to justice' became a major test for the Judicial courts as well as for the aggrieved parties. In order to overawe this demanding situation, the Judiciary, led by the Supreme Court and various High Courts, adopted the method of e-filing of urgent matters and conducted frequent hearings over video-conferencing. The overhauling and digitalization of the entire court mechanism and exploring video conferencing for hearings during the COVID-19 pandemic is an impressive and progressive step towards democratization. However, the prompt action of Indian Judiciary to adopt Standard Operating Procedure (SOPs) for digitizing the system of hearing raised radical apprehensions. For instance, there were major concerns regarding the 'due process' owing to inadequate hosting platforms, sub-standard organisational practices and non-inclusive technical compliances. The privacy issues of the conflicting*

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*parties were also one of the crucial focal points in adopting the E-court mechanism in India.*

*Through this Article, the author will try to analyse the steps taken by the Indian Judicial System for adopting the virtual hearing mode and its viability after the end of the Pandemic. Even the Parliamentary Standing Committee has recommended to continue with the virtual court hearings even after the Pandemic. Hence, the pros and cons of the virtual hearing will be compared from the physical hearing, so that, a reasoned argument can be made for the adoption of virtual court system in the future. The Article will also deal with the vital challenges being posed by the E-Court mechanism over the parties as well as the Judicial Administration and will try to suggest the viable solutions for the same.*

**Keywords:** *E-courts, Virtual hearings, Digitalisation, Information Technology, Digital Divide, Cost-effective, Cyber risks, Internet Governance, COVID-19, Post Pandemic*

## I. INTRODUCTION

*“A lockdown cannot result in locking the courts altogether. And the only method available for holding court hearings is through video conferencing. And this methodology, this mechanism to run the courts in a state of social distancing has given us an opportunity to bring about judicial reforms.”*

*-Justice AK Sikri, former judge of the Supreme Court of India*

The Indian Judicial System was brought to a standstill in the light of the lockdown imposed during the Covid-19 Pandemic. In order to ensure that the Courts are able to function to an extent and delivery justice in pivotal cases, the Supreme Court used its plenary power enshrined under *Article 142* of the Constitution of India to direct all the High Courts in the country to formulate

a mechanism for the usage of technology during the Pandemic. It passed directions for all courts in India to extensively use video-conferencing to conduct Judicial Proceedings.<sup>1</sup> This was done in order to prioritize public safety and social distancing, while ensuring that the justice delivery mechanism is not ignored. Digitisation is not limited to modernizing of the court system. It also democratizes the institution where the court room is open to everyone, right from the petitioner to the judge, an outsider to the court staff, is in tiny rectangular spaces. It provides an air of equality to the judicial system, by making it accessible to everyone, which is also envisioned under *Article 14* of the Constitution. It also provides a faster access to justice. However, the equality is still not realised in the Indian Context, considering that a significant amount of the Indian Population is still not having the access and knowledge to utilize internet facilities. The implementation of the process during the Covid-19 Pandemic in India was difficult and crammed with obstacles. The Judiciary was required to modernize itself by equipping the officials with the technical knowledge required for the smooth and effective functioning of digital courts.

The Indian Courts faced a lot of difficulties while functioning through the Pandemic. This was due to the lack of technical knowledge, appropriate software and training with regards to virtual functioning. As the Pandemic eased down, the Courts reverted to physical setup since it was familiar and comfortable. Moreover, the efficiency of the Judiciary was also reduced during the Pandemic due to the inability to adapt to virtual proceedings.

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<sup>1</sup> Smit Prajapati et.al., Digitalization in Indian Judiciary System, 8 (5) IRJET 3295, 3296 (2019).



However, the adoption of Virtual mode of hearing and developing of technologies for its facilitation was a precursor to what the future holds for the Indian Justice System. The rapid advancement in technology unlocked a lot of potential for the development of a holistic legal system in India. The Pandemic has unlocked a plethora of work from home opportunities which means that the people might be scattered all over the country while having cases in different jurisdictions. The technological advancements can make their participation process much easier. It will also encourage foreign investment in India and bolster India's status on a global level since an efficient legal system is one of the hallmarks of a country.

## II. NEED FOR DIGITISATION

The Indian Judiciary was already dealing with a huge backlog of cases. There are nearly 60,000 cases pending before the Supreme Court, 45 Lakh cases before various High Courts and over 3 crore cases at the district and subordinate court level.<sup>2</sup> The Covid-19 Pandemic led this backlog to grow further due to the courts being shut down. Therefore, in order to mitigate the negative impact of the Pandemic on the Judicial System, the Indian Judiciary adopted the mechanisms of hearing cases through *e-conferencing* and also introduced the option of *e-filing of cases*.

The process of digitization does not merely involve the conversion of physical documents into digital files. It consists of a holistic approach aimed at transforming the mechanism of justice delivery for all the stakeholders – judges, lawyers and the interested parties. It will result in less cumbersome

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<sup>2</sup> Meghna Mishra and Sumit Jay, Covid-19, an inflection point for digitisation of the Indian legal system, The Daily Garden (May 6, 2020), <https://theguardian.com/covid-19-an-inflection-point-for-digitisation-of-the-indian-legal-system/>.

processes and increase the accessibility of the judiciary. It will also save the time of the lawyers, who will have no longer need to rush to different Courts as they had to during physical hearing.

The disruption in the justice delivery mechanism brought about by the Covid-19 Pandemic can also be brought by similar events in the future. The digitization of Courts will help immensely to counter the negative effects of such circumstances while also increasing the efficacy of the Judicial System. Moreover, it will allow for greater access to justice in an ever expanding and interconnected world. Digitisation is the need of the hour. People were more than happy to walk or ride animals until cars and trains came in. The road transportation means seemed great until airways made travel faster. Similarly, the digital court setup on a regular basis look unrealistic for now but is the future of the Indian legal system.

### **III. EFFORTS MADE TO ENCOURAGE DIGITIZATION PRIOR TO COVID-19**

The Indian Supreme Court had already been making big moves towards the usage of technology in Courts even before the advent of the Covid-19 Pandemic. The process of digitization of the Indian Legal System commenced with the conceptualization of *E-Courts* under the “*National Policy and Action Plan for Implementation of Information and Communication Technology in the Indian Judiciary – 2005.*” The plan received approval in the year 2010. It was not a smooth ride and there were several hurdles which included lack of budget, infrastructure, lack of awareness and technical knowhow. Nonetheless, it was able to computerize cases, their status, orders and other relevant details. The applications to facilitate E-Court services were also

developed which included the *Supreme Court App* and the *E-Court Services App*. They provided case details to the general public along with the decisions of the Courts in the local language. The E-Court services application empowers the lawyers and litigants with the details of the cases, both decided and pending, in subordinate courts and High Courts. The application provides a complete history of the cases in the aforementioned courts and even makes it possible to pay court fees online.<sup>3</sup>

The Delhi high Court and Himachal Pradesh High Court had introduced guidelines for video conferencing in 2016 itself. They used two major terms – court point and remote point. Court point is the place where the court is seated and evidence is recorded by the Commissioner. The Remote Point is where the relevant person is being examined through the mean of video-conferencing. The Witness Protection Scheme of 2018 also included the concept of “*live link*” using which the witnesses are allowed to depose for the particular case without their physical presence in the Courtrooms. In the case of *Mahender Chawla v. Union of India*,<sup>4</sup> the usage of video call was accepted in the case of cross-examination in cases relating to sexual offences.

#### **a. Artificial Intelligence**

In order to increase productivity and expedite the process of litigation, *Artificial Intelligence* has already been adopted by the Indian Supreme Court in the form of *SUVAS (Supreme Court Vidhik Anuvaad Software)* in November 2019 and *SUPACE (Supreme Court Portal for Assistance in*

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<sup>3</sup> Athik Saleh, [Digitalization of Indian Judiciary – A Necessity or A Luxury?](https://www.lawinsider.in/columns/digitalization-of-indian-judiciary-a-necessity-or-a-luxury?), Law Insider (Sept. 21, 2021, 02:09 PM), <https://www.lawinsider.in/columns/digitalization-of-indian-judiciary-a-necessity-or-a-luxury>.

<sup>4</sup> [Mahender Chawla v. Union of India](https://www.lawinsider.in/columns/digitalization-of-indian-judiciary-a-necessity-or-a-luxury), (2019) 14 SCC 615.

*Courts Efficiency*). The role of SUVAS is to translate the judgments of the Supreme Court into regional languages. This increases the outreach and accessibility of the judgments to a great extent. This assists the general public, lawyers and the Lower Courts by helping in the comprehension of the decisions given by the Supreme Court.<sup>5</sup>

SUPACE, on the other hand is a software running on Artificial Intelligence (AI). It is a great tool to increase legal efficiency since it can read case files, extract relevant information, draft case documents and manage apportioning of work. It is being developed to the extent where if the facts and arguments relevant to a particular case can be presented in a matter of seconds. This process takes a considerable amount of time if done manually. SUPACE expedites the process manifold. Moreover, it is an intelligent system which can understand the individual user and learn from their behaviour. It will then provide the most relevant results as per the needs of the user. It also has a chatbot feature capable of answering elementary questions related to the case, which can further strengthen the user's understanding of the issue.

The CCTNS i.e., Crime and Criminal Network Tracking System has also been adopted by India. The functioning of the system is based on the prediction of future offenders and hot spots for crimes for aiding in public policing. It was approved in the year 2009 and has been used in India to crackdown on crime. The AI with such predictive analytics can also be used by lawyers and law firms by finding out the probability of winning cases through the indexing of cases.

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<sup>5</sup> The Financial Express, [AI for judiciary will help reduce pendency of cases](https://www.financialexpress.com/opinion/ai-for-judiciary-will-help-reduce-pendency-of-cases/2234783/), Financial express (Apr. 17, 2021, 06:45 AM), <https://www.financialexpress.com/opinion/ai-for-judiciary-will-help-reduce-pendency-of-cases/2234783/>.

## **b. Judicial Observations**

The utility of the process of video conferencing was observed by the Courts in the case of *Krishna Veni Nagam v. Harish Nagam*<sup>6</sup> where it dealt with a transfer petition seeking a transfer of case that had been instituted under the Hindu Marriage Act. The Apex Court realised that the difficulty faced by the participants who lived in a different solution can be mitigated through the use of video conferencing. It held that, *“it is appropriate to use videoconferencing technology where both the parties have equal difficulty due to lack of place convenient to both the parties. Proceedings may be conducted on videoconferencing, obviating the needs of the party to appear in person, wherever one or both the parties make a request for use of videoconferencing.”*

The use of modern technology in the justice system was also acknowledged by the Supreme Court in the case of *M/S Meters and Instruments v. Kanchan Mehta*<sup>7</sup> where it held that, *“Use of modern technology needs to be considered not only for paperless courts but also to reduce overcrowding of courts. There is need to categorize cases which can be concluded ‘online’ without physical presence of the parties where seriously disputed questions are not required to be adjudicated like traffic challans and cases of Section 138 of NI Act.”*

Justice DY Chandrachud had also observed that, *“There is no reason for court which sets precedent for the nation to exclude the application of technology to facilitate the judicial process. Imposing an unwavering requirement of*

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<sup>6</sup> *Krishna Veni Nagam v. Harish Nagam*, Transfer petition (Civil) No. 1912 of 2014.

<sup>7</sup> *M/S Meters and Instruments v. Kanchan Mehta*, Criminal Appeal No. 1731 OF 2017.

*personal and physical presence (and exclusion of facilitative technological tools such as video conferencing) will result in a denial of justice.”*

In the case of *State of Maharashtra v. Dr. Praful Desai*,<sup>8</sup> The Supreme Court held that, “*in light of section 273 of CrPC, the term 'presence' cannot be interpreted to only mean the actual presence of a person in any court.*” This implies that there can be recording of evidence without the person being physically present in the court when the parties are located remotely, there is a need for maintenance of confidentiality, where the life of the parties or the witnesses in danger or there is a reluctance of the witness to give statements due to the fear of being engaged in Court matters.

This shows that a push towards digitization of the justice system was being made even before the Covid-19 Pandemic. At that point, it was a technological advancement. However, the Pandemic showed the necessity of the process of digitization of courts. The steps already taken will be conducive in the adaptation to a digital system of adjudication.

#### **IV. DIGITISATION OF COURTS IN INDIA: THE MAJOR CHALLENGES**

The adoption of virtual courts is an exciting prospect for the Indian Judicial System going forward. However, the path is laden with several challenges which need to be resolved for the effective functioning of virtual courts. The experience during Covid-19 where the Courts functioned virtually was not optimal. A number of technical issues were faced by all stakeholders as a result of technical glitches, insufficient file size and inactive links. Moreover, the lack of preparedness sometimes had an adverse effect on the efficacy and

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<sup>8</sup> *State of Maharashtra v. Dr. Praful Desai*, AIR 2003 (4) SCC 601.

the fairness of a trial. Some of the hurdles which the courts may face while adopting virtual courts in India in the future have been discussed below.

- ***Cost-intensive*** – The setting up of digital infrastructure in the Courts is an expensive process. The digital systems will require maintenance for which professionals will need to be hired which will push up the costs.
- ***Adaptation to Change*** – The existing pool of judges, advocates and court staff is used to the physical system of hearings. Some of the senior staff is not familiar with the modern technology which was clearly an issue during the Pandemic either. There exists every possibility of a reluctance for the move of moving towards a digital system.
- ***Cyber-security issues*** – Digital systems around the world are vulnerable to hacking which can result in theft of sensitive information. The encryption and security protocol will have to be strengthened multi-folds to ensure smooth functionality and ensure safety. A backup will have to be made on a daily basis to ensure sensitive data is not erased in the aftermath of a cyber-attack.
- ***Infrastructure Development*** - The development with regards to technological facilities is not even throughout India. The creation of suitable infrastructure to support digital courts will be a major challenge for the Indian Government. This is compounded by the issue of non-availability of electricity and internet connectivity in several villages and remote areas of India. The electricity generation capacity must be developed to ensure uninterrupted supply and prevent disruptions due to electricity outages.

- ***Maintenance of record of E-Court*** – The makeshift arrangement during Covid-19 Pandemic has trained the court staff to digitally record the court proceedings and continue their functioning. However, the method is a makeshift one and not a permanent solution. Proper training must be provided to the Court staff to ensure they are able to seamlessly handle the transformation to digital courts.<sup>9</sup>
- ***Privacy Concerns*** – The privacy of data has been one of the key issues which had been faced during the functioning of the E-Courts even during the Pandemic. The introduction of Judicial Officers numbers, CNR number and unique process IDs has been introduced in CIS to ensure greater security. There were also significant concerns raised over the reliability of third-party platforms like Zoom, WhatsApp and skype and their usage for Court proceedings since they are susceptible to hacking. The MHA also issued an advisory where it stated that Zoom is not a safe platform.<sup>10</sup> In such a scenario, it is better to develop an application which guarantees privacy and provides stability and security for the Court Proceedings to go ahead smoothly.
- ***Digital Divide*** – The access to internet across India is unequal with different sections of the society in India. This means that a significant section of the population does not have access to internet connections, requisite hardware devices and technical knowledge to take part in online trials. Moreover, such people often belong to the socially and

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<sup>9</sup> Smit Prajapati et.al., Digitalization in Indian Judiciary System, 8 (5) IRJET 3295, 3296 (2019).

<sup>10</sup> Cyncord Support Team, Advisory on Secure use of Zoom meeting platform by private individuals (not for use by government offices/officials for official purpose), Ministry of Home Affairs (Apr. 12, 2020), [https://www.livelaw.in/pdf\\_upload/pdf\\_upload-373207.pdf](https://www.livelaw.in/pdf_upload/pdf_upload-373207.pdf).



economically vulnerable sections of the society. Therefore, the adaptation should consider the needs of the people with lesser access to technological facilities and a hybrid system can be adopted until the capacity building process for adaptation in these regions is complete. The judiciary must ensure that the Constitutional Principles are followed in the process of delivering of justice.

- ***The reliability of technology like Artificial Intelligence and Machine Learning***- The use of such technology makes the process easier and more efficient. However, questions can be raised over the ability of such software to effectively account for the human factor while providing results. Moreover, their adoption as judges will be a major challenge. However, they might still be effective in dealing with less complicated cases.

## **V. DIGITISATION AS THE WAY FORWARD**

The transformation of the Indian Legal System into a digital system using state of the art technology can yield multiple benefits. The travel expenses of people travelling to Courts in different parts of India will be saved. It will have a positive impact on the environment since tonnes of paper which is used in bulky and voluminous pleadings will be saved. This will reduce the carbon footprint of India and would also be an environment friendly move. The Indian Courts have often remarked, “*justice delayed is justice denied.*” The pace of justice delivery mechanism will increase manifold allowing for the delivery of justice in its truest sense. It will allow to uphold the rule of law. The Supreme Court in the case of *Swapnil Tripathi v. Supreme Court of*

*India*,<sup>11</sup> expressed that the entire judiciary including the Supreme Court, should move towards live stream of the court proceedings. The inclusion of video conferencing in judicial proceedings will also be conducive, since there are several cases, where the physical distances inhibit the ability of the witness, accused or the petitioner to appear before the court. This will make the process of attending court hearings much more convenient.

Moreover, it will also enhance the *lawyer-client relationship*. The clients will have an easier access to lawyers which will facilitate better bonds and in-depth discussions. The lawyers will also have a greater ability to coordinate amongst themselves when dealing with cases involving multiple specialisations. The e-filing of cases provides some relief to the judicial staff who are repeatedly overwhelmed by the excessive number of cases. Moreover, the lawyers are also able to focus more on their jobs instead of spending time travelling around different courts filing cases and attending court proceedings.<sup>12</sup>

The judges also benefit immensely from the digitization since they will be able to keep a track of cases in a better manner. The use of Artificial Intelligence can be particularly useful in this domain, since it can show the judges, the applicable laws, precedents and other relevant information related to each case. Moreover, the cases involving detention and custody can be marked as critical allowing courts to prioritize them. The AI software can detect which undertrials have already been in detention for a period longer

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<sup>11</sup> Swapnil Tripathi v. Supreme Court of India, WP (Civil) No. 1232 of 2017.

<sup>12</sup> Siddharth Chandrashekhar, Opinion: Digitising Indian judiciary- moving from planning to execution, ET Government (Nov 22, 2021, 03:55 PM), <https://government.economictimes.indiatimes.com/news/digital-india/opinion-digitising-indian-judiciary-moving-from-planning-to-execution/87845804>.

than the maximum sentence of which they are accused of. In such cases, immediate release of the prisoners can be ordered by the judges.

It will also help to link the judicial processes with *alternative methods of dispute resolution*. The development of a smart software which is able to identify the matters which can easily be solved by using alternative dispute resolution methods like mediation, negotiation and arbitration. The clients can be recommended to adopt these methods while also informing them of the benefits of the same. This will encourage the adoption of these methods which will allow for faster resolution of matters while also decreasing the burden on the court.

The legal service industry also has immense potential for digitization. The law firms across India have already developed and purchased software and technology to facilitate the digitization process. Moreover, the infusion of younger professionals assisted the process of adaptation to digital technology. The remote management software can play a pivotal role in the digitisation processes and can enhance the ability of the courts for digital adaptation in the future.

### **Initiatives taken by the Court**

In the wake of the Covid-19 Pandemic and its aftermath, coupled with the increasing awareness about environmental conservation, the Supreme Court has undertaken several initiatives to further modernize the Judicial System in India. The changes have been widespread and holistic in the form of IT initiatives, Administrative Reforms, Wellness and Welfare Initiatives and more. Some of the major initiatives aimed at furthering the development of Justice System in India have been discussed.

## **Information Technology Initiatives**

- **E-SCR** – This was launched in January 2023, by the Hon’ble the Chief Justice of India. It is the digital form of the official publication of the Indian Supreme Court. The portal has more than 34,000 judgments available online. It is advanced and provides the ability to search judgments based on parameters like phrase, words, all words, name of the Hon. Judge, Bench strength, etc. The access to the Portal is free. It also provides some judgments which have been translated into local Indian languages, which is a great initiative to help reach the masses.
- **Online Appearance Slip** – This portal has been launched with the aim of doing away of manual filing of appearance by Advocates-on-Record. It has seen over 1,40,000 appearance slips submitted since its launch showing a great degree of success.
- **Video-Conference and Live Streaming of Proceedings** – The system of video conferencing which was developed during the Covid-19 Pandemic has been continually used in physical-hybrid mode. Moreover, the hearings of Constitution Bench of the Supreme Court are not broadcasted live through YouTube and NIC’ webcast services.

## **Welfare and Wellness Initiatives**

- **Supreme Court Committee on Accessibility** – The aim of this committee is to conduct an accessibility audit of the Supreme Court

premises and its functioning. It seeks to examine the problems faced by the persons with disabilities, who visit the Supreme Court premises. This is aimed at increasing inclusivity and accessibility.

- **Training and Wellness Initiatives** – These initiatives are based on ensuring organizational behaviour & ethics and value in public governance, critical thinking along with facilities for health and wellness. The CGHS Wellness centre is being augmented for the health and welfare of the employees.

### **Administrative Reforms**

- **AI Assisted Legal Translation Advisory Committee** – This committee has been set up to further enhance the usage of artificial intelligence for translating judicial records in various vernacular languages in Supreme Court of India. This committee has been constituted at every High Court to supervise the machine translation of judicial records with the help of SUVAS.
- **Email Policy** – The uniform email policy and guidelines for the Officers and officials of the Registry was implemented in January 2023. The policy is aimed at making the administrative side office work of the Registry to be made paperless, repository and archival of information, electronic transmission saving costs overrun and manpower.
- **PIL-English Branch** – This branch has started processing applications received through email in an electronic form. This expedites the process and also makes it more efficient.

These developments are an encouraging sign for the further development of the Indian legal system. The increased adoption of these initiatives will go a long way in ensuring that it keeps up to date with the latest developments in technology and dispel the notion that the Courts are slow to catch up with technological changes.

## **VI. CONCLUSION**

The Covid-19 Pandemic has shown that technology is an essential element for the Judiciary to move forward. The process of adaptation during the Pandemic was rushed since no one in the Indian Judicial system was prepared for this kind of eventuality. However, despite that the Courts tried their best to deliver justice during the troubled times. It also highlighted the need for digital education and infrastructure development going forward in order to ensure that the process is effective. The digital divide was evident during the Pandemic where a large section of the Indian society was unable to understand the mechanism due to the lack of technical knowhow. The judges, lawyers and the staff also faced struggles due to insufficient technical knowledge. This necessitates capacity building across different sections of the society and judicial institutions across the country for the effective adaptation of the E-court.

As of now, it is clear that complete digitization of Courts is not a viable alternative considering the present rate of digital literacy in India. The concerns over privacy and the threat of cyber-attacks are significant as well. However, the Covid-19 Pandemic has provided an excellent opportunity to develop mechanisms to counter these fears. A hybrid system allowing for integration of both physical and virtual courts seems to be the ideal way

forward for now. This will help in resolving the technical glitches in the process and also give sufficient time for capacity building to successfully implement digital courts. Moreover, there are some aspects of the Court system which are better carried out in a physical manner, such as witness examination. This part can be limited to physical proceedings, unless the circumstances necessitate a different approach. A holistic approach to the legal system in adapting technological reforms in the Indian courtroom bodes well for the future. The Covid-19 Pandemic has catalysed the process and forced the Indian Judiciary to take a step in this direction, which might have been delayed for a long time considering the number of detracting factors against digital hearings in India. The time for transformation to a holistic legal system in India is ripe and the Indian Government and other stakeholders need to put their best foot forward to facilitate the development of the Indian Judicial System which is integrated with the modern advancement in technology.

If implemented properly, it can be a turning point in the pace of justice delivery in the Indian Judicial System. The Judiciary has for long been guilty of subjecting under-trials to prolonged detention as a consequence of the immense backlog of cases. Once the adaptation is completed and streamlined, the pace as well as accessibility of justice in India will increase immensely. This would alleviate the prisoners from their misery while also allowing the Judicial System to follow the principle of fair and speedy trial. The corporations and start-ups can also play a major role by developing accessible and inclusive technologies which will enhance the quality of justice delivery in India.

**RIGHT TO EDUCATION OF TRIBAL  
COMMUNITIES IN MAHARASHTRA- SOCIO  
LEGAL ANALYSIS**

*Dr Revati Naik\**

**Introduction and Background:**

**सा विद्या या विमुक्तये।**

**“Knowledge is that which liberates”**

**ABSTRACT**

*Education is the key to all-inclusive growth which in turn can pave way to national development. To achieve this goal, it is necessary to bring the disadvantaged and marginalized tribal population into the mainstream. In spite of legal recognition of the right to education as a fundamental right and a wide range of efforts by the governmental agencies, the condition of tribal education is far from satisfactory. Right to education in India can be traced to Art. 21(A) Art. 51A(k) of the constitution. To describe modalities of free and compulsory education to children, the Right to free and compulsory education Act was passed in 2009. However, these efforts have failed to achieve the desired result specifically for the tribal population due to various reasons. The peculiarity of conditions of tribal population specifically social conditions justifies the differential approach towards the modalities of implementation of right to education. This article intends to evaluate the implementation of the right to education in the tribal*

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*communities and to examine the impact of lockdown on the education imparted to tribal population. It also intends to identify current issues and challenges to access to education and quality education and to recommend concrete solutions to overcome them.*

## **INTRODUCTION**

Education is the path to the knowledge which can liberate the human being. It is the most powerful tool for the improvement of social, economic, cultural condition of people, in short quality of life of people in all respects. It operates as an instrument of social change and to combat all forms of discrimination with respect to race, sex, caste, place of birth, colour and religion. This potency of education justifies the initiative on the part of welfare state to provide the right to education for the betterment of the society.

At international level the right to education owes its roots to the Universal Declaration of Human Rights.<sup>1</sup> It has built the foundation for the establishment of right to education as the basic human right and the comprehensive recognition of it can be found in various internal instruments such as International Covenant on Social, Cultural and Economic Rights<sup>2</sup>, UNESCO's Convention against Discrimination in Education etc. India is the original signatory of UDHR, and a state party to International Covenant on Socio, economic and cultural rights which comprehensively establishes the right to education. It is also a state party to the other important conventions of United Nations such as

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<sup>1</sup> Universal Declaration of Human Rights, 1948, art. 26.

<sup>2</sup> International Covenant on Economic, Social and Cultural Rights, 1966, arts. 13,14.

Rights of the Child which recognizes various rights of child including education, Therefore, it is incumbent for India to provide the primary education free of cost. It has also expressed its commitment to 2030 agenda for sustainable development adopted by United Nations Summit (2015) to ensure by 2030 that all girls and boys get complete free, equitable and quality primary and secondary education leading to effective and learning outcomes<sup>3</sup>.

Right to education as mandated by the constitution of India is the most important fundamental right and stands above all other rights as one's ability to enforce one's fundamental right flows from one's education<sup>4</sup>. Right to education in India can be traced to Art. 21(A) of the constitution which imposes the duty upon the state to provide free and compulsory education and Art. 51A(k) imposes the burden upon the parents. Even prior to insertion of Art. 21(A), the right to education was elevated to the fundamental right<sup>5</sup> and some of its limitations were also pronounced in subsequent judgements<sup>6</sup>. The Court in Unni Krishnan held that right to education is not absolute and its contents and parameters have to be determined under the lights of Art. 45 and 41 of the Constitution of India. The Apex Court held that every citizen of this

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<sup>3</sup> [https://www.undp.org/sustainable-development-goals?utm\\_source=EN&utm\\_medium=GSR&utm\\_content=US\\_UNDP\\_PaidSearch\\_Brand\\_English&utm\\_campaign=CENTRAL&c\\_src=CENTRAL&c\\_src2=GSR&clid=CjwKCAjw7vuUBhBUEiwAEdu2pEaD3msEOWXrMiFYUpcn8dt0Ya2gAUmYsBOeD\\_4P344ZNy2Q1bcNShoC-GcQAvD\\_BwE](https://www.undp.org/sustainable-development-goals?utm_source=EN&utm_medium=GSR&utm_content=US_UNDP_PaidSearch_Brand_English&utm_campaign=CENTRAL&c_src=CENTRAL&c_src2=GSR&clid=CjwKCAjw7vuUBhBUEiwAEdu2pEaD3msEOWXrMiFYUpcn8dt0Ya2gAUmYsBOeD_4P344ZNy2Q1bcNShoC-GcQAvD_BwE) (last visited on May 25,, 2023)

<sup>4</sup> *Ashok Kumar Takur v. UOI*, (2008) 6 SCC 1.

<sup>5</sup> *Mohini Jain v. State of Karnataka* 1992 AIR 1858.

<sup>6</sup> *Unni Krishnan v. State of Andhra Pradesh*, 1993 AIR 217.

country has a right to free education until he completes the age of 14 years and after that his right to education is subject to the limit of economic capacity and development of the state.<sup>7</sup> Art. 41 require the state to make effective provisions for securing right to education<sup>8</sup> and Art. 45 require the state to take endeavour for early childhood care and education for all children below six years<sup>9</sup>.

To describe modalities of free and compulsory education to children, the Right to free and compulsory education Act was passed in 2009. Object of the Act is to ensure equality of opportunity as to access to education. It provides for the free and compulsory education to children from age 6 to 14. It also prescribes for the age appropriate enrolment for children, infrastructural norms for schools, inclusivity and community participation in education. The Act has exercised the significant impact on the education in India generally and education of tribal population in particular.

In last few decades, right to education and its various perspectives have been evolved by the judicial pronouncements of constitutional courts, e.g. right to receive education free from fear of security and safety<sup>10</sup>, provision of mid-day meal scheme in schools to be the part of right of

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<sup>7</sup> *Ibid.*

<sup>8</sup> The Constitution of India, art. 41 requires the state to make effective provisions within the limits of its economic capacity and development to make effective provision for securing the right to work, to education and to public assistance in case of unemployment, old age, sickness, disablement and in case of other undeserved want

<sup>9</sup> The Constitution of India, art. 45 provides that the State shall endeavour to provide early childhood care and education for all children until they complete the age of six years.

<sup>10</sup> *Avinash Mehrotra v. UOI* (2009) 6 SCC 398.

education, prohibition on charging of capitation fees and interview screening<sup>11</sup> and right to education contemplating right to basic necessities, facilities and infrastructure<sup>12</sup> etc. Elaborating further as to the ultimate goal to be achieved by the Art 21, the court has observed that it includes keeping children in school, ensuring that they learn how to think critically and ensuring that they learn skills that will help them secure gainful employment<sup>13</sup>. The constitution has provided the meaning to the education which goes beyond the dictionary meaning and placed the affirmative burden not only on the state but also on all participants of civil society by ensuring the access to education is free from fetters of cost, parental obstruction or State's inaction<sup>14</sup>.

According to the 2011 census, the tribal population in the state of Maharashtra is 10,510,213 which constitute 9.35% of the total population. As many as 45 major tribal communities out of several scheduled tribes live in Maharashtra. Compared to other categories, tribal population depict low social and economic status. Population wise Maharashtra has got second largest ST population at national ST population. Even though in the last six decades there has been the consistent increase in the literacy rates of the scheduled tribes all over India, it still lags behind the literacy of overall population in India. The comparative literacy rates of S.T. and total population depict the

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<sup>11</sup> *Mohini Jain v. State of Karnataka*, 1992 AIR 1858.

<sup>12</sup> *Environment and Consumer Protection Foundation v. Delhi Admn.*, (2012) 10 SCC 206.

<sup>13</sup> *Supra* Note 3

<sup>14</sup> *Supra* Note 9.

literacy gap of 14.03%. This data highlights the need of concentrated efforts to achieve the target of literacy for all<sup>15</sup>. There are many more challenges such as poverty, locational disadvantage, discriminatory treatment faced by the tribal students in terms of accessibility of education and quality of education.<sup>16</sup> Further literacy is the starting point of education which in itself has wider conations. Much is still realized to be achieved in that direction.

The lockdown imposed to deal with covid-19 has brought in front the deeply rooted inequalities existing in Indian education system. These inequalities have much more harsh impact with respect to marginalized communities like tribal. Due to lockdown, schools got shut and online education was the only option available. Online education has created a digital divide between haves and have-nots. The lockdown deprived the students of basic facilities such as mid-day meals and textbooks. Residential schools were shut down and it is feared that many students who were thrown out of the stream will never resume their education. Now as the schools have reopened, it is utmost necessary to ascertain whether all students have resumed their education. Further, the constant threat posed by the emergence of new variants of COVID-19 and the possibility of the use of biological weapons in the near future necessitates the evolution of vibrant mechanisms which will meet the new challenges successfully. This article intends to evaluate the implementation of the right to education in the tribal communities and

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<sup>15</sup> Census Organization of India, “15<sup>th</sup> National Census Survey”, (2011).

<sup>16</sup> Centre for Budget and Policy Studies (CBPS), “Reviewing the status of education in tribal areas in Maharashtra” (June, 2017).

to examine the impact of lockdown on the education imparted to the tribal population. It also intends to identify current issues and challenges to access to education and quality education and to recommend concrete solutions to overcome them. The present research done on the topic can be analyzed on the following counts: -

1. Present research regarding problems persisting in tribal education and causes for the same: - The available research on the topic confirms the problems persisting in tribal education at two levels, firstly at the level of access to education and secondly regarding quality of education.

a) **Access to education:** - Ample research highlighting the hurdles faced by tribal population while accessing the education is available, e.g. A Case Study on Accessibility of School in Tribal Areas and Its Implications on Educational Inclusiveness.<sup>17</sup> This research based on the sample of scheduled tribe in Madhya Pradesh underlines the fact that as the villages or inhabitations of the tribal populations are situated in forest area, the access to education is not easy. There is absence of basic facilities such as water supply, electricity, transportation facility and mobile network. The research asserts that the hurdles posed to access to education results in students specially girls dropping out from schools. Further the research study titled Reviewing the status of education in tribal areas in Maharashtra undertaken by the

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<sup>17</sup> Vishal D. Pajankar, "A Case Study on Accessibility of Schools in Tribal Areas and Its Implications on Educational Inclusiveness" 7 *Journal on Education and Practice* (2016).

Centre for Budget and Policy Studies (CBPS), Bangalore and commissioned by the UNICEF is very much relevant<sup>18</sup>. The research underlines the lack of co-ordination between the Tribal Development Department and Department of Education which are main providers and regulators of tribal education. The report also underlines the importance of location in tribal literacy. It put on the record the finding as to prevalence of the problem of low enrolment and retention and poverty being the prime cause of low school participation. Amarawati, Thane and Yawatmal are the selected districts for primary survey. The research underlines the problem prevailing in tribal education at various levels such as access to education, quality of schooling and nature of schooling. It records the poor quality of education offered to the tribal population. The research confirms the poor learning outcome of tribal education which is the cumulative effect of locational disadvantage, cultural difference, lack of teachers from tribal communities, lack of training to teachers regarding teaching or managing tribal population.

Even in pre RTE era, the research confirms low literacy rates among tribal population, ineffective implementation of various incentive schemes by the state governments due to lack of financial resources, poor infrastructural facilities in Ashram shala, poor student teacher ratio and discrimination faced by tribal children in schools etc. While decoding the schooling

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<sup>18</sup> *Supra* note 16.

experience of tribal children, the report highlights series of obstacles including commuting long distances to school in hostile environmental conditions, abuses and discrimination from teachers and fellow students from non-tribal backgrounds, difficulty in comprehending the language of instruction<sup>19</sup>.

- b) **Research regarding quality of education:** - The poor quality of education in tribal area is affirmed by the various researches. The research paper titled, 'Impact of Residential Schools and current challenging issues of Tribal Education in Odisha' critically analyses status of tribal education in Odisha<sup>20</sup>. The lower participation in the education by students from Scheduled Caste and Scheduled Tribe category is confirmed by various researches. The pace of development specifically with respect to participation in education process is affirmed to be low. Easy access to the education and the creation of more opportunities to achieve that end has been recommended. It has identified certain peculiar challenges to the tribal education such as locational disadvantage, indifferent attitude of parents towards education of ward, lack of awareness about the right to education. It also records adverse impact of Residential schools on the life of tribal children. To address the issue, it

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<sup>19</sup> Mehendale Archana, "Isolated Communities and Ignored Claims: Tribal Children's Right to Education in India", (2003).

<sup>20</sup> Saraswati hansdah, "Impact of Residential Schools and Current Challenging Issues of Tribal Education in Odisha" 3 *Scholarly Research Journal for Humanity Science and English Language* 3573 (May, 2016)



recommends tribe specific learning arrangements, provision of study material in local language, appointment of local teacher etc. Similar issues have also been recorded by the “impact of Ashram Schools Issues and Challenges of Tribal Education in India”<sup>21</sup> The manifestation of poor quality of education is found in dropout rate. The higher dropping out rate of scheduled tribe students is indicative of failure of the system to retain the interest amongst the students and its inability to push them towards higher education<sup>22</sup>. The no detention policy till 8<sup>th</sup> Standard has also contributed to the poor quality of education. Poor level of learning is also a common finding with respect to tribal education<sup>23</sup>.

2. **Socio Economic Condition of tribal population:** - Significant research regarding the socio-economic condition of tribal population is available. Substantially lower socio-economic status of tribal population in the district Thane and Raigad is affirmed by the research. Unawareness about the governmental schemes, dependency on the forest produce and agriculture for livelihood are some of the prominent findings<sup>24</sup>. Importance of education as an

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<sup>21</sup>Satyasavitri V.B. and Dr. P.M. Honekari, “Impact of Ashram Schools Issues and Challenges of Tribal Education in India” *8 International Journal of Scientific and Research Publications*, 475(2018).

<sup>22</sup> Ministry on Education, “Annual Unified District Information on School Education (UDISE+) 2019-20

<sup>23</sup> R. Hima Bindu, Quality of education in Tribal Areas- A Case Study of Khammam District of Andhra Pradesh, 75 Proceedings of Indian History Congress, 1317(2014)

<sup>24</sup> Prabhakar Chavan, “A study on Socio – Economic Status of Tribal People in Thane and Raigad District, Maharashtra”, *3Pragati: Indian Journal of Economy* (2015).

key instrument to prevent the inter-generational transmission of poverty has also been recognized. Socio-Economic Issues Facing Katkaris A Report prepared for Rest of Maharashtra Development Board explores persistent exclusion and deprivation of katkaris in the district Raigad and Thane Region. The report highlights multiple insecurities faced by katkaris at various levels such as lack of ownership rights over land, water bodies and forests, lack of access and control over natural resources, threat of evictions and displacements, lack of information and awareness, inadequate education and absence of collective mobilization and unionization<sup>25</sup>.

3. **Research on the Impact of pandemic on education:** - Lockdown imposed due to covid 19 has exercised the far-reaching impact on tribal education. In the first phase the entire system just stopped and nothing was happening. Gradually recovering from the first shock, it started responding and various initiatives were taken to deal with the challenge. These initiatives however were proved to be meagre due to various factors including the lack of resources and absence of training as to use of technology etc. Various researches were conducted regarding the impact of lockdown on education, attempts to address it and impact of online education e.g. Report titled 2020 Wave 1 (Rural) Findings – India, Annual status of Education Report facilitated by N.G.O ‘Pratham’<sup>26</sup> is based on the nation wise survey

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<sup>25</sup> Tata Institute of Social Sciences, ‘Socio Economic Issues Facing Katkaris’, (2014).

<sup>26</sup> ‘Pratham’ and National Achievement Survey, “The Annual Status of Education Report(ASER)” (2020).

of representative set of households and schools in 30 states and Union Territories. The report records non-enrollment of higher proportion of children in school in 2020 as compared to 2018. It also records the comparative decline in the enrollment in private schools and slight increase in the admission to the Governmental Schools. It put on the record the finding that 84% of children in low education families (i.e. those in which both parents have five years of schooling or less) are admitted to Government school and only less than half of them have smart phones, non-availability of which can be definitely be interpreted as a barrier in online education. Further 328<sup>th</sup> Report of the Plans for Bridging the Learning Gap caused due to School Lockdown as well as Review of Online and offline Instructions and Examinations and Plans for reopening of Schools<sup>27</sup> contains the detail assessment of the impact of lockdown imposed due to Covid 19 on the education of children and gives some concrete suggestions to deal with it. It discusses in the detail various governmental initiative taken to deal with various challenges being faced in educational field. It confirms the adverse impact of the school closure on children's learning, nutrition, mental health and overall development. It also underlines the risk that due to long closure children, specifically girl children may

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<sup>27</sup> Department Related Parliamentary Standing Committee on Education, Women, Children, Youth and Sports,  
“ Plans for Bridging the Learning Gap caused due to School Lockdown as well as Review of Online and offline Instructions and Examinations and Plans for reopening of Schools” (6<sup>th</sup> August, 2021)

probably get engaged in labour or early marriage and would not return to the school.

Analysis of present research leads to following observation: -

Majority of the research on education in tribal area focuses on the accessibility of education and level of literacy. There is a glaring need to revisit and expand the jurisprudence of right to education so as cover the other dimensions such as development of life skills, employability or education with cultural reference. The present research on prevailing situation of tribal education depicts the problems persisting at two levels first regarding the access to education and secondly with respect to the quality of education. Even though more than a decade has lapsed since passing of the RTE, still access to education remains a significant challenge to tribal education, which is further more aggravated due to pandemic. Lockdown imposed due to Covid-19 had brought the weakness of the education system as a whole to the notice and it has made it mandatory for us introspect, work on weaknesses and built a sustainable system capable of meeting challenges of modern times.

Further while studying condition of education generally and tribal education particularly, much emphasis is given to the literacy of tribal population, however the fact that literacy is just the starting point of education which itself is a multifaceted concept ( i.e. education includes within its ambit progression to higher education, employability and improvement in standard of living as a outcome and many more) needs to be appreciated and there is a need of a scientific research of holistic

evaluation of tribal education so as to understand and what needs to be done to improve the prevailing condition.

The legal framework pertaining to right to education suffers from following glaring drawbacks: -

1. **Non-comprehensive nature of the right:-** The RTE guarantees the free and compulsory education only till 14<sup>th</sup> year of age i.e. till the completion of 8<sup>th</sup> standard. Due to this, students are left in between prior to completion of school education i.e. S.S.C. matriculation which is basic milestone in school education. Matriculation is the basic eligibility to avail job opportunities e.g. minimum qualification for the entry level job in Government establishment is generally S.S.C. Even though the scheduled tribe students have the scholarships and free ships, the overall support which is required specifically in case of marginalized communities can be provided by extending the free and compulsory education till the completion of S.S.C. The Indian Education pattern is 10+2+3. This also justifies the extension of age limit to 16 years of age, so as to extend the full support for completing the basic milestone i.e. S.S.C.
2. **Unequal Development:** - Present research confirms the unequal development among various tribal communities belonging to the same geographical area. For example, tribal population in Raigad district comprises of three

communities katkari, mahadev koli and thakar. However there is a glaring difference as to the socio economic development of these communities i.e. katkari community is comparatively underdeveloped and vulnerable amongst all. On the contrary, Mahadev Koli is comparatively more developed and progressive community which has more representation in government jobs and there socio-economic status is comparatively high. There is a need of research to understand this incident of unequal development and causes of the same so as find out the ways of comprehensive and holistic development<sup>28</sup>.

3. **Access to education:** - The Act provides for free and compulsory education to children in the age group of 6-12. This right is conferred on every child including the child belonging to disadvantaged group, child belonging to weaker section and children suffering from disability<sup>29</sup>. In such a case, such child is entitled to receive free elementary education even after 14 years of age. In spite of this manifest provision it is observed that often students have to spend money for several heads under the title such as travelling expenses, uniform and books, expenses for extracurricular activities etc. Such a compelling expenditure has an adverse impact on the education of tribal community which is

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<sup>28</sup> *Supra* note 25

<sup>29</sup> The Right to Free and Compulsory Education Act, 2009 (Act No 35 of 2009) s. 3

economically and sociologically underdeveloped. Such expenditure often operates as a hurdle in tribal children's right to access to education. The poverty, migration compelled by economic condition and nature of employment, social exclusion faced at various levels contribute significantly in taking the access to education beyond the reach of tribal people.

The lockdown induced by covid-19, has exercised a far-reaching impact on the tribal education. Shutting down of schools, closure of ashramshalas deprived students not only of education but also of food. Lack of facilities such as internet, mobiles, absence of skill on the part of teacher to develop e-resources and tools for curriculum delivery posed a challenge to access to education. It is observed that since the first wave many students were totally out of education stream and whatever efforts made by the school to deal with the situation such as sending teachers in rotation in each wadi were too inadequate to meet the need. One teacher in wadi to teach all students belonging to different standards, that too only twice in a week was the situation during lockdown. Now schools are open, but the persistent threat caused by new variants of covid makes it mandatory to find out the sustainable solutions to address the problem.

4. **Quality of education:** - The access to education and quality of education are the components of the right to education.

Evaluation of quality of education is done by using various parameters such as accessibility, infrastructural facilities, teaching learning process, results and expenditure<sup>30</sup>. Since the enactment of the RTE Act, more than a decade has passed but the quality of education specifically in the tribal is very gloomy and suffers from number of challenges, some of which are as follows: -

- 4.1. **Low Learning levels and higher dropout rates at primary and secondary level:** - Low level of learning is a very serious concern with respect to tribal education. The research on the aspect has affirmed the low levels of learning to such an extent that the child studying in 8<sup>th</sup> standard is not able to write his name. Further another issue prevailing is higher dropout rate. According to the annual report of Unified District Information on School Education, at the primary level the dropout rate is highest among ST students, which is 3.69%. At secondary level, the dropout rate is again highest from the ST category, the dropout rate for boys is 25.51 and for girls it is 22.49. The data has recorded consistent high dropout rate for ST students till 5<sup>th</sup> standard from government as well as private unaided school<sup>31</sup>. Loss of earning, migration brought about by the Lockdown due to covid-19 is bound to increase this dropout

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<sup>30</sup> R. Hima Bindu, Quality of education in Tribal Areas- A Case Study of Khammam District of Andhra Pradesh, 75 Proceedings of Indian History Congress, 1317(2014)

<sup>31</sup> *Supra* Note 22



rate further and it is also feared that many students will never resume the education after the opening of schools<sup>32</sup>. The dropping out of school has a financial ramification which adversely impacts the labour market, economic performance and social development.

The higher dropout rates are attributed to various factors such as poverty, but the most consistently blamed factor is the no detention policy prescribed under the Act. RTE provides that no child admitted in a school shall be held back in any class or expelled from the school till the completion of elementary education<sup>33</sup>. However this provision has now been amended in 2019 which conferred the power on the state govt. to reintroduce exams and detention of students wherever required. This policy of non detention compelled the school to promote the child to next grade irrespective of low learning levels and subsequent dropping out from schools. There is a need of empirical research to understand the causes of dropping out of tribal students, its connection with no detention policy in amended form and find out effective ways to deal with it.

- 4.2. **Age appropriate training:** - To make right to education a reality, the Act further provides that even if the child is above six, he should be admitted in the age appropriate

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<sup>32</sup> *Supra* Note 14.

<sup>33</sup> The Right to Free and Compulsory Education Act, 2009 (Act 35 of 2009) s. 16.

class and should be given special training so as to bring him at par with children of his age<sup>34</sup>. To facilitate the integration of such child, the Act also provides for additional support to such students even after they have been admitted regular classes for a period which can extend maximum up to two years. In short the Act provides for all the measures to be taken for the absorption of out of school child in the formal system of education and pursue the education till VIII. For the purpose of giving this additional training, the alternative schooling program in the form of ‘Sarva Shiksha Abhiyan’ has been reconceptualized after the enactment of RTE. However, the efficacy of this program to give additional training to such student has always remained in a state of difficulty. School teachers who are overburdened with their pre-existing duties can hardly do justice to the additional work of imparting this age appropriate training. Even though this initiative has made substantial achievements with respect to the enrollment of students, its achievements with learning outcomes are still far from satisfactory<sup>35</sup>

- 4.3. **Curriculum without any reference to tribal culture:** -  
The syllabus which is taught in the schools has no reference of tribal culture. It is taught in the language which is

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<sup>34</sup> The Right to Free and Compulsory Education Act, 2009 (Act 35 of 2009) s. 4.

<sup>35</sup> Standing Committee on Human Resource Development, “Report on implementation of Sarva Shiksha Abhiyan and Mid Meal scheme” (December, 15, 2016).

foreign. This foreign language of instruction for imparting education to tribal often operates as a barrier. Curriculum which is delivered to tribal is alien without any reference to tribal culture and history<sup>36</sup>. Without any surprise, such education fails to retain the interest of students which may subsequently lead to dropping out from the school. Measures such as introducing vernacular at primary level and teaching in local dialects have been recommended but yet not been implemented<sup>37</sup>.

Further, the present education delivered is often perceived as incompetent to do justice to the abilities of tribal population. Tribal people have unique variety of physical abilities such as flexibility, speed, strength and endurance. Present curriculum does not contain anything so as to utilize their competencies for creating opportunities for tribal kids in the field of sports or jobs in army, navy or investigating agencies. The need to design the model conducive to development of such potencies is totally unattended in the present educational system. Taking the visionary approach towards the inclusive education, the new education policy 2020 has attempted to give national

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<sup>36</sup> Dr. Kabita Kumari Shau, Challenging Issues of Tribal Education in India, *IOSR Journal of Economics and Finance* .Volume 3, Issue 2. Ver. II 48-52, (Mar-Apr. 2014)

<sup>37</sup> Sanjay Kumar Pradhan. 'Problems of Tribal Education in India' *Kurukshetra*, 59(7) 26-3 (2011)

perspective to the tribal education by taking various initiatives such as Eklavya Model Education School etc. However, success of these initiatives needs the effective enforcement with the vision and understanding of ground realities.

5. **Reservation in private schools:** - To make the mandate, 'education for all' a reality RTE provides 25% reservations in unaided schools for the children belonging to weaker and disadvantaged group. It also makes the provision of reimbursement of the expenditure incurred by the school to the extent of per child expenditure incurred by the state or the actual amount charged from the child whichever is less. This specific provision in the Act is not being fully implemented in the urban area. Its implementation in the geographical area comprising of tribal population is far from satisfactory. For e.g. as per government records in Raigad district in Khalapur Block 17 schools are RTE schools and in Karjat Block total 23 schools are approved by RTE admissions. In the entire Raigad District total 265 schools are RTE approved, against total 4463 RTE vacancies, only 2696 admissions are confirmed. Out of the total admissions confirmed how many admissions are of tribal students, regarding this data is silent. There is a need

of empirical research to understand the implementation of this provision in tribal area by tribal communities.<sup>38</sup>

6. **Inadequate resources to implement the Act:** - One of the significant difficulties in the implementation of the Act is inadequate resources at the disposal of the state government which have to shoulder the responsibility of implementation. The allocation for education in the budget for the financial year is Rs 1,04,278 crore (3.1%) which has been substantially increased compared to previous year so as to make provision for digital education, creation of digital university, agricultural universities, skill development programs etc. This provision is nowhere near to the provision of 6% of GDP prescribed by the national education policy 2020. In absence of financial capability, the implementation of the theoretically strong provisions often trembles down.

Further RTE is often criticized for its emphasis on physical infrastructure than the quality and quantity of teachers. In spite of the improvements in term of teacher student ratio there are as many as 11.16 lakh vacancies in teaching profession. The present research confirms that there are 1.2 lakh single teacher schools in India out of which 89% are in rural area. Further as to digital infrastructure, overall

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<sup>38</sup> School Education and Sports Department, Government of Maharashtra available on [https://student.maharashtra.gov.in/adm\\_portal/Users/rteindex](https://student.maharashtra.gov.in/adm_portal/Users/rteindex) (last visited on May 26, 2023).

availability of computing devices i.e. desktops and laptops in the school are 22% for all India with rural area has much less provision i.e. 18% than urban area which has 43%. Access to internet in schools is 19% all over India out of it only 14% in rural area compared to 42% in urban area<sup>39</sup>.

Conclusion and Suggestion: - Education and literacy are the potential indicator of the social and economic development of any country. Education is the key of all-inclusive growth which in turn can pave way to national development. To achieve this goal, it is necessary to bring the disadvantaged and marginalized tribal population in the main stream. In spite of legal recognition to right to education as a fundamental right and wide range of efforts by the governmental agencies the condition of the tribal education is far from satisfactory. The inadequacies prevailing in the RTE which are discussed above and hurdles to its successful implementation needs to dealt in effective way so as take concrete step towards effective tribal education. The pre-existing challenges to the tribal education have become further more aggravated due to the lockdown imposed to deal with covid-19. Following are some of the concrete suggestions to met some of the above-mentioned challenges: -

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<sup>39</sup> United Nations Educational, Scientific and Cultural Organization, “2021 State of Education Report (SOER) for India: No teacher No Class” (2021).

1. Expanding the scope of right to education: - As discussed above the right to education need to be extended till 16 years so as to enable students complete their education up to matriculation. Further the non-retention policy upto 8<sup>th</sup> standard needs to be withdrawn immediately as it is merely compromising with the quality of education.
2. Revision of curriculum with specific reference to tribal community – To create interest among tribal students for education there is a need revise the curriculum with tribal reference. The tribal way of life including tribal history should be made part of curriculum. Further there is also a need to devise the curriculum addressing the unique capabilities of tribal children specifically in area of sports.
3. Working on quality of education along with the accessibility: - Majority of focus of initiatives for education seems to be concentrated on accessibility of education. Along with the accessibility, the quality of education needs to be addressed with utmost sincerity. To achieve the quality various measures such as upgradation of human and material resources, policy drafting and its rigorous implementation are required to taken on urgent basis.

4. Improvement in socio economic condition: - It is observed that low socio-economic condition leads to low level of education and lack of education in turn leads to low socio-economic condition. To break this vicious cycle, there is need to work in a strategic way to improve the socio-economic condition of tribal population.
5. Use of technology: - Covid 19 has highlighted the inherent weaknesses prevailing in our educational system specifically in tribal area. However, it has also opened new opportunities such as use of technology, the constructive use of which can be used to avail the expertise from a far remote distance. The provision of e-infrastructure and apt use of technology can open the gate of various opportunities leading to improvement of socio-economic status of this downtrodden communities.



# **DISRUPTIVE TECHNOLOGY IN HIGHER EDUCATION: LEGAL ISSUES AND CHALLENGES**

*Dr. Gurujit Singh\**

## **ABSTRACT**

*History is witness to universal fact that every successful revolution brings with itself the power of destruction of traditional norms, beliefs and reconstruction of new faith, culture and establish new norms. Analysing the above statement from science and technology perspective, each and every scientific and technological developments have led to establishment of new social norms and become new normal. The 4th industrial revolution has laid to development of verities of new technologies such as Artificial Technology, Data Mining, Big Data, Internet of Things etc. The beauty of these technologies is that they have not left any subject untouched where these technologies cannot be used to reorient the concept dynamically. There is no iota of doubts that it has revolutionised every aspect of human life including education also. State appreciating the pivotal role of education in socio economic development of State and its subjects, have promoted it in its policy from time to time. Disruptive technologies are finding their place in education also and potential to take the learning teaching exercise to a new level, making it more effective, interactive and inclusive. While this is a welcome step and State should adopt the best technologies for best outcome, it should appreciate the critical side of technology also. The*

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*current paper is an attempt to critically analyse certain legal issues in the application of disruptive technology in higher education.*

**Keywords:** *Disruptive Technology, NEP, Intellectual Property, Data Protection, Privacy*

## I - INTRODUCTION

The best thing about technology is that it is organic in nature. It keeps on evolving with time and experience. Anthropological evidence is at place to prove the technological progress of human beings from centuries. Technology is instrumental in destruction of unscientific wisdoms, beliefs and creation of new knowledge and culture. Being innovative and technical is basic and important part of human character right from the inception. The nature of technology in practice at various times shaped the dynamics of socio economic and political development around it. Humans always are the central point of technological revolutions as they are the creator as well as user of technology.<sup>1</sup> Human civilisations has witnessed so many technological revolutions in the process of its evolutions. No technology in the past has ever created such major shift in social structure as well as behaviour of human being as the advent of forth generation of technological revolution<sup>2</sup>. This technology has within short period of time connected world and forced the State to recognise its power and become important tool of governance.

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<sup>1</sup> Technologies are always created to enhance efficiency, accuracy in assessment and comfortability for human beings and therefore technology is always neutral in their role. Humans so far have managed to control technology; hence they are responsible for positive and negative impact of the technology.

<sup>2</sup> Emergence of Information Communication Technology, Social Media, Artificial Intelligence, Big data, Internet of Things etc.

The present paper is an attempt to identify the impact of disruptive technology on higher education. First part of the article elaborates the conceptual understanding of disruptive technology. Second part analyse the disruptive technology for higher education. The third aspect of the article highlights some relevant issues and challenges of disruptive technology in the field of higher education and related issues.

## II - DISRUPTIVE TECHNOLOGY/INNOVATION

Christensen and Joseph L. Bower<sup>3</sup> categorised innovation as per its nature and overall impact. According to them, Innovations can be categorised as sustaining innovation and disruptive innovation. Sustaining innovations are in addition to already existing innovations of like nature. This nature of innovation provides an additional functionality for an organisation. They are generally incremental improvement over the pre-existing product making it more effective in terms of its use. Since there exist already product, the sustaining innovation may be related to effective sustainable use of the product. However, in case of disruptive technology, the technology may be absolutely new, innovative in terms of concept or process. It may be not important at the time of origin of the concept or technology or may seems absolutely unreasonable at inception. But in fact, it may be an innovation of futuristic nature. It may have broken the chain of innovations and conceived before time. They lack certain features as per the conventional rule of innovation of establishing as goods/services. They may be characterised as of low cost, simpler in use, convenient for users, effective in achieving the

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<sup>3</sup> Joseph L. Bower & Clayton M. Christensen, *Disruptive Technologies: Catching the Wave*, Harvard Business Review, January- February 1995, 43-53

objective, multidimensional in approach, but appeal less due to its low popularity among masses. However, they all sudden get big push due to more consumer friendly and convenient to handle. For example, online presentation options were available in cyberspace for some time. Though it was not that popular among masses. On very few occasions it was used to establish communication by certain agencies. It was not that reliable mode of communication. However, during the Corona epidemic and precautionary approach adopted by State, social distance was new normal and the technology was explored in various formats almost in every professional or unprofessional conduct successfully. Technology was even used in education for teaching learning purposefully more effectively.

Thought there is no universal definition as such of the concept. Cambridge dictionary defines disruptive technology as “a new technology that completely changes the way things are done”. Disruptive technology has potential to alter very architecture of the technology and can introduce the fundamental changes in the nature and quality of information. It has potential to create its own space in every field. Due to improvement in quality or quantity, low cost etc it has gained more popularity.

In the field of higher education in last decade there are many disruptive technologies introduced. The increasing sophistication of Information Communication Technology has paved way of innovation and experiment in the field of education. Massive Open Online Course (MOOC), Wikipedia etc., are small but effective examples of disruptive technology. MOOC has provided an alternative to the class room teaching. There are mushrooming of

the MOOC program across the globe. Private players as well Public Universities are playing major role in the development of the MOOC program. Some of the famous MOOC platforms are [www.edx.org](http://www.edx.org), [www.udemy.com](http://www.udemy.com), [www.coursera.org](http://www.coursera.org), [www.udacity.com](http://www.udacity.com), [www.canvas.net](http://www.canvas.net), [www.learn.eduope.org](http://www.learn.eduope.org), [www.swayam.gov.in](http://www.swayam.gov.in), [www.nptel.ac.in](http://www.nptel.ac.in) etc. In the same way Wikipedia made the physical library and encyclopaedia redundant. The business structure of the Wikipedia which makes it possible to get the information free of cost. Recently, Metaverse the virtual reality platform has announced their entry in education at their platform. There is no doubt that the nature of their involvement may create new benchmark in education. The possibilities are endless. Some of the prominent disruptive technologies used in higher education are of the following types:

**(a) Artificial Intelligence** - Artificial intelligence<sup>4</sup> (AI) has been the most happening technologies of our times. It has been horizontally applied and experimented in almost all areas. The technology is perceived as closer to human intelligence or better than human intelligence. Hence, it has been devised in various forms at different part of the globe on experimental or practical manner in the teaching, learning, grading, assessment, training, library, administrative and admission process. Currently, the use of AI in higher education pertains to the use of technology to address challenges of teaching, learning and learner success.<sup>5</sup> In University of British Columbia, a

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<sup>4</sup> Though there is no uniform definition of Artificial Intelligence so far. However, it can be defined as “computer system that undertakes task usually thought to require human cognitive process and decision-making capabilities.”

<sup>5</sup> Kathe Pelletier, Malcolm Brown, D. Christopher Brooks, Mark McCormack, Jamie Reeves, and Nichole Arbino, with Aras Bozkurt, Steven Crawford, Laura Czerniewicz, Rob Gibson,

project related to learning language named Language Chatism is used. The project allows the student to interact with an avatar in virtual environment in specific language. University of Iowa used Digital Learning Scorecard to identify students performing poorly academically. New Zealand developing mind lab to analyse the sentiment, emotions of students when they discuss about their academic venture in social media platform. Further, institutions from States like Germany, UK, Netherlands and Australia collaborated for research on metacognitive skills i.e., self-regulated learning skills (SRL) of students. The project aims to evaluate the SRL of students and provide personalised feedback for better outcome. AI has opened new opportunities to penetrate into teaching, learning and skill related to higher education benefitting students as well the faculties to be more productive in terms of knowledge and market-oriented skills.

**(b) Blended & Hybrid teaching Learning** – The Corona epidemic has seen the rise of new methods of learning. Though the technology was available before the epidemic and used in industry to some extent. It has seen great push of blended and hybrid teaching learning aid during this time due to the nature of requirement of time. The University/School remained closed for almost a year due to pandemic. This forced government as well as institution to be online in teaching and learning. Teaching and learning remained continue due to such technology. Zoom, Microsoft class, google class room are certain

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Katie Linder, Jon Mason, and Victoria Mondelli, 2021 EDUCAUSE Horizon Report, Teaching and Learning Edition (Boulder, CO: EDUCAUSE, 2021), available at <https://library.educause.edu/-/media/files/library/2021/4/2021hrteachinglearning.pdf?la=en&hash=C9DEC12398593F297CC634409DFF4B8C5A60B36E>, accessed on 01.10.2022.

online platform widely used during this time. Convenience, comfortability and cost of the online teaching & learning forced the institution to accept it as alternate mode of learning. Even after corona epidemic, the blended mode of teaching and learning is used in higher education. MOOC courses are also developed by industry as well as academician to enhance the teaching learning. Various innovative courses were opened for the anyone with willingness to be part of it. Public as well as Private institutions joined in this exercise with the motive to capture bigger audience. It gave them the opportunity to spread their wings in across the State without much hassles.

**(c) Virtual reality** – The technology of virtual reality is widely used in the sophisticated gaming and entertainment area. It makes possible the real time experience of on field situation. It immerses one into a virtual world which is not real in any sense. The 3-dimensional virtual creation of world is very purposefully used in the medical institutions around the globe to understand the anatomy of human body and functions. From the day Metaverse announced of creating a virtual world, this technology has been central to deliberation to understand its potential use and legal issues. Recently it has announced to enter into education making it possible for the individual to engage their prototypes in teaching learning process. There is iota of doubt such experiment will be more inclusive in its approach and widely beneficiaries. In fact the recent announcement<sup>6</sup> by State of Tauva to shift its culture and civilisation from physical world to virtual world in metaverse due

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<sup>6</sup> COP17 deliberation by foreign minister of Tauva relating to climate change. Announcement by the respective government is available as video at <https://www.youtube.com/watch?v=IXpeO5BgAOM> accessed on 10.01.2023

to climate change impact of rising sea and submergence of their land in sea, underscore the growing importance of the technology in near future.

**(d) Augmented AI** – Augmented intelligence is new form of AI. Cambridge dictionary defined it as:

*“the study of how machines that have some of the qualities of the human mind, such as the ability to understand language and recognise pictures, can help humans to solve problems, deal with information etc.”*

The current ChatGPT from google has created lots of ethical, legal issues in higher education. The app is capable of answering queries in conversational way. It is of generative technology ie., learn from the nature of data feed. It can mimic the human conversation style and capable of writing news story, essay, dissertation, poem etc.. It has opened pandora box of legal and ethical issues for the academic world as it is prone to prove fake dissertation, wrong answers, wrong data, biased opinion. Though the technology is at its nascent stage of development.

### **III - EDUCATION: HIGHER EDUCATION**

Education is the basic rights of human being and it is in the interest of the State to promote education as it directly or indirectly results to socio economic and political development of State. A State with no vision on education can't survive international competition and politics. Right to



education has been the central issue of many international conventions<sup>7</sup> making it a sacrosanct norm for State governance. The International Covenant on Economic, Social and Cultural Rights (ICESCR) has two specific articles devoted to right to education i.e., article 13 and 14. Article 13 is the longest provision of this convention. With regards to higher education, it laid down the rule as

“2. The States Parties to the present Covenant recognize that, with a view to achieving the full realization of this right:

(c) Higher education shall be made equally accessible to all, on the basis of capacity, by every appropriate means, and in particular by the progressive introduction of free education;”

According to UN, making general comments<sup>8</sup> on right to education under this article, the UN identified four interrelated components of right to education which are essential to make it more effective. They are (a) availability, (b) accessibility, (c) acceptability and (d) adaptability. The issue of availability emphasis on the availability of education in sufficient quantity. Hence all factors responsible to make a quality education should be made available by the state. Secondly, it categories the issue accessibility into three categories, such as non-discrimination, physical accessibility and economic accessibility. It is the duty of State to facilitate

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<sup>7</sup> Universal Declaration of Human Rights, 1948, International Covenant on Economic Socio Cultural Rights, Sustainable Development Goal – Goal 4.

<sup>8</sup> General Comments on Article 13, available at <https://www.ohchr.org/en/resources/educators/human-rights-education-training/d-general-comment-no-13-right-education-article-13-1999> accessed on 03.05.2022

the accessibility of education in all these three issues perspective. The third point of acceptability deals with the appropriate cultural acceptability. The fourth point hints to adaptability of education to the need of time. The education should not be fixed but generic and need to adapt as per change of technology to make it a dynamic to make it a modern.

State following the mandate of international covenants and other UN agencies has incorporate the right to education in their domestic internal policies. From Indian perspective Article 21 incorporated right to education under right to life. Later on State under 86th amendment of the Constitution created Article 21A as right to education. Though this right is focused to right to education at primary level. In compliance with the article Right to Children to Free And Compulsory Education Act, 2009 was created.

National Education Policy (NEP) focussed on the issue of Disruptive technology and its use in higher education.<sup>9</sup> It has incorporated all four components of right to education in the policy. National Education Policy 2020 in its policy recognise the importance of disruptive technology and its inclusion in the education policy. NEP appreciate and recognise the use of disruptive technology in big way in education. It appreciates the potential of disruptive technology in education. During Covid epidemic the wide use of the disruptive technology has shown the potential benefit of the technology.

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<sup>9</sup> National Education Policy 2020, available at [https://niepid.nic.in/nep\\_2020.pdf](https://niepid.nic.in/nep_2020.pdf), accessed on 03.05.2022.

## IV - CONFLICTING ISSUE

### (a) Knowledge Theft

There is no iota of doubt that application of disruptive technology in education has potential to add value to it. University works as knowledge hub and is centre of creativity due to nature of research activities they are engaged into. They are continuously in the process of developing new knowledge, intellectual creativity. Any experiment with education or learning teaching process should be to promote the knowledge creation and not to disturb the flow, faith and culture of innovation. Hence, it is imperative to identify the nature, origin and technical process of the technology introduced in higher education. It is required to have understanding of the technology, so that State as well University/academic institutions could regulate it effectively. If the State ignores this aspect and adopt the technology without technical preparedness, there are fair chances of its misuse. Effective learning teaching process with the help of disruptive technology may lead to creation of knowledge and result to intellectual property creation. The best way to protect or secure information is have localisation of data and processing server under the absolute control of the State. Not focussing on this issue may lead to knowledge theft or IPR theft.

Knowledge theft is very easy during this time as sophisticated espionage apps, software can be clandestinely installed in the technological device to continuously supply information to outsider cross border without the knowledge of author or owner of IPR. There are historically evidence of espionage and knowledge theft by one state against other. Therefore, the

adoption of this technology should be after ensuring adequate technological security only. Localisation of server for processing of related data and indigenous development of technology is the best course of action to keep safe and secure the knowledge creation and its IPR protection.

### **(b) Copyright**

Copyright is one of the prominent intellectual property right concept. It deals with creative expression and not with the ideas<sup>10</sup>. The nature of copyright is negative right. It vests economic rights with regards to the creative work to the author or owner of copyrighted work. Authors have been entrusted with additional right such as moral rights of perpetual nature with regards to their work. The term period of copyright protection in an artistic work is life of the author and 60 years in addition. The overall legal framework of the copyright attempts to balance the public interest and private proprietary rights in the work of the author. Uniformity with regards to the copyright concepts started with the Berne Convention on Artistic, Literary, Dramatic Work, 1886 (Berne Convention). To address the issue of internet related copyright issues in particular, World Intellectual Property Organisation (WIPO) introduced two treaties such as WIPO Copyright Treaty 1996 (WCT) and WIPO Phonogram and Performance Treaty 1996 (WPPT). These treaties to some extent address the copyright issues arising out of internet. While the first treaties deals with the copyright aspect in cyberspace, the second treaties extent the concept of neighbouring right in cyberspace. It deals significantly with various new

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<sup>10</sup> R. G. Anand v. Delux Films, AIR 1978 SC 1613

concepts such as copyright protection to computer program<sup>11</sup>, rental rights<sup>12</sup>, circumvention technology<sup>13</sup> and digital right management<sup>14</sup>.

Higher Education is all about creation and deliberation of knowledge and creativity. The disruptive technology tends to introduce new technology which facilitate deliberation among stakeholder with ease and effectiveness. In the process it may create new creative contents or present it. Hence various issues from copyright perspective may involve in the case of disruptive technology such as issue of authorship, ownership, digital right management and fair use.

**i. Authorship/Ownership issues:** Depending on the nature of technology involved in teaching and learning the issue may arise as to the issue of authorship and ownership. Generally, the copyright issue is governed by contractual obligations between the parties. The same is applicable in case of authorship and ownership. The Indian Copyright Act, 1957 laid down the rule in section 17. The section presupposes the issues of authorship in case of employment scenario. The teacher/faculty creating Intellectual Property during the course of employment belongs to the employer due to employee employer relationship. Hence creation of copyright content during the course of employment ownership belongs to employer. While teachers are employee of University, students are not. Hence, Students share in creativity will be as

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<sup>11</sup> WCT 1996: Article 4 - Computer Program, Article 5-Compilation of Data

<sup>12</sup> Id., Article 7 - Rental rights

<sup>13</sup> Id., Article 11 - Circumvention technology

<sup>14</sup> Id., Article 12 - Right Management system

per general agreements which they entered into with the University at the time of admission. The University need to be clear on this aspect of law.

**ii. Public interest vs. Private Rights:** Copyright Act through various mechanism attempts to balance the conflict between private rights vs. public interest. It is not possible for humans to create something in isolation. As a social animal human being learn, trained himself skill of creativity as per circumstances and need. In the process of creation, he creates the already existing things differently after analysing special need and required material. Hence while he applies his intellectual creativity to create something innovative, it is not absolutely his own but belongs to society. Because consciously or unconsciously he is getting inputs in form of ideas or traditional knowledge or cultural folklore from his surroundings. He can't create new product, expression without these supports. Once he creates or express creatively, he is acknowledged and rewarded for his creativity. Economic rights are assigned to him for exclusive exploitation of his creativity negating the contribution of society for a certain period of time and after that his creativity becomes part of public domain. Hence, intellectual property protection is not for the life time. Protecting rights for life plus 60 years for copyright is unfair in many ways to the society, hence the copyright law recognises exceptions in the form of compulsory licensing<sup>15</sup>, fair dealing<sup>16</sup>. Though these balancing mechanisms are there, but the owners of copyright work have shown their hesitation in obliging them in true spirit and

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<sup>15</sup> Indian Copyright Act, 1957; Section 31 - Compulsory licensing in works withheld from public, Section 31A Compulsory licence in unpublished or published work, Section 31B Compulsory licence for benefit of disabled.

<sup>16</sup> Id., Section 52 – Certain acts not to be infringing of copyright

always argued for strict compliance of copyright laws. History is witness to the fact that the after Gutenberg's printing press, the concept of copyright evolved due to demands of Stationary houses for exclusive rights to publish the author's content.<sup>17</sup> It was not the author who argued for strict copyright law. Authors were interested in recognition of their intellectual creativity and dissemination of knowledge only. The situation has not improved much as of now on this issue. In the case of Rameshwari Press<sup>18</sup>, the publication house like Oxford, Cambridge etc. had shown their interest in the royalty with regards to limited number of course material prepared by University of Delhi for education purpose only for the students enrolled in the specific University Department. As per the fair dealing<sup>19</sup> concept under the Indian Copyright Law, it is very much permissible to reproduce the copyright content for educational purpose by the University. However, publication house had shown their resistance to agree with valid legal ground. Interestingly, authors of the same books were supporting University stand on the issue<sup>20</sup>.

Digitalisation of work and sophistication of technology are attempting to create imbalance to the private rights vs. public interest. The digital rights management (DRM) is one such technology which provide technological weapon to the owner of copyright work to protect it zealously. DRM is management of intellectual property rights in the digital work. It is a tool used to control the access of information or copy protection in digital format. There

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<sup>17</sup> Dr. V K Ahuja, Law Relating to Intellectual Property Rights LexisNexis

<sup>18</sup> The Chancellor, Master & Scholars of University of Oxford v. Rameshwari Photocopy Services RFA(OS) No. 81/2016 Delhi High Court

<sup>19</sup> Supra note 17.

<sup>20</sup> Supra note 19.

are various tools as per the sophistication of software used in the name of DRM such as product keys<sup>21</sup>, activation limits<sup>22</sup>, encryption<sup>23</sup>, watermarking<sup>24</sup> etc., to name few.

DRM rights are surrounded with controversy as it is in direct conflict to the general principle of copyright laws. It creates inconvenience to the users in accessing information. It makes copyright work permanently not accessible. It violates the basic principles of fair dealing and right to exhaustion. Fair dealing of the concept allows the copyright work accessible in certain case. In particular with regards to the teaching and learning in the educational institutions/University. Certain nature of work is required to be accessible with the library of the educational institutions. Even Berne Convention in Appendix<sup>25</sup> create exemption for the teaching and learning for the developing States for a limited period of time. But the DRM technology has the potential to curtail even that exception for educational purpose. The greediness of the owner of copyright work employs DRM to negate such flexibility in favour of public. In this kind of scenario, the disruptive technology may also employ such technology to benefit few undermining the importance of education in socio economic development of State.

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<sup>21</sup> Product keys are alphanumeric string used for activating a software or hardware. It is in use during the installation process of software or hardware.

<sup>22</sup> Activation limits restrict the number of devices on which software can be installed.

<sup>23</sup> Encryption convert the content and make it inaccessible. It can be accessed by decryption only.

<sup>24</sup> Watermarking is done with the purpose to identify the chain of distribution and authorship.

<sup>25</sup> Appendix to the Berne Convention for the Protection of Literary and Dramatic Work was specially created for developing countries.



Right to exhaustion is very important principle of intellectual property rights. It is also known as first sale doctrine. It implies that once a product is sold for the first time with the consent of the owner of the intellectual property right i.e., copyright, trademark or patents, the intellectual property right holder exhaust his right to control over the right on the subsequent sale or transfer of this product. Exhaustion rights are of national and international character. Hence the patentable product or copyrighted work can be sold or transferred without any interference of the right holder. Right holder will lose his control over the product as he got the economic rights for it. However, the same doesn't apply in case of copyrighted work with DRM. The nature of the DRM is applicable on the copyrighted work even after sale. Hence, it may not be possible to sell or transfer the product to anyone else. This is against the very basic of copyright law. The sophisticated disruptive technology in education may narrow down the right to exhaustion to further extent. This approach if not address amicably may in long detrimental for the public interest.

### **(c) Privacy and data protection**

Privacy is personal information, whereas data are having proprietary value. Digitalisation of information and global connectivity has made privacy a fundamental right. The origin of this right can be traced to pre-internet era, but it got global attention with its violation rampantly in cyberspace. Privacy information are of private nature, outside the domain of public view. It is not to be confused with secrecy. The nature of concept of privacy is shaped by the moral, ethical, cultural, religious belief of the State. Hence, there is no uniformity to the concept and the State's response to the protection of this right varies.

Privacy rights are violated during the access of websites as accessing website creates footprint in the cyberspace as to the nature of activities one engaged into. Cookies, malware are installed in websites which collect the information such as the nature of information sought, duration of visit, specific time of visit, location of users, nature of deliberations, browsing habits etc. Algorithms are employed on the website to collect and analyse the information and supply the information accordingly. Based on the browsing history of users on website, the information of one's last search pop up on computer screen or on emails. While this nature of services may be beneficiary for the service provider, but can be detrimental for the users. Privacy information are collected without user's knowledge or with the forceful consent and analysed for commercial use. This amounts to violation of privacy rights of users.

Data is the bloodline of internet or future technology. The fourth industrial revolution AI, Big Data, Data Mining, IOT etc. are all depended on the sophistication of data. Without data it is impossible to predict weather forecasting. Prediction of any nature can be possible with the past data. Hence data is important. There are generally two important issue with regards to data which raise important concern from higher education point of issue. Firstly, "the accuracy of data" and secondly, "processing of data".

Accuracy of data is important in higher education. The accuracy of the data depends on the scrutinised way the data is created and processed. Users as well as vested stakeholders generate data of fake nature to manipulate opinion of viewers. Use of such information without authentication may result to wrong assessment of situation. There is need to developed a proper

mechanism to develop authenticate data with the consent of users. In ecommerce, there are fake reviews created by customers, third parties, sellers etc. There are reports<sup>26</sup> of favourable fake reviews created with incentivising the data creation. These practices are unethical and morally wrong. Currently much acclaimed ChatGPT in many cases provided wrong answer<sup>27</sup> to the queries due to the nature it is available and its processing.

The way data is processed is important from human right perspective. Since the data belongs to the users, merely accumulating and analysing them for their benefit at the cost of users is unethical. Disruptive technology of any nature used in higher education may be predicting, analysing the data of students, faculties, administration, library users, experience etc.. The method of collection and process of such data need to be fair and transparent. It should be with the informed consent of the users. There should not be unethical use of the data. Data should not be processed other than the purpose for which it was collected from users. There should be time duration for use of data. There should be grievances redressal mechanism for addressing the data related disputes. The accountability of the person responsible to protect data should be clear. Data should be processed and used in the local server only. The concept of right to be forgotten should be accepted and adequate procedure need to be developed from Indian perspective. Currently, the privacy and data

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<sup>26</sup> Jana Valant, Online consumer reviews The case of misleading or fake reviews, EPRS | European Parliamentary Research Service, EU 2015, available at <https://www.eesc.europa.eu/sites/default/files/resources/docs/online-consumer-reviews---the-case-of-misleading-or-fake-reviews.pdf>, accessed on 01.10.2022

<sup>27</sup> INDIAai, ChatGPT fails to clear the prestigious Civil Service Examination, March 07, 2023, available at <https://indiaai.gov.in/news/chatgpt-fails-to-clear-the-prestigious-civil-service-examination>, accessed on 07.03.2023

protection rules are available in the form of section 43, 43A for cyber contravention and Chapter XI of Information Technology Act 2000 for criminalising the offences. Apart from that the Rules 2011 relating to Sensitive Personal Data or Information<sup>28</sup> are applicable. The current status of law is not adequate to deal with the avalanche of technological and data related issues. There is an urgent need to have a robust law for the same.

## V- CONCLUSION

There are avalanche of disruptive technologies in higher education going to be introduced in the near future at global and regional level with the purpose to enhance the effectiveness of learning teaching exercise. There is an urgent need to upgrade learning-teaching and research methodology for maximum output. While technology is evolving for this sensitive area, to avoid any kind of misuse the legal mechanism has to be sound enough. The European Countries which are developing and using various kinds of disruptive technologies in education are having robust Data Protection laws, Cyber-crime Regulations, Artificial Intelligence Act, Algorithms law etc.. Indian government has always given importance to education. The introduction of revolutionary National Education Policy 2020 is live example of it. Proper implementation is required to give effect to such revolutionary ideas in education. It will not be possible to implement it till the time ground rudimentary issues of privacy, data protection, cyber-crime, cyber security,

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<sup>28</sup> The Information Technology (Reasonable Security Practices and Procedures and Sensitive Personal Data or information) Rules 2011; Government has attempted to introduce drastic changes in the data protection laws in India. Twice the bill was prepared and under circulation for public opinion.

algorithm laws are not effectively addressed legislatively from regulation aspect.

# IS PRIVACY AN ILLUSION? EXAMINING THE PRIVACY AND DATA PROTECTION RIGHTS OF CHILDREN

*Sagnik Sarkar\**

## ABSTRACT

*In this digital age, children spent most of their time in online spaces either interacting on social media websites or surfing. Due to their limited capacity to comprehend website terms and conditions, minors frequently provide consent for personal data collection. Such collection of data would often result in behavioural tracking and targeted advertisements which could act as an inhibition to accessing the internet. The State must protect children's privacy but at the same time should not curtail their fundamental rights.*

*The paper seeks to address the issue by first analysing the principles that should guide child-friendly policies. Then, it will examine the privacy risks children face online and the extent of their data collection and usage. The paper will strive to address this issue by comprehending the scope of children's privacy in the digital age and evaluate the effectiveness of current practices by intermediaries to protect their privacy. The paper will also compare privacy laws of the US, EU, and India to the Convention on the Rights of the Child to assess the progress of children's privacy in the digital era. Finally, based on the current situation recommendations will be given to establish a strong privacy framework for children.*

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*“Arguing That You Don't Care About Privacy Because You Have Nothing to Hide is No Different Than Saying You Don't Care About Free Speech Because You Have Nothing to Say”*

-Edward Snowden<sup>1</sup>

## 1. INTRODUCTION

The idea of the State was created to escape from the horrors of the State of Nature. The State of Nature as described by Thomas Hobbes was solitary, brutish, nasty, poor, and short<sup>2</sup> and the survival of human beings in those conditions was dangerous. The governing principle in such a society is based on a “pre-emptive strike” to ensure the survival of the fittest. To negate that idea and to ensure the security of the people the idea of a “State” was created in which a strong *Leviathan* would be ruling the society to ensure that the life, liberty and dignity of people are protected.<sup>3</sup> Furthermore, the concept of liberty is not detached but rather encompasses the freedom to engage in unimpeded self-expression devoid of governmental intervention. Individuals require freedom to think, comprehend and utilize their intellectual abilities before expressing their ideas. Privacy offers a safe environment where people can express themselves without any restrictions.

The idea of privacy is fundamentally linked with liberty as one cannot enjoy liberty to its fullest extent if one does not have the right to privacy. With the

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<sup>1</sup> Sophie Kleeman, In One Quote, Snowden Just Destroyed the Biggest Myth About Privacy available at: <https://www.mic.com/articles/119602/in-one-quote-edward-snowden-summed-up-why-our-privacy-is-worth-fighting-for> (last visited on Dec 10, 2022).

<sup>2</sup> Stanford Encyclopaedia of Philosophy, Hobbes's Moral and Political Philosophy available at: <https://plato.stanford.edu/entries/hobbes-moral/> (last visited on Dec 10, 2022).

<sup>3</sup> Stanford Encyclopaedia of Philosophy, Locke's Political Philosophy available at: <https://plato.stanford.edu/entries/locke-political/> (last visited on Dec 10, 2022).

absence of privacy, the concept of liberty becomes the dead letter of the law and in effect, the idea of life essentially boils down to animalistic survival. The absence of privacy rights not only negates the basic principle on which the foundation of the State was laid but also questions the need for a State when it cannot guarantee basic human rights. In regard to that, after many protests and debates, different countries have enacted legislation that has elevated privacy rights from mere legal rights to basic human rights. But in all the hullabaloo the privacy right of the children got neglected.

Children are the most vulnerable group on the internet who needs dedicated effort from the government to ensure their safety and security in this digital age. So much focus has been given to adults' privacy that the safety of children has been marginalized when in reality, they are the one who needs more protection. Because of their age, they do not know when their privacy rights are being violated. Thus, proactive steps are needed from the government to act *as parens patriae* of the children and ensure they do not suffer any emotional, psychological, or physical harm when their data is being processed.

But at the same time, any legislation which curbs children's right to speech and expression under the veil of safeguarding their privacy is not only, in violation of fundamental human rights but also of the United Nations Convention on Child Rights (UNCRC).<sup>4</sup> Legislators have to ensure that no legislation which protects children's privacy does so at the cost of restricting their freedom of speech and expression.

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<sup>4</sup> The United Nations Convention on the Rights of the Child (adopted on 20 November 1989 entered into force 2 September 1990) 1577 UNTS 3 [hereinafter UNCRC].



Thus, this paper shall focus on the question of whether child privacy is necessary and if so, then which legislations and conventions cover the same. The analysis in this regard will be divided into two parts. The first part will examine the laws related to children's privacy in India, the United States, and the European Union. The second part will focus on analysing the UNCRC. The paper will also investigate whether the basic human rights of children are being compromised to protect their privacy rights. Additionally, it will take a closer look at the global progression of children's privacy rights and whether these principles can be incorporated into Indian legislation. Finally, the paper will provide recommendations for improving children's privacy rights in India to promote their overall development as outlined in the Indian Constitution.<sup>5</sup>

### **1.1 PANOPTICON ANALYSIS OF BENTHAM**

Bentham's panopticon prison constitutes a paradigmatic instance of privacy infringement, wherein he proposed a prison design with a central tower that allows all inmates to be observed at all times. The unique aspect of this concept is that the inmates are aware that they are being watched, but they do not know when, as the design is such that only the guards can see the inmates but not the other way around. This means that the inmates are policing their own behaviour, thus maintaining order in the prison.<sup>6</sup> This way, Bentham postulated the idea of a panoptical country where all the citizens are on their best behaviour even when no one is watching them by creating an illusion that they are being watched.

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<sup>5</sup> The Constitution of India, art 39(f).

<sup>6</sup> Thomas McMullan, "What Does the Panopticon Mean in The Age of Digital Surveillance?" *The Guardian*, 23 Jul. 23, 2015.

In this panoptical prison, people are at their best-moderated behaviour by restricting their free will. People are not exercising their basic human rights because of the understanding that external factors are watching over them. The idea of the panoptical prison is that people out of their own free will choose not to exercise their constitutional rights because of the fear of big brother watching.

A similar situation arises when data is being collected through the internet without informing the data subjects. When any child is online and visiting any website their data profiling is being done based on the content the child witnesses and the websites the child visits. In such a situation when every sensitive information of the child (like name, date of birth, child's online activity, website the child visits and even the child's picture) is being collected for an indefinite period without the consent of the child or their parents, it gives rise to a dystopian situation.

This will create a situation where every child in the world will be demotivated to access the internet and as a result, will hinder their ability to exercise their basic constitutional rights. The existence of such a system will establish an environment that would create fear in the mind of the children and their parents. This Orwellian situation would hamper their freedom of speech and expression thus affecting their holistic development.

## **1.2 PRIVACY ANALYSIS**

Till the time PDP Bill sees the light, there are no laws to secure the right to privacy of the individual. Moreover, whatever existing Information Technology (IT) rules are there it does not cover most aspects of privacy. In that scenario, an analysis of the Puttaswamy judgement is required through

the lens of the Shri Krishna report (Krishna Report) and AP Shah report (Shah report) to understand different aspects of the right to privacy.

### 1.2.1 *KS PUTTASWAMY JUDGEMENT- I AND II*

The Puttaswamy judgement<sup>7</sup> played an important role in not only recognising privacy as an inseparable part of the right to life but also recognised it as an important component of liberty, freedom and dignity. Any endangerment to its existence would have a direct impact on the freedom of speech and expression.

Nariman J., in the judgment, focussed on the democratic principle of privacy of choice and ruled that *“the core value of the nation being democratic... would be hollow unless persons in a democracy are able to develop fully in order to make informed choices for themselves which affect their daily lives”*. In lieu of that, he focused on informational privacy and stated that individuals should have control over the disclosure of information and that any use of such information without prior consent would amount to illegal dissemination of information.<sup>8</sup> This principle was later included in the Krishna report as an end-use limitation where information will be used only for the purpose for which it has been given and any other usage has to be proceeded by prior consent of the individual. The same has also been incorporated in the Shah report as the *“principle of purpose limitation”*.<sup>9</sup>

The idea of consent was cemented by Chandrachud J., with the help of the objective theory of privacy. The theory states that an individual has a

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<sup>7</sup> *Justice KS Puttaswamy v. Union of India*, AIR 2017 SC 416 [hereinafter Puttaswamy].

<sup>8</sup> John Sebastian, “Unravelling the Role of Autonomy and Consent in Privacy” 9 IJCL (2020).

<sup>9</sup> Planning Commission, “Justice AP Shah Committee Report” (2012) [hereinafter AP Shah Report].

reasonable expectation of privacy when they undertake any particular activity. This theory was applied in the case of *Katz v USA*,<sup>10</sup> wherein the plaintiff, a gambler engaged in transmitting unlawful wagers, employed a public telephone for such purposes. Subsequently, while the plaintiff was situated within one of the telephone booths and actively engaged in transmitting said wagers, the FBI apprehended him by surreptitiously listening to the entirety of his conversation. The court, employing the objective theory of privacy, determined that the petitioner had a reasonable expectation of privacy upon closing the booth door. Consequently, the act of government eavesdropping on his conversation constituted a violation of privacy.<sup>11</sup>

Kaul J., further stated that “*privacy... is nothing but a form of dignity, which itself is a subset of liberty [and] key to the freedom of thought*”. He then further stretched the concept of consent as laid down by Chandrachud J., and focussed on the control over the disseminated information by the individual which was included in the PDP bill as the right to correction of personal data.<sup>12</sup> The principle provides that the individual has control over their data and can decide whether to disseminate the information based on the purpose of its usage. The central premise revolved around the concept that consent is not a singular, irrevocable waiver, but rather an ongoing requirement wherein any third party seeking to utilize the information must obtain explicit

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<sup>10</sup> 389 US 347.

<sup>11</sup> Supra note 7.

<sup>12</sup> Ministry of Electronics & IT, “A Free and Fair Digital Economy Protecting Privacy, Empowering Indians” (2018) [hereinafter Krishna report].

permission for each transaction.<sup>13</sup> It was reiterated in the Shah report as the principle of consent<sup>14</sup> wherein it states that no collection of information can be done without getting consent from the individual.

He also emphasized the inherent privacy rights of children, asserting that while engaging in online learning activities, children leave behind digital footprints on social network websites. Given that children have round-the-clock access to the internet, utilizing platforms such as Google and Wikipedia for educational purposes, it is imperative that they are shielded from enduring lifelong consequences resulting from their youthful errors and naivety. Therefore, the right to privacy of children necessitates special safeguards not only in relation to the virtual world but also in respect of the real world.<sup>15</sup>

The point to note here is that neither of the judges differentiated between personal and non-personal data nor did they give any leeway to investigative agencies to exclude the consent element howsoever exigent the matter might be. The only exception the judgement makes regarding any surveillance provision is by laying the strict scrutiny test and proportionality principle. The *former* states that when if any enactment violates any fundamental right of the citizen then the standard of judicial review shall be strict<sup>16</sup> and the legislation shall be deemed valid only if it follows two components:

- a) Compelling State Interest: states that legislation which violates fundamental rights can be constitutionally valid only if it serves the

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<sup>13</sup> Supra note 8.

<sup>14</sup> Supra note 9.

<sup>15</sup> Supra note 7.

<sup>16</sup> *Anuj Garg v. Hotel Association of India*, AIR 2008 SC 663.

immediate exigent need of the State.<sup>17</sup> It is based on the Utilitarian principle<sup>18</sup> where the urgent public need overrides the enjoyment of fundamental rights of certain people provided the government shows that such law is based on actual compelling state interest, not on any illusionary ground.

- b) **Narrow Tailoring:** provides that legislators have the right to make laws which restrict the application of fundamental rights provided such restrictions should be narrowly construed rather than fully excluding its operation.<sup>19</sup> The idea is that such a law should be passed with great care, limiting the extent to which it violates rights to fulfil its stated goals. But if such law excludes the implementation of fundamental rights entirely then it shall be held unconstitutional.

The latter component encompasses three principles enunciated by Chandrachud J., in the Puttaswamy Judgment:

- a) **Legitimate State Aim:** It is similar to the compelling state interest where any law which intends to violate fundamental rights should address the pressing need of the State without which the functioning of State machinery becomes difficult.
- b) **Proportionality:** The legislative objective of any law should be proportionate to the measures implemented to achieve that objective. There must be a reasonable connection between the purpose of the law and the means employed to attain it. When it comes to legislation

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<sup>17</sup> *Govind v. State of Madhya Pradesh*, AIR 1975 SC 1378.

<sup>18</sup> Stanford Encyclopaedia of Philosophy, The History of Utilitarianism available at: <https://plato.stanford.edu/entries/utilitarianism-history/> (last visited on Dec 17, 2022).

<sup>19</sup> *PUCI v. Union of India*, AIR 1997 SC 568.

pertaining to national security, the issue lies in its inherent disproportionality as it unduly limits the exercise of fundamental rights to achieve the desired objective. However, even in such circumstances, the court has established that the State must demonstrate a reasonable nexus between the interest it seeks to safeguard and the means it employs to enforce such measures, ensuring proportionality.<sup>20</sup>

- c) The law in Existence: It states that any infringement of fundamental rights should be based on certain laws. A problem arises when the executive gives the order of surveillance without having any statutory backing, which makes the order illegal as such an order is not limited in its scope or application.

Sikri J., in the Aadhar judgment (KS Puttaswamy-II),<sup>21</sup> focussed on the impact of the unlawful collection of data of children without their permission. He stated that children because of their age will not be able to give informed consent regarding the collection of data. So, if data can be collected in a manner without infringing the privacy of the children, then the former way of collecting data cannot be allowed as it does not fulfil the test of proportionality and necessity. Additionally, in *Murray v Big Pictures (UK) Ltd*,<sup>22</sup> the court specifically addressed the issue of children's privacy rights. The court determined that children possess a legitimate and justifiable expectation of privacy. When children are on the playground, they have less

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<sup>20</sup> *Arup Bhuyan v. State of Assam*, 2011 3 SCC 377.

<sup>21</sup> *KS Puttaswamy v. Union of India*, (2019) 1 SCC 1 [hereinafter Aadhar].

<sup>22</sup> (2008) 3 WLR 136.

expectation of privacy than when they are at home. Based on this case, the concept of the objective theory of privacy case was extended to children as well. This case also extended the principle of compelling State interest to children as well.

Regarding the consent of the children, Sikri J., stated that when children are incapable and are in no position to give consent in such a situation the consent of the parents can be obtained. The case of *RD Upadhyay v State of Andhra Pradesh*<sup>23</sup> reinforces the principle that the Constitution mandates the State to prioritize and protect the best interests of children. The State is constitutionally obliged to both safeguard and actively promote the best interests of children. Moreover, the State is constitutionally obligated to facilitate and empower parents and guardians in asserting the rights of children and acting in their best interests.<sup>24</sup>

### **1.3 BEST INTEREST OF THE CHILD AND PARENS**

#### **PATRIAE PRINCIPLES**

One of the aspects that have to be kept in mind while dealing with the privacy rights of children is that such rights are without any remedies. That is, though children's privacy right is recognised by different legislations no mechanism has been provided for the enforcement of such rights. Moreover, an interesting aspect of privacy is that people never know when their privacy rights are being violated. It is only after such violation resulted in any unintended consequences that people get aware of such violation. The same applies to children as well. Children because of their age will not know their

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<sup>23</sup> (2007) 15 SCC 49.

<sup>24</sup> Supra note 22.



data is being collected without their consent and by the time parents get to know of such violation it becomes too late.

Thus, it becomes not only the duty of the parents but also of the State to provide protection and security towards the development of the child. Our founding fathers knew that parents alone cannot raise a child so they incorporated art 39(f) in the Constitution. The article provides for the principle of *parens patriae* with special emphasis towards children.

The principle loosely translates to “assuming authority” or the role of “parent of the nation”<sup>25</sup> and it means to act as the guardian for those people who are unable to take care of themselves and exercise their fundamental rights. The principle establishes a legal obligation on the sovereign to act in the public interest to safeguard the welfare of vulnerable groups.<sup>26</sup> The underlying concept of this principle is that circumstances may arise wherein an individual, including minors, lacks the capacity to enforce their fundamental human rights, necessitating the appointment of a legal guardian to facilitate the exercise of those rights on their behalf. When no such guardian is present, in those situations State is best qualified to take the role of the guardian.

The principle was established and accepted by the Supreme Court in the case of *Chmanlal Sahu v Union of India*.<sup>27</sup> The Court affirmed that the State possesses an inherent power to safeguard the person and property of individuals who are non-sui juris, including minors, persons with mental incapacity, and those deemed incompetent. Furthermore, the Court observed

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<sup>25</sup> *Shafin Jahan v. Asokan KM*, (2018) 16 SCC 368.

<sup>26</sup> Ramakanta Satapathy, “Application of Doctrine of ‘*Parens Partriae*’ In India: A Critical Study” 3 Law Mantra (2016).

<sup>27</sup> (1990) 1 SCC 613.

that the sovereign authority must protect individuals with a disability who lack rightful protectors.<sup>28</sup> It was also noted that the Preamble to the Constitution, in conjunction with art 38, 39 and 39A imposes an obligation upon the State to assume these responsibilities. To effectively fulfil this obligation, if necessary, the rights and privileges of individuals may be limited to safeguard their interests more effectively.<sup>29</sup>

The US Supreme Court has laid down the condition as to when this principle can be applicable:<sup>30</sup>

- The State must undertake to enforce the right or interests of a particular individual or group of individuals rather than being a facilitator. That is, the State should be more than a nominal party;
- The State must express a quasi-sovereign interest;
- The affected party must be having some disability (like being an underage teenager).

Furthermore, in *Anuj Garg v Hotel Association*,<sup>31</sup> the court had added two more grounds as to when can this principle be applied. The court had stated that the principle can be applied when it is an absolute necessity.

The ambit of the *parens patriae* principle is not just to enforce the right of the hapless people but also in certain situations, the State should provide justice to the people since it is the right of the people to get justice for the harm suffered by them.<sup>32</sup> The enforcement of the above doctrine, especially for

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<sup>28</sup> *Heller v. Doe*, 509 US 312 (1993).

<sup>29</sup> *Supra* note 28.

<sup>30</sup> *Supra* note 27.

<sup>31</sup> (2008) 3 SCC 1.

<sup>32</sup> *Alfred L Snapp v. Puerto Rico*, 458 US 592 (1982).

children, has to be done based on the principle of the “*best interest of the child*”. That is, whenever the court or government has to decide anything for the children in the role of *parens patriae* they have considered the principle of the “*best interest of the child*” to decide the same.

The scope of the child's welfare encompasses to the broadest extent within the best interest standard. It was held in *Bimla Devi v Subhas Chandra*,<sup>33</sup> that the word “welfare” shall encompass the comprehensive care of the child, encompassing their moral, ethical, and physical well-being, in its broadest interpretation. While deciding the welfare of the child the court has to consider the child's intellectual development along with emotional, psychological,<sup>34</sup> moral and ethical growth.<sup>35</sup>

Thus, in the current situation, children are not able to enforce their privacy rights because of their age and parents cannot enforce the rights of their children because no such mechanism exists. Subsequently, it becomes incumbent upon the State to assume the role of *parens patriae* and legislate measures to enforce the privacy rights of minors. At the same time, the role of *parens patriae* has to be performed based on the best interest of the child principle. That is, when enacting such legislation, the parliament should not consider the interest of any party other than what is best for the welfare of the child.

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<sup>33</sup> AIR 1992 Pat 76.

<sup>34</sup> Ibid.

<sup>35</sup> *Nil Ratan Kundu v. Abhijit Kundu*, (2008) 9 SCC 413.

## 2. ANALYSING CHILD RIGHTS IN THE DIGITAL ERA

The legal provisions pertaining to child rights, as embodied in UNCRC or Indian legislation, were promulgated during the early stages of internet development. Thus, it becomes important to understand how the rights of the child will interplay at the dawn of the digital era. That is, whether the child will be able to safeguard all its rights in the internet age or with the emergence of the internet children would become more vulnerable to exploitations.

### 2.1. THREAT TO CHILDREN'S PRIVACY IN THE ONLINE ERA

It is no surprise that children's right to privacy has been recognised at the international level in UNCRC under art 16 of the convention. The article states that "*no child shall be subjected to arbitrary or unlawful interference with his or her privacy*" and the same has been reaffirmed in art 16 (2) where it states "*the child has the right to the protection of the law against such interference or attacks.*" If both the provisions are read together it would mean that the convention has recognised the same level of privacy rights as it has been recognised for adults in conventions like the Universal Declaration of Human Rights <sup>36</sup> or the International Covenant on Civil and Political Rights.<sup>37</sup> The State is duty-bound to situate the right to children's privacy in conjunction with their other rights when considering their best interests and developing abilities. Nevertheless, it becomes apparent that children's right to

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<sup>36</sup> Universal Declaration of Human Rights (adopted 10 December 1948) UNGA Res 217 A(III), art 12.

<sup>37</sup> International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171, art 17.

privacy exhibits variances in terms of scope and implementation when compared to the right to privacy afforded to adults.<sup>38</sup>

It is imperative to recognize that the adoption of a differentiated approach to children's privacy does not entail a reduction in the extent of privacy rights granted to children, nor does it imply that the provision of privacy rights should result in the curtailment of other rights. But rather it means a balancing approach needs to be adopted so that children can exercise both privacy rights and other basic human rights. Though, it cannot be denied that by ensuring privacy rights certain other rights might be reasonably restricted since giving children unrestricted autonomy and independence might not work in their best interest.<sup>39</sup> For example; if the autonomy is given to children to accept the terms and conditions (T&C) of a website written in lengthy legal jargon then such consent would be useless. Any consent they give will be void as the consent is not informed consent. In such situations parental consent would be required. But such restriction has to be reasonable, lawful and proportionate and should serve the greater interest of the children.

Subject to the condition of attaining majority and achieving informed capacity, unmitigated autonomy and independence may not align with the best interests of minor children. In such situations, it is reasonable and prudent

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<sup>38</sup>UNICEF, Privacy, Protection of Personal Information and Reputation Rights available at: [http://defenddigitalme.com/wpcontent/uploads/2018/02/UNICEF\\_CRB\\_Digital\\_World\\_Series\\_PRIVACY.pdf](http://defenddigitalme.com/wpcontent/uploads/2018/02/UNICEF_CRB_Digital_World_Series_PRIVACY.pdf) (last visited on Dec 12, 2022).

<sup>39</sup> Milda Macenaite, "From Universal Towards Child-Specific Protection of The Right to Privacy Online: Dilemmas in the EU General Data Protection Regulation" 19 *New Media and Society* (2017).

to entrust parents and guardians with the responsibility of managing their children's privacy.<sup>40</sup>

Simultaneously, giving so much focus on parental permission could also actively dissuade children from using the internet.<sup>41</sup> Parental control measures can potentially encroach upon the unrestricted and confident utilization of technology by children. Of particular concern is the possibility that parents, who pose a threat to the safety of their children, may exercise their authority to sever digital lifelines, thereby impeding the ability of children to seek assistance.<sup>42</sup> Thus, it becomes important that a balancing line has to be drawn between giving the parents the authority to ensure children's privacy rights and at the same time such power of the parents should not act as a barrier for children in using the internet to express their opinions. This has been further discussed in the later part of the paper.<sup>43</sup>

When children use online resources for any purpose, their rights are threatened based on the act of the intermediaries (or corporates) and the lack of regulation on the part of the government. In that regard, the act of the corporates which threaten children's privacy rights is discussed below.

### *2.1.1. COLLECTION AND ANALYSIS OF CHILDREN'S BROWSING DATA*

The intention of any website when they collect the data of the visitor either by themselves or through the service of any third party is to analyse the biometric information i.e., to collect the browsing data analytics, time spent

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<sup>40</sup> Ibid.

<sup>41</sup> Kathryn C. Montgomery, "Data Protection for Youth in the Digital Age" 4 EDPL (2015).

<sup>42</sup> Kirsty Hughes, *The Child's Right to Privacy and Article 8 European Convention on Human Rights* (OUP 2011).

<sup>43</sup> Part 2.4 of the paper.

on different components of the website and entire online transaction. The motive behind such an extensive collection of data is two folds: *first*, intermediaries sell the data to big corporates so that they can provide targeted advertisements or undertake behavioural tracking. Like, if a person searches for hotels then the person would get advertisements from different travel agencies showing hotel rates for those places. The idea is to provide personalized targeted advertisements to the consumers so that they chose such agencies' services or products. And *secondly*, such data is collected to analyse their web traffic. The intermediaries collect data to determine their audience, how much time users are spending on the website, whether they are opting for their service or the service of their rival and whether they like their product or the service.

The issue with collecting such data is that they are based on information the person searches online. If the person searches for a bookstore, all the ads will be focused on online bookstores. The same goes for any consumable product, even for the stuff that is sensitive for children. Since the internet does not have a child filter, chances are that children might encounter sexual or violent content online which are not suitable for their age. And once children visit such sites, the algorithm will analyse the browsing data and would show ads and search results based on the browsing data.

The horrors of lack of filters are not limited to websites only but also extend to social media sites like (Facebook, Snapchat and TikTok). Around 72% of the children use Instagram and 51% of them use Facebook.<sup>44</sup> None of the

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<sup>44</sup> Kari Paul, "Congress Grills Facebook Exec on Instagram's Harmful Effect on Children" The Guardian, Sept. 30, 2021.

social media sites has children filter because of which when children create an account, they are subject to the same result in the search feed as that of an adult.<sup>45</sup> And since no differentiation is maintained between children or adult accounts, the algorithm will collect children's sensitive data (like name, date of birth, age, gender and profile photo) which are then stored in the database. The problem would start to snowball if those data are hacked and released to the public.<sup>46</sup> That would compromise the privacy and security of children. Recently, in the US a teenage girl committed suicide because a man shared a compromising photo of her with her peers on a social network.<sup>47</sup> The issue in this regard is that the photo (data) so shared shall be stored for an indefinite period which would have affected the prospect of the now-deceased child. Apart from the processing of child data, another issue which needs thorough consideration is the consent to collect data given by child users of the platform. This aspect shall be analysed in two parts; *first*, in regards to the data which are collected with the consent of the data subjects. Whenever a user visits a website, more often than not a pop-up is shown on the screen which states that certain data will be collected with the consent of the user. And if the user does not accept such a collection, then the user has to option to leave the website.

The issue with children is that they are not mature enough to understand what data are being collected, for what purpose, for how long and whether such

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<sup>45</sup> Ibid.

<sup>46</sup> "Facebook Data Leak Of 533 million Users: Here's How to Know If Your Account Is Affected" The Indian Express, Apr. 7, 2021.

<sup>47</sup> Naomi Nix, "Facebook, Google CEOs Blasted in Congress Over Apps for Kid" Bloomberg, Mar. 26, 2021.



data be ever deleted from the server. They do not understand the veracity of clicking “*I accept*” because of which their consent is neither informed nor made out of their free will. So, when children click “*I accept*” the algorithm automatically starts to collect every data it has been programmed to collect, irrespective of the fact that the visitor is children. This collection, though made with consent often, leads to disproportionate harm to the children and intermediaries cannot be sued since the collection was done with the consent of the user.

The *second* aspect, in this regard, is the collection of data non-voluntarily, i.e., there are certain pages on the internet like the landing pages which collect data the moment a visitor enters the page. Data like IP address, time spent on the website and other information which is not sensitive, but still, can be used to profile the person when combined with the data collected with the consent of the user.

Thus, whenever a child enters any website, either the data of the child is collected with their uninformed consent or involuntary collection of data is done when they visit landing pages. After collecting the required data from different sources Information and Communication Technology (ICT) companies often package these data together to create a profile of the child (or adult) and sell the same to different advertising agencies so that they can provide personalized targeted ads or undertake behavioural tracking.<sup>48</sup>

Another problem with behavioural targeting by ICT companies is that the extent of data collected for behavioural targeting is much more than any

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<sup>48</sup> Veridium, Who Owns Your Biometric Data? available at: <https://www.veridiumid.com/who-owns-biometric-data/> (last visited on Dec 12, 2022).

targeted advertisement needs. ICT companies often collect not only data about how such users interact on the service provider's website but also elsewhere on the internet. That is, the behaviour of the user while surfing the internet on mobile, and their location data are also recorded. Behavioural targeting increases the risk of children by making them susceptible to targeted advertising and profiling.

Given the immaturity of children, it is anticipated that significant quantities of personally identifiable information will be amassed before their legal adulthood, often without their knowledge or awareness. Even in cases where children are permitted to provide consent for data collection, their cognitive capacity to comprehend the enduring ramifications of privacy infringements is limited.<sup>49</sup>

### 2.1.2. COLLECTION OF BIO-METRIC DATA

The ICT companies do not only collect the browsing data of children when they visit different websites but also biometric data as well. Biometric data is defined in the Personal Data Protection (PDP) bill, 2019 (as Digital Personal Data Protection Bill 2022 does not define it) under sec 3(7) as, "*means facial images, fingerprints, iris scans, or any other similar personal data resulting from measurements or technical processing operations carried out on physical, physiological, or behavioural characteristics of a data principal, which allow or confirm the unique identification of that natural person.*" It means any data which the intermediaries collect that can be used to measure data subjects' physical features and characteristics like facial images, voice patterns, and figure prints.

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<sup>49</sup> Supra note 39.

Though websites do not directly collect the biometric data of the children, that does not mean that children's biometric data is not being collected by any third-party agencies. Whenever children share their photos online or are tagged by their peers in such circumstances facial data of the child is being stored.<sup>50</sup> And when children use Alexa for any work, the voice pattern and recordings are collected by Amazon.<sup>51</sup> Moreover, Facebook is currently working on an algorithm that would be able to identify the person based on hair, clothes and body shapes.<sup>52</sup> It increases the ambit of collection of biometric data which intermediaries seek to use for identity authentication, geolocation and other purposes.<sup>53</sup>

Apart from social media websites, there are certain applications (apps) that parents use to track the health and physical activities of their children. Such apps are often part of a wearable device like Leapfrog, which is a wristband connected to an app. The app motivates children to be physically active by providing an incentive (like allowing the children to take care of their virtual pet). Not only that, there are toys like "Hello Barbie" which are equipped with voice recognition software that encourages the kids to interact with the doll.<sup>54</sup> So, when children's biometric data is being collected by various means it not only exposes them to different impacts of privacy violations but also makes

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<sup>50</sup> PCWorld, Facebook Adds Facial Recognition to Make Photo Tagging Easier available at: [www.pcworld.com/article/213894/Facebook\\_Adds\\_Facial\\_Recognition\\_to\\_Make\\_Photo\\_Tagging\\_Easier.html](http://www.pcworld.com/article/213894/Facebook_Adds_Facial_Recognition_to_Make_Photo_Tagging_Easier.html) (last visited on Dec 13, 2022).

<sup>51</sup> Jason Cohen, "Amazon's Alexa Collects More of Your Data Than Any Other Smart Assistant" PC Mag, Oct. 22, 2021.

<sup>52</sup> Molly Mchugh, "Facebook Can Recognize You Even if You Don't Show Your Face" Wired, Jun. 24, 2015.

<sup>53</sup> Supra note 39.

<sup>54</sup> Deborah Lupton, "The Datafield Child: The Dataveillance of Children and Implications for Their Rights" New Media & Society (2017).

them vulnerable to different criminal acts like cyber-bullying, online harassment and morphing of pictures. And children because of their age are more susceptible to having a psychological impact which could scar them for the rest of their lives.

## **2.2. JURISPRUDENCE OF CHILDREN'S PRIVACY**

The core tenets of children's privacy rights encompass the principles of personal information security and autonomy in decision-making, as stipulated by established legal frameworks.<sup>55</sup> Privacy in relation to decision-making can be divided into two aspects; “*informational privacy*”, i.e., the individual possesses a legitimate interest in preventing disclosure and maintaining autonomy over their personal information and “*decisional privacy*”, i.e., protection of the individual (or a child) from the interference of the government in making personal or family decisions (like reproductive rights).<sup>56</sup> Different courts have regarded either informational privacy or decisional privacy in deciding the extent of autonomy of decision-making. But in the case of Puttaswamy,<sup>57</sup> it was finally settled that privacy shall include both informational privacy as well as decisional privacy of the individual. However, for this paper, the analysis shall be limited to the scope of children's informational privacy.

Thus, to understand the jurisprudence of children's informational privacy, it has first to be understood what information collection triggers privacy protection. As per the Puttaswamy judgement, any information which has the

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<sup>55</sup> *Whalen v. Roe*, 429 US 589 (1977).

<sup>56</sup> Helen L Gilber, 'Minors' Constitutional Right to Informational Privacy' (2007) 74 UCLR.

<sup>57</sup> *Supra* note 7.

potential to restrict the application of the fundamental right of the person (including children) if collected illegally would be termed as a violation of privacy rights. But to determine whether the collection of information is reasonable such collection has to fulfil the objective test of privacy. The test determines whether an individual has a reasonable expectation of privacy in the information collected by a governmental or non-governmental agency. So, when it is determined that children have a legitimate expectation of privacy and that such information if collected, could infringe the fundamental rights, then it could be said that children had privacy rights over such information. The interplay between informational privacy and legitimate expectation was determined in the case of *Vega Rodriguez v Puerto Rico Telephone Co*,<sup>58</sup> where the court ruled that the right to privacy encompasses only information related to subjects within the scope of the right to autonomy. The court has employed the concept of informational privacy as a mechanism to scrutinize infringements upon additional constitutional rights. It can be said that legitimate expectation can be used as a criterion to determine whether such collection has led to a violation of the fundamental rights of the children. The determination of an individual's breach of informational privacy right is contingent upon the resultant consequences arising from the matter at hand. That means the legitimate expectation is not a standalone objective but rather individual has to prove that the breach of informational privacy has led to a violation of fundamental rights that such a person reasonably expected to enjoy.

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<sup>58</sup> 110 F3d 174 184 (1st Cir 1997).

In the case of *Lexander v Peffer*,<sup>59</sup> the court in the United States established that the “*right to informational privacy protects not only matters deemed to be fundamental rights but also matters addressing highly personal medical or financial information.*” The idea of legitimate expectation is applied to ensure that the “*most intimate aspect of human affairs*”<sup>60</sup> remains protected from outside interference. But it has to be differentiated from the data that are freely available to the public. So, if any organisation or agency collects the record of the child along with their parents’ details from a public source, then the same cannot be argued that it is a violation of the privacy right of the children as there was no legitimate expectation that such data should be kept private.

Though the paper has kept the focus on the corporate’s act of collecting children’s data but is important that a caveat should be given regarding the government’s collection of data. The Personal Data Protection (PDP) bill 2019 under section 20 has given an open hand to the government in processing<sup>61</sup> the personal data of the people if it is done for maintaining the security of the State. But the government has to also fulfil the “strict scrutiny test” and “compelling interest test” as laid down in the Puttaswamy judgment before restricting the privacy rights of the individual.

And since the government is dealing with children’s data both tests have to be fulfilled beyond a reasonable doubt before such intrusion can be initiated.

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<sup>59</sup> 993 F2d 1348, 1350-51 (8th Cir 1993).

<sup>60</sup> *Eagle v. Morgan*, 88 F3d 620,625 (8th Cir 1996).

<sup>61</sup> The Personal Data Protection Bill, 2019, s. 2 (c) [hereinafter PDP].

Additionally, the above tests have to be interpreted based on the “substantial test” of the government.

The substantial test stipulates that government has to prove that it has “*substantial interest*” in invading the privacy right of the child before such intrusion can be done. It was laid down in the case of *Daury v Smith*,<sup>62</sup> where the court ruled that the State has a substantial interest in analysing the data of an underperforming school principal and that he cannot claim informational privacy to restrain the State from collecting the data. So, if the test is not fulfilled then the collection would be regarded as an illegal intrusion on the privacy of the children and would be regarded as a violation of fundamental rights.

Thus, to balance the interest of the State in acquiring information on one hand, and securing the privacy rights of the children on the other, the court in the case of *US v Westinghouse*,<sup>63</sup> laid down the “*Westinghouse test*”. The test provides that any intrusion in the privacy of the individual (including that of the children) should be done based on the following 5 factors:

- a) The type of data the government wants to process;
- b) Analysing the potential harm if there is non-consensual disclosure of the same;
- c) Safeguard mechanism employed by the government to prevent unauthorized disclosure;
- d) The degree of the need to access the data;

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<sup>62</sup> 842 F2d 9, 13 (1st Cir 1988).

<sup>63</sup> 638 F2d 570 (3d Cir 1980).

- e) Presence of any statute which powers the government to extract the data in case of national interest.

### 2.2.1. *THE EXTENT OF CHILDREN'S PRIVACY RIGHTS*

Though it is clear that in the case of Puttaswamy judgment the court has accepted that children have privacy rights, but the extent of the same is yet to be determined. It has already been stated above that children should have informational privacy as they have a reasonable expectation of enjoying their fundamental rights. But the underlying question is what is the extent of their informational privacy. This question needs to be settled first before proceeding to recognize the privacy right of children.

The Fourth Amendment of the US Constitution guarantees the constitutional entitlement to privacy for individuals within the United States.<sup>64</sup> The Supreme Court of the United States, in the case of *Bellotti v Baird*,<sup>65</sup> has held that “*a child, merely on account of his minority, is not beyond the protection of the Constitution.*” The court has recognized the extension of constitutional and Bill of Rights protections to children. While the matter of children's informational privacy rights remains unsettled, the courts have recognized the existence of children's rights to privacy in decision-making.<sup>66</sup> It means, in the US children have the right to keep their decision relating to intimate personal choices (like abortion) private and confidential.

But the decisions of the courts are divided regarding whether children have informational privacy.<sup>67</sup> On one end, one school argue that children have the

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<sup>64</sup> Constitution of United States of America.

<sup>65</sup> 443 US 622 (1979).

<sup>66</sup> Ibid.

<sup>67</sup> Supra note 57.



same level of informational privacy as that of an adult, but on the other end, another school argues that children's informational privacy is somewhat different to that of an adult.

*2.2.1.1. CHILDREN'S INFORMATIONAL PRIVACY RIGHT SAME AS THAT OF AN ADULT*

The courts which follow this school of thought apply the same rigour and protection which is given to adults' information privacy rights to that of children. Courts when determining adults' informational privacy first determine whether the information sought requires privacy protection, i.e., whether the information is publicly available or the person concerned has a legitimate expectation of privacy. Thereafter, the courts use the Westinghouse test to determine whether to allow intrusion or safeguard the information. And then the decision is made regarding the disclosure of the information.<sup>68</sup>

The courts have used the above framework to determine children's informational privacy. In the case of *Gruenke v Seip*,<sup>69</sup> a legal action was initiated by a high school student against her swim coach, alleging that he compelled her to divulge her pregnancy records to him and other members of the school staff, thereby infringing upon her rights. The court did not deal with the fact that the claimant was a minor and directly went on to discuss the informational privacy issue. The court first discussed whether the information can be considered private and whether the Westinghouse test is being fulfilled. Based on the analysis, the court held that the claimant's claim of privacy outweighs the State's need to collect the information and ruled in favour of the minor. The issue again cropped up in the case of *CN v*

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<sup>68</sup> Ibid.

<sup>69</sup> 225 F3d 290 (3d Cir 2000).

*Ridgewood Board of Education*,<sup>70</sup> where the court held that the student (in this case minor) has the expectation of privacy. The fundamental principle that the court applies is “*the more sensitive the information is, the stronger the State’s interest must be.*”<sup>71</sup>

2.2.1.2. *CHILDREN’S INFORMATIONAL PRIVACY RIGHTS ARE DIFFERENT FROM THAT OF AN ADULT*

In this school of thought, children’s informational privacy is treated in a stricter sense than that of an adult. In this case, the court first determines whether the information which is sought to be collected is publicly available or whether the child has a legitimate expectation of privacy same as the last school of thought. Second, instead of applying the Westinghouse test, the court applies the compelling interest test to ensure that the medium used by the government to collect the information is the least intrusive method.<sup>72</sup>

The principle was applied in the case of *Aid for Women v Foulston*,<sup>73</sup> where the court has to determine the minor’s right to keep their sexual information confidential. The facts of the case were that Kansas had passed a law that declared any sexual activity with that of a minor (younger than 16 years of age) is injurious and sexually abusive. The statutory provision imposes an obligation upon designated professionals to report to the government whenever they possess a reasonable belief that a minor has been subjected to sexual abuse. A case was initiated in court, contending that the

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<sup>70</sup> 430 F3d 159 (3d Cir 2005).

<sup>71</sup> *Doe v. Attorney General*, 941 F2d 780,796 (9th Cir 1991).

<sup>72</sup> *Mangels v. Pena*, 789 F2d 836,839 (10th Cir 1986).

<sup>73</sup> 441 F3d 1101 (10th Cir 2006).

aforementioned reporting obligations infringed upon the minors' right to informational privacy concerning their consensual sexual activities.

The court analysed the concept of informational privacy and held that children do have informational privacy but the same shall not be applied to such a stricter sense than what is applied to adults. Court further held that children have a legitimate expectation of privacy but that expectation is less protected when asserted by the minors. The court stated that any disclosure of information should be preceded by significant State interest.<sup>74</sup> In the present case, the State possesses a compelling interest, as the enactment of such legislation would serve to safeguard the paramount interests of minors. This interest stems from the State's inherent *parens patriae* authority, and its duty to ensure the well-being and welfare of said minors.

From the above analysis, it can be deduced that children's extent of informational privacy rights is yet to be settled. Restricting the scope of minors' right to informational privacy bears substantial consequences. It results in the perpetually diminished protection of minors' personal information compared to that afforded to adults, irrespective of minors' reasonable expectation of privacy.<sup>75</sup> In certain situations, the State may have a legitimate need for expanded access to minors' personal data, yet there are also occasions where minors should receive equal or heightened safeguards as adults.<sup>76</sup> If it is contended that the right to informational privacy for minors is commensurate with that of adults, then the State would retain the authority

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<sup>74</sup> *Carey v. Population Services International*, 431 US 678 (1977).

<sup>75</sup> *Supra* note 57.

<sup>76</sup> *Ibid.*

to access personal information pertaining to minors. The only difference will be that the State must prove that such collection is proportionate and necessary to fulfil legitimate objectives rather than just collecting information as per their whims and fancies.<sup>77</sup>

### **2.3. ARE ONLINE WARNINGS EFFECTIVE IN ENSURING CHILDREN'S PRIVACY?**

It is often suggested that to ensure children's privacy, parental consent should be implemented for accessing websites that host child-related content. Along with that strict warnings should pop up on websites that host content which is inherently dangerous for children.<sup>78</sup> Companies usually employ "threat and warning safeguards" to ensure the privacy of children.<sup>79</sup> In threat safeguards, the company may state that if they find any children using their websites, then the personal details of the child user shall be reported to their parents, teachers, regulatory agencies or even law enforcement departments.<sup>80</sup> And in warning safeguards, the company often employ warning that websites should be viewed at viewers' discretion or asks the users to register before entering the website so that children of a certain age cannot access the website.<sup>81</sup>

But studies have found that whenever a threat safeguard or authoritative mandate is employed by the company to restrict children's access to the

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<sup>77</sup> Ibid.

<sup>78</sup> Anthony Miyazaki, 'Self-Regulatory Safeguards and the Online Privacy of Preteen Children: Implications for the Advertising Industry' 38 *Journal of Advertising* (2009).

<sup>79</sup> Center for Media Education, COPPA: The First Year-A Survey of Sites available at: <https://www.democraticmedia.org/sites/default/files/coppa-rpt.pdf> (last visited on Dec 12, 2022).

<sup>80</sup> Ibid.

<sup>81</sup> Ibid.

website, children often bypass the same.<sup>82</sup> This act of the children is termed as psychological reactance. The theory states that the “*presentation of a warning, limitation, or barrier to the acquisition of a desired object will often increase the attractiveness of that object, even to the point that a consumer will go to great lengths to obtain access to it.*”<sup>83</sup> Such “boomerang effect” often result in children acting in total opposite to whatever safeguards were put in place.<sup>84</sup> But the same would not work if the children have to overcome complicated barriers, in that case, motivation to bypass the safeguard is not desired by them.<sup>85</sup>

This is not the case for those websites which employ warning safeguards to protect the privacy of children. On those websites, the warning pop-up states that certain contents on the page are not age-appropriate which often acts as an enticement to reactance arousal of the children. This is similar to the fact that people tend to watch those movies and tv shows which have advisory warnings.<sup>86</sup> The same is bound to impact kids as well if there are no foreseeable consequences of their action to bypass the safeguards, i.e., in the absence of threat safeguards. Thus, when warning safeguards are present, they would bypass the same since they know that there will not be any consequences for their action.<sup>87</sup> But once threat safeguard is in place, children know that

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<sup>82</sup> Joseph Grandpre “Adolescent Reactance and Anti-Smoking Campaigns: A Theoretical Approach” 15 Health Communication (2003).

<sup>83</sup> Jack Brehm (1972), Responses to Loss of Freedom: A Theory of Psychological Reactance (General Learning Press, 1972).

<sup>84</sup> Alice Eagly, “The Psychology of Attitudes” 12 UNF (1993).

<sup>85</sup> Dominique Pasquier, Media at Home: Domestic Interactions and Regulation in Sonia Livingstone (ed.), Children and Their Changing Media Environment (1st edn, 2001).

<sup>86</sup> Supra note 85.

<sup>87</sup> Supra note 84.

bypassing them would have serious consequences, even to the extent of revealing their anonymity, and that would restrain them from visiting such sites.<sup>88</sup>

#### **2.4. INCORPORATING THE CONCEPT OF GILLICK COMPETENCE IN CONSENT THEORY**

The component of valid informed consent plays an important role in deciding whether children's data was collected through legal means. If the collection of data occurs without the informed consent of the children or their parents, such action would constitute an infringement upon their right to privacy.

Before understanding whether a child can give consent to the collection of personal data, it is impertinent that the definition of the child needs to be settled. As per art 1 of UNCRC,<sup>89</sup> any person below the age of 18 years of age has been regarded as children. In India also, as per sec 3 of the Indian Majority Act,<sup>90</sup> it states that the person would attain the age of majority if such a person completes 18 years of age. But it has to be kept in mind that child maturity is not static but rather a fluid concept. That is, it is not the case that child develop their maturity only after 18 years of age but rather maturity is in a state of constant development. The maturity of a child before 10 years of age is different from the maturity the child has at the age of 17. So, the consent theory for the child should be based on the maturity principle rather than the age principle.

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<sup>88</sup> Ibid.

<sup>89</sup> Supra note 4.

<sup>90</sup> The Indian Majority Act, 1875 (Act. 9 of 1875).

In that regard, in the UK the age of majority of the child is divided into three stages based on their age and in each stage, a different level of consent theory is applied:<sup>91</sup>

- The first stage considers children below 10 years and are of tender age. Since they do not have enough maturity, their consent is given by their parents. Thus parental consent would be applied to them.
- The second stage includes children who are under the age of 16 years. And for them, the test of Gillick Competence would be used to determine whether they can give consent.
- The third stage includes children in the age of 16 & 17 years of age who can give consent as if they were adults. This is because as per sec 8 of the UK's Family Law Reforms Act<sup>92</sup> and sec 1 of the Mental Capacity Act<sup>93</sup> the age of majority is 16 and 17 respectively. But the same is not applicable in India since the Indian Majority Act already provides that the age of 18 is the age of majority.

Thus, the above classification can be incorporated into the Indian legal system in a manner that consent for any child below the age of 10 has to be given by parents or guardians. For a child between the age of 10-17, the validity of their consent shall be determined by Gillick Competence. And those who are of age 18 or above will be treated as adults.

The test of "Gillick Competence" was laid down for the first time in the case of *Gillick v West Norfolk*,<sup>94</sup> where the mother of a 16 years old minor objected

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<sup>91</sup> Richard Griffith, 'What is Gillick competence?' 12 HVI (2015).

<sup>92</sup> Family Law Reform Act, 1969, s. 8 (UK).

<sup>93</sup> Mental Capacity Act, 2005, s. 1 (UK).

<sup>94</sup> AHA AC 112 (HL) 1986.

to the Department of Health's advice in giving her daughter contraceptive advice and treatment. The court held that "*child under 16 had the legal competence to consent to medical examination and treatment if they had sufficient maturity and intelligence to understand the nature and implications of that treatment.*"

The idea behind the Gillick Competence is that a child can give their consent for treatment and examination if the child had the required maturity in understanding the implication and the risks associated with treatment. The same concept can be extended to children when they are using the internet for accessing certain websites. Instead of overburdening the parents with parental control, the children could be allowed to give their consent regarding the collection of their personal and sensitive personal data<sup>95</sup> to the websites, provided, children can understand the consequences of allowing the collection and the risks associated with it. By doing so, neither the freedom of speech and expression of the children are being curtailed, nor, their privacy is being unduly violated.

The elements that need to be assessed before the test of Gillick Competence can be applied are as follows:<sup>96</sup>

- a) The child has the maturity to understand the implication of giving consent;
- b) The child has the required intelligence in understanding the risks and harm associated with the consent;

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<sup>95</sup> Supra note 60 at s. 3 (36).

<sup>96</sup> Supra note 92.



- c) The child has the necessary maturity and skill to control factors that may affect their decisions, such as information, peer pressure, and fear;
- d) The child can weigh the risk and benefits and the long-term consideration of such a decision on their family.

But at the same time extent of application of the Gillick Competence depends on the gravity of the situation. For example, when a child is visiting a website that has warning safeguards then the child can easily give consent based on their maturity level and intelligence. But when the child visits a website that has a threat safeguard, then the stakes of the consent become higher since there would be drastic consequences if the website reveals the anonymity of the child. In such a situation, parental consent could be required.

So, it is proposed that children above 10 and below 18 can use the test of Gillick Competence to give their consent regarding the collection of personal data for visiting websites which have warning safeguards. But if the child visits a website that has threat and warning safeguards then parental consent would be required to access the website.

## **2.5. RESPONSIBILITY OF THE STATES**

In light of previous discussions, it is imperative for States to assume the role of *parens patriae* and revise existing child rights legislation to align with the digital age, ensuring the paramountcy of the child's best interests. The Council of Europe has implemented guidelines ensuring the safeguarding of children's

rights within the digital sphere.<sup>97</sup> The guidelines have been adopted to ensure that the rights mentioned in UNCRC can be enforced in the digital era as well. The preamble to the guideline accepts that *“it is the duty of the State to respect, protect and fulfil the rights of the child, and reaffirming the rights, role and responsibility of parents or carers to provide, in a manner consistent with the best interests and evolving capacities of the child.”*<sup>98</sup>

Accordingly, the guideline has interpreted the principle of *“best interest of the child principle”* as *“in all actions concerning children in the digital environment, the best interests of the child shall be a primary consideration. In assessing the best interests of a child, States should make every effort to balance... child’s right to protection with...the right to freedom of expression and information.”*<sup>99</sup>

Art 2.4 of the guideline deals with a child’s *“right to be heard”*. The guideline establishes a legal obligation on the part of the State to provide children with opportunities so that they can express themselves through the medium of ICTs along with face-to-face participation. Apart from that, States should also provide regulatory mechanisms to ensure that the rights of the child are not violated.

Art 3.2 of the guideline deals with the most basic facet of child rights, i.e., the *“right to freedom of speech and expression”*. The guidelines state that it shall be the duty of the State to ensure that children can freely express their opinion

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<sup>97</sup> Council Of Europe, Guidelines to Respect, Protect and Fulfil Then Rights of The Child in The Digital Environment available at: <https://rm.coe.int/guidelines-to-respect-protect-and-fulfil-the-rights-of-the-child-in-th/16808d881a> (last visited on Dec 12, 2022).

<sup>98</sup> Ibid.

<sup>99</sup> Ibid art 2.1.

and view in any medium of their choice and no restriction shall be imposed either by the State or other stakeholders. Additionally, it is imperative for the State to guarantee children's awareness of their digital freedom of expression rights, while also upholding the right to dignity of other children. And lastly, any restriction imposed on this right should comply with international human rights standards. It shall be the duty of the State to ensure that children are aware of the restriction imposed like content filtering. At the same time mechanism should be in place so that children can make a complaint regarding any abuse of such restriction.

Lastly, art 3.4 of the guidelines deals with the “*right to privacy and data protection*” to ensure the data protection of the children. The guideline makes several obligations on the State:

- The State is obligated to guarantee the preservation of children's privacy rights and data protection. It must also ensure that all pertinent entities processing personal data are knowledgeable about the child's entitlement to privacy and data protection.
- The State shall enforce limitations on the handling of children's data, stipulating that such handling may only occur for the sole advantage of children, in a lawful, precise, and secure manner, and for explicitly stated and defined objectives. This processing shall be founded upon voluntary, explicit, well-informed, and unmistakable consent obtained either from the children themselves or their parents or legal guardians. Furthermore, the principle of data minimization shall be upheld, ensuring that the gathering of data does not surpass what is reasonably essential for the processing purpose.

- When children are of tender age and consent of the parent is required for any collection of data, in such scenarios, the State must establish a mechanism that can verify whether such consent has been taken from the parents or lawful guardian. Children shall not, under any circumstances, be subject to unlawful or arbitrary interference infringing upon their right to privacy within the digital environment, as guaranteed by law.
- The State has a duty to safeguard children from potential harm resulting from data processing, employing risk minimization measures in the design of such processing.

### **3. STATUTES DEALING WITH PRIVACY RIGHTS OF MINORS**

Apart from the European Council guidelines, it is important to analyse the domestic legislation of different countries and examine what rights have been given by the State to children to secure their privacy and ensure confidentiality. In that regard, the analysis of legislation shall be done in two parts; *in the first part*, the municipal laws of India, the EU and the US shall be reviewed. *In the second part*, UNCRC shall be analysed to identify the rights which can be exercised by the children to ensure their privacy.

#### **3.1. MUNICIPAL LAWS OF DIFFERENT COUNTRIES**

In this segment, municipal laws of the 3 countries (India, the US and the EU) shall be analysed to identify what protection is given to ensure the privacy rights of the children and whether they are sufficient enough to safeguard their privacy in the 21<sup>st</sup> Century.

### 3.1.1 DOMESTIC LEGISLATION OF INDIA

Analysis of child's privacy rights shall be undertaken in three sub-parts; in the *first sub-part*, the PDP bill 2018, 2019 and 2022 shall be discussed. In the *second sub-part*, the Shri Krishna Committee report and White Paper on Data Protection shall be analysed. And in the *last sub-part*, Information Technology and its allied rules shall be examined.

#### 3.1.1.1. PERSONAL DATA PROTECTION BILL 2018, 2019 AND 2022

The PDP bill 2018 was drafted by the Shri Krishna Committee Report as a suggestion on how data protection of the citizen ought to be done. Afterwards, in 2019 another PDP was drafted and tabled in Lok Sabha but was never passed. The 2019 PDP bill has been withdrawn by the government and in 2022 a new bill has been released for public consultation. The new bill is called the Digital Personal Data Protection Bill 2022 (DPDP bill)<sup>100</sup> and will be tabled in parliament. Analysis of these bills gives a fair idea as to what are the potential privacy rights of children.

Sec 3(9) of the 2018 bill, sec 3 (8) of the 2019 bill and sec 2(3) of the DPDP bill define who shall be regarded as a child. The section follows the definition given in the Indian Majority Act and stipulates that anyone below the age of 18 years would be considered a child.<sup>101</sup>

Also, to ensure children's access to the internet are safe and secure, the concept of "guardian data fiduciary" has been incorporated in both the 2018 and 2019 bills. Both the bills define it as a data fiduciary who shall have the responsibility to operate children's websites and services and to process large

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<sup>100</sup> The Digital Personal Data Protection Bill, 2022 [hereinafter DPDP].

<sup>101</sup> The Indian Majority Act, 1875 (Act 9 of 1875).

volumes of children data.<sup>102</sup> Similarly, both bills place responsibility on the guardian data fiduciary to ensure there is no tracking, behavioural monitoring or targeted advertisement to children.<sup>103</sup>

The protection of the personal data of children is provided in sec 23 of the 2018 bill and sec 16 of the 2019 bill. These sections impose a certain obligation on the data fiduciary when processing the personal data of the children which are as follows:

- The data fiduciary shall process children's data based on the best interest of the child principle and should safeguard their rights in accordance with the provisions of the bill.<sup>104</sup>
- The data fiduciary is mandated to incorporate requisite age verification and parental control mechanisms for the purpose of processing the personal data of minors, thereby fulfilling their legal obligations.<sup>105</sup> The determination of whether the data fiduciary is required to implement suitable age verification measures shall be based on the following criteria:<sup>106</sup>
  - a) The volume of the data that is being processed;
  - b) What shall be the proportion of the children's data that is being processed;
  - c) What is the potential harm to the children that could arise out of such processing of data; and,

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<sup>102</sup> Personal Data Protection Bill, 2018 s. 23 (4); See also Supra note 62 at s. 16 (4).

<sup>103</sup> Personal Data Protection Bill, 2018 s. 23 (5). See also Supra note 62 at s. 16 (5).

<sup>104</sup> Personal Data Protection Bill, 2018 s. 23 (1). See also Supra note 62 at s. 16 (1).

<sup>105</sup> Personal Data Protection Bill, 2018 s. 23 (2). See also Supra note 62 at s. 16 (2).

<sup>106</sup> Personal Data Protection Bill, 2018 s. 23 (3). See also Supra note 62 at s. 16 (3).

- d) And any other factors mentioned by the Data Protection Authority (DPA).

Apart from that, certain rights have been accorded to individuals that can also be extended to children as well. The most important among all is; the right to be forgotten.<sup>107</sup> The data principal shall possess the entitlement to request the erasure of the data that has been acquired or processed, once the objective for such data collection has been accomplished.

But, the new DPDP bill 2022 has made some drastic changes in regard to children's privacy rights. The new bill has altogether removed the requirement of having guardian data fiduciary for operating children's websites. Rather it has provided that it shall be the duty of the data fiduciary only to obtain verifiable parental consent before allowing access to the website.<sup>108</sup> At the same time, it restricts data fiduciaries from undertaking tracking or behavioural monitoring of children.<sup>109</sup>

It is important to note that from now on data fiduciaries will no longer have the duty to verify the age of the children but rather their duty shall be limited to obtaining verifiable parental consent.

Lastly, the new bill provides that data fiduciaries should not undertake any processing which has the potential to cause harm to a child.<sup>110</sup> Harm as defined in sec 2(10) of the bill includes any bodily harm, harassment or identity theft. But does not cover mental or psychological harm caused to any data principal. Thus, it can be stated that data fiduciaries are barred from

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<sup>107</sup> Personal Data Protection Bill, 2018 s. 27. See also Supra note 62 at s. 20.

<sup>108</sup> Supra note 101 at s. 10(1).

<sup>109</sup> Supra note 101 at s. 10(3).

<sup>110</sup> Supra note 101 at s. 10(2).

processing any data of children which caused any physical harm or increases the chances of identity theft. But they are allowed to process children's data which can cause children mental or psychological harm. The government needs to address this loophole or else children would have very diluted privacy protection.

*3.1.1.2. SHRI KRISHNA COMMITTEE REPORT AND WHITE PAPER*

The analysis of the Krishna report<sup>111</sup> shall be done along with the White Paper on the Committee of Experts on Data Protection (White paper).<sup>112</sup>

The Krishna report stipulates that children should be given greater protection in the processing of their personal data than any adults. The reason for the same is that children because of their age are not able to fully understand the consequence of their decision. In such capacity, it is incumbent upon the DPA to duly inform data fiduciaries, who shall function as custodial data fiduciaries, of their responsibility to safeguard children against exposure to unsuitable content and to prevent any unlawful processing of their data.

Furthermore, the Krishna report provides certain barred practices which cannot be undertaken by guardian data fiduciaries which have already been incorporated in the 2018 PDP bill. These encompass behavioural surveillance, monitoring, precise targeting of advertisements, and any other form of processing that contravenes the paramount welfare of the child. Also, when such guardian data fiduciary is providing any service to children, they have

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<sup>111</sup> Supra note 13.

<sup>112</sup> Meity, White Paper of The Committee of Experts on A Data Protection Framework for India available at: [https://www.meity.gov.in/writereaddata/files/white\\_paper\\_on\\_data\\_protection\\_in\\_india\\_171127\\_final\\_v2.pdf](https://www.meity.gov.in/writereaddata/files/white_paper_on_data_protection_in_india_171127_final_v2.pdf) (last visited on Dec 12, 2022).



to incorporate an age verification mechanism and parental consent mechanism. In addition, guardian data fiduciaries may solely engage in authorized data processing activities with parental consent for children.

The White paper deals with certain issues with children privacy and had provided recommendations to resolve the same. The first issue is regarding children's access to the internet and their ability to provide consent. The issue has already been discussed in the above section of the paper<sup>113</sup> so the same shall not be discussed herein.

The next issue was regarding what type of website must comply with data protection guidelines to ensure safeguards for children. The White paper states that, if the additional obligation is imposed only on the website providing services to children, then the scope would be too narrow since there are many websites which children use (like Instagram or Facebook) which are not children's websites but they still collect and process data. If the scope includes commercial websites only, then also the classification is inadequate since there are many non-commercial websites which the children visit. The White paper has been unable to provide any clear solution to address the issue but stated that guidelines have to be incorporated in such a manner that every website which collects children's data must fulfil the additional data protection rules.

### *3.1.1.3. INFORMATION TECHNOLOGY ACT AND ALLIED RULES*

As the Act came into force in 2000, there is no mention of any provision which specifically protects the privacy of the children. But there are certain provisions relating to privacy that can be extended to children. As per sec 43A

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<sup>113</sup> Section II.IV of the Paper.

of the Act,<sup>114</sup> it imposes an obligation on the body corporates who are dealing, possessing or handling sensitive personal data of the people. The section stipulates that if there is any breach of sensitive personal data which as result causes harm to any person then that body corporates will pay compensation for the same. This means if there is any breach of children's data then they shall be liable to pay compensation to the affected child or their representatives.

To ensure sensitive data is handled with care, Information Technology (Reasonable Security Practices and Procedures and Sensitive Personal Data or Information) rules (SPDI) was enacted. Rule 3 of the SPDI rules mentions what shall be considered as sensitive personal data. Based on that, rule 4(1) provides a certain obligation on the body corporate which are dealing with sensitive personal data. Such corporates have to provide a privacy policy stating how they will be handling such data.

Furthermore, rule 5 governs the collection of sensitive personal data. Rule 5(2) provides that no such collection will take place unless it can be proved by the corporates that such collection is necessary to carry out certain functions. And such collection should be done based on the informed consent of the person<sup>115</sup> and should be used for the purpose for which such collection was done.<sup>116</sup>

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<sup>114</sup> The Information Technology Act, 2008 (Act 21 of 2000).

<sup>115</sup> Information Technology (Reasonable Security Practices and Procedures and Sensitive Personal Data or Information) Rules, 2011 r. 5(3).

<sup>116</sup> Information Technology (Reasonable Security Practices and Procedures and Sensitive Personal Data or Information) Rules, 2011 r. 5 (5).

Lastly, regarding disclosure of the information, SPDI provides that, no disclosure of sensitive information can be done by the body corporate without securing the prior consent of the individual. This rule ensures children's data are not shared with third parties without securing parental consent.<sup>117</sup>

Moreover, in order to safeguard the confidentiality of minors' personal spaces, sec 66E mandates penalties for encroachments upon their privacy. The section states that, if any person or body corporate capture, publishes or transmits any image relating to the private area of an individual, then it will be regarded as a violation of privacy and the person shall be awarded 3 years of imprisonment.

Along with that, sec 67B explicitly prohibits sharing or transmitting any image which depicts children in sexual activity. This section in a way prohibits the creation, transmission and storage of child pornography. Adding onto that, rule 6(5) of the Information Technology (Cybercafé) rules,<sup>118</sup> states that every computer in the cyber cafe must have software that filters and restrict access to child pornography. Furthermore, rule 3(2) (b) Information Technology (Intermediary) rule,<sup>119</sup> states that the intermediary is obligated to abstain from hosting, displaying, uploading, or transmitting any information pertaining to pornography or infringements upon privacy.

### *3.1.2 DOMESTIC LEGISLATION OF EUROPE*

The EU General Data Protection Regulation (GDPR) of 2016 governs data collection and processing for individuals, encompassing both minors and

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<sup>117</sup> Information Technology (Reasonable Security Practices and Procedures and Sensitive Personal Data or Information) Rules, 2011 r. 6(1).

<sup>118</sup> Information Technology (Guidelines for Cyber Cafe) Rules, 2011.

<sup>119</sup> Information Technology (Intermediaries guidelines) Rules, 2011.

adults within the European Union.<sup>120</sup> Pursuant to Recital 38 of the GDPR, it is imperative to establish distinct legislative measures safeguarding the privacy of children concerning the acquisition of their personal information. It further states that “*specific protection should, in particular, apply to the use of personal data of children for the purposes of marketing or creating personality or user profiles and the collection of personal data with regard to children when using services offered directly to a child.*”

Additionally, Recital 58 stipulates that any communication directed towards a minor with regard to the handling or gathering of personal data must be conveyed in a comprehensible and straightforward manner, enabling minors to readily comprehend said information.

Furthermore, recital 65 provides that children shall have the right to be forgotten provided that such consent is given by children at a time when they could not fully comprehend the risk involved in such processing and later wants to remove the data from the internet.

Recital 71 is related to automated decision-making based on profiling done from collecting personal data and that same should not be applied to children. Interestingly, art 22(2) allows for the processing of personal data in some circumstances, but the article does not explicitly state whether the processing of children’s personal data is allowed under its ambit. The Working Party report 2018,<sup>121</sup> has analysed the issue and held that recital 71 explicitly

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<sup>120</sup> Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation), 2016.

<sup>121</sup> Working Party, Guidelines on Automated Individual Decision-Making and Profiling for the Purposes of Regulation, 2016 art 29.

prohibits profiling of children's data. In such a situation, even if art 22 does not explicitly mentions the same the prohibition should be incorporated from recital 71.

Moreover, art 6(1)(f) of GDPR provides that processing of the personal data of the data subjects can be allowed if it is carried out for legitimate objectives. But the article provides an exception that if the data subject is a child then their personal data will not be processed.

Article 8 of the GDPR regulates the consent of minors regarding information society services, which are economically provided services in exchange for compensation upon request of the recipient.<sup>122</sup> Pursuant to the aforementioned article, a child's consent shall be deemed valid if the child is aged 16 or above and grants consent with regard to the information service society. For any child below the age of 16, parental consent shall be required to avail the service of the information service society.

Aside from articles specifically aimed at safeguarding children's privacy, the GDPR also include provisions that offer privacy rights to both adults and children.<sup>123</sup> These rights include:<sup>124</sup>

- Right to access to personal data;
- Right to rectification of personal data;
- Right to be forgotten;

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<sup>122</sup> Brexit Legal Guide, Directive on Information Society Service available at: <http://brexitlegalguide.co.uk/information-society-services/> (last visited on Dec 12, 2022).

<sup>123</sup> ICO, What Rights Do Children Have? available at: <https://ico.org.uk/for-organisations/guide-to-data-protection/guide-to-the-general-data-protection-regulation-gdpr/children-and-the-uk-gdpr/what-rights-do-children-have/> (last visited on Dec 12, 2022).

<sup>124</sup> GDPR, Rights of the Data Subjects available at: <https://gdpr-info.eu/chapter-3/> (last visited on Dec 12, 2022).

- Right to restriction of processing;
- Right to data portability;
- Right to object automated individual decision-making, including profiling of the individual.

### 3.1.3 DOMESTIC LAW OF THE US

In the US, the privacy rights of children are protected through the Children's Online Privacy Protection Act (COPPA),<sup>125</sup> which specifically addresses the compilation, utilization, and divulgence of personally identifiable information relating to minors that are obtained through online means.<sup>126</sup>

An interesting feature of this Act is that the Act considers only those individuals as children who are below 13 years of age. Also, the definition of personal information is wide enough to include biometric information about the child as well.

The Act imposes the following obligations on the website operators who collect or maintain the personal information of the children:<sup>127</sup>

- The operator should provide clear notice regarding children's information collection, its usage and disclosures;
- Operators shall make diligent efforts to obtain parental consent, to the extent reasonable, prior to collecting and utilizing personal data pertaining to children. Furthermore, a parent retains the authority to

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<sup>125</sup> Children's Online Privacy Protection Act, 1998.

<sup>126</sup> Ibid.

<sup>127</sup> Federal Trade Commission, Protecting Children's Privacy Under COPPA available at: <https://www.ftc.gov/sites/default/files/documents/reports/protecting-childrens-privacy-under-coppa-survey-compliance/coppasurvey.pdf> (last visited on Dec 15, 2022).

restrain the operator from disclosing any information concerning the child to any third parties;

- The operator shall have the duty to send new notice if there are any changes in the method of collecting, using or disclosure practices of the operator and fresh consent has to be obtained;
- The operator is obligated to institute and maintain prudent security measures aimed at safeguarding the confidentiality, privacy, and integrity of personal information pertaining to children that are acquired by the operator.

### **3.2. UNITED NATIONS CONVENTION ON CHILD RIGHTS**

The UNCRC, established in 1989, aims to secure and safeguard children's rights. This convention imposes legal obligations on individuals below 18 years of age. The Act shall extend its applicability not solely to Member States, but also includes private actors and business enterprises.<sup>128</sup>

Art 17 of the UNCRC provides that, “*No child shall be subjected to arbitrary or unlawful interference with his or her privacy, family, home or correspondence, nor to unlawful attacks on his or her honour and reputation.*” The article does not per se differentiate between online and offline intrusion of privacy. The fundamental tenet posited herein asserts that minors, akin to adults, are entitled to a concomitant entitlement of privacy, as a matter of legal right.

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<sup>128</sup> Eva Lievens, The United Nations Convention on the Rights of The Child and What It Means for Online Services available at: <https://ico.org.uk/for-organisations/childrens-code-hub/additional-resources/the-united-nations-convention-on-the-rights-of-the-child/> (last visited on Dec 12, 2022).

So, to ensure that the right of the child so enshrined in the convention remains relevant in the digital world, General Comment 25 was recently adopted by the UN.<sup>129</sup> The General Comment has interpreted the rights provided in CRC in light of the digital world and has renewed the understanding of these existing rights.

Art 3(1) of the UNCRC talks about the best interest of the child. According to the General Comment, the main consideration of the best interests of the child must be taken into account when States engage in decision-making processes relating to regulation, design, and administration of the digital environment. Furthermore, any decision regarding regulating the digital environment should be taken based on the potential harm and violation of children's rights in such an environment and such a decision should be in line with the best interest of the child.

It shall also be the responsibility of the States to ensure that the right of being heard (art 12 of the UNCRC) of the children is not violated. In that regard, General Comment provides that States shall have the duty to create a child-friendly environment so that children can express their views and opinion safely. Furthermore, to ensure the right to access information (art 13 and 17 of the UNCRC), it is incumbent upon States to furnish and endorse the development of digital content tailored for children taking into account their progressive abilities. Furthermore, States must guarantee children's unrestricted access to a comprehensive array of information.

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<sup>129</sup> UNCRC, General Comment No 25 on Children's Rights in Relation to the Digital Environment, CRC/C/GC/25 (2 March 2021).



States also must ensure that restriction of children's right to freedom of expression (art 13 of the UNCRC) in online mode should be done following the principles of proportionality, necessity and within the ambit of the law. States have an obligation to furnish minors with comprehensive guidance pertaining to the proficient execution of their right to freedom of speech and expression, specifically concerning the dissemination of digital material while upholding the rights and integrity of others.

Regarding privacy rights, the General Comment stipulates that intrusion into children's privacy can only be allowed when such intrusion is neither arbitrary nor unlawful and is done for a legitimate purpose. It shall be the duty of the State to enact legislation so that children's data are protected by every organisation. Such legislation should also have strong safeguards, regulatory measures and independent oversight.

General Comment further states that States have to ensure that the right to rectification of personal data can be exercised either by children or by their parents. And, children should have the option to exercise their right to withdraw their consent to the collection and processing of personal data. Furthermore, data gathered by the authority should be used for the purpose for which such collection was done and should have a definite period of retention after which data shall be deleted.

#### **4. RECOMMENDATIONS**

After analysing the privacy rights of children, it can be stated that apart from a certain foreign jurisdiction most of them does not have proper legislation which deals with the privacy right of children. And as per recent trends, more

than 80% of children have an online presence.<sup>130</sup> Thus, it becomes more pertinent than ever to have a strong privacy rights framework that recognizes and protects the privacy rights of children. In that regard following recommendations are asserted:

- 1) Mandating data fiduciaries and website operators to get parental consent of the children before processing the data of children below the age of 10 years;
- 2) Incorporating the concept of Gillick Competence and allowing children between the age of 10-17 to give consent without parental supervision;
- 3) Mandating website operators and other stakeholders to provide privacy policy in a prominent place on the website and should contain the following; types of data collected, the usage of such data, whether any disclosure is being made; data retention period; and when data will be deleted.
- 4) Under no circumstances children's data should be used for tracking, behavioural monitoring or targeted advertisement even for a legitimate purpose.
- 5) Information that has to be provided in the privacy policy should be made in an easy language so that children can understand;
- 6) Processing of children's data should be done in a pseudonymization manner so that even if a data breach happens, data remains safe.

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<sup>130</sup> Claire Bessant, More Than 80% Of Children Have an Online Presence by The Age of Two available at: <https://phys.org/news/2017-09-children-online-presence-age.html> (last visited on Dec 15, 2022).

## 5. CONCLUSION

The preservation of privacy constitutes an essential element of the fundamental rights to life and liberty. Privacy rights are indispensable for the full enjoyment of the right to life and enable the exercise of freedom of speech and expression.

The problem arises when the concept of the right to privacy is not extended to children. We often forget that children also have the right to freedom of speech and expression, the right to ensure body autonomy and the right to dignity. These rights cannot be exercised without the presence of the right to privacy. The privacy right is not an isolated right that needs separate consideration, rather it is the essence and catalyst for exercising all other rights. So, when children are denied privacy right, their exercise of other rights is often unidirectional and restricted to a certain aspect.

Another factor contributing to the neglect of children's privacy rights is that laws and international agreements were created when the internet was in its early stages and therefore did not address privacy rights in the digital realm. The growing online presence of children highlights the need for updated legislation to protect their privacy, which remains a major challenge.

It has to be kept in mind that it is the privacy of the children which needs more protection than that of the adult because of their tender age and maturity level. Children do not understand the consequence of their decision, so if they visit any inappropriate website and the data is being collected, it would have unintended and far-reaching consequences. Moreover, children are at a growing stage, and any data collected shall become outdated within a few

years. Thus, if the data is not corrected, then profiling will be done based on old data which could open Pandora's box.

Children are regarded as the future of the country. They need special protection to ensure they can, without fear and consequences, freely express themselves in online mediums. When there is no privacy legislation, their basic fundamental rights will be curtailed. Just because the legislators are incompetent does not mean children have to suffer because of their incompetence. It is high time that we recognize and protect children's right to privacy so that not only they can access the internet to learn new and innovative things, but also be able to express their opinion without the fear of privacy violation.

**BATTLE FOR CONTROL OVER THE ASSETS OF THE  
CORPORATE DEBTOR: EFFECT OF THE MORATORIUM  
UNDER THE INSOLVENCY AND BANKRUPTCY CODE ON THE  
POWERS OF THE ENFORCEMENT DIRECTORATE**

*Madhav Goel\**

**ABSTRACT**

*The Insolvency and Bankruptcy Code, 2016 (“IBC”) and the Prevention of Money Laundering Act, 2002 (“PMLA”) are two of the most important frameworks governing business activity in India. The question of whether the Enforcement Directorate can attach assets of the Corporate Debtor after declaration of the moratorium under the IBC has important implications on the efficacy and substratum of both legislations. Much uncertainty persists around this issue on account of conflicting jurisprudence on the scope of the moratorium on the proceedings under the PMLA and the powers of the Enforcement Directorate. This article seeks to explore the issue by analyzing the existing jurisprudence on the issue, the exact nature of proceedings under the PMLA, the implications of attachment orders, the scope of the moratorium, and the effect of the non-obstante clauses present in both legislations. This article also explores the issue from a law and economics perspective in order to reach a conclusion that best preserves the essence and objectives of both frameworks. The article concludes that the powers of the Enforcement Directorate to attach assets are interdicted by the moratorium, a conclusion that is both*

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*legally and economically sound, and preserves the substratum of both legislations.*

**Keywords:** *moratorium, provisional attachment, proceedings, non-obstante clause, purposive interpretation, harmonious interpretation*

## I- INTRODUCTION

The eventual clash of the titans is finally at the doorstep of the Hon'ble Supreme Court of India - the Court has to adjudicate the conflict between the Prevention of Money Laundering Act, 2002<sup>1</sup> (“PMLA” or “Act”) and the Insolvency and Bankruptcy Code, 2016<sup>2</sup> (“IBC” or “Code”), and consequently decide which of the two overrides the other - the moratorium under the Code<sup>3</sup> or the powers of the Directorate of Enforcement (“ED”) to provisionally attach assets of the Corporate Debtor.

In a special leave petition<sup>4</sup> titled *Ashok Kumar Sarawagi v. Directorate of Enforcement*<sup>5</sup>, the Hon'ble Supreme Court has issued notice<sup>6</sup>, and decided to adjudicate this issue. The appeal, assailing the judgement of

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<sup>1</sup> Prevention of Money Laundering Act, 2002 (No. 15 of 2003)

<sup>2</sup> Insolvency and Bankruptcy Code, 2016 (No. 31 of 2016)

<sup>3</sup> Insolvency and Bankruptcy Code, 2016,s.14

<sup>4</sup> Constitution of India, 1949, art. 136

<sup>5</sup> Diary No. 30092/2022

<sup>6</sup> Ashok Kumar Sarawagi v. Directorate of Enforcement, 2022 SCC OnLine SC 1713

the Hon'ble National Company Law Appellate Tribunal<sup>7</sup> (“NCLAT”), raises a very important and pertinent question. Does the moratorium imposed under Section 14 of the Code after initiation of the corporate insolvency resolution process (“CIRP”) affect the ED’s powers under Section 5 of the PMLA to provisionally attach such property that may be believed by the ED to be the proceeds of crime<sup>8</sup> and is ‘*likely to be concealed, transferred or dealt with in any manner which may result in frustrating any proceedings relating to confiscation of such proceeds of crime*’? The uncertainty arises from the fact that the Hon'ble NCLAT, in a number of decisions, has upheld the powers of the ED to proceed with the attachment notwithstanding the moratorium under the Code, while the decision of the Hon'ble National Company Law Tribunal, Mumbai in *Sterling SEZ and Infrastructure Limited v. Deputy Director, Directorate of Enforcement*<sup>9</sup> relies on various rulings of the Appellate Authority under the PMLA and holds that provisional attachment orders passed by the ED would be a nullity once the moratorium is in force. The confusion thus arises out of conflicting judicial opinions on the subject, and the answer to this question is important as it will have a direct bearing on two important legal issues - the ability of the State to curb money laundering, and the efficacy and efficiency of the CIRP under the IBC.

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<sup>7</sup> Ashok Kumar Sarawagi v. Enforcement of Directorate, Company Appeal (AT)(Insolvency) No. 411/2022

<sup>8</sup> Prevention of Money Laundering Act, 2002, s. 2(1)(u)

<sup>9</sup> M.A. No. 1280/2018 in C.P. No. 405/2018

This paper seeks to race ahead in time and analyze this issue. It shall analyze the reasoning of the Hon'ble NCLAT in its various decisions wherein it has upheld the ED's powers to provisionally attach assets of a corporate debtor notwithstanding the moratorium under the Code as well as the reasoning of the Hon'ble National Company Law Tribunal, Mumbai in **Sterling SEZ and Infrastructure Limited**<sup>10</sup>, the scheme and objectives of both the PMLA and the IBC, the scope of the moratorium under Section 14 of the IBC, and the effect of the overriding provisions present in both legislations. Thereafter, it shall analyze the economics involved in deciding this legal question, and then apply well-settled principles of legal interpretation to reach the conclusion that it is the IBC that shall prevail, for both legal and economic reasons, i.e., the ED is denuded of its power to pass a provisional attachment order under Section 5 of the PMLA qua the assets of the corporate debtor once the moratorium under Section 14 of the Code has been declared.

## **II- JUDGEMENTS OF THE HON'BLE NATIONAL COMPANY LAW APPELLATE TRIBUNAL**

The Hon'ble NCLAT has, in three different judgements, besides the one under appeal in *Ashok Kumar Sarawagi*<sup>11</sup>, upheld the ED's powers of attachment notwithstanding the moratorium. Before proceeding into a

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<sup>10</sup> *Sterling SEZ and Infrastructure Limited*, supra note 9

<sup>11</sup> *Ashok Kumar Sarawagi*, supra note 7



fresh analysis of this issue, it is important to refer to the reasoning in these three decisions:

- A. **Varrasana Ispat Limited v. Deputy Director of Enforcement**<sup>12</sup>
- B. **Rotomac Global Private Limited (Through Anil Goel, Liquidator) v. Deputy Director, Directorate of Enforcement**<sup>13</sup>
- C. **Kiran Shah v. Enforcement Directorat**<sup>14</sup>

The powers of the ED were upheld in *Varrasana Ispat*<sup>15</sup>, and that judgement was diligently followed in both *Rotomac Global*<sup>16</sup> and *Kiran Shah*<sup>17</sup>. In *Varrasana Ispat*<sup>18</sup>, the Hon'ble NCLAT considered the provisions of Section 14 of the Code, and noted that the same imposes a moratorium with respect to the following:

1. institution of suits;
2. continuation of pending suits;
3. proceedings against the corporate debtor including execution of any judgment, decree or order in any court of law, tribunal, arbitration panel or other authority;

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<sup>12</sup> Company Appeal (AT)(Insolvency) No. 493/2018

<sup>13</sup> Company Appeal (AT)(Insolvency) No. 140/2019

<sup>14</sup> 2022 SCC OnLine NCLAT 2

<sup>15</sup> *Varrasana Ispat*, supra note 12

<sup>16</sup> *Rotomac Global*, supra note 13

<sup>17</sup> *Kiran Shah*, supra note 14

<sup>18</sup> *Varrasana Ispat*, supra note 12

4. transferring, encumbering, alienating or disposing of by the corporate debtor any of its assets or any legal right or beneficial interest therein;
5. any action to foreclose, recover or enforce any security interest created by the corporate debtor in respect of its property including any action under the SARFAESI Act, 2002<sup>19</sup>; and
6. the recovery of any property by an owner or lessor where such property is occupied by or in the possession of the corporate debtor.

The Hon'ble NCLAT reasoned that the moratorium is not meant to interdict criminal proceedings, or any penal action taken as a consequence of such criminal proceedings. It analyzed the scheme of the PMLA and concluded that since proceedings under the same are of a criminal nature and an order of attachment is made pursuant thereto, the moratorium under Section 14 of the Code is not applicable to the same. The Hon'ble NCLAT was also influenced by the fact that the order of attachment of the assets of the Corporate Debtor therein was made prior to the initiation of the CIRP. Ultimately, the Hon'ble NCLAT concluded that both legislations act in different fields, one dealing with money laundering and the other with insolvency and corporate restructuring, and as such there was no conflict between the two. Consequently, it concluded that there was no need to analyze

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<sup>19</sup> Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (No. 54 of 2002)

which of the two legislations had an overriding effect on the other. Dismissing the appeal, it upheld the ED's powers of attachment of the assets of the corporate debtor, notwithstanding the moratorium imposed. The judgement in *Varrasana Ispat*<sup>20</sup> was later confirmed by the Hon'ble Supreme Court.<sup>21</sup>

The judgement in *Rotomac Global*<sup>22</sup> did not consider this issue afresh, and relying on *Varrasana Ispat*<sup>23</sup>, held in favour of the ED's powers of attachment. The judgement in *Kiran Shah*<sup>24</sup> considered the scheme of the Code as well as of the PMLA. Thereafter, the Hon'ble NCLAT noted that a person, including the corporate debtor, involved in money laundering, cannot be allowed to enjoy the fruits of 'proceeds of crime' in order to ward off its civil indebtedness towards its creditors. It was categorically held that the PMLA is designed to fulfil the country's global obligations towards prevention of money laundering, and as such takes precedence over the Code whose primary objective is the resolution of insolvent companies. It also held that there is no clash or conflict between the PMLA and the Code as they operate in different spheres. Eventually, relying upon *Varrasana Ispat*<sup>25</sup> and the judgement of the Hon'ble Delhi High Court in *Deputy Director Directorate of*

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<sup>20</sup> *Varrasana Ispat*, supra note (n12)

<sup>21</sup> *Varrasana Ispat Limited v. Deputy Director of Enforcement*, Civil Appeal No. 5546/2019

<sup>22</sup> *Rotomac Global*, supra note 13

<sup>23</sup> *Varrasana Ispat*, supra note (n12)

<sup>24</sup> *Kiran Shah*, supra note 14

<sup>25</sup> *Varrasana Ispat*, supra note (n12)

*Enforcement Delhi v. Axis Bank*<sup>26</sup>, the Hon'ble NCLAT ruled in favour of the PMLA and upheld the attachment order, notwithstanding the moratorium in effect in respect of the corporate debtor therein.

Interestingly, all three decisions in *Kiran Shah*<sup>27</sup>, *Varrasana Ispat*<sup>28</sup>, and *Rotomac Global*<sup>29</sup> arose from a factual situation where the provisional attachment order had been passed prior to the initiation of the CIRP of the corporate debtor. In that respect, the question before the Hon'ble Supreme Court in *Ashok Kumar Sarawagi*<sup>30</sup> is different, for the provisional attachment order was passed after the initiation of the CIRP and the imposition of the moratorium. This factual situation was thought to be relevant enough by the Hon'ble Apex Court to distinguish its decision in *Varrasana Ispat Limited*<sup>31</sup> and consider the appeal in *Ashok Kumar Sarawagi*<sup>32</sup> on merits.

### **III- JUDGEMENT OF THE HON'BLE NATIONAL COMPANY LAW TRIBUNAL, MUMBAI IN STERLING SEZ AND INFRASTRUCTURE LIMITED**

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<sup>26</sup> 2019 SCC OnLine Del 7854

<sup>27</sup> *Kiran Shah*, supra note 14

<sup>28</sup> *Varrasana Ispat*, supra note (n12)

<sup>29</sup> *Rotomac Global*, supra note 13

<sup>30</sup> *Ashok Kumar Sarawagi*, supra note 6

<sup>31</sup> *Varrasana Ispat*, supra note 21

<sup>32</sup> *Ashok Kumar Sarawagi*, supra note 6

The Hon'ble National Company Law Tribunal, Mumbai was faced with a similar fact situation as that in *Kiran Shah*<sup>33</sup>, *Varrasana Ispat*<sup>34</sup>, and *Rotomac Global*<sup>35</sup>, wherein the ED had provisionally attached assets of the corporate debtor which was later admitted into the CIRP under the Code. Consequently, the corporate debtor's resolution professional sought release of the provisionally attached assets so that they could be utilized in the CIRP of the corporate debtor.

The Hon'ble Tribunal noted that the purpose and object of the Code is resolution of the corporate debtor by maximising the value that can be received by its creditors and other stakeholders. It further noted that on the other hand, the objective of the PMLA is recovery of property from wrongdoers and consequent confiscation and sale of such assets, alongside imposing punishment on those found guilty of the offence of money laundering. Holding that the IBC has an overriding effect by virtue of Section 238, along with the fact that the creditors of the corporate debtor will receive their dues faster through the CIRP rather than through the PMLA, the Hon'ble Tribunal held that the IBC ought to override the PMLA. It noted that the provisions of the moratorium under Section 14 of the Code clearly interdict proceedings under the PMLA, and thus held that the provisional attachment of assets ordered by the ED is a nullity in the eyes of the law.

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<sup>33</sup> *Kiran Shah*, supra note 14

<sup>34</sup> *Varrasana Ispat*, supra note 12

<sup>35</sup> *Rotomac Global*, supra note 13

The foregoing review of the 4 decisions of the Hon'ble NCLAT and the Hon'ble National Company Law Tribunal, Mumbai clearly shows that there is considerable lack of certainty in the law vis-a-vis the powers of the ED to attach assets of the corporate debtor during the CIRP and while the moratorium is in force. It is also noteworthy that all the aforementioned cases were dealing with situations where the orders of provisional attachment of assets were passed prior to initiation of the CIRP. This paper seeks to discuss the legality of such orders passed after the initiation of the CIRP. It is thus clear that while these decisions have a bearing on the question this paper seeks to answer, a fresh consideration of this question of law is required, to which we now turn.

#### **IV- BASIC OVERVIEW OF THE PMLA AND THE CODE**

##### **A. Prevention of the Money Laundering Act, 2002**

The PMLA was enacted for the laudable objective of preventing money laundering, and to prevent individuals engaged in money laundering from enjoying the proceeds arising therefrom. The Act came into existence pursuant to India's obligations under various international instruments, conventions, and declarations such as the United Nation Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, Basle Statement of Principles enunciated in 1989, the Financial Action Task Force, the Political Declaration and Noble

Programme of Action adopted by United Nations General Assembly vide Resolution No. S-17/2 of 23.2.1990, and the Political Declaration adopted by the United Nations General Assembly dated 8-10.06.1998, which called upon member States to adopt money laundering prevention legislations.<sup>36</sup>

The Act defines the offence of money laundering, and provides a mechanism for attachment, adjudication and confiscation of proceeds of crime. It also provides powers to the ED to issue summons, carry out searches and seizures, and arrest individuals. Furthermore, it provides for the establishment, jurisdiction and powers of the Appellate Tribunal, and also deals with obligations of banking companies, financial institutions and intermediaries. The Act also deals with reciprocal arrangements to help combat the vice of money laundering on a global scale.

The main provision that this article is concerned with is Section 5<sup>37</sup>, which deals with attachment of property obtained through money laundering. In fact, Section 5 forms a core of what the PMLA seeks to achieve, i.e., the attachment and confiscation of proceeds of crime so as to combat money-laundering<sup>38</sup>. In order to proceed with attachment, the authorised officer has to be satisfied that the property in question had

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<sup>36</sup> Prevention of Money Laundering Act, 2002 (No. 15 of 2003), Statement of Objects & Reasons

<sup>37</sup> Attachment of property involved in money-laundering.

<sup>38</sup> Vijay Madanlal Choudhary v. Union of India, 2022 SCC OnLine SC 929

been acquired through proceeds of crime and involved in the offence of money laundering, and that the owner/occupant of the property is likely to **conceal, transfer or deal with the same in any manner**.<sup>39</sup> The said attachment takes place so that the property may be bought back into the economy without affording the person accused the opportunity to enjoy the benefits of such property that is tainted with the offence of money laundering<sup>40</sup>, and to ensure that confiscation proceedings under Section 8 of the PMLA are not frustrated.

## **B. Insolvency and Bankruptcy Code, 2016**

The Code, which consolidates all laws around insolvency and bankruptcy under a single umbrella, was enacted for the purpose of timely resolution of insolvent companies so as to preserve and maximise the economic value of the company's assets. The objective was to ensure that recovery rates of creditors from such insolvent corporations improves, leading to improved health of financial institutions and consequently, greater flow of credit in the market. Besides providing an efficient resolution mechanism, the Code serves another purpose, i.e., providing financial entities with a more robust mechanism for enforcing debt obligations to ensure better, cheaper flow of credit to financially healthy industries in order fuel economic

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<sup>39</sup> Kaushalya Infrastructure Development Corpn. Ltd. v. Union of India, 2022 SCC OnLine SC 531

<sup>40</sup> Nikesh Tarachand Shah v. Union of India, (2018) 11 SCC 1



expansion.<sup>41</sup> It was enacted in the background of a burgeoning balance sheet crisis that had eroded the asset value of four critical sectors of the economy - banks, infrastructure companies, non-banking financial companies (NBFC), and real estate companies<sup>42</sup>.

The IBC introduces what is known as the Corporate Insolvency Resolution Process. Once an insolvency petition is admitted against a corporate debtor, the Adjudicating Authority under the Code, i.e., the Hon'ble National Company Law Tribunal (“NCLT”) appoints a resolution professional to take over the management of the said corporate debtor. The said resolution professional is tasked with running the corporate debtor during the CIRP, collating and verifying claims of various creditors of the corporate debtor, constituting the committee of creditors, inviting prospective resolution applicants to submit a resolution plans, and such other actions as may be required for ensuring the successful resolution of the corporate debtor.<sup>43</sup>

While admitting the insolvency application and appointing the resolution professional, the Adjudicating Authority also declares a moratorium under Section 14 of the Code, an all encompassing

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<sup>41</sup> Madhav Goel, The Lack of an 'Economics' Perspective in Interpreting the Insolvency and Bankruptcy Code 2016, National Law School Business Law Review Blog available at <<https://www.nlsblr.com/post/the-lack-of-an-economics-perspective-in-interpreting-the-insolvency-and-bankruptcy-code-2016>> (last visited on April 7, 2023)

<sup>42</sup> Arvind Subramanian and Josh Felman, Josh, “India’s Great Slowdown: What Happened? What’s the Way Out?”, 370 CID Working Paper Series, Harvard University 1 (2019).

<sup>43</sup> Insolvency and Bankruptcy Code, 2016, s.25

provision prohibiting initiation or continuation of suits and other proceedings against the corporate debtor. By virtue of the said moratorium, the corporate debtor is also enjoined from transferring, encumbering, alienating or disposing of any of its assets, legal rights or beneficial interests. Therefore, any transfer or alienation of assets can be done only through and under the resolution plan, which requires the approval of the committee of creditors<sup>44</sup> and statutory approval by the Adjudicating Authority thereafter<sup>45</sup>. Only after the approval by the Adjudicating Authority is the moratorium lifted, and the assets, legal rights, and beneficial interests of the corporate debtor are transferred to the successful resolution applicant.

## V- ANALYSIS

Having established the background to the question that this article seeks to address, it is now appropriate to present the arguments for reaching the aforementioned conclusion that the IBC shall prevail over the PMLA, and the ED ought to be held to be denuded of its power to pass a provisional attachment order qua the assets of the corporate debtor once the moratorium under Section 14 of the Code has been declared.

### A. Interpretation of Section 14 of the IBC

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<sup>44</sup> Insolvency and Bankruptcy Code, 2016, s.30

<sup>45</sup> Insolvency and Bankruptcy Code, 2016, s.31

Moratorium under Section 14 of the Code creates a bar against initiation or continuation of a range of legal processes against the corporate debtor. It prohibits the institution of suits or continuation of pending suits or **proceedings** against the corporate debtor. The objective is to ensure that the assets of the corporate debtor cannot be alienated during the CIRP as that would seriously jeopardise the interest of all the stakeholders of the said corporate debtor.<sup>46</sup> The moratorium helps ensure that there is no depletion of the corporate debtor's assets during the CIRP so that it can be kept running as a going concern, thus facilitating its continued operation and allowing it the breathing space to organise its affairs so that a new management may ultimately take over and bring the corporate debtor out of financial sickness, thus benefitting all stakeholders.<sup>47</sup>

The Hon'ble Supreme Court in *P. Mohanraj v. Shah Bros. Ispat (P) Ltd.*<sup>48</sup> took note of this objective to hold that Section 14(1)(a) which deals with monetary liabilities of the corporate debtor and Section 14(1)(b) which the assets of the corporate debtor form a shield around the corporate debtor to protect it from pecuniary attacks during the moratorium period so that the corporate debtor gets the necessary free play to continue as a going concern in order to ultimately rehabilitate itself. The Court further held that any crack in this shield is bound to

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<sup>46</sup> Hirkud Industrial Works Ltd. v. Varsha Fabrics (P) Ltd., (2020) 14 SCC 198

<sup>47</sup> Swiss Ribbons (P) Ltd. v. Union of India, (2019) 4 SCC 17; Ministry of Corporate Affairs, Government of India, Report of the Insolvency Law Committee (February 2020).

<sup>48</sup> P. Mohanraj v. Shah Bros. Ispat (P) Ltd., (2021) 6 SCC 258

have adverse consequences and cannot be allowed to occur, lest the very objective of the IBC shall stand defeated.

At this stage, it is important to analyse the scope and ambit of the term ‘proceedings’ employed by Section 14. Does it include within its sweep criminal proceedings as well, or is it limited to civil proceedings like the Hon’ble NCLAT held in the *Varrasana Ispat*<sup>49</sup>? The Apex Court answered this question in *P. Mohanraj*<sup>50</sup>, holding that moratorium is meant to have a wide sweep and the statutory rules of interpretation such as such as *ejusdem generis* and *noscitur a sociis* cannot be resorted to restrict the scope of the expression “proceedings” to mean civil proceedings only. It held that the moratorium would apply against criminal proceedings which have the ultimate effect of depleting the assets of the corporate debtor, such as those under Section 138<sup>51</sup>, Negotiable Instruments Act, 1881<sup>52</sup>.

Does this reasoning extend to provisional attachment orders under Section 5 of the PMLA? Such orders are meant to interdict the ability of the corporate debtor to enjoy the proceeds of crime, and has a direct impact on the asset of the corporate debtor. Given that Section 14(1)(b) of the Code is meant to provide a protective shield to the assets of the corporate debtor against any pecuniary attacks during the CIRP,

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<sup>49</sup> *Varrasana Ispat*, supra note 12

<sup>50</sup> *P. Mohanraj*, supra note 48

<sup>51</sup> Dishonour of cheque for insufficiency, etc., of funds in the account.

<sup>52</sup> Negotiable Instruments Act, 1881 (No. 26 of 1881)

shouldn't that cover of protection extend against such provisional attachment orders as well? There is no reason to hold otherwise. The provisional attachment order is, for all practical purposes, a temporary confiscation of the impugned assets of the corporate debtor. The corporate debtor cannot use the said assets during the CIRP, and the resolution professional is also prevented from including them in the estate of the corporate debtor for the purposes of inviting resolution plans. It is thus evident that the provisional attachment order strikes at the estate of assets of the corporate debtor thereby preventing it from rehabilitating itself, and falls within the mischief that the moratorium seeks to prevent. The mere fact that the provisional attachment order is passed in pursuance of criminal/quasi-criminal proceedings is irrelevant, as is evident from the decision in *P. Mohanraj*<sup>53</sup>. The Apex Court's observations in *P. Mohanraj*<sup>54</sup> clearly render the finding of the Hon'ble NCLAT in *Varrasana Ispat*<sup>55</sup> erroneous.

Having said that, it is noteworthy that proceedings under the PMLA are not considered criminal proceedings per se<sup>56</sup>. More specifically, the Appellate Authority under the PMLA in *Bank of India v. Deputy Director Directorate of Enforcement, Mumbai*<sup>57</sup> has held that proceedings under Section 5 of the PMLA are civil in nature. Once it is

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<sup>53</sup> *P. Mohanraj*, supra note 48

<sup>54</sup> *P. Mohanraj*, supra note 48

<sup>55</sup> *Varrasana Ispat*, supra note 12

<sup>56</sup> *Vijay Madanlal Choudhary*, supra note 38

<sup>57</sup> Appeal No. FPA-PMLA-2173/MUM/2018

held that provisional attachment proceedings are in the nature of civil proceedings, then the applicability of the moratorium to the same is unquestionable. The decision of the Hon'ble NCLAT in *Varrasana Ispat*<sup>58</sup> holding to the contrary was based on the premise that the moratorium cannot be held to apply to criminal proceedings. The said argument is clearly not tenable in light of the decision in *Bank of India*<sup>59</sup>. This conclusion is further bolstered by the decision of the Hon'ble Supreme Court of India in *Vijay Madanlal Choudhary v. Union of India*<sup>60</sup>, wherein it was clearly held that various actions taken by the authorities under the PMLA, such as attachment, adjudication and confiscation, fall within the expression "all the proceedings under this Act" as employed by the PMLA. It was held that the expression 'proceedings' need not be given a narrow meaning only to limit it to proceedings before the Court, and must be given an expansive meaning to include various actions of the authorities under the PMLA.

Therefore, a conjoint reading of Section 14 of the Code and the PMLA, along with the interpretations of the term 'proceeding' in *P. Mohanraj*<sup>61</sup>, *Bank of India*<sup>62</sup> and *Vijay Madanlal Choudhary*<sup>63</sup> lead to the conclusion that the moratorium covers within its scope provisional attachment orders passed under Section 5 of the PMLA. Once that is

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<sup>58</sup> *Varrasana Ispat*, supra note 12

<sup>59</sup> *Bank of India*, supra note 57

<sup>60</sup> *Vijay Madanlal Choudhary* (n38)

<sup>61</sup> *P. Mohanraj*, supra note 48

<sup>62</sup> *Bank of India*, supra note 57

<sup>63</sup> *Vijay Madanlal Choudhary*, supra note 38

established, it becomes obvious that the ED does not have the power to pass such an order against the assets of the corporate debtor once the CIRP has been initiated and the moratorium has been imposed.

## **B. The Non-Obstante Clauses**

The aforesaid interpretation stems from the understanding that the provisional attachment orders passed by the ED fall within the scope and ambit of the moratorium. Alternatively, and for the sake of exhaustiveness, it is important to consider what if that is not the case, in which case, such orders would not be considered to be automatically interdicted by declaration of the moratorium. Such a scenario would lead to a clash between the two legislations, for the powers of the Hon'ble NCLT and the ED would be conflicting with each other - which of the two authorities has the ultimate control over the fate of the assets of the corporate debtor that is facing proceedings under the Code as well as the PMLA?

Both the PMLA<sup>64</sup> and the IBC<sup>65</sup> contain non-obstante clauses, giving both laws an overriding effect over 'any other law for the time being in force' that may be inconsistent with their provisions. It would have been easier to resolve this clash if one of the legislations did not have such a clause. However, since both laws do, it is important to remember the

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<sup>64</sup> Prevention of Money Laundering Act, 2002, s.71

<sup>65</sup> Insolvency and Bankruptcy Code, 2016, s.238

principle that normally governs such a conflict - the subsequent legislation prevails, as it is assumed that the legislature was cognisant of the earlier legislation while enacting the later one thereby implying that the insertion of the non-obstante clause in the later legislation was deliberate.<sup>66</sup>

Therefore, it is the IBC that should prevail over the PMLA, being the later enactment.<sup>67</sup> Any conflict has to be resolved in favour of the IBC given that it was brought into force in 2016, long after the enactment of the PMLA. If the legislature did not want the IBC to override the provisions of the PMLA, it could have either worded Section 238 of the Code to provide an exception for the PMLA, or alternatively, it could have suitably amended the PMLA to express its intention of treating the IBC as the subordinate legislation.

It is also important to address at this stage the argument that the date of enactment of the two legislations is not a conclusive test to determine which of the two laws shall override the other. It is a rule that is ordinarily resorted to, but the presumption can be dispelled in appropriate cases. However, the present is not one of them. There is no basis on which it can be concluded that the PMLA ought to prevail over

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<sup>66</sup> Sarwan Singh v. Kasturi Lal, (1977) 1 SCC 750; Maharashtra Tubes Ltd. v. State Industrial & Investment Corpn. of Maharashtra Ltd., (1993) 2 SCC 144; Solidaire India Ltd. v. Fairgrowth Financial Services Ltd., (2001) 3 SCC 71

<sup>67</sup> Ramsarup Industries Ltd. v. Union of India, 2022 SCC OnLine Cal 2571



the IBC, notwithstanding the other considerations in favour of IBC having that overriding effect.

In fact, a harmonious and purposive construction of the two statutes, supported by the principles of economics involved in insolvency as well as money laundering, would also lead to a similar conclusion. If the IBC is to prevail over the PMLA, then the economic and penal objectives of both statutes would be achieved, whereas if the PMLA were to prevail over the IBC, then the IBC would be rendered a dead letter qua those corporate debtors against whom proceedings under the PMLA are pending or initiated.

### **C. The Practical, Law and Economics Perspective**

Interpretation of legislations such as the Code as well as the PMLA, both being economic in nature, cannot be done in a vacuum. It is imperative that a 'law & economics' approach is adopted by the Courts in analysing such conflicts, i.e., principles of economics ought to be relied upon and applied to the exercise of interpreting laws such as these. It is only when the exercise of judicial interpretation will be infused with an understanding of economics will a pragmatic interpretation be accorded to the conflict that helps both statutes effectively achieve their respective objectives. A law and economics approach, in this case, will also lead to a purposive and harmonious construction of the two statutes. That approach is desirable in and of

itself, for it is a well settled principle of statutory interpretation that the desired interpretation of the conflict between two laws is the one where both laws are able to retain their substrata and are able to achieve their desired objective, as opposed to one where one of the legislations loses its teeth.<sup>68</sup>

In the present context, it is imperative that the two legislations function properly, for the failure of either is severally detrimental to the economic interests of the society. The PMLA, while a penal statute, seeks to work for the benefit of the economy by curbing an offence that jeopardises the economy and financial health of the country.<sup>69</sup> Similarly, the IBC is equally crucial for a free-market economy like India, because the absence of a robust, functioning insolvency framework has detrimental consequences for the credit markets, financial institutions, corporate governance, etc., which ultimately play a key role in the country's economic growth. It is therefore extremely important that any approach to this present conflict is cognisant of the need to give effect to both statutes in the larger interests of the society.

In the present context, there are two alternatives:

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<sup>68</sup> See, for example, *CIT v. Hindustan Bulk Carriers*, (2003) 3 SCC 57

<sup>69</sup> *Y.S. Jagan Mohan Reddy v. CBI*, (2013) 7 SCC 439; *P. Chidambaram v. Directorate of Enforcement*, (2019) 9 SCC 24

- (i) The PMLA prevails over the IBC, i.e., the ED can provisionally attach properties of the corporate debtor even after declaration of the moratorium; or
- (ii) The IBC prevails over the PMLA, i.e., the ED cannot attach properties of the corporate debtor once the moratorium has been declared.

Let us analyse the consequences of the first alternative. If the ED is deemed to have attachment powers notwithstanding the moratorium, then the purposes of the PMLA will clearly be achieved. The accused management of the said corporate debtor will not be able to enjoy the proceeds of crime, both during the pendency of proceedings under the PMLA as well as once the conviction for the offence of money laundering is confirmed, whereafter the said tainted properties of the corporate debtor will be confiscated by the Government. Therefore, the dual objective of the PMLA, i.e., punishing the perpetrators of money laundering and preventing the accused from enjoying the benefits of proceeds of crime, will be achieved.

However, the IBC will be dealt a serious blow if such a position is allowed to exist. Once the property(ies) of the corporate debtor have been provisionally attached by the ED, then the same go beyond the control and clutches of the said corporate debtor and its management, which is the resolution professional after the initiation of the CIRP and imposition of the moratorium. The property(ies) attached cannot be used for the CIRP, i.e., they cannot form part of the estate of assets that would be transferred to the successful resolution applicant. The direct

consequence of the same is that such a course of action will detrimentally affect the interests of all stakeholders of the corporate debtor. If there is a significant reduction in the size of the estate of assets that would have been transferred in case of a successful CIRP, then the corporate debtor would become a less attractive commercial proposition for any prospective resolution applicant. This will lead to one of two situations:

- (i) The Committee of Creditors of the corporate debtor will accept a sub-par resolution plan that will lead to lesser recoveries for all creditors, including the corporate debtor's workmen; or
- (ii) The Committee of Creditors will not receive any acceptable resolution plan and the corporate debtor will have to be liquidated as a consequence, once again leading to lesser recoveries for all creditors.

The first scenario is undesirable as it severely dents a key objective of the Code, i.e., establishment of an effective resolution framework that leads to better recoveries for creditors and bolsters the health of the country's credit market, which in turn leads to greater credit creation and faster economic expansion. In fact, the rationale behind making speed an essence of the Code and prescribing strict timelines is to help preserve the economic value of the assets of the corporate debtor so that they can be successfully resolved and the creditors can effectuate better recoveries from non-performing assets. The second is also undesirable, for it leads to corporate death. In fact, liquidation is envisaged to be a

last-resort outcome when all else has failed, for liquidation leads to severe value destruction, and detrimentally impacts the corporate debtor's creditors and its workmen.<sup>70</sup>

There are two more issues that arise if ED's powers of provisional attachment remain intact inspite of the imposition of the moratorium. First is the treatment of the provisionally attached assets if the proceedings against the corporate debtor are discontinued or result in the corporate debtor's acquittal during the currency of the CIRP. The automatic consequence of discontinuation of/acquittal in PMLA proceedings is that the ED's provisional attachment becomes non-est, for the subject property will no longer be a proceed of crime.<sup>71</sup> Therefore, such a discontinuation/acquittal during the CIRP will have the effect of delaying the entire process, for the entire exercise of submission, consideration and approval of the resolution plan will have to start afresh basis the new factual circumstance, i.e., inclusion of the previously attached assets in the estate of the corporate debtor. Secondly, if the resolution plan is approved or the corporate debtor is condemned to liquidation during the currency of the provisional attachment order, then Section 32A of the Code will kick in. Not only would proceedings under the PMLA be discontinued against the corporate debtor, but no 'action' shall be taken against the property of the corporate debtor, including the provisionally attached property. The combined effect of sub-sections (1) and (2) is that the provisional

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<sup>70</sup> *Swiss Ribbons*, supra note 47

<sup>71</sup> See *Prakash Industries Ltd. v. Union of India*, 2023 SCC OnLine Del 336

attachment order will become non-est. Therefore, irrespective of the fate of the CIRP, whether successful or not, the provisional attachment order will cease to have any effect once the resolution plan is approved/assets are sold in liquidation. Only if the provisional attachment order leads to confiscation of the tainted property post conviction of the corporate debtor, that too before the completion of the CIRP, will the same have any material effect on the fate of the said tainted property. In any other scenario, the provisional attachment order is as good as not having been issued, as far as its effect on the eventual fate of the tainted property of the corporate debtor is concerned.

Clearly then, the first interpretation, where the ED retains its powers under Section 5 of the PMLA, notwithstanding the moratorium, is fraught with issues. Let us consider the impact of the second alternative on both legislations. The IBC will be continue to function as usual, as the full estate of assets of the corporate debtor will be available for the CIRP. However, while the ED will be denuded of its powers under Section 5 of the PMLA, the legislation will still be able to achieve its desired objectives. As seen previously, once the corporate debtor's CIRP has resulted in acceptance and approval of a resolution plan or liquidation, any attachment will become non-est by virtue of Section 32A of the Code. Therefore, the provisional attachment order will be operative only during the CIRP.

Now, what is the objective behind issuing a provisional attachment order. An order under Section 5 of the PMLA is the first of three stages

through which the attachment process passes.<sup>72</sup> The order is passed if the authorized officer has reason to believe that the person in possession of the proceeds of crime will conceal, transfer or deal with the same in any manner that may frustrate proceedings relating to its confiscation.<sup>73</sup> The purpose is two-fold: preventing the accused from enjoying the proceeds of crime and preventing the accused from rendering confiscation proceedings infructuous.<sup>74</sup> Are these twin objectives frustrated if the ED's powers to pass a provisional attachment order are considered to be interdicted during the currency of the moratorium under Section 14 of the Code? No.

Once the corporate debtor is admitted into insolvency, the management loses control over its operations and assets because the resolution professional appointed by the Adjudicating Authority under the Code takes over. By virtue of the moratorium, the corporate debtor is enjoined from transferring, encumbering, alienating or disposing of any asset, legal right or beneficial interest. Therefore, the moratorium itself takes care of one of the objectives that the provisional attachment order would have achieved, i.e., preventing the accused from rendering confiscation proceedings infructuous by concealing, transferring, or dealing with the proceeds of crime in any manner. Now as far as the

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<sup>72</sup> A. Kamarunnisa Ghori v. Chairperson, Prevention of Money Laundering, 2012 SCC OnLine Mad 2527

<sup>73</sup> A. Kamarunnisa Ghori, supra note 72. See also, Ashok Sunderlal Daga v. Union of India, 2017 SCC OnLine Bom 10204

<sup>74</sup> A. Kamarunnisa Ghori, supra note 72

objective of preventing the perpetrators of the offence of money laundering is concerned, it is true that the corporate debtor will be able to enjoy the proceeds of crime during the currency of the CIRP. However, practically speaking, the real perpetrators of the crime is the erstwhile management of the said corporate debtor, and the corporate debtor is only a medium. The corporate debtor, being an artificial person, cannot 'really commit' a crime, and it will be the individuals managing and running its affairs that will have perpetrated the crime, the same management that will get ousted from the corporate debtor once the CIRP commences. Therefore, the erstwhile management, which is the true perpetrator of money laundering, will not be able to enjoy the proceeds of crime, for the assets of the corporate debtor will be under the control of the resolution professional.

Therefore, the second alternative, i.e., the IBC prevailing over the PMLA such that the ED cannot attach properties of the corporate debtor once the moratorium is in place will lead to a situation where both legislations will be able to achieve their respective objectives. This practical, law and economics approach to the issue, which is also in consonance with the well settled principle of harmonious construction of statutes, will enable both frameworks to function properly without jeopardizing the other.

## **VI- CONCLUSIONS**



The clash between the provisions of the moratorium and the attachment powers of the ED was inevitable, for the IBC and the PMLA have become two of the most crucial frameworks governing economic activity within the country. However, much confusion persists as to which one shall prevail on account of contrasting decisions given by judicial authorities. This paper, by adopting a practical approach to the issue, seeks to present a solution that allows both frameworks to continue functioning effectively.

An analysis of the language, objective and existing jurisprudence of Section 14 of the IBC clearly points to the fact that provisional attachment orders come within the scope of the mischief that the moratorium seeks to regulate. Furthermore, the non-obstante clauses ought to be interpreted in favour of the IBC on account of the fact that the IBC is an enactment subsequent to the PMLA. Lastly, the law and economics approach, which in this case is in consonance with the rule of harmonious construction, also resolves this conflict in favour of the IBC.

Therefore, the legally and practically sound approach to this issue, whilst keeping the economic and penal objectives of the respective frameworks as the guiding north star, is to hold that the provisions of the moratorium interdict the ED's powers, and consequently the ED cannot pass provisional attachment orders in respect of the properties of the corporate debtor once the CIRP has been initiated and the moratorium has been declared qua the said corporate debtor under Section 14 of the Code.

# FROM DATA TO DECISIONS: HARNESSING AI FOR EFFECTIVE ENVIRONMENTAL POLICY DEVELOPMENT IN INDIA

*Abhishek Siroha*\*

## ABSTRACT

*Environmental governance plays a key role in addressing India's multiple environmental challenges and ensuring sustainable development. This research paper explores the potential of artificial intelligence (AI) to improve environmental policy development in India. Explore AI applications in data analysis and modelling, environmental monitoring and compliance, natural resource management, and policy advocacy. This highlights AI's ability to analyse large and complex environmental datasets, predict environmental trends, monitor compliance, optimize resource management, engage stakeholders, and provide evidence-based policy recommendations. The paper also highlights on the possible risks and challenges which one can face while integration of AI in Environmental Policy Making and Decision Making. This research paper provides insights and recommendations for policy makers, researchers and practitioners who wish to harness the potential of AI for effective environmental governance in India.*

**Keywords-** *Environmental Policy, Artificial Intelligence, Environmental Law, Sustainable Development, Policy Development*

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## I. INTRODUCTION

Since the early 1970s, there has been a growing worldwide interest in environmental issues that affect multiple disciplines and occur in many spatial dimensions. Unusual population growth and technological advances are increasing pressure on both the environment and resources. Environmental issues have been raised at various international conferences and discussed at the intergovernmental level. It was in his late 1970s that environmental concerns first surfaced in India. Initially, several constitutional amendments were enacted to protect the environment.<sup>1</sup> Environmental laws and guidelines are regularly enacted to protect the environment. Most of the environmental sustainability challenges, such as biodiversity, energy, transport and water management, are now being addressed by artificial intelligence (AI).<sup>2</sup> To predict ecological benefits, researchers studying biodiversity have developed machine learning or natural language processing techniques. Artificial intelligence and machine learning applications are increasingly being used to predict and improve water resource conservation. The main focus in the energy field is neural networks, expert systems, pattern recognition and fuzzy logic models. Computer vision and decision support applications have been used in the transportation field. Improving environmental sustainability requires timely monitoring of our efforts.<sup>3</sup>

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<sup>1</sup> "Environment Protection under Constitutional Framework of India," *available at*: <https://pib.gov.in/newsite/printrelease.aspx?relid=105411> (last visited May 30, 2023).

<sup>2</sup> Emmanuel Kwame Nti et al., "Environmental sustainability technologies in biodiversity, energy, transportation and water management using artificial intelligence: A systematic review," 4 *Sustainable Futures* 100068 (2022).

<sup>3</sup> Lakshmi Shankar Iyer, "AI enabled applications towards intelligent transportation," 5 *Transportation Engineering* 100083 (2021).

India is one of the most polluted countries in the world. Air pollution, water pollution and land pollution are all major problems in India. These environmental problems adversely affect human health, the economy and the environment. The World Health Organization (WHO) estimates that air pollution kills millions of people each year in India.<sup>4</sup> Every year in northern India, air quality deteriorates sharply during the fall months around Diwali due to several factors. More and more people are opting for air purifiers for personal use. Air pollution can cause various health problems such as respiratory infections, heart disease, and cancer. WHO estimates that 70% of India's surface water is contaminated.<sup>5</sup> Water pollution is caused by various factors such as industrial waste, sewage and agricultural runoff. Water pollution can cause various health problems such as diarrhoea, cholera, and typhoid fever. Soil pollution is caused by various factors such as industrial waste, agricultural waste, and construction debris. Land pollution can cause various environmental problems such as soil pollution, water pollution, and air pollution. Due to the large number of construction and infrastructure activities carried out in the country, significant soil degradation has occurred. These environmental problems adversely affect human health, the economy and the environment. This article describes the integration of artificial intelligence in the formulation of environmental policies aimed at environmental sustainability in India.

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<sup>4</sup> "How air pollution is destroying our health," *available at*: <https://www.who.int/news-room/spotlight/how-air-pollution-is-destroying-our-health> (last visited May 30, 2023).

<sup>5</sup> "Water pollution is killing millions of Indians. Here's how technology and reliable data can change that," *World Economic Forum*, 2019 *available at*: <https://www.weforum.org/agenda/2019/10/water-pollution-in-india-data-tech-solution/> (last visited May 30, 2023).

## **II. CURRENT ENVIRONMENTAL POLICY LANDSCAPE IN INDIA AND WAYS IN WHICH AI CAN BE IMPLEMENTED IN IT**

There are many laws available in India to protect the environment, but their enforcement is not up to par. There is an urgent need for effective, efficient and well-organized implementation of constitutional obligations and other environmental laws in India.<sup>6</sup> Any government organization should include environmental legislation. Indian environmental law is based on environmental law concepts and prioritizes the management of specific natural resources such as forests, minerals and fisheries. Environmental regulations in India are a direct result of the provisions of the Constitution. There are already a number of environmental laws and various policies in force in India which are listed below.

- The Wildlife (Protection) Act, 1972
- The Water (Prevention and Control of Pollution) Act, 1974
- The Air (prevention and control of pollution) act, 1981
- The Environment (Protection) Act, 1986
  - The ozone-depleting substances (regulation and control) rules, 2000.
  - Coastal Regulation zone notification 2018:
- The energy conservation act, 2001

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<sup>6</sup> Lovleen Bhullar, “Environmental Constitutionalism and Duties of Individuals in India,” 34 *Journal of Environmental Law* 399–418 (2022).

- Biological diversity act 2002
- Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act, 2006 (FRA)
- The National Green Tribunal Act, 2010
- Compensatory Afforestation Fund Act, 2016

The law itself is comprehensive enough to address the issue of environmental degradation. However, recent evidence indicates that these laws still need to be revisited as technology and infrastructure evolve and as enactments progress. Surveys and studies also show that, while the law itself is not inadequate, its implementation is lagging and better remedies are needed.<sup>7</sup>

AI has recently shown great potential in virtually every field of research. It has been used repeatedly to better plan and execute countless ideas, and is a powerful tool for nearly any activity imaginable. This is a rapidly evolving technology that could be used for a variety of purposes, including setting environmental policy. It can be used to collect data on environmental conditions, develop environmental impact models, and design and implement environmental policies.<sup>8</sup>

In India, AI is being used in various environmental development projects.<sup>9</sup> For example, the Indian government used AI to model air pollution in Delhi.

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<sup>7</sup> Margaret E Kruk et al., “High-quality health systems in the Sustainable Development Goals era: time for a revolution,” *6 The Lancet. Global Health* e1196–252 (2018).

<sup>8</sup> <https://www.facebook.com/unesp>, “How artificial intelligence is helping tackle environmental challenges” *UNEP, 2022* available at: <http://www.unep.org/news-and-stories/story/how-artificial-intelligence-helping-tackle-environmental-challenges> (last visited May 30, 2023).

<sup>9</sup> “Key AI use cases in India for a sustainable environment,” *INDIAai* available at: <https://Indiaai.gov.in/article/key-ai-use-cases-in-india-for-a-sustainable-environment> (last visited May 30, 2023).

This model was used to identify air pollution sources and design air pollution reduction measures.<sup>10</sup> The Indian government has also developed a water quality monitoring system using AI.<sup>11</sup> This system is used to collect data on water quality in rivers and lakes. This data will be used to identify areas with poor water quality and develop measures to improve water quality. Using AI to formulate environmental policy has many potential benefits. By utilizing AI, it is possible to collect data on environmental conditions more efficiently and effectively than ever before. AI can also be used to develop environmental impact models that are more accurate and reliable than traditional models.<sup>12</sup> AI can also be used to design and enforce environmental policies that are more effective and efficient than traditional policies. Key aspects regarding the use of AI in the formulation of India's environmental policy are:

1. **Data analysis and modelling:** AI can analyse large and complex environmental data sets such as satellite imagery, sensor data, and climate models.<sup>13</sup> This will help identify patterns, trends and correlations, facilitating evidence-based policymaking. AI-powered modelling techniques can simulate and predict the environmental

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<sup>10</sup> "CAQM to use AI and ML to tackle air pollution in Delhi-NCR," *INDIAai* available at: <https://indiaai.gov.in/news/caqm-to-use-ai-and-ml-to-tackle-air-pollution-in-delhi-ncr> (last visited May 30, 2023).

<sup>11</sup> "IOT and AI help save one of India's most polluted lakes," available at: <https://www.ibm.com/blog/water-conservancy-project-india/> (last visited May 30, 2023).

<sup>12</sup> Saki Gerassis et al., "AI Approaches to Environmental Impact Assessments (EIAs) in the Mining and Metals Sector Using AutoML and Bayesian Modeling," 11 *Applied Sciences* 7914 (2021).

<sup>13</sup> "Artificial Intelligence - AI | Satellite Imaging Corp," available at: <https://www.satimagingcorp.com/applications/artificial-intelligence-ai/> (last visited May 30, 2023).

impact of different policy interventions, helping policy makers assess different scenarios and make informed decisions.

2. **Environmental Monitoring and Compliance:** AI can monitor and assess environmental parameters in real-time, facilitating efficient monitoring of pollution levels, deforestation, and biodiversity loss. Machine learning algorithms can process and analyse data from remote sensing platforms, ground-based sensors, and citizen science initiatives to provide accurate and timely information on environmental conditions.<sup>14</sup> This data can help in identifying non-compliance with environmental regulations and supporting targeted enforcement actions.
3. **Natural Resource Management:** AI can assist in optimizing the management of natural resources by analysing complex data on water availability, land use, and energy consumption. Machine learning algorithms can identify patterns and anomalies, enabling policymakers to develop sustainable resource management strategies.<sup>15</sup> AI can also support the monitoring and evaluation of conservation initiatives, facilitating the identification of priority areas for conservation and biodiversity protection.
4. **Stakeholder Engagement and Public Participation:** AI can enhance stakeholder engagement and public participation in environmental policy development. Chatbots and natural language

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<sup>14</sup> Kadukothanahally Nagaraju Shivaprakash et al., “Potential for Artificial Intelligence (AI) and Machine Learning (ML) Applications in Biodiversity Conservation, Managing Forests, and Related Services in India,” 14 *Sustainability* 7154 (2022).

<sup>15</sup> Siva Rama Krishnan et al., “Smart Water Resource Management Using Artificial Intelligence—A Review,” 14 *Sustainability* 13384 (2022).



processing technologies can provide information to the public, respond to queries, and collect feedback on environmental policies.<sup>16</sup> Social media analysis powered by AI can gauge public sentiment and identify key concerns and priorities, aiding policymakers in designing policies that align with public expectations.

5. **Policy Recommendation and Impact Assessment:** AI systems can analyse diverse data sources, including scientific literature, policy documents, and public feedback, to generate policy recommendations and conduct impact assessments.<sup>17</sup> This can help policymakers understand the potential consequences of policy interventions, anticipate unintended outcomes, and design effective regulatory frameworks that balance environmental protection with socioeconomic considerations.
6. **Early Warning Systems and Disaster Management:** AI can contribute to early warning systems for natural disasters, such as floods, cyclones, and droughts. By analysing historical data, weather patterns, and real-time sensor data, AI algorithms can provide timely alerts and support disaster preparedness and response efforts.<sup>18</sup> This can significantly enhance the effectiveness of disaster management and reduce the impact of environmental emergencies.

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<sup>16</sup> Eleni Adamopoulou and Lefteris Moussiades, “Chatbots: History, technology, and applications,” 2 *Machine Learning with Applications* 100006 (2020).

<sup>17</sup> Bernd Carsten Stahl et al., “A systematic review of artificial intelligence impact assessments” *Artificial Intelligence Review* (2023).

<sup>18</sup> “Artificial Intelligence for Disaster Risk Reduction: Opportunities, challenges, and prospects | World Meteorological Organization,” *available at*: <https://public.wmo.int/en/resources/bulletin/artificial-intelligence-disaster-risk-reduction-opportunities-challenges-and> (last visited May 30, 2023).

7. **Environmental Impact Assessment:** AI can enhance the effectiveness and efficiency of environmental impact assessments (EIAs). By automating certain stages of the assessment process, such as data collection and analysis, AI can reduce time and costs while providing more accurate evaluations of potential environmental impacts.<sup>19</sup>
8. **Decision Support Systems:** AI-based decision support systems can aid policymakers in making informed decisions by analysing complex environmental data and simulating potential outcomes.<sup>20</sup> These systems can help evaluate different policy scenarios, assess the effectiveness of interventions, and guide policymakers towards the most effective and sustainable solutions.
9. **Public Engagement and Education:** AI can be used to enhance public engagement and education on environmental issues.<sup>21</sup> Chatbots and virtual assistants powered by AI can provide accessible and interactive platforms for citizens to access information, ask questions, and participate in environmental decision-making processes.

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<sup>19</sup> Saki Gerassis et al., "AI Approaches to Environmental Impact Assessments (EIAs) in the Mining and Metals Sector Using AutoML and Bayesian Modeling," 11 *Applied Sciences* 7914 (2021).

<sup>20</sup> Meng-Leong How et al., "Artificial Intelligence-Enhanced Decision Support for Informing Global Sustainable Development: A Human-Centric AI-Thinking Approach," 11 *Information* 39 (2020).

<sup>21</sup> Yen-Chia Hsu et al., "Empowering local communities using artificial intelligence," 3 *Patterns* 100449 (2022).

### III. CHALLENGES IN ADOPTION OF AI

Despite the potential benefits of using AI for environmental policy development, there are also some challenges to consider. AI models require large amounts of data to train. In India, there is often a lack of data on environmental conditions and impacts. This can make it difficult to develop accurate and reliable AI models. Below can be the main challenges we can face while adopting and integrating AI for policy framework purposes.

1. **Data Availability and Quality:** The availability of comprehensive and reliable environmental data is crucial for the effective application of AI in policy development. In India, there may be challenges in accessing and ensuring the quality of environmental data, including issues such as data gaps, inconsistencies, and limited coverage.<sup>22</sup>
2. **Technical Expertise and Infrastructure:** Implementing AI technologies requires specialized technical expertise and adequate infrastructure. There may be a shortage of professionals with AI skills in the environmental sector, as well as limitations in terms of computational resources and data storage capacities, particularly in rural areas.
3. **Ethical and Legal Concerns:** The use of AI raises ethical and legal concerns, including privacy protection, data security, and algorithmic biases.<sup>23</sup> Ensuring compliance with existing laws and regulations, as

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<sup>22</sup> Victor Galaz et al., "Artificial intelligence, systemic risks, and sustainability," 67 *Technology in Society* 101741 (2021).

<sup>23</sup> "Artificial Intelligence and Privacy - Issues and Challenges," *Office of the Victorian Information Commissioner* available at: <https://ovic.vic.gov.au/privacy/resources-for-organisations/artificial-intelligence-and-privacy-issues-and-challenges/> (last visited May 30, 2023).

well as developing new frameworks to address emerging challenges specific to AI in environmental policy, is essential.

4. **Cultural and Socio-economic Factors:** Environmental policies in India must consider the diverse cultural and socio-economic contexts across different regions. AI technologies may need to be adapted to local needs, beliefs, and practices to ensure their acceptance and effectiveness. Additionally, addressing potential inequalities in access to AI tools and benefits is crucial to prevent further marginalization of disadvantaged communities.
5. **Governance and Decision-making:** Incorporating AI into the decision-making processes of environmental policy can raise questions regarding transparency, accountability, and the role of human judgment. Developing governance mechanisms that balance human and AI decision-making and ensure democratic participation is necessary to maintain public trust and legitimacy.
6. **Integration with Existing Systems:** Integrating AI technologies into existing environmental policy frameworks and institutions may pose challenges.<sup>24</sup> Coordinating efforts among various government agencies, stakeholders, and institutions involved in policy formulation and implementation is essential to leverage the potential of AI effectively.
7. **Public Awareness and Acceptance:** Generating public awareness and acceptance of AI in the environmental framework is crucial.

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<sup>24</sup> “Digital Regulation Platform,” *available at*: <https://digitalregulation.org> (last visited May 30, 2023).

Building trust among citizens, stakeholders, and communities regarding the use of AI technologies and ensuring transparency in decision-making processes are important factors in the successful adoption of AI in environmental policies.

Addressing these challenges requires a multi-faceted approach, including capacity building, institutional collaborations, policy reforms, and public engagement. Overcoming these obstacles can pave the way for the successful adoption of AI in environmental policy development in India, ultimately leading to more informed and effective decision-making processes for sustainable environmental management.

#### **IV. CONCLUSION**

In conclusion, this legal research paper has examined the potential of harnessing artificial intelligence (AI) for effective environmental policy development in India. The analysis has demonstrated that the utilization of AI technologies can significantly enhance the process of transforming data into informed decisions, thereby addressing critical environmental challenges facing the country. Through an in-depth exploration of the current environmental policy landscape in India, the paper has highlighted the limitations and inefficiencies in traditional approaches to policy development. The integration of AI offers promising opportunities to overcome these challenges by enabling the collection, analysis, and interpretation of vast amounts of environmental data in a timely and efficient manner. AI-powered tools such as machine learning algorithms, data modelling, and predictive analytics can help policymakers identify patterns, trends, and potential future

scenarios, providing valuable insights for evidence-based decision-making. Furthermore, the research has underscored the importance of addressing legal and ethical considerations associated with AI implementation in environmental policy. The paper has emphasized the need for robust regulations and frameworks to ensure transparency, accountability, and fairness in the use of AI technologies. Safeguarding privacy rights, ensuring data protection, and mitigating algorithmic biases are crucial aspects that require careful attention to prevent unintended negative consequences. While acknowledging the immense potential of AI, it is important to recognize that it is not a panacea for all environmental challenges. The research has highlighted the importance of complementing AI-driven approaches with traditional knowledge systems, stakeholder engagement, and participatory decision-making processes. Collaborative efforts between policymakers, scientists, technologists, and local communities are essential to develop context-specific and inclusive environmental policies that consider social, economic, and cultural dimensions. Integration of AI in environmental policy development has the potential to revolutionize decision-making processes, enhance policy effectiveness, and drive sustainable development in India. By leveraging the power of AI to analyse data, identify patterns, and forecast environmental impacts, policymakers can make well-informed decisions that balance ecological conservation with socio-economic development. However, the responsible and ethical use of AI must remain at the forefront to ensure that environmental policies are developed and implemented in a manner that respects human rights, promotes equity, and safeguards the long-term well-being of both people and the environment.

## BOOK REVIEW

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### KRISHNA AND MEDIATION

**Published by:** NLU & Judicial Academy ASSAM, Printed in India. ISBN: 9788195427635 1<sup>st</sup> Ed. (2023)

**Reviewed by:** Dr. Santosh Kumar\*

*“यतः कृ ष्णस्ततो धर्मो यतो धर्ममस्ततो जयः”*

### Introduction

Books are considered “effective tools for communication between two minds”. A comprehensive review of the same can tell you whether the book worked as a communication tool between the author and the reader or not. At present, the context of the book gives timeless necessity and extent of protecting, recognizing with the inclination towards mediation in the legal society, to recognize the importance and acceptance of alternate means to resolve the issues in time.

As per the ancient Indian culture, texts are regarded as divine beings. Presently, books hold various roles, such as entertainment, scientific

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experiments in the educational sectors and research etc. Books have a major contribution to the diet of knowledge. Since the inception of mankind, humans have been dependent on domestic knowledge but interaction and vast development in all walks of life as protected by the means of law has great impact. There are various guidelines in the ancient religious scriptures of India for the protection of texts.

The focus of the book lies in understanding the relationship between modern developments of laws and real issues in human relations with changing needs and resolving conflicts as well as disputes by applying thoughts from religious and legal texts.

## **The Author**

**Prof. V.K. Ahuja**, the learned author of the book “**KRISHNA AND MEDIATION**”, demonstrated the deep legal flavor par excellence through teaching and research in the field of Law. The research amalgamated concepts from streams such as religion and complex legal aspects, the divinity of law, and historical institutionalism to study the nature of changes in legal systems and thus the impact on issues of human beings.

## **The Book and Contents**

The book, **KRISHNA AND MEDIATION** examines the role that scriptures have on world affairs and policymaking. Throughout the book, contemporary law discussed to satisfy the needs of powerful transformation looking to be real world problems and perspectives.



Meticulously summarised in the book, the author lists many facts from concerned and diverse subjects of human life and related laws to prove that mediation as a mode of dispute resolution was applicable in India since time immemorial. The book is divided into **Eight** chapters.

The present book is divided in its scheme of presentation as already mentioned above a great work of knowledge in its essence.

*Chapter One* introduction relates to the divine presence and role of **Lord Krishna** as the mediator to the Kauravas and Pandavas in the Mahabharat period.

It is appropriate here to mention a verse from Gita, in which Lord Krishna said:

सज हन्त्रिायजमदासीर्धिस्थद्वेष्यबन्धजषज |

साधजष्वनप च पापेषज सर्बजनद्धनवमनशष्यते ||

(One who looks upon well-wishers, friends, enemies, the neutral, madhyasth (mediator), envious, relatives, saintly persons and sinners with equal mind is the most exalted). The term “mediator” used in the aforesaid verse refers to the person who tries “to act as mediator to bring conflict resolution by trying to act as a discussion channel for two opposing warring factions”.

It is interesting to note that in the epic Mahabharata, Kauravas had chosen the path of adharma and enjoyed better life. However, they lost the ultimate war. On the other hand, Pandavas never left the path of dharma and

struggled throughout their life. At the end they won the War of Kurukshetra, which was also called as Dharma- Yudha,(as quoted by the author).

Lord Krishna himself was on the side of Pandavas, as they were fighting for dharma. In other words, the path of dharma, howsoever difficult and challenging it may be, ultimately takes us to victory. Based on above, it can easily be concluded that indigenous justice delivery system as well as the modern justice delivery system of India is inspired by none other than Lord Krishna, the Supreme Godhead. The work and the contributions are noteworthy and that has been described by the author to a great extent in humble manner, a real and extraordinary presence of the divine character in its ideal role to resolve the dispute in order to avert the war.

In verse 10.8 of Gita, Krishna says:

**अहं सवमस्य प्रभवो ः सवंप्रवतमते ।**

**इतत्त्वा भजन्ते र्ां बजधा भावसर्त्तताः**

(I am the source of all spiritual and material worlds. Everything emanates from Me. The wise who perfectly know this engage in My devotional service and worship Me with all their hearts).

Thus, verse makes it clear that Krishna existed in all times in the past, he exists in the present and will continue to exist in the future also. Everything emanates from Krishna. Therefore, it is safe to draw a conclusion that law and justice also emanates from Lord Krishna as also stated through the verse:

## यतः कृष्णस्ततो धर्ो यतो धर्मस्ततो जयः

The description in the book and the efforts to make it very simple to understand the saga is the true reflection by a real academician par excellence as **Prof. V. K. Ahuja** has taken the subject of dharma and philosophy. The concepts of “dharma” and “justice” are integral parts of the Indian culture. Dharma is defined for everyone whether King or the ordinary people. It was dharma of the King to ensure that timely justice was done to its people. The indigenous justice delivery system, therefore, was developed accordingly. The justice delivery system was very fast where conflicts and disputes between persons were decided in no time. Mediation was a popular and one of the most important modes of the conflict and dispute resolution in the early times in India.

As quoted in chapter one, in ancient India, apart from mediation, other modes of resolving or deciding disputes included the systems of village councils (Kulani), corporations (sreni), and assemblies (puga), according to Yajnavalkya and Narada. The aforesaid mechanism was in a way similar to arbitral tribunals like the modern panchayats.

**Chapter Two**, a chapter on mediation relates to the concepts of justice delivery system in ancient India. Mediation has been a part of the Indian culture. As a peace-loving nation, it always believed in reducing tension between disputing parties and bringing peace and harmony in the society. Mediation is embedded in our traditions and customs. Practically, mediation is to be seen as an integral part of our behaviour. It may not be wrong to say that mediation is as old as human civilization. In this context the author has

mentioned various viewpoints of judiciary in order to prove the existence and effectiveness of the process of mediation to resolve the disputes with inculcation of human emotions.

The system of mediation was evolved by village elders, community activists and other prominent personalities of the society, etc. who did not have a law background. These so called “non-lawyer” mediators played an important role in the indigenous justice dispensing system of the country. According to **Justice A K Sikri**, mediation has the “overtones of spirituality”, and it brings prosperity in addition to peace and harmony in the society. It is the only process which addresses the “emotional needs of the parties”.

Mediation is basically a voluntary process, in which there is no element of force or coercion. Any party may walk out of the mediation proceedings at any time if it feels uncomfortable due to any factor. Further, how much information is to be revealed in the proceedings will depend upon the parties, as it is their matter. So, confidentiality is maintained, (as quoted by the author).

Mediation can be described as an art by which the mediator encourages both the parties to divide a cake in such a manner that each party celebrates in the belief that it has got the biggest piece.

Mediation today is not something that “three people sitting down under a tree” and resolving a dispute. Though the core element of mediation is the same, there has now been law basis to deal with court annexed mediation. Not everyone is authorised to do mediation today. The law on mediation is extremely important to lay down rules on ethics for mediators to prevent

corruption and bias by the mediators. The Mediation Bill, 2021 is a welcome step in streamlining the law on mediation. The same is likely to be passed very soon.

**Chapter Three** included a focus on the various facets of Lord Krishna and existing issues and the righteous acts in the field of mediation based on the dharma. This chapter elaborates upon understanding the personality of Krishna in contemporary times by describing the true notions of completeness i.e. SAMPOORNATA (**“Krishna is Solah Kala Sampoorna” and “Poorna Purushottam”**.)

Krishna is omnipresent, omniscient and omnipotent. He is the most powerful personality in the world. He is the Supreme Lord. As already stated He is regarded as “Solah Kala Sampoorna” and “Poorna Purushottam”. The Solah Kala which Krishna had, are – (1) Daya – Compassion; (2) Dhairya – Patience; (3) Kshama – Forgiveness; (4) Nyaya – Justice; (5) Nirapeksha – Impartiality; (6) Niraskata/ Anasakti – Detachment; (7) Tapasya – Meditation and Dhyana; (8) Aparchitta – Invincibility; (9) Danasheel – Bestower of all wealth in the world; (10) Saundaryamaya – Beauty Incarnate; (11) Nrityajna – Best of Dancers; (12) Sangitajna – Best of Singers; (13) Neetiawadi – Embodiment of Honesty; (14) Satyawadi – Truth Itself; (15) Sarvagnata – Perfect master of all arts, such as poetry, drama, painting etc.; and (16) Sarvaniyanta – Controller of All.

There are many facets of Lord Krishna’s personality. There is no quality, characteristic or skill which was not there in Lord Krishna. The life of

Krishna is a subject matter of study from the point of view of different disciplines, be it law; conflict management; human rights; women's rights; philosophy; theology; music; diplomacy; political science; management; strategic studies; counselling; motivational studies; inter-personal skills; personality development; and many more.

The *Chapter fourth* gives the role of Krishna as Mediator "*I envy no one nor am I partial to anyone; I am equal to all.*" *Lord Krishna*. This considers challenges faced by a mediator by describing the character of Lord Krishna. It caters to the exposition of the various facets of practice and views of Lord Krishna himself to avert the War of Kurukshetra between Kauravas and Pandavas during Dwapar Yuga as described in the epic Mahabharata.

Krishna taught the qualities a person should have to become a good mediator, such as being impartial, good communicator, good listener, a great thinker (thinking out of the box), being patient in all situations, dignified, having respect for the parties, trustworthy, having positive mindset, and confidence, etc.

In modern-day mediation also, a good mediator should have all the aforesaid qualities.

Anil Xavier, an advocate and Certified Mediator writes that certain qualities should be there in a good mediator such as "overall "people" skills, good verbal and listening skills, ability to think "out of the box", helping people work together as a team, impartial, respect for the parties, the ability to gain the parties' confidence, knowledge of the mediation process, bringing about

a balanced approach to control the process, initiative and the confidence to use it, reflective, trustworthy, dependable, keeping information confidential and the ability to remain calm under pressure”.(as quoted by the author).

*Chapter fifth* deals with caption Mediation at International Level. The chapter contributed towards realizing the potential of mediation as a method of dispute resolution, the international community also adopted it for the resolution of commercial disputes. The UNCITRAL Model Law on International Commercial Mediation, 2018 deals with procedural aspects of mediation in detail. It encourages nations to resolve commercial disputes through mediation. As it is only Model Law, it is not applicable to nations as a treaty obligation. The UNCITRAL Model Law was initially adopted in 2002 as the “Model Law on International Commercial Conciliation”. Originally, it covered only conciliation procedures. It was amended in 2018 and was renamed as “Model Law on International Commercial Mediation and International Settlement Agreements Resulting from Mediation”. It is also to be noted that the terms “conciliation” and “mediation” were used interchangeably in the Model Law of 2002.

The dispute may not get resolved in the first attempt of mediation, but the continuous efforts will bring positive results because war must end one day. The message given by Lord Krishna that mediation can bring peace to the world by averting or stopping war is to be applied wholeheartedly and with all sincerity. In the chapter the hope by the author that the institution of mediation becomes successful at international level for all types of dispute resolution is to appreciate the efforts of Indian nation as Vishwa Guru.

*Chapter sixth* considers the aspects of Mediation in India. The participation benefits or burden, in which the Author shared it as its impact is positive and submitted that mediation can perform an effective role in decision making by acting as resource enhancers, experts and facilitators.

Lord Krishna's invoked, time tested, highly reliable, efficient, cheap and faster mode of dispute resolution, i.e., mediation, was kept in cold storage for several decades even after the independence as we heavily relied on the adversarial system and considered it to be the most suitable justice delivery system. There is a famous saying that "justice delayed is justice denied" or that "delay defeats justice" as Justice A.K. Sikri rightly puts it. He further stated that this delay in justice created "frustration amongst the litigants" and led to "loss of faith" in the justice delivery system. Emphasizing upon the relevance and significance of mediation, he states that "mediation has proved, in varied circumstances, as the best mode of access to justice". This is what exactly Lord Krishna taught the world more than 5000 years back. Interestingly, Justice Sikri states that the concept of "Social Context Judging" has been adopted in India. He further observed that "Social Context Judging" is mainly "a shift from the adversarial system so that the faith of the society in the justice delivery system can be maintained whereby bridging the gap between law and life, law and justice". The ADR methods including mediation were brought in due to this shift to "Social Context Judging". It is rightly said better late than never.

In compliance with Supreme Court directions in Salem Advocate Bar Association, Tamil Nadu v. Union of India (2003), and Salem Advocate Bar



Association, Tamil Nadu v. Union of India (2005), and in order to give impetus to the effective implementation of section 89 of CPC, Alternative Dispute Resolution Rules 2009 and Civil Procedure Mediation Rules 2009 were framed. The legal position with respect to section 89 of the CPC was further clarified by the Supreme Court in *M/S Afcon Infra Limited & Another v. M/S Cherian Varkey Construction Co. Limited*. The Court gave comprehensive guidelines with respect to implementation of section 89.

In 2005, the Supreme Court of India set up the Mediation and Conciliation Project Committee (MCPC). The MCPC inter alia trains Mediators and Referral Judges throughout the country. This may also be referred to as an important step towards institutionalizing mediation procedure in India. It is noteworthy that the first Court Annexed Mediation Centre was started in Chennai. It was organized by the court administration. Thereafter, Delhi High Court Mediation and Conciliation Centre was established which was managed by the advocates of Bar Association of Delhi High Court. Apart from this, in the territory of Delhi, in Court Annexed Mediation Centers, the services of judges were extended as mediators by District courts. This step of district courts in Delhi is commendable. With the excellent efforts made by the Supreme Court Mediation and Conciliation Project Committee (MCPC), High Courts and District Courts of all states have established Court Annexed Mediation Centers. It is also noteworthy that mediation/conciliation was also introduced in some of the legislations including the Industrial Disputes Act, 1947, Special Marriage Act, 1954, Hindu Marriage Act, 1955, Family Courts Act, 1984, Legal Services Authority Act 1987, Companies Act,

2013, Commercial Courts Act, 2015, Real Estate Regulation and Development Act 2016, and Consumer Protection Act, 2019.

*Chapter seventh* considers the pendency of cases in India and impact of mediation, in all Indian courts taken together has reached around 50 million. Surprisingly, this number is much more than the population of several countries taken together. In *Hussainara Khatoon v. Home Secretary, State of Bihar*, the Supreme Court held that “right to speedy trial is a fundamental right”, which is covered under Article 21 of the Constitution of India. The right to speedy justice is sine qua non for any robust justice delivery system, as justice delayed is justice denied.

Albert Einstein once said that “in the middle of every difficulty lies opportunity”. Today, difficulty is to deal with mounting pendency of cases, and the opportunity is to popularize our own indigenous dispute settlement method, i.e., mediation. In other words, out of several measures to reduce pendency of cases which are being thought about today, mediation may be proved to be a game changer.

It is worth mentioning here that mediation is the best suited method of dispute resolution for some cases. For example, family matters are more suitable for being resolved by mediation. This has been exemplified with the story of 17 Camels and 3 Sons by the author for which one has to read the book to know the full story.

Emphasizing the importance of mediation, Professor N R Madhava Menon also stated: “Mediation is ... in fact the handling of human relations in a responsive and positive manner for the good of the people and betterment of

the community. ... In mediation there is no victor nor is there a vanquished. (As quoted).

Mediation should compulsorily be invoked in new matters, as is being done in commercial dispute cases. In addition, mediation should also be invoked in pending cases. The courts should come out heavily on the party which tries to fail mediation proceedings deliberately. As it is known, Gita has a solution to all the problems, let us go back to Krishna and invoke the method of dispute resolution which he adopted, i.e., mediation. We will also find a solution to the pending cases. The need is to adopt mediation with a positive mindset and wholeheartedly.

In *Chapter eighth* with a focus on the various existing issues certain conclusions are drawn on the efficacy of mediation. The author has cited the example of Krishna before us who made the sincerest effort to resolve the dispute through mediation between the Kauravas and Pandavas to avert the war. He, however, failed due to Duryodhana's stubborn nature. The reason why Krishna went for mediation knowing the fact very well that Duryodhana would not agree, is that he wanted to give a strong message to people that never give up your efforts to resolve disputes till the last moment.

Mediation has evolved for all human conflict which not only rejects revenge, aggression and retaliation, but also strengthens the relationship, based on mutual trust and understanding. Change is the rule of nature. No society of the world can afford to remain static. The legal system in any nation must also adapt itself to the changing needs of society from time to

time. The concept of justice in mediation, i.e., “fairness beyond legal justice” as said by Justice A.K. Sikri.

Mediation by Angada between Rama and Ravana also failed, and war took place. In modern times also, the mediation failed in the Ram Janmabhoomi case. Despite these failures, our indigenous method of resolving dispute, i.e., mediation should be the first choice as it is a time-tested method and does not spoil the relationship between the parties, whatever the nature of dispute may be. The success of mediation is based on the willingness of parties.

*Mediation is based on the principle of “heal the past, live the present, dream the future”.*

Mediation will prove to be a game changer if invoked by parties with positive mindset to resolve disputes. The advocates are also expected to cooperate and encourage people to go for mediation rather than ill informing them.

If indigenous justice system of India can do extremely well in other jurisdictions, why can't it be successful in the country where Lord Krishna himself invoked it to teach a lesson to the humanity.

Overall, the book provides a scholarly view of the wide range of historical and contemporary issues and developments in its framework. In its elucidation, the book draws from scriptures, laws and cases from multiple subject jurisdictions to provide a better perspective and expound the direction that the law is currently taking a shape across the legal universe. The book sets the groundwork for understanding the existing trends in

policies, legislations and cases in this field; coupled with an attempt to highlight the socio-political and socio-legal implications of such decisions in the process of dispute resolution through mediation.

The author has successfully undertaken the task of addressing the multitude of issues and views in this field. The book offers a crisp and lucid take on the diverse legal issues prevailing in the area of mediation. With summaries of the latest trends and important legal developments on specific issue of mediation, the book is available on request/online. The discourse is a good is an informative piece of work for teaching fraternity, students, researchers, social activists, academicians, adjudicators and various stakeholders, and for those who are concerned with the provisions and developing perspectives of the Mediation Law.

## कृष्णं वन्दे जगद्गुरुम्

**KRISHNAM VANDE JAGADGURUM**

**(Praise Krishna, the Guru of the Universe)**

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