

SCAORA  
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Vol 1 10 March 2024



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## Foreword

Dear Esteemed Members and Readers,

It is with immense pleasure and pride that we introduce to you the latest edition of the SCAORA e-Journal. It is our privilege to provide this foreword for what promises to be a captivating and enlightening collection of articles.

The SCAORA e-Journal is a testament to the intellectual vitality and scholarly rigor of our esteemed members. Within this edition, we have curated a diverse selection of articles, case analyses, and commentaries that showcase the depth and breadth of our profession. From groundbreaking legal precedents to contemporary challenges confronting the legal community, each contribution offers valuable insights and perspectives that enrich our comprehension of the law.

This year's edition is particularly notable for its timely exploration of pressing legal issues and its dedication to fostering dialogue and debate among legal professionals. As practitioners and scholars, it is our responsibility to engage with the intricacies of the law and contribute meaningfully to the ongoing development of jurisprudence. The SCAORAE-Journal serves as a platform for this purpose, facilitating intellectual exchange and collaboration.

We extend our heartfelt gratitude to all the contributors who have generously shared their expertise and knowledge in this publication. Your commitment to the pursuit of excellence in the practice of law is commendable, and it is through your efforts that the SCAORA E-Journal continues to thrive.

To our readers, we encourage you to delve into the thought-provoking articles and analyses contained within these pages. May this edition of the SCAORA E-Journal inspire you, challenge you, and deepen your appreciation for the complexities of the law.

Warm regards,

Mr. Aruneshwar Gupta

Ms. V. Mohana

Mr. Nikhil Nayyar

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# THE CONSTITUTION

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## DISCOURSE OF TUSSLE ON THE BASIC STRUCTURE DOCTRINE

*Manish Kumar*

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THE DOCTRINE of Basic Structure bears significant importance in the domain of Indian constitutional jurisprudence, serving as a foundational element intricately integrated throughout the legal framework of the nation. The proposition that specific components of the Constitution are unchangeable holds substantial ramifications, encompassing the allocation of authority, the safeguarding of democratic principles, and the overall structural soundness of the Constitution.

### **The Current Tussle**

The current tussle between legislature, executive, and judiciary regarding basic structure rekindled when the Vice-President of India Jagdeep Dhankar made certain remarks and questioned the Basic Structure Doctrine. Speaking at the 83<sup>rd</sup> All-India Presiding Officers Conference in Jaipur raised the issue of the National Judicial Appointments Commission judgment and



observed that, “In 1973, a very incorrect precedent was started in India. In the case of Kesavananda Bharati, The Supreme Court gave the idea of basic structure, that Parliament can amend the Constitution but not its basic structure. With due respect to the judiciary, I cannot subscribe to this. This must be deliberated. Can this be done? Can Parliament allow its verdict will be subject to any other authority?... Otherwise, it will be difficult to say that we are a democratic nation”. Earlier in his opening address on December 7, after assuming the office of Rajya Sabha Chairperson, said that the striking down of the National Judicial Appointments Commission (NJAC) Act was a “glaring instance” of “severe compromise” of the sovereignty of Parliament and disregard of the “mandate of the people”.

This is not the first time that such remarks have been explicitly stated by a Vice-President. Even in the year 2020, the then Vice-President Venkaiah Naidu using the very same platform expressed his reservations regarding judicial overreach on the ban of fire-crackers and the NJAC decision. “Occasionally, concerns have been raised as to whether they (judiciary) were entering the domains of the legislative and the executive wings”, was what he observed. The observations made by Dhankar on the appointment of judges are closely knit with the constant remarks made the then Union Law Minister Kiren Rijiju, who called the mechanism to be “opaque”, “alien to the Constitution” and described the present system as the only apparatus in the globe where judges appoint people who are familiar to them. The very next day while hearing

a case relating to the appointment of judges, the Supreme Court asked Attorney General R. Venkataramani to advise governmental functionaries to “exercise control”. Following this Dhankar expressed his displeasure and said that, “I cannot be a party to emasculate the power of legislature... what is the situation today? One- upmanship, public posturing...public posturing from judicial platforms. This is not correct.” Later, Lok Sabha Speaker Om Birla speaking at the event too affirming this view was of the opinion and urged the judiciary “to confine its limits prescribed in the Constitution”. He expressed that, “Judiciary is also expected to follow the principle of separation and balance of powers conferred by the Constitution among all institutions while exercising its constitutional mandate.”

“The basic structure of our Constitution, like the north star,” said CJI Chandrachud at the 18<sup>th</sup> Nani Palkhivala Memorial lecture on “Traditions and transitions: Palkhivala’s legacy in an interconnected world” at Tata Theatre, National Centre for Performing Arts (NCPA),

Mumbai. Further, he observed and said, “Guides and gives a certain direction to the interpreters and implementers of the Constitution when the path ahead is convoluted.” These were the views of the Chief Justice in response to the comments made by the Vice-President. The doctrine of basic structure working as a ‘north star’ provides guidance which is invaluable for the purpose of interpretation of the Constitution here and elsewhere. Elaborating this further, CJI opined that the basic structure or philosophy of our Constitution is based upon the



supremacy of the Constitution, rule of law, separation of powers, judicial review, secularism, federalism, freedom, and the dignity of the individual and the unity and integrity of the nation.

Supreme Court former Judge Deepak Gupta raised the question ‘What if there is no basic structure doctrine?’ while delivering a guest lecture at the 2<sup>nd</sup> Dr. B.R. Ambedkar Memorial Lecture in the year 2023 at Hidayatullah National Law University on the topic ‘Will of the People or Rule of Law’. He opined that the government intends to have courts with such people who will toe their line and the ones who will not be critical of them upholding their every action. Through this lecture he highlighted the significance of ‘basic structure doctrine’ serving as a check on the abuse of majority power. He made a significant comparison while speaking about the experience of Germany under the dictatorship of Adolf Hitler. He said, “Using brute majority in Germany, they made so many amendments that they took away the rights of the citizens including the right of freedom of speech, residence, association and habeas corpus. He also passed a law that hereinafter you do not have to bring anything to the Parliament. The executive was supposed to bring in laws. And we know what happened. Millions of Jews who belonged to the minority community were killed. So, after the Second World War when the Federal Republic of Germany was drafting its new Constitution, they said, we will have some basic clauses that can never be removed. They took out rule of law, fundamental rights, separation of powers from the amending power of the Parliament.

They said these basic laws are eternal and nobody can remove them.”

Justice Gupta then raised the question as to what will happen if we don’t follow the basic structure doctrine today? In such a scenario Parliament can say and do anything. For

instance, if the Parliament wants the country to be a monarchy or dictatorship and do away with democracy. Parliament can even say to take away all fundamental rights. A striking statement was made here and he said, “So even if the Parliament represents the will of the people, it cannot change the basic structure of the Constitution.”

The last nail in the coffin was struck by former CJI Ranjan Gogoi, now a nominated member of Rajya Sabha when he opined that the doctrine of basic structure has an arguable jurisprudential basis in his speech made in the Rajya Sabha. During his maiden speech, he observed that “there is a book by Andhyarujina on the Kesavananda Bharati case. Having read the book, my view is that the doctrine of the basic structure of the Constitution has a debatable, very debatable jurisprudential basis. I would not say anything more than this.” In response to this K.C. Venugopal, Congress general secretary and Rajya Sabha member raised the issue whether the government too endorsed the former CJI’s views on basic structure doctrine.

## Conclusion

Given the current involvement of the nation with ever-changing political environments and growing public



demands, the ongoing struggle offers an opportunity to assess the resilience of its democratic foundations. Understanding the legitimate concerns articulated by adversaries is of paramount significance. Nevertheless, it is crucial to acknowledge that the Basic Doctrine Structure functions as a safety mechanism, discouraging potential occurrences of power exploitation and upholding the fundamental ideals outlined in the Constitution.

*Manish Kumar is Supreme Court  
Advocate-On-Record (AOR Code - 3767)*

## MISUSE OF ARTICLES OF CONSTITUTION

*M K Ravi*

### **Constitutional Guarantee of the Right to Peaceful Protest**

THE CONSTITUTION of India protects the fundamental right of citizens, including students, to express dissent, express grievances and demonstrate peacefully, subject to reasonable restrictions. Article 22 of the Constitution of India allows the Protection against arrest and detention in certain cases. Article 19(1) (a) allows for “freedom of speech and expression” and therefore the peaceful expression of non-derogatory slogans is permitted. Article 19(1)(b) guarantees all citizens the right to assemble peacefully and without arms, while Article 19(1)(d) guarantees the right to move freely; on the basis of this provision the elimination of peaceful protest marches cannot be denied. The importance of including the right to peacefully protest in Part III of the Constitution cannot be underestimated. However, these fundamental rights are subject to reasonable restrictions, namely the sovereignty and integrity of India and public order.



The police also have broad legal powers to ensure the peaceful nature of protests. Provisions of the Indian Penal Code, such as Section 141, define ‘unlawful assembly’ as an assembly of five or more persons whose common purpose is to intimidate the central or state government by use of force criminal to oppose the execution of any law or statute. regulation to resist an imposition, commit an offense, obtain property or deprive a person of the enjoyment of a right, or compel a person by criminal force to do something which he is not required by law to do to do or to refrain from causing to be done what he is required by law to do.

While Article 268 defines “public nuisance”, Chapter X of the Code of Criminal Procedure deals with “maintenance of public order and peace”. In particular, article 129 provides for the dissolution of the assembly with the use of civil force; Article 130 allows the use of armed forces to disperse an unlawful assembly; section 143 empowers the Executive Magistrate to prevent the continuation or recurrence of public nuisance; Article 144 allows instructions to be given to the public to refrain from certain acts or to maintain a certain order in relation to certain property owned or controlled by him.

These legal provisions restrict the fundamental right to speech and expression, unarmed assembly and movement to ensure that protests, dharnas and demonstrations remain peaceful and do not become ‘unlawful’. The question arises as to what guarantees that these restrictions are “reasonable”. Do the police have carte blanche under these regulations? The answer is negative. These provisions are



also not absolute and the powers contained therein are not unlimited. Its reasonableness is determined by carefully and fully reading the provisions. In the case of *Karam Singh v. Hardayal Singh* 1979 SCC OnLine P&H 180, the Hon’ble Punjab and Haryana High Court held that “Three conditions must be satisfied before a magistrate can order the use of force to disperse a crowd.

In the case of the recent student protest at AMU, the “common purpose” of the rally, i.e. requesting the police to register an FIR and arrest the encroachers, and not for any of the five types of common purposes which convert a gathering into an unlawful assembly under Section 141 IPC. The power of the police to invoke Sections 129 and 130 of the Cr.P.C. is weak if the assembly was not illegal. However, for the sake of argument, let’s assume that there was an unlawful assembly.

### **Crowd Control and Use of Armed Force**

Where an unlawful assembly is not dispersed by resorting to civil force, the Executive Magistrate has the power under Section 130 Cr.P.C. to bring about its dissolution by armed force, Clause (3) of Section 130 requires the police officers to “Use as little force as possible, and do as little damage to people and things as may be compatible with the dispersion of the assembly”.

Internationally, India is also bound by the United Nations Fundamental Principles on the Use of Force and Firearms. Section 13 of the Basic Principles states that the use of force to disperse unlawful and non-violent gatherings should be avoided and if this is not possible then minimal force should be used.

In *Anita Thakur v. State of J&K*, (2016) 15 SCC 525, the Supreme Court of India held that In cases where the assembly is peaceful, resort to police force is not at all justified. In situations where crowds or gatherings become violent, however, it may be necessary and justified to deploy adequate police forces. However, the problem becomes even more serious when the police resort to such measure, indulge in excesses and cross the line by using excessive force, thereby becoming barbaric, or by not stopping even after controlling the situation and continues his tirade. This leads to a violation of human rights and human dignity. It is for this reason that human rights activists believe that the police often abuse their power to resort to violence, which poses a serious threat to the rule of law.

In *Police Commissioner and Ors. Vs. Yash Pal Sharma*, (2008) 155 DLT 209, The Division Bench of the Delhi High Court observed that “the purpose of the provisions of Section 129 of the Code is to use the force to suppress a disturbance of public order or to disperse a gathering which threatens to cause such a disturbance and which has refused to disperse or has shown its determination not to disperse. Because the police forgot this, the police action was punitive and repressive.”

### **Fake Cases Filed in Courts**

Many such Supreme Court and high court decisions have identified the manner in which investigations were conducted with the intention of framing or harassing innocent people. The standard response from the police

when someone is falsely accused is that they have a duty to file a report and launch an investigation. Put it differently, their attempt is to convey that they are so meticulous that they must examine each and every word that is said to them. But the law has a weird sound.

In the case of *Lalita Kumari v. Govt. U.P. & Ors 2013*, the Constitution Bench of the Supreme Court held that it is not the duty of the police to initiate investigation in any FIR compulsorily registered on receiving information about the commission of a cognizable offence. The FIR can be quashed before investigation under Section 157 of the Act if the police officer is of the opinion that there is no sufficient basis for the investigation. The Supreme Court held that although the registration of an FIR is mandatory under Section 154 of the Criminal Procedure Code, the arrest of the accused immediately after the registration of the FIR is not at all mandatory. Unfortunately, despite such loud pronouncements, the police continue to use arrests as their main means of prosecution.

Discover the abuse of their powers of arrest, In *Joginder Kumar v. State of UP 1994*, the Supreme Court held that the police cannot make an arrest in the ordinary way. Subsequently, the Code of Criminal Procedure (Amendment) Act 2008 also provides that the police must now give the accused a “notice to appear” rather than make an arrest, except in certain circumstances which must be recorded. The crime is punishable by up to seven years in prison.



## The Court Acknowledges that the Police Implicate Innocent People

In *Vinay Tyagi v. Irshad Ali @ Deepak & Ors 2012* Irshad Ali, an informer of the Special Cell of the Delhi Police and Intelligence Bureau, was falsely implicated in a criminal case as their unjust demands were not met. The CBI filed its closure report. The Supreme Court bench, while acquitting him, acknowledged that the investigation could be unfair, tainted or that persons could be unduly implicated.

In *Girja Prasad Sharma and Ors. v. Umashankar Pathak 1972*, a division bench of the High Court of Madhya Pradesh had found an Sub Inspector guilty of falsely implicating Umashankar Pathak, a lawyer who had staged a hunger strike on the issue of food shortage in Panna, MP.

In *Babloo Chauhan @ Dabloo vs. State Govt of NCT of Delhi 2017* where High Court of Delhi expressed serious concern over the illegal prosecution and imprisonment of innocent persons and their acquittal after years of incarceration and emphasized the need for a legal framework to provide relief to such persons. For this purpose, the Law Commission of India in India's Report No. 277 submitted on August 30th, 2018 entitled "Wrongful Prosecution (Miscarriage of Justice): Legal Remedies".

## Can Erring Police Officers be Punished?

Theoretically yes. In the famous judgment of *State of Gujarat v. Kishanbhai 2014*, a Division Bench of the

Supreme Court held that innocent persons are being prosecuted and subjected to humiliation and humiliation for wrong reasons. The Supreme Council ordered the deluded officials to be subject to disciplinary punishment. *Perumal v. Janaki (2014)* is one of the rare cases where the Supreme Court has decided to prosecute an investigating officer under Section 211 IPC (Offence of false accusation with intent to cause harm).

The Punjab and Haryana High Court in the case of *Harbhajan Singh Bajwa Vs. The Senior Superintendent of Police 2000* ordered prosecution against the complainants of false FIRs also under Section 182 IPC (false information, with intent to induce a public servant to exercise his lawful power over the injury of another person). Unfortunately, these cases are rare.

*Satender Kumar Antil v. Central Bureau of Investigation and Anr. SLP (Crl.) No. 5191 of 2021*: An accused arrested by the police without a warrant has the constitutional right under Article 22 (2) of the Constitution of India.

*Dr M K Ravi is Advocate,  
Supreme Court of India*



# ENSURING ACCESS TO JUSTICE: THE URGENT NEED FOR OPERATIONALIZING HUMAN RIGHTS COURTS IN INDIA

*Aakarshan Aditya*

THE PROTECTION of Human Rights Act, 1993, stands as a cornerstone in the legal framework of India, aiming to protect the fundamental rights and dignity of individuals. However, a critical element of this legislation, the establishment of Human Rights Courts in each district, has faced significant challenges in becoming fully operational. This article explores the imperative need to activate these Human Rights Courts, highlighting the potential benefits they could bring to the justice system, particularly at the grassroots level.

## **The Legislative Framework**

Envisioned under Section 30 of The Protection of Human Rights Act, 1993, Human Rights Courts are designated for

each district to ensure the speedy trial of offenses arising from human rights violations. Section 31 mandates the appointment of a Special Public Prosecutor for these courts, emphasizing the significance attached to their functioning. Despite these provisions, many already designated courts across the country remain non-functional, posing a substantial challenge to the effective enforcement of human rights.

## **Operational Challenges**

Currently, no state in the country has successfully established and operationalized Human Rights Courts. Human rights violations that constitute criminal offenses are already adjudicated in Criminal Courts. Human Rights Courts should focus on addressing violations not covered by existing criminal laws. The current situation where no state has successfully implemented Human Rights Courts results in challenges related to overburdened criminal justice systems, limited expertise, inadequate redress for victims, inconsistent application of standards, and a missed opportunity for preventive measures. Establishing and operationalizing dedicated Human Rights Courts would address these consequences by providing a more specialized, efficient, and comprehensive approach to handling human rights violations. Discrepancy between legislative intent and practical implementation is evident in instances like the non-functional Human Rights Court in various states of the country including our capital Delhi. Despite notifications and designations, these courts have failed to become



operational revealing a glaring gap between legislative foresight and execution.

### **Comprehensive Jurisdiction of Human Rights Courts: Potential to Safeguard Fundamental Rights and Promoting Justice at the Grass root level**

The Human Rights Courts, as envisioned under The Protection of Human Rights Act, 1993, possess the potential for expansive jurisdiction, adeptly addressing a multitude of human rights infringements and providing remedies at the grassroots level. These courts are equipped to adjudicate cases involving violations of fundamental rights, including arbitrary deprivation of life, liberty, or security, heinous acts of torture or degrading treatment, unjust detention, and infringements upon the right to a fair trial. They stand as strongholds against discrimination based on race, gender, religion, or caste, mitigating systemic biases and providing recourse to marginalized groups. Furthermore, they can tackle modern challenges such as forced labour, human trafficking, and violations of children's rights. Their scope extends to environmental concerns affecting human dignity, ensuring accountability for acts leading to environmental degradation or displacement. Additionally, they safeguard freedoms of expression, assembly, and association, countering encroachments upon civil liberties, and address socio-economic injustices, advocating for rights to education, health, and adequate housing. Through their mandate, they can challenge impunity, holding both state and non-state actors accountable for human rights abuses,



thereby serving as vital mechanisms in upholding human dignity and fostering a just society. The establishment of Human Rights Courts under The Protection of Human Rights Act, 1993, holds significant promise in addressing a plethora of environmental issues plaguing communities across India, from air and water pollution to habitat destruction and violations of indigenous rights. By ensuring swift and accessible justice, these courts can play a pivotal role in safeguarding fundamental human rights entwined with environmental degradation, preserving ecological balance, addressing community displacement, and upholding the right to clean water, thereby contributing to a more just and sustainable future where constitutional guarantees of a dignified life are actively protected.

### **Confusion and Ambiguity**

One major hindrance to the functioning of Human Rights Courts is the ambiguity surrounding the types of cases considered as human rights violations and the lack of specificity in judicial appointments. The confusion extends to the jurisdiction of Sessions Judges, who, under the Criminal Procedure Code 1973, are restricted in taking cognizance of offenses related to human rights violations. This ambiguity in legal procedures poses a considerable challenge to the effective implementation of The Protection of Human Rights Act, 1993.

### **Legal Clarity and Empowerment**

In response to these challenges, it is imperative to clarify that human rights violations encompass rights related

to life, liberty, equality, and dignity guaranteed by the Constitution and international covenants. Article 32(3) of the Indian Constitution empowers Parliament to authorize other courts to exercise powers similar to those of the Supreme Court. This dispels the notion that Sessions Judges cannot take cognizance of human rights violations, as these rights primarily concern the state's failure to fulfil its obligations.

### **Recommendations for Effective Implementation**

To overcome procedural ambiguities and empower Human Rights Courts, granting these courts powers similar to those vested in State Human Rights Commissions is suggested. This would allow them to approach higher courts for necessary directions, orders, or writs in cases involving human rights violations. It is emphasized that legislative hesitancy or presumed difficulties should not hinder the establishment and functioning of these crucial courts.

### **A Call for Judicial Intervention**

Given the persistent inaction of governments in activating designated Human Rights Courts, it is proposed that the Hon'ble Supreme Court of India takes Suo moto cognizance of this issue. The Supreme Court, with its history of upholding constitutional rights and democratic values, is urged to issue a directive to competent authorities to ensure the immediate functioning of these courts in the interest of justice and the common good.



### **Conclusion**

In a country where the formal justice system often struggles to deliver speedy and affordable justice, the activation of Human Rights Courts becomes paramount. This article underscores the urgent need for operationalizing these courts to ensure the protection of human rights at the grassroots level. By addressing legal ambiguities, empowering these courts, and advocating for judicial intervention, the article aims to contribute to the realization of the legislative intent behind The Protection of Human Rights Act, 1993.

*Aakarshan Aditya is Advocate on Record,  
Supreme Court of India.*

*E-mail: aakarshanofficial@gmail.com*

# RIGHT TO LEGAL EDUCATION

## A Case For Compulsory Legal Education In Schools And Colleges

*Priya Aristotle*

RECENT NEWS headlines such as, “Educated juveniles committed crimes more than the illiterate ones” and “National Crime Records Bureau chart shows that youth in the age group of 18-30 were responsible for several heinous crimes,” expose the biggest crime a state commits against its people, that is, not providing legal education to its citizens, especially children. The spurt of violence being perpetrated against our children by adults and by children against each other is a clear indicator of where our state has failed. Introducing ‘Law’ as a distinct subject would empower our children to know their legal rights and contribute to reducing unlawful behavior in society.

A study conducted by the Social Science Education Consortium and the Centre for Action Research indicates that Law Related Education, when properly conducted, can reduce tendencies toward delinquent behavior and improve a range of attitudes related to responsible

citizenship. For example, students are less likely to associate with delinquent peers, use violence as a means of resolving conflict, or refrain from reporting criminal behavior to authorities. Introducing ‘Law’ as a subject from the primary school level onwards has the potential to yield significant positive outcomes. This initiative will also enable children to understand and appreciate rules and regulations in all aspects of life, train students’ minds to think critically, focus on problem-solving, conflict resolution, and engage less in violence as a means to win a situation.

### **RTLE- A Basic Need in a Democratic Society**

The Right to Legal Education (RTLE) is not merely a policy decision; it is a Fundamental Right of every citizen, as the laws of this land govern everyone from birth until death. In a democratic country governed by the rule of law, it is proclaimed that “Law is the king of kings, far more rigid and powerful than they; there is nothing higher than law; by its prowess, as by that of the highest monarch, the weak shall prevail over the strong.” Echoing Thomas Paine’s words, “When the people fear the government, there is tyranny. When the governments fear the people, there is liberty.” Citizens who are knowledgeable about their rights and privileges will not stand for tyranny. The global jurisprudence principle is clear: ‘ignorance of the law is no excuse’—this applies to both lawyers and laymen.

The significance of legal education has been underplayed by our education system, relegating it to a stream reserved



only for those who choose to become lawyers, advocates, and legal consultants. Nani Palkhivala argued that the law should not only be understood by judges and lawyers but also by the general public. He believed our constitution is primarily shaped and molded for the common man. Every judgment pronounced in courts is against a common man, who needs to know the basic procedure and at least understand to some extent what the ultimate verdict means. There should be no monopoly on information relating to the laws that govern everyone. Therefore, the approach to teaching law as a subject for all grades in schools must be taken seriously. The inclusion of legal acumen could complete the education system and turn students into responsible adults.

### **Children of All Ages Engage with Law Everyday**

Even a young child, as a citizen of this country, engages with law in numerous ways that may not be immediately apparent, due to the law's seamless integration into daily life. When children accompany their parents for shopping, they observe negotiations, oral contracts, the principle of 'buyer beware,' MRPs, expiry dates on products, and witness the cause of action of consumer laws, weights and measures, and traffic laws. Some children witness various kinds of abuse or violence at home, school, and on roads, whether as victims themselves or as observers. Therefore, by not making law a compulsory part of school/college education, we are deceiving ourselves into thinking we are adequately educating our children.



In the case of *A.S. Narayana Deekshitulu v. State of A.P. and others* [(1996) 9 SCC 548], Justice Hansaria aptly pointed out:

*147. Ashoka mentioned about victory of dharma in his rock edict at Kalsi which proclaimed his achievement in terms of the moral and ethical imperatives of dharma, and exemplified the ancient dictum: “yato dharmastato jaya” (where there is Law, there is Victory).*

Furthermore, children are exposed to various kinds of evils, including social media, drugs, and other activities. Schools are aware of these dangers and try to create awareness through programs a couple of times a year. However, these programs are not taken seriously by children, as they are not fully aware of the legal implications and consequences of some dangerous choices they make either for fun or under peer pressure. Child rights education, advocated by UNICEF, should be a priority in our education system. Students ought to know at least the basics of laws such as POCSO, Anti-ragging laws, consumer laws, Food safety laws, Law of Contract, Juvenile Justice Act, Cyber Laws, certain provisions of The Indian Penal Code, Child labour laws, Domestic Violence Act, and punishments for substance and drug abuse, to help them make informed decisions. The spurt of violence being perpetrated against our children by adults and by children against each other highlights a stark reality of the gap that our state could address through the education system. Introducing 'Law' as a distinct subject would empower and equip our children to know their legal rights and contribute to reducing unlawful behavior in society.

## Right to Legal Literacy to Be Read Into Right to Education

The perspective on learning law needs a paradigm shift, from seeing it merely as a career choice post-12th grade to recognizing it as an integral aspect of life. Thus, pedagogical methods should evolve to include law as a 'separate compulsory subject,' aligning with the mandate of Article 51A of the Constitution of India. Consequently, the 'Right to Formal Legal Education' should become an integral component of the 'Right to Education' under Article 21A of the Constitution of India.

### Study Law as 'Law'

While it's promising that the current syllabus incorporates topics on civil liberties and governance under civics, it's crucial for children to understand 'Law' as a distinct subject, not merely merged with Civics/Social Studies. Law could potentially become the most engaging subject in schools if approached with a 'No exam' module, fostering legal morality through interactive classes focused on legislative discussions. The goal is to ensure that upon completing school, students are well-informed about the basic laws governing them, which could also benefit them in careers in civil service, media, politics, judiciary, or other public services. The current decline in lawyers in legislature since independence has resulted in poorly enacted legislation or laws being frequently challenged as unconstitutional.



## Law Studies in Higher Secondary

High school students, pursuing professional courses like engineering or medicine benefit from their foundational course till 10th grade. Conversely, students interested in a legal career have no similar preparatory path and only begin their legal education with entrance exams like CLAT and LSAT. This puts them at a significant disadvantage, as the 4-5 years spent in law school are barely sufficient to grasp the complexities of law and develop a legal mindset. This gap between academic learning and practical application could be bridged by introducing 'law as a distinct subject' from primary school onwards.

### Impact of Legal Education Globally

The need for integration of legal education into school curricula across various countries and contexts underscores a universal recognition of its significance in fostering informed, responsible, Law abiding citizens and promoting societal well-being. Students appreciate the relevance of the content to their daily lives, particularly as it empowers them to navigate legal systems, advocate for themselves and their communities, and participate more actively in democratic processes.

Educators and the broader community globally recognize legal education as a mandate in promoting respect for the rule of law, reducing tendencies toward delinquent behavior, and fostering a culture of lawfulness. Such education is seen as crucial for nation-building, especially in such a vast diverse nation as India, where

societal transitions underscore the need for legal awareness and civic engagement.

### Conclusion

The need for embedding legal education within the school curriculum to create a more informed, engaged, and responsible citizenry, capable of contributing to the well-being and democratic health of our country is the need of the hour. *Without making law as a compulsory part of school/college education, we are fooling ourselves somehow thinking we are educating our children.* Let the light of Law not be in letter in the law books used in the courtrooms, but may every effort be made for the letter and Spirit of Law to be found written in the hearts and minds of our children to equip them as good citizen for our nation right from primary school. The Pledge which we used to say in school assemblies will thus be fulfilled by each law abiding citizen, *“To my country and my people, I pledge my devotion. In their well being and prosperity alone, lies my happiness.”* This comprehensive approach to education underscores the critical role of legal literacy in achieving social justice, reducing crime, and promoting a culture of peace and respect for the rule of law.

*Priya Aristotle is AOR,  
Supreme Court of India  
(RTLE #LAW4K-12)*



# A CASE OF CHILD CUSTODY ARRIVAL OF MESSIAH & INDECENT ACTS

*Jayant Mohan*

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JIDDU KRISHNAMURTY -World renowned Modern Day Guru from India known for his unconventional views on Life and Spirituality. Rebellious and Free thinking Krishnamurthy was born in 1876 in Madras.

Unconventional as the path of Jiddu Krishnamurty was his childhood and education resulting in a most sensational and controversial Court Case in India in the year 1912 regarding his custody.

The controversial case made headlines in the newspapers of the time because of the personalities and clash of ideas involved in the case.

The British Colonial Judges laid down the principle of Law regarding child custody while dealing with such complicated issues of personal law and conduct of seemingly infallible individuals of such high stature made it a heady mix of religion, philosophy, Law.

The case was titled ***G Narayaniah Vs Mrs Annie Besant reported in (1913) MLJ 661*** a decision



rendered by the Division bench of the High Court of Judicature at Madras on 29th October, 1913. Arnold White, Chief Justice of the Madras High Court delivered the Judgment. Oldfield J agreed with the Chief Justice and gave additional reasons to support the Decision by the Chief Justice.

### Brief Facts of The Case

G Narayaniah filed a suit for custody of his two sons aged 14 and 11 under the Guardianship and Wards Act, 1890 (as applicable to British India) from Annie Besant before the District Court and the Suit before the District Judge, Chingleput, Madras. It was subsequently transferred to the High Court of Judicature at Madras meaning that the suit was tried before the Learned Single Judge of the High Court in its Original Jurisdiction.

Plaintiff G Narayaniah - a retired Government Servant was employed as a senior correspondence Clerk with the Theosophical Society at its Headquarters in Adyar, Chennai. By the end of year 1908 the plaintiff shifted his residence along with his two minor sons Krishnamurty and Nityanand in the premises of the Society and was given accommodation rent free as part of his employment benefit.

Theosophical Society preached metaphysical ideas and thoughts heavily derived from ancient Hindu and Buddhist religion and philosophy.

The Defendant Annie Besant was the President of Theosophical Society of India Since 1882. CW Leadbeater was also working with Annie Besant in The Society for the preaching and propagation of Theosophy.



J Krishnamurty (left), CW Leadbeater (Middle) and Annie Besant (right)

In September 1909 C.W. Leadbeater noticed that the boy Krishnamurty was having exceptional qualities and divine powers. He told Annie Besant about the boy's exceptional spiritual qualities and that the boy can be the medium through which the new messiah of the modern age would arrive.

Annie Besant agreed to adopt the boy Krishnamurty and his Brother Nityanand. Annie Besant believed that Krishnamurty is a gifted Human Being and Leadbeater and Besant would nurture the young prodigy who will be future messiah/spiritual leader namely '**Jesus Christ**' or '**Lord Maitreya**'.

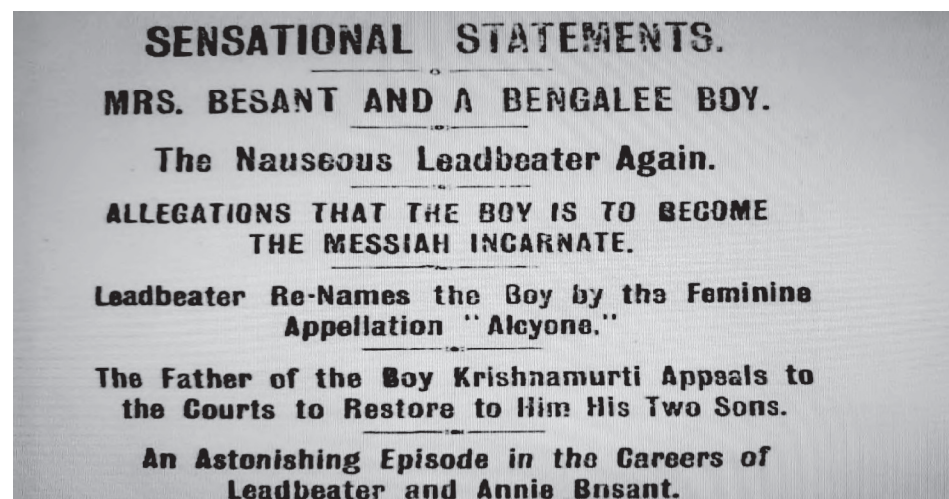
## Dramatis Personae

Annie Besant, despite being British, was one of the founders of the Home Rule Movement along with Bal Gangadhar Tilak agitating for freedom from British Rule for India.

Mr GS Arundale, founder of the Central Hindu University at Benaras being an ardent theosophist was a witness and gave evidence in support of Annie Besant.

Sir C.P. Ramaswamy Aiyar, an Eminent Lawyer from Madras and later Diwan of Travancore Estate represented the Father.

The Custody Case was very Controversial and media and press not only in India but across the world reported extensively on the case.



Headline in Australian Newspaper - The Truth (1914)

## Issue Before the Court

The Learned Single Judge of the High Court allowed the Suit and directed Annie Besant to restore custody of the two boys to their Natural Father -the Plaintiff.

The Legal Issue before the Appellate Court was :

‘Whether the father having delegated his rights of custody of the 2 minor boys to defendant could have subsequently revoked the custody of the rights over the Sons’

The Court considered all the case law regarding the rights of the father for the control of the children and accepted and applied the succinct statement of Law provided in the Halsbury’s laws of England vol 17 pg 107 ;

“After Surrender by him(the Father) of the Custody has actually taken place, he can recover the custody unless his doing so would be injurious to the interests of the child”

Therefore ‘Interest of the child’ was the primary consideration for the custody issue to be decided and the various other issues.

## Complicated Issues Uniquely Before The Court

Applying the aforesaid ratio to the facts of the case the very unique issues were which arose and how they were decided is ;

### a) Deification of The Child

The 10th Issue before the Single Judge regarding welfare of the child was :

*“Has the defendant stated that the elder boy is going to be Lord Christ or Lord Maitreya?”*

The finding of the Learned Judge was in the affirmative.

The defendant denied in her evidence that she had ever said that she believed that the elder boy was to be Lord



Christ or Lord Maitreya but she having said that believed that the body would be the vehicle for his re-incarnation.

Krishnamurthy was made the head of an Order called “Star of the East” and underwent two ceremonies for initiation. Respectable people prostrated before the elder son.

### Findings of the Court

Court recorded a finding that far from stimulating the Moral and intellectual capabilities of the Boy, the deification might have the opposite effect on the boy.

The Court also noted the fact that Mr. Leadbeater claims to have certain peculiar powers and he persuaded Annie Besant to take interest in the boys.

Leadbeater desired to take the children under his own control and out of that of the plaintiff whom he regarded as an obstacle in his path.

This led to the issue of misconduct and indecent acts committed by Mr Leadbeater with the infant boys.



C W Leadbeater with infant boys J Krishnamurthy and Nityanand



### b) Allegations of Misconduct and Indecent

#### Acts Against Mr C W Leadbeater

While dealing with the sensitive issue ,the court proceeded with caution and considered the Evidence in detail;

The Judge noted the evidence that Mr Leadbeater held opinions and continues to hold such opinions which can be described as certainly immoral and as such unfit to be the tutor of the boys.

### Findings Recorded by the Court

Since Leadbeater claimed power to detect impure thoughts the same would render him a highly dangerous associate for children.

The Charge made in the plaint by the father regarding conduct of Mr Leadbeater was held to be having proved.

As per Leadbeater he was teaching the boys how to bathe like an English gentleman in the bathroom.

This act was witnessed by the Servant Lakshman and Mrs Van Hook the housekeeper both who confirmed that Mr Leadbeater was not wearing any clothes and the boys were alone with him in the bathroom.

The Court relied upon the testimony of Laxman who was summoned as court witness and confirmed the fact that Leadbeater was doing certain improper things in a compromising position with the boy in the bathroom .Mrs Van Hook the Housekeeper also stated that it was most improper for Mr Leadbeater who was above 60 years of age to be giving bath to young boys in bathroom.

Hence the misconduct against Mr Leadbeater was found to be proved.

In view of finding of misconduct against Mr Leadbeater regarding the infants, the issue of whether custody had to be decided.

### **Delicate and Difficult Balancing Act**

In deciding what is in the best interest of the child ,the Court was to balance the competing factors namely :

*Factors in Favour of giving Custody to the Father ;*

- He was a respectable Hindoo Gentleman and a retired Government Servant. He was deemed fit to be appointed as the Asst Corresponding Secretary of the Esoteric Section of society.
- Plaintiff was in sympathy with the entire tenets and beliefs of the Society of which the defendant was the President.

*Factors in favour of continuing the Education in England:*

- Physical Training the boys are getting is all that is desired
- Best tutors available at Oxford are teaching the boys.
- Regarding the younger child it was considered desirable that he should take a degree for the purpose of competing in the Indian Civil Service Examination.

*Operative Portion of the Order :*

The Division Bench confirmed the direction given by the Single Judge/Trial Court to hand over custody to the Father.

The Plaintiff father was substituted as the guardian of the boys and a direction was issued to the *Defendant to*



*hand over the Custody of the boys to the father to make the decree effective.*

The Hon'ble Judges hearing the Appeal showed remarkable judicial statesmanship and Sensitivity to the complex factors regarding the welfare of the Minor Boys in the backdrop of bitter dispute between the father and the Adoptive Mother.

### **Appeal to Privy Council**

Annie Besant challenged the decision of the Division Bench of the Madras High Court before the Privy Council against the Decision passed by the Judgment of the High Court of Judicature at Madras.

The Decision of the Privy Council, the Final Court of Appeal in British India was delivered on 25th May,1914 in the case titled ***Mrs Annie Besant Vs G Narayaniah and Ors reported in AIR 1914 PC 41 equivalent citation 1914 SCC Online PC 40.***

In a very short Judgement the Privy Council held that the suit as filed by the plaintiff was not maintainable because it was impossible to hold that the infants who had left India with a view of being Educated in England and going to the University of Oxford were ordinarily resident of district Chingleput, Madras. Furthermore the Privy Council relied upon the statement of Krishnamurty and his brother who were now major that they wished to remain in England and complete their education.

Therefore it was held that the Suit could not have been filed before the District Judge at Madras (subsequently

transferred to the Single Judge of the High Court of Madras).

The Appeal was allowed on this short Technical ground and Annie Besant won the custody battle against the Father from the Privy Council in London.

Thereafter, Krishnamurthy completed his Education and continued to work under Annie Besant for Theosophical Society for next 16 years.

### Postscript

On 3rd August, 1929 at Ommen Star Camp, Holland all the leading theosophists of the world gathered. At the Public event J Krishnamurthy was to be proclaimed as Maitreya or the Coming of Jesus Christ i.e. the World Teacher project under the Organisation Star of the East of which J Krishnamurthy was the head.

To the shock of Annie Besant and about 3000 followers J Krishnamurthy dissolved the Organisation Star of the East and gave the following speech :

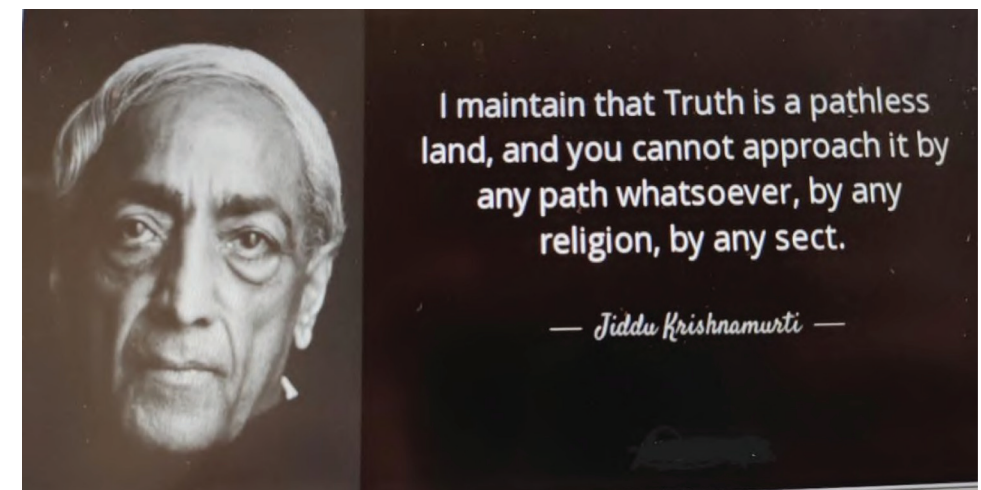
*"I maintain that truth is a pathless land and you cannot approach it by any path. Whatsoever by any religion, any sect. This is my point of view and I adhere to that absolutely and unconditionally.*

*Truth being limitless , unconditional, unapproachable by any path whatsoever cannot be organised nor any organisation should be formed to lead or coerce people along any particular path"*

In this David Vs Goliath Fight where unlike David the Father -Plaintiff could not defeat Annie Besant the-Goliath but Krishnamurthy the Son decisively finished the battle.



Krishnamurthy dissolved the Very Organisation he was to head concluding all issues and arguments decisively against the Theosophical Society and Annie Besant.



Question Still remains

Did Lord Christ or Maitreya really arrive?

### **SUPREME COURT HAS CONSISTENTLY FOLLOWED THE PRINCIPLE THAT INTEREST OF CHILD IS OF PARAMOUNT CONSIDERATION**

The aforesaid proposition of Law regarding Interest of Child being paramount consideration has been consistently been followed by the Supreme Court of India in the following cases ;

In **Ravi Chandran's Case [2010 (1) SCC 174]**, the Hon'ble Supreme Court took note of the actual role of the High Courts in the matter of examination of cases involving claim of custody of a minor based on the principle of parens patriae jurisdiction considering the fact that it is the minor who is within the jurisdiction of the court.

Based on such consideration it was held that even while considering Habeas Corpus writ petition qua a minor, in a given case, the High Courts may direct for return of the child or decline to change the custody of the child taking into account the attending facts and circumstances as also the settled legal position.

In **Nithya Anand Raghawan Vs. State (NCT of Delhi) & Anr. [(2017) 8 SCC 454]**, the Supreme Court had also referred to the decision in **Dhanwanti Joshi Vs. Madhav Unde [(1998) 1 SCC 112]**, which in turn was rendered after referring to the decision of the Privy Council in **Mckee Vs. Mckee [(1951) AC 352]**. In Mckee's case the Privy Council held that the order of the foreign court would yield to the welfare and that the comity of courts demanded not its enforcement, but its grave consideration.

**Tejaswini Gaud and others vs. Shekhar Jagdish Prasad Tewari & Ors., (2019) 7 SCC 42:**

*“19. The court while deciding the child custody cases is not bound by the mere legal right of the parent or guardian. Though the provisions of the special statutes govern the rights of the parents or guardians, but the welfare of the minor is the supreme consideration in cases concerning custody of the minor child. The paramount consideration for the court ought to be child interest and welfare of the child.”*

The recent decision of the Supreme Court in **Rohit Thammana Gowda vs. State of Karnataka & Ors., [2022 SCC OnLine SC 937]** reiterated the principle of Law in the following terms:

*“....that for considering the claim for custody of a minor child, unless very serious, proven conduct which should make one of them unworthy to claim for custody of the child concerned, the question can and shall be decided solely looking into the question as to, ‘what would be the best interest of the child concerned’. In other words, welfare of the child should be the paramount consideration.”*

*Jayant Mohan is a Supreme Court  
Advocate-on-Record*



# MENTAL ILLNESS AND RIGHT TO MARRY

*Kumud Lata Das*

*To be mothers, were women created and to be fathers men. (Rig Veda, IX, 85)*

MARRIAGE IS one of the most important events of human life affecting their social as well as the psychological status. It not only serves to satisfy the fundamental biological need of sexual gratification through a socially acceptable way, but also helps an individual to achieve a higher level of personality maturation. The institution of marriage is the foundation for establishing peace and public order in the society. Marriage entails commitment and lifelong responsibilities. As per Hindu personal law, one of the basic ingredients of marriage is a sound mind. Mental disorder/mental illness/unsoundness of mind is a statutory disqualification depriving an individual of her/his right to life. Section 5 in the Hindu Marriage Act (hereinafter referred to as HMA, 1955 lays down conditions

of marriage between two Hindus encompassing soundness of mind.

## 1. Conditions for a Hindu Marriage

A marriage may be solemnized between any two Hindus, if the following conditions are fulfilled, namely:

- (a) is incapable of giving a valid consent to it in consequence of unsoundness of mind; or
- (b) though capable of giving a valid consent, has been suffering from mental disorder of such a kind or to such an extent as to be unfit for marriage and the procreation of children; or
- (c) has been subject to recurrent attacks of insanity <sup>3</sup> [\*\*\*];]

Section 5 (1)(c) provides for mentions severe mental illness followed by disruptions of behavior and, it may result in disability and inability to satisfactorily discharge marital obligations. Different legislations on marriage have put restrictions on the right to marry for those persons who as suffering from mental illness. The disability to marry no longer remains a disqualification as medical science has developed by leaps and bounds. Mental illness is better understood and better treated today. Medical terminology has gradually changed from terms like “Idiot” “Lunatic” “Mentally unsound” to “mental illness or disorder” taking its origin from psychiatric parlance. Mental disorder has infinite dimension ranging from minor anxiety disorders to major disorders. The availability of drugs such as, Chlorpromazine, Imipramine and/or Electroconvulsive therapy makes it treatable and curable. Legislative



enactments of the decade of 1950s need to undergo a change as in those times the prognosis of severe mental illness was poor.

In India, each religion has its own personal laws to govern the institution of marriage. In some religions, a marriage can be annulled or is voidable at the instance of mentally sound spouse. In some cases, marriage is not legally recognised as one of the parties to the marriage is incompetent to contract because of unsoundness of mind and, in such cases, it effectively results in a situation where the marriage did not take place at all. In other words, it provides a ground for divorce. Here is how the different personal laws of each religion deal with mental illness and marriage:

## **Section 2 in the Dissolution of Muslim Marriages Act, 1939**

### **2. Grounds for decree for dissolution of marriage**

(d) that the husband has been insane for a period of two years or [\*\*\*];

Thus, under Muslim law, persons of unsound mind and minors can be validly contracted into marriage by their legal guardian. Such marriage is considered valid in the eyes of law.

## **Section 32 in The Parsi Marriage and Divorce Act, 1936**

**32. Grounds for divorce:** Any married person may sue for divorce on any one or more of the following grounds, namely:—

[(bb) that the defendant has been incurable of the unsound mind for a period of two years or upwards immediately preceding the filing of the suit or has been suffering continuously or intermittently from mental disorder of such kind and to such an extent that the plaintiff cannot reasonably be expected to live with the defendant.

Explanation.—In this clause,—

- (a) the expression “mental disorder” means mental illness, arrested or incomplete development of mind, psychopathic disorder or any other disorder or disability of mind and includes schizophrenia;
- (b) the expression “psychopathic disorder” means a persistent disorder of disability of mind (whether or not including subnormality of intelligence) which results in abnormally aggressive or seriously irresponsible conduct on the part of the defendant, and whether or not it requires or is susceptible to medical treatment;]

As discussed, under the Parsi law, unsoundness of mind of one of the parties does not invalidate a marriage and is recognized in law.

## **The Indian Christian Marriage Act, 1872**

The Christian matrimony laws do not talk about mental illness or unsoundness of mind at all. If a party is of unsound mind at the time of marriage, it does not render the marriage void. Section 45 & 46 of the Act provides for the procedure of consent.



### The Special Marriage Act, 1954

Under this Act, unsoundness of mind is a condition that renders the marriage invalid. It says that a marriage is void if at the time of the marriage, either party:

- (a) Is unable to give valid consent due to unsoundness of mind.
- (b) Are able to give valid consent, but are suffering from a mental disorder so severe that it renders them unfit for marriage or procreation.
- (c) Has been suffering recurring attacks of insanity.

### The Hindu Marriage Act, 1955

**Section 13. Divorce:** (1) Any marriage solemnized, whether before or after the commencement of this Act, may, on a petition presented by either the husband or the wife, be dissolved by a decree of divorce on the ground that the other party—

- (iii) has been incurably of unsound mind, or has been suffering continuously or intermittently from mental disorder of such a kind and to such an extent that the petitioner cannot reasonably be expected to live with the respondent.

*Explanation.*—In this clause,—

- (a) the expression mental disorder means mental illness, arrested or incomplete development of mind, psychopathic disorder or any other disorder or disability of mind and includes schizophrenia;
- (b) the expression psychopathic disorder means a persistent disorder or disability of mind (whether or not including subnormality of intelligence)



which results in abnormally aggressive or seriously irresponsible conduct on the part of the other party, and whether or not it requires or is susceptible to medical treatment; or]

A person may have suffered or is suffering from mental illness but to incapacitate her/him to marry is legislative incompetence, for such marriages mandatorily require counselling. The occurrence of post marriage problem may not validate a ground for separation/divorce as the suffering spouse is further made to undergo a mental trauma in the courts of law. A treatable medical symptom alike to any physical illness ought not become a reason for ostracization. There is a pressing need to revise the archaic laws which are proving to be detrimental to persons suffering from mental illness for it is violative of 'Right to Life', one of the most basic fundamental right [Article 21]. It is germane to highlight that 'Schizophrenia' is a specified mental illness among the grounds for divorce under section 13 of HMA 1955. Family Courts either deny this ground or do not acknowledge it for not being equipped to examine the veracity of this ground but, it is an indicator the allegation of 'Cruetly' which helps dissolve the marriage. In the 21<sup>st</sup> century, Mediation has become the most viable alternate dispute resolution mechanism and, it has helped solved large number of matrimonial disputes besides saving the parties to the disgrace of allegations and counter- allegations in public gaze.

### Case Laws (Supreme Court)

The Supreme Court held in **Narayan and Santhi (2001)** that to brand a wife as unfit for marriage and procreation

of children on account of a mental disorder, it needs to be established that the ailment suffered by her is of such a kind or to such an extent that it is impossible for her to lead a normal married life. The unfitness for marriage and procreation of children contemplated here is one arising from mental disorder only, and not on account of any other disorder. Infertility or sterility as such is not a ground for annulment of marriage under Section 12 or for divorce under Section 13. In this case, the respondent was at the time of marriage suffering from schizophrenia. Section 13 (1) (iii) “Schizophrenia is what schizophrenia does.” (**Gupta and Gupta 1988**). The Supreme Court in the case of **Padmalatha Vs. Chandrasekhar (2000)** ruled that the wife cannot be dumped on grounds of schizophrenia and considered that schizophrenia is a treatable, manageable disease, which can be put on a par with hypertension and diabetes.

Conclusively, there is an urgent need to address this problem by bringing suitable amendments in The Mental Health Care Act, 2017 which came into force from 29<sup>th</sup> May, 2018 for decriminalizing attempted suicide under section 309 of Indian Penal Code and delete sub section (c) of section 5(ii) of Hindu Marriage Act, 1955 to protect and actualize the constitutionally guaranteed right to life which includes right to live with dignity further encompassing ‘Right to Marry’.

*Kumud Lata Das is Advocate-on-Record,  
Supreme Court of India*



## References

1. The Hindu Marriage Act, 1955
2. Dissolution Of Muslim Marriages Act (1939)
3. The Parsi Marriage & Divorce Act, 1936
4. The Indian Christian Marriage Act, 1872
5. The Special Marriage Act, 1954
6. Indian Divorce Act (1869) (as amended in 2001)
7. Kollam Padmalatha Vs. Kollam Chandrasekhar (Supreme Court, 2000)
8. Narayan RL v. Santhi. 2001, 4 SCC 688
9. Sharada v. Dharmapaul. 2003, 4 SCC 493
10. Gupta R N v. Gupta R. 1988, 4 SCC 247

# MINORITY EDUCATIONAL INSTITUTIONS: CONSTITUTIONAL VISION AND JUDICIAL INTERPRETATION

*Anuradha Arputham*

## Constitutional Rights for Protection of Minorities

THE SENSE of protection felt by minority communities is a measure of the advancement of a country's civilization<sup>i</sup>. This essay critically analyses the judicial interpretation cast on Articles 29<sup>ii</sup> and 30<sup>iii</sup> of the Indian Constitution, which deal with the 'Cultural and Educational Rights' of minorities. Article 29(1) confers the right on minority communities to conserve their distinct language, script and culture<sup>iv</sup>. This was envisaged as a progressive right as distinguished from merely preserving the special traditions and characteristics of minorities<sup>v</sup>. Further, Article 30(1) confers on minorities the fundamental right to establish and administer educational institutions of their choice, which includes the freedom to teach religious subjects, impart secular education and educate in their own language.

The 'right to administer' under Article 30(1) has been interpreted by the Hon'ble Supreme Court to mean management of the affairs<sup>vi</sup> of the minority educational institution and its components *inter alia* the right to choose the teaching methodology, composition of the governing body<sup>vii</sup>, mechanism for selection of students, appointment of teaching faculty<sup>viii</sup>, service conditions of teaching and non-teaching staff<sup>ix</sup>, nomination of the head of the institution<sup>x</sup> and disciplinary powers<sup>xi</sup>.

The prerequisites for qualifying as a minority educational institution are that it should be established and administered by a minority community<sup>xii</sup>. The question whether a minority educational institution would lose such a status on being upgraded to a University by an Act of Parliament or State Legislature and determination as to basic features of a minority educational institution etc., has been recently considered by a 7 Judges Constitution Bench of the Hon'ble Supreme Court in the case of Aligarh Muslim University<sup>xiii</sup>.

## Test to determine 'Minorities'

The term 'minorities' has not been defined in the Indian Constitution and the Hon'ble Supreme Court expounded that a minority community is a non-dominant group which is numerically small in a particular State<sup>xiv</sup>. The numerical strength of minorities in the whole country was held to be the unit of assessment with respect to a central legislation<sup>xv</sup>. However, subsequently in the *T.M.A. Pai Foundation* case, the 11 Judges Constitution Bench held that the State shall be the unit for determining the



minority status of any community and there cannot be two different tests i.e. one regarding a Central legislation and another for any State legislations<sup>xvi</sup>.

### Admission of Students

The Hon'ble Supreme Court had for a long time shielded the right of minority educational institutions to select their students, provided the methodology for evaluation was rational and based on merit<sup>xvii</sup>. It was consistently held in a number of judgments that the State cannot appropriate to itself the right to select students for admission to a minority educational institution<sup>xviii</sup>.

The legislative intent in protecting the rights of minorities in selecting students from their community is also evident from Article 15(5)<sup>xix</sup>, which was inserted in the Indian Constitution by the 93<sup>rd</sup> Constitution Amendment. The minority educational institutions were specifically excluded from its ambit and this was affirmed by the Hon'ble Supreme Court in the case of *Ashoka Kumar Thakur*<sup>xx</sup>. Subsequently, in the *Pramati Educational & Cultural Trust* case, while dealing with the issue of the mandatory 25% admission quota for economically weaker sections of society, the same exclusion was reiterated, "with a view to protect the minority institutions from a law made by the majority"<sup>xxi</sup>.

The Hon'ble Supreme Court in the case of *St. Stephen's College v. University of Delhi*, held that minorities can admit students from its own community to an extent of 50% and leaving the remaining 50% for others<sup>xxii</sup>. It also upheld the unique procedure of interviewing students adopted by

St. Stephen's College, as opposed to granting admission only on the basis of class 12 marks, as stipulated by the Delhi University. However, recently, the Hon'ble Delhi High Court has taken a view that for selecting students in the general category, such interview cannot be held and admission has to be strictly on the basis of the centralized entrance examination conducted for admission to colleges affiliated to the Delhi University. The limited protection granted to St. Stephen's being a minority educational institution was that interviews could be conducted only for selecting the 50% Christian minority students<sup>xxiii</sup>. The challenge to the same is pending before the Hon'ble Supreme Court<sup>xxiv</sup>.

### Effect of State Aid on the Autonomy and Character of Minority Educational Institutions

Article 29(2) provides that if the educational institution receives aid from the State then students cannot be denied admission in such institutions on the grounds of religion, race, caste or language<sup>xxv</sup>. Minority educational institutions which receive State aid have to mandatorily comply with Article 29(2) while exercising their otherwise unfettered right to select students under Article 30(1). To this extent, there is an apparent conflict between Article 29(2) and Article 30(1)<sup>xxvi</sup>. In the case of *T.M.A. Pai Foundation*, the Hon'ble Supreme Court reconciled the two Articles in a more meaningful way by holding that giving preference to students from the minority communities as against those from other communities cannot be regarded as discrimination<sup>xxvii</sup>.



## Rights of Linguistic Minorities

Article 350A<sup>xxviii</sup> casts a mandatory duty on each State to facilitate primary education of children belonging to linguistic minority groups in their mother tongue. The Hon'ble Supreme Court had been zealously guarding the rights of the linguistic minorities to impart instruction to the children of their own community in their own institutions in their own language<sup>xxix</sup>. The university cannot prescribe a particular language as the medium of instruction as a condition for granting affiliation since it is contrary to their right to choose the medium of instruction<sup>xxx</sup>. Even a mandate for instruction in the national or official language in purported furtherance of national integration would be an abridgment of Article 30<sup>xxxi</sup>.

However, subsequently in the case of *Usha Mehta*, the Hon'ble Supreme Court upheld the validity of the 'three language rule' i.e. one national language, one regional language and one optional language which may be the mother tongue or a foreign language<sup>xxxii</sup>. This was aimed at their integration with the mainstream but has cast an additional burden on the linguistic minorities. Moreover, in the *English Medium Students Parents Assn.* case, an onus was cast on each State to promote its regional language<sup>xxxiii</sup> and thus, giving precedence to the official language of the State instead of the mother tongue, which has impaired the rights of linguistic minorities<sup>xxxiv</sup>.

## Analysis and Conclusion

While interpreting the scope of the right to administer under Article 30, the Hon'ble Supreme Court held that



standards of education are not part of management<sup>xxxv</sup> and propounded the doctrine that “*the right to administer does not include the right to maladminister*”<sup>xxxvi</sup>. The noble aim was to prevent malpractices and abuse by minority educational institutions, which would ultimately be detrimental to the interest of students. This paved way for restrictions to be imposed on the minority educational institutions for regulating their standards of education<sup>xxxvii</sup> and served as the guiding principle to balance the absolute rights of minorities.

Nevertheless, such a test has been applied for reading down the bare text of the Constitution and curtailing the constitutionally guaranteed autonomy conferred on minorities to establish and administer educational institutions ‘*of their choice*’, which ipso facto denotes the unqualified nature of the vast spectrum of the rights of minorities. The cultural and educational rights of minorities under Articles 29 and 30 are blanketed in liberal terms without any restrictions mandated by the Constitution<sup>xxxviii</sup> and therefore, are even broader than the freedoms provided in Articles 19 and 25 to 28 of the Indian Constitution, which are subject to reasonable restrictions stipulated in the Constitution itself<sup>xxxix</sup>.

In the *Ahmedabad St. Xavier's College Society* case, the Hon'ble Supreme Court safeguarded the rights of minorities and emphasized that “*Article 30(1) of the Constitution is a natural result of the feeling of insecurity entertained by the minorities which had to be dispelled*

by a guarantee which could not be reduced to a “teasing illusion”xl.

*Anuradha Arputham is Advocate On Record,  
Supreme Court of India*

- i Ahmedabad St. Xavier’s College Society v. State of Gujarat (1974) 1 SCC 717 [89]
- ii “Article 29: Protection of interests of minorities
  - (1) Any section of the citizens residing in the territory of India or any part thereof having a distinct language, script or culture of its own shall have the right to conserve the same.
  - (2) No citizen shall be denied admission into any educational institution maintained by the State or receiving aid out of State funds on grounds only of religion, race, caste, language or any of them.”
- iii “Article 30: Right of minorities to establish and administer educational institutions
  - (1) All minorities, whether based on religion or language, shall have the right to establish and administer educational institutions of their choice.
  - (1A) In making any law providing for the compulsory acquisition of any property of an educational institution established and administered by a minority, referred to in clause (1), the State shall ensure that the amount fixed by or determined under such law for the acquisition of such property is such as would not restrict or abrogate the right guaranteed under that clause.

- (2) The state shall not, in granting aid to educational institutions, discriminate against any educational institution on the ground that it is under the management of a minority, whether based on religion or language.”
- iv James Massey, *Minorities in a Democracy: The Indian Experience* (1st edn, Manohar 1999)
- v Bhrigu Nath Pandey, *Socio-Legal Study of Cultural and Educational Rights of the Minorities* (1st edn, APH Publishing Corporation 2000)
- vi State of Kerala v. Very Rev. Mother Provincial, (1970) 2 SCC 417 [9]; Dayanand Anglo Vedic (DAV) College Trust & Management Society v. State of Maharashtra, (2013) 4 SCC 14 [28]
- vii Gandhi Faiz-e-am-College v. University of Agra, (1975) 2 SCC 283 [42]; Modern School v. Union of India, (2004) 5 SCC 583[15]
- viii N. Ammad v. Emjay High School (1998) 6 SCC 674 [20]; Sindhi Education Society v. Govt. (NCT of Delhi), (2010) 8 SCC 49 [101]
- ix All Saints High School v. Govt. of A.P., (1980) 2 SCC 478 [98]; Frank Anthony Public School Employees’ Assn. v. Union of India, (1986) 4 SCC 707 [16]
- x Lily Kurian v. Lewina, (1979) 2 SCC 124 [25]; Board of Secondary Education and Teachers Training v. Jt. Director of Public Instructions, (1998) 8 SCC 555 [3]
- xi All Saints High School v. Govt. of A.P., (1980) 2 SCC 478 [14]
- xii Azeez Basha v. Union of India, (1968) 1 SCR 833
- xiii Judgement in the matter of Aligarh Muslim University v. Naresh Agarwal, Civil Appeal No. 2286 of 2006 has been reserved by the Hon’ble Supreme Court



- xiv T.M.A. Pai Foundation v. State of Karnataka, (2002) 8 SCC 481 [244]
- xv D.A.V. College v. State of Punjab, (1971) 2 SCC 269 [9]
- xvi Virendra Kumar, 'Minorities' Right to Run Educational Institutions: 'T.M.A. Pai Foundation in Perspective' (2003) 45 Journal of the Indian Law Institute
- xvii *Supra* note xiv [65]
- xviii Kolawana Gram Vikas Kendra v. State of Gujarat, (2010) 1 SCC 133 [7]
- xix "Article 15: Prohibition of discrimination on grounds of religion, race, caste, sex or place of birth  
(5) Nothing in this article or in sub-clause (g) of clause (1) of article 19 shall prevent the State from making any special provision, by law, for the advancement of any socially and educationally backward classes of citizens or for the Scheduled Castes or the Scheduled Tribes in so far as such special provisions relate to their admission to educational institutions including private educational institutions, whether aided or unaided by the State, other than the minority educational institutions referred to in clause (1) of article 30"
- xx Ashoka Kumar Thakur v. Union of India, (2008) 6 SCC 1 [611]
- xxi Pramati Educational & Cultural Trust v. Union of India, (2014) 8 SCC 1 [34]
- xxii St. Stephen's College v. University of Delhi, (1992) 1 SCC 558 [102]
- xxiii St. Stephen's College v. University of Delhi, 2022 SCC OnLine Del 2893; St. Stephen's College v. University of Delhi, 2023 SCC OnLine Del 4406

- xxiv University of Delhi v. St. Stephen's College, Special Leave Petition (Civil) No. 17344 of 2023 and University Grants Commission v. St. Stephen's College, Special Leave Petition (Civil) No. 17715 of 2023 pending before the Hon'ble Supreme Court <sup>xxv</sup> Kalyani Ramnath, 'We the People': Seamless Webs and Social Revolution in India's Constituent Assembly Debates' (2012) 32 South Asia Research
- xxvi M. P Raju, *Minority Rights: Myth Or Reality - A Critical Look At The 11-Judge Verdict* (1st edn, Media House 2002)
- xxvii *Supra* Note xiv [229]
- xxviii "Article 350A: Facilities for instruction in mother-tongue at primary stage. It shall be the endeavour of every State and of every local authority within the State to provide adequate facilities for instruction in the mother-tongue at the primary stage of education to children belonging to linguistic minority groups; and the President may issue such directions to any State as he considers necessary or proper for securing the provision of such facilities."
- xxix *Supra* note xxii [129]
- xxx *Supra* note xv [17]
- xxxi *Supra* note xiv [274]
- xxxii Usha Mehta v. State of Maharashtra, (2004) 6 SCC 264 [11], [13]
- xxxiii English Medium Students Parents Assn. v. State of Karnataka, (1994) 1 SCC 550 [20]
- xxxiv Hans Raj Khanna, *Making Of India's Constitution* (2nd edn, Eastern Book 2008)
- xxxv State of Kerala v. Very Rev. Mother Provincial (1970) 2 SCC 417 [10]; Ahmedabad St. Xavier's College Society v. State of Gujarat (1974) 1 SCC 717 [221]; St. Stephen's College v. University of Delhi (1992) 1 SCC 558 [129]



- <sup>xxxvi</sup> In Re: The Kerala Education Bill, 1957 (1959) 1 SCR 995; St. Stephen's College v. University of Delhi (1992) 1 SCC 558 [59]; T.M.A. Pai Foundation v. State of Karnataka (2002) 8 SCC 481 [136]; Islamic Academy of Education v. State of Karnataka (2003) 6 SCC 697 [121]; P.A. Inamdar v. State of Maharashtra (2005) 6 SCC 537 [91]
- <sup>xxxvii</sup> Ranu Jain, 'Minority Rights in Education: Reflections on Article 30 of the Indian Constitution' (2005) 40 Economic and Political Weekly
- <sup>xxxviii</sup> Manoj Kumar Sinha, 'Minority Rights: A Case Study of India' (2005) 12 International Journal on Minority and Group Rights
- <sup>xxxix</sup> P. R Gupta, *Soul of the Nation - Constitution of India* (1st edn, Educreation Publishing 2011)
- <sup>xl</sup> Ahmedabad St. Xavier's College Society v. State of Gujarat, (1974) 1 SCC 717 [229]

## REALIGNING PROSECUTORIAL DISCLOSURE DISCRETION: TO ENSURE FAIRNESS IN CRIMINAL JUSTICE SYSTEM

*Saurabh Kapoor and Shiva Satish Sharda*

INDIA HAS inherited its legal system from the British colonial regime, when the purpose of Criminal Law was punitive. Post-Independence, Constitution of India recognized the basic human rights and the Courts time and again stressed the need of preservation of rights of all the parties to crime in consonance with the rights guaranteed under Part-III of the Constitution<sup>1</sup>.

The colonial mindset continue to have impact on the law enforcement agencies including police to the extent that it is considered utmost important for them to find the person guilty of the crime and to secure conviction instead of justice. Although, Prosecution including investigating agency being state<sup>2</sup> is bound to uphold the right to equality<sup>3</sup> and life and liberty<sup>4</sup> without any discrimination between accused and victim during investigation. Both



accused and victim have not only right to fair trial but also fair investigation<sup>5</sup>. Whereas it is usually seen that only inculpatory documents and evidence is disclosed to the accused<sup>6</sup> and presented to the court<sup>7</sup> as the discretion has been misinterpreted to withhold the exculpatory evidence collected during investigation. The judicial history on disclosure can be traced to the landmark judgment of *Braddy v. Maryland*<sup>8</sup>, wherein United States Supreme Court held that the government's withholding of evidence that is material to the determination of either guilt or punishment of a criminal defendant violates the defendant's constitutional right to due process.

The reliability of withheld exculpatory evidence in the criminal justice system has first been noticed by Supreme Court of India in *Nitya Dharmananda @ K. Lenin and another v. Shri Gopal Sheelum Reddy*<sup>9</sup> and it was held that the material beyond the police report can be considered by Trial Court, if it is of sterling quality and has been withheld by the Investigating agency<sup>10</sup>. But again court failed to define what it means by "sterling quality" and the discretion is transferred to trial court.

In *Suo Moto*<sup>11</sup> W.P. (CRL) No. 1/2017, the guidelines has been issued by Supreme Court to afford the accused, the right to the unrelayed documents collected during the course of investigation. Accordingly, Supreme Court directed<sup>12</sup> High Courts for modification of the rules to curb the inadequacies and deficiencies in criminal trial. Thus, in the interests of fairness, all criminal trial courts should as a matter of rule ensure that the list of statements, documents, material objects and exhibits which are not

relied upon by the investigating officer be furnished to accused.<sup>13</sup> The Supreme Court in *P. Ponnusamy v. The State of Tamil Nadu*<sup>14</sup> liberally expanded the disclosure to conclude that the accused can avail the right of disclosure even at the appellate stage within the parameters of Section 391 Cr.P.C.

### Misuse of Discretion

The following examples demonstrate that investigating agency has misused its discretion to secure conviction by withholding evidence suggestive of innocence of accused persons:—

- a) The Non-production of Closed Circuit Television Footage, non-collection of call records details and sim details of mobile phones seized from the accused cannot be said to be mere instances of faulty investigation but amount to withholding of best evidence.<sup>15</sup>
- b) Prosecution did not place on record the exculpatory evidence<sup>16</sup> seized during investigation. Rather the investigating officer in her cross examination admitted that she did not receive any Forensic Science Laboratory report on the instructions of her senior police officer.<sup>17</sup> Further the pathology lab report of the vaginal swab of the deceased stating that spermatozoa not found was not produced as being against the prosecution case but favorable to the accused person.<sup>18</sup>
- c) During investigation in First Information Report (FIR) registered for forging a certificate of handicap,



a letter confirming that certificate of handicap is genuine and true by hospital has been withheld by the investigating officer at the time of presentation of final investigation report leading to false prosecution.<sup>19</sup>

Arrests have usually been made mere after the registration of FIR, on account of colonial mindset of the Investigating Agency<sup>20</sup> and sometimes after false criminal cases for personal enmity by complainant in connivance with police to humiliate and embarrass an individual.<sup>21</sup>

### Over-crowded Prisons

The prison data <sup>22</sup> for the years 2019 to 2021 tabulated as under suggests that the prisons in India are overly populated and at the end of 2021 the prison occupancy rate was 130.2%.

| Year | No. of Prisons | Actual Capacity of Prisons | No. of prisoners at the end of the year | Occupancy Rate at the end of the year |
|------|----------------|----------------------------|-----------------------------------------|---------------------------------------|
| 2019 | 1351           | 4,00,934                   | 4,81,387                                | 120.1%                                |
| 2020 | 1306           | 4,14,033                   | 4,88,511                                | 118.0%                                |
| 2021 | 1319           | 4,25,609                   | 5,54,034                                | 130.2%                                |

The United Nations office on Drugs and Crime, classified 120% overcrowding as critical and 150% as extreme. <sup>23</sup> At the end of 2021 (Figure 1), the prison occupancy in six state was extreme as being crossed 150% whereas in 13 States/UTs was critical. <sup>24</sup>

The United Nations Office on Drugs and Crime classifies 120% overcrowding as 'critical' and 150% as 'extreme'. At the end of 2021, the average occupancy rates in 13 states/UTs were critical. In six, it had crossed 150%. Averages, however, disguise the fact that in several prisons, overcrowding crosses 150%.

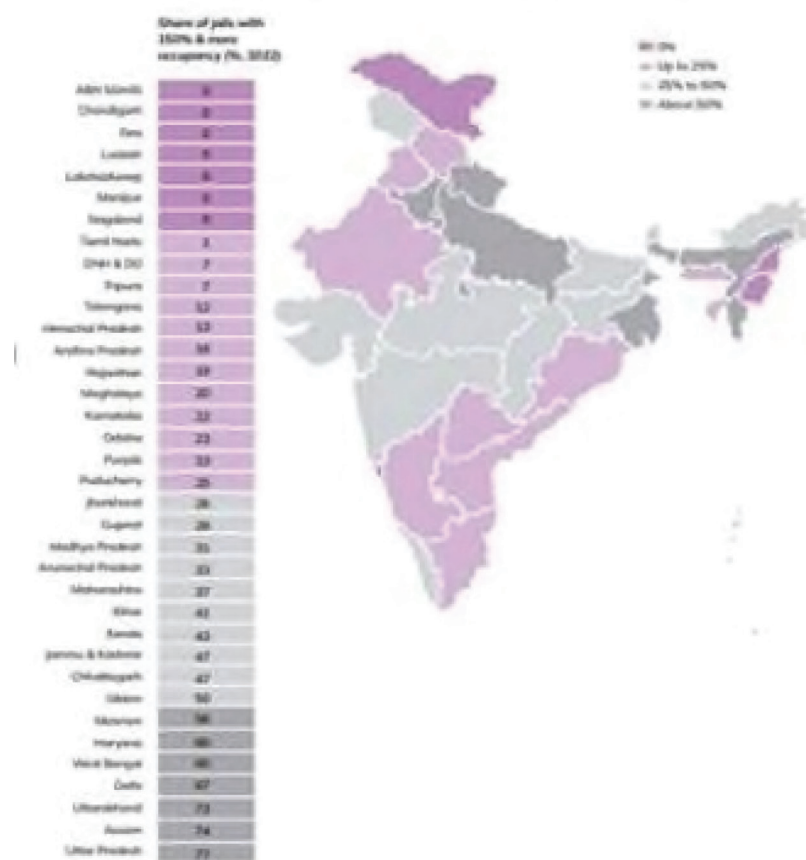


Figure 1: Prison Population in India, 2021

To reduce the prison population, a National campaign aimed at reduction in the number of the under trial prisoners has been launched by National Legal Services Authority<sup>25</sup> with an objective to accelerate the existing functioning of the Under Trial Review Committees at district level bodies. It was reported that in the last five years, Under Trial Review Committees have recommended the release of over two lakh prisoners, resulting in the release of 91,703 prisoners across India.<sup>26</sup>



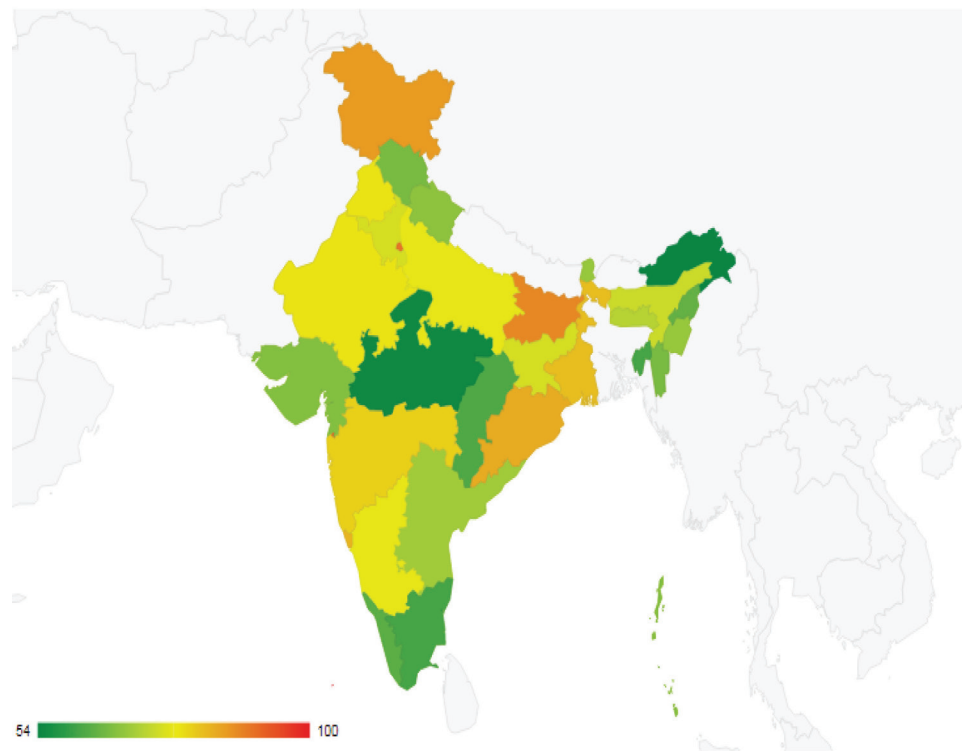


Figure 2: Prison Watch: At the end of 2022, India had 5,73,220 prisoners in its prisons.

### Disclosure Obligations of Prosecution in Other Jurisdiction

In United Kingdom (U.K.), the courts are always in favor of disclosure as in *Regina v Ward (Judith)*<sup>27</sup>, Court of Appeal held that the prosecution's forensic scientists are under a common law duty to disclose to the defence anything they may discover which may assist the defendant. Similarly, House of Lords in *Regina v. Preston (Stephen)*<sup>28</sup> held that it is the prosecution's general duty to disclose anything which arguably may assist the defence. Presently, the disclosure in U.K. is governed by statute<sup>29</sup>, which provides that the prosecutor must disclose to the

accused any prosecution material which has not previously been disclosed to the accused and might reasonably be considered capable of undermining the case for the prosecution or of assisting the case for the accused,<sup>30</sup> or give to the accused a written statement that there is no such material.<sup>31</sup>

The Canadian Supreme Court held in *William W. Stinchcomb v. Her Majesty The Queen*<sup>32</sup> that right to disclosure flows from section 7 of the Canadian Charter of Rights and Freedoms.<sup>33</sup> The Supreme Court<sup>34</sup> concluded that the Crown has a legal duty to disclose all relevant information to the defence. The fruits of the investigation which are in its possession are not the property of the Crown for use in securing a conviction but the property of the public to be used to ensure that justice is done.<sup>35</sup> The absolute withholding of information can only be justified on the basis of existence of a legal privilege and privilege is reviewable.<sup>36</sup>

### Conclusion

In India, the conviction rate is far less than the number of prosecution initiated against the accused.<sup>37</sup> It not only leads to the inference that an innocent person has been wrongfully prosecuted<sup>38</sup> but creates a distrust among people on the justice delivery system in serving the cause of justice.<sup>39</sup> Therefore, the disclosure by prosecution to the accused and court assumed significance to curb not only false prosecution but to tackle the pendency of the court. The newly enacted Criminal law has first time included community service<sup>40</sup> for reformation of the accused and



various measures has been included for fair investigation<sup>41</sup> and speedy trial<sup>42</sup> but fail to address the issue disclosure by the prosecution.

*Dr Saurabh Kapoor is a  
Ph D Scholar, Rajiv Gandhi  
National University of Law, Punjab;  
Advocate on Record,  
Supreme Court of India, New Delhi and  
Dr Shiva Satish Sharda is  
Assistant Professor, Rajiv Gandhi National  
University of Law, Punjab.*

### End Notes:

1. Fundamental Rights.
2. Article 12 of the Constitution of India.
3. Article 14 of the Constitution of India.
4. Article 21 of the Constitution of India.
5. Nirmal Singh Kahlon versus State of Punjab and Others, 2008 INSC 1211.
6. Section 207 The Code of Criminal Procedure, 1973.
7. Section 173 (5) The Code of Criminal Procedure, 1973.
8. 373 U.S. 83 (1963)
9. 2017 INSC 1201.
10. Ibid.
11. 2021 INSC 260.
12. Ibid.
13. Ibid.
14. 2022 INSC 1177.

15. Tomaso Bruno and another v. State of Uttar Pradesh, (2015) 7 SCC 178.
16. Munna Pandey vs. State of Bihar, 2023 INSC 793.
17. Ibid.
18. Ibid.
19. Kamal Chandra Tiwari v. The State of Maharashtra and Another, Criminal Writ Petition no. 1124 of 2018 Date of Decision: 28th June, 2023 by The High Court of Judicature at Bombay.
20. Satender Kumar Antil v. Central Bureau of Investigation and Another, 2022 INSC 690.
21. Third Report National Police Commission.
22. Prison Statics India Report 2021 published by National Crime Record Bureau, Ministry of Home Affairs, Government of India.
23. India Justice Report: Ranking States on Police, Judiciary, Prisons and Legal Aid (2022) available at <https://indiajusticereport.org> (accessed on 22.09.2023 at 17:22 IST).
24. Ibid.
25. Undertrial Review Committee Special Campaign 2023 Launch 18th September, 2023 Press Note.
26. Ibid.
27. [1993] 1 WLR 619
28. [1993] 3 W.L.R. 891
29. Criminal Procedure and Investigations Act, 1996
30. Section 3 (1) (a) of Criminal Procedure and Investigations Act, 1996
31. Section 3 (1) (b) of Criminal Procedure and Investigations Act, 1996
32. [1991] 3 SCR 326



33. Section 7. Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.
34. Supra 32.
35. Ibid.
36. Ibid.
37. Supra 20.
38. State of Gujarat v. Kishanbhai etc. 2014 INSC 14.
39. Ibid.
40. Section 4 (f) of Bharatiya Nyaya Sanhita, 2023.
41. Statement of Objects and Reasons, The Bharatiya Nagarik Suraksha Sanhita, 2023.
42. Ibid.

## FROM AUTONOMY TO EXPRESSION: NEED FOR A NUANCED APPROACH VIS-À-VIS PUBLICITY RIGHTS

*Varun Pathak and Intisar Aslam*

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PUBLICITY RIGHTS find their roots in protecting individuals from unauthorized commercial use of their identity that could potentially harm their reputation. However, this right must be enforced carefully without stifling creative expression. Media in the form of cartoons, satire, or parody, often and inherently possess a certain degree of exaggeration or distortion. Striking a balance, thus, becomes crucial to prevent any chilling effect on speech and expression. The hurdle lies in demarcating clear boundaries when the use of an individual's identity may transition from protected expression to intrusive commercial use.

While the Emblems and Names (Prevention of Improper Use) Act, 1950 [**Emblems Act**] protects



the unauthorized use of the names of certain national dignitaries and institutions for commercial purposes, without the government's permission, celebrity rights are yet unrecognized in India.<sup>i</sup> In 2009, the Supreme Court restricted Mont Blanc from selling limited edition pens bearing Mahatma Gandhi's picture. However, given that Mont Blanc gave an undertaking not to sell the pens anymore, no clear ruling was made by the Court in this regard.<sup>ii</sup>

Against this backdrop, this article attempts to explain the law vis-à-vis publicity rights as it stands in India today. It emphasizes adopting a nuanced approach by the courts, instead of a one-size-fits-all approach, while deciding cases on the interplay of publicity rights and freedom of speech and expression to prevent foregoing one over the other.

### Publicity Rights in India: A Saga of Consent and Commercialization

In the *Krishna Kishore Singh v. Sarla Saraogi* [**"Sushant Singh Rajput Case"**]<sup>iii</sup>, the Delhi High Court denied any relief to the plaintiff on the grounds that the impugned film was based on media that were available in the public domain. Moreover, it ruled that any publicity right or the right to privacy is personal to the individual which becomes non-existent upon his death. The court further observed that it was not necessary to obtain the consent of the plaintiff [herein the father of the actor] before making or publishing the film. Such observation might be problematic and necessitate a case-to-case nuanced approach for the courts to consider.



The same court in its 1995 decision in *Phoolan Devi v. Shekhar Kapoor*<sup>iv</sup>, granted an injunction against the release of the movie *Bandit Queen* based on the life of banditry in India. It placed its reliance on the apex court's decision in the *R. Rajagopal v. State of Tamil Nadu* [**"Auto Shankar Case"**] and ruled that the element of being a public figure is immaterial and that the right to privacy must protect the personal intimacies of the home, family, marriage, procreation, and child-rearing.<sup>v</sup> As for the fact that the right withered away with the demise, the court failed to note that in *Ramji Singh @ Mujeeb Bhai v. State of U.P. & Ors.*, the Allahabad High Court had held,

*"the word and expression 'person' in Art.21, would include a dead person in a limited sense and that his rights to his life which includes his right to live with human dignity, to have an extended meaning to treat his dead body with respect, which he would have deserved, had he been alive subject to his tradition, culture and the religion, which he professed"*<sup>vi</sup> [emphasis supplied].

Lastly, the right to privacy of an individual is an inherent right of every individual and does not become non-existent based on the profession or background of an individual. It has been held that the publication of private information of a celebrity without her consent would constitute a breach of the right to privacy.<sup>vii</sup>

For the purposes of this article, it is noteworthy to summarily mention a few principles that were laid down in the Sushant Singh Rajput case: (i) If a person's name or likeness is used, without his consent, for any purpose or his life story is written or published without his consent, the person's right to privacy is violated and in such case, the remedy is to sue for damages and not to seek an injunction even if the impugned publication was defamatory; (ii) The veracity of the impugned publication is not required to be verified provided it was earlier available in public domain. These principles set an unsettling precedent for future courts adjudicating upon such facts for several reasons.

*First*, while the court acknowledges the fact that any publication sans consent and for 'any' purpose is a violation of the right to privacy, it divests the aggrieved individual from restraining the offender from future infringement. In the *ICC Development (International) Ltd. v. Arvee Enterprises*<sup>viii</sup>, it was observed that "*the right of publicity has evolved from the right of privacy and can inhere only in an individual or in any indicia of an individual's personality...*" Further, the right to publicity permits only the individual alone, by whom such right is possessed, to derive profit from it. *Second*, while the court denies the remedy of seeking an injunction, the Delhi High Court in the *Amitabh Bachchan v. Rajat Nagi* granted an ad-interim ex-parte injunction in favor of Amitabh Bachchan, thereby restraining defendants from infringing his personality rights by misusing any indicia of his identity for any commercial or personal gain.



<sup>ix</sup> *Third*, the waiver of the requirement of ensuring the veracity of the facts published can have dire consequences through the reproduction and subsequent dissemination of inaccurate facts. This could further be used for swaying public opinion, advocating propaganda, or erosion of public trust, etc. Given the foregoing, this observation runs antithetical to the Supreme Court's concerns regarding the spread of false information on television and social media.<sup>x</sup> Given that twisting of facts is prevalent<sup>xi</sup>, any information previously published does not lead to an inference that it is necessarily true.

### Privacy and Expression: Independent or Interdependent?

Freedom of speech and expression forms the touchstone of a free democracy. Satire and parody are forms of expression which by their inherent nature can be offending to the concerned individual. However, in the US Constitution, the First Amendment safeguards parody as a mode of expression and this jurisdiction also recognizes the fair use principle to counter suits of copyright infringement.<sup>xii</sup> This is because any blanket restriction on such expression would lead to censorship of media in the garb of ensuring the privacy of an individual.

In *DM Entertainments v. Baby Gift House*<sup>xiii</sup>, Justice Bhat observed that it is the individual's autonomy, under whom the right of publicity vests, to decide whether their likeness or indicia of their personality can be commercially exploited. However, he laid down a rider noting that forms of expression such as caricature, lampooning, or

parody through various media should not automatically be considered as commercial exploitation.

*“In a free and democratic society, where every individual’s right to free speech is assured, the over emphasis on a famous person’s publicity rights can tend to chill the exercise of such invaluable democratic right. Thus, for instance, caricature, lampooning, parodies and the like, which may tend to highlight some aspects of the individual’s personality traits, may not constitute infringement of such individual’s right to publicity. If it were held otherwise, an entire genre of expression would be unavailable to the general public”<sup>xiv</sup> [emphasis supplied].*

Lately, the Delhi High Court referred to this decision and concluded that the use of player names, images, and statistics for commercial gain would be protected under Article 19(1)(a) of the Constitution.<sup>xv</sup> A plain interpretation of Article 19(1)(a) reflects that Indian citizens are entitled to exercise this right “*wherever they choose, regardless of geographical considerations*” subject to the operation of any existing law or any ground mentioned in Article 19(2).<sup>xvi</sup> It is well-settled that the focus should be on the direct impact on fundamental rights, and not on the direct subject matter of the law or action.<sup>xvii</sup> In the present scenario, only defamation can curtail the operation of freedom of speech and expression given that it is the only ground under Article 19(2) that relates to the personality or identity of an individual.



## Conclusion

Publicity rights are merely intellectual property rights arising from a statute. Further, the principle of fair use in copyrights allows the fair usage of any literary, dramatic, musical, or artistic work of any person.<sup>xviii</sup> While Justice Kaul, in his opinion in *K S Puttaswamy v. Union of India*<sup>xix</sup>, did emphasize an individual’s right to exercise control over one’s image and its commercial use without his consent, however, any blanket order by the judicial courts upholding absolute autonomy will lead to a restriction on the free and fair use of speech. Additionally, the fundamental right to freedom of speech and expression, in the present context, can be restricted only on grounds of defamation. It is up to the Supreme Court to adopt a nuanced perspective that emphasizes free speech and artistic expression allowing them to balance with the publicity rights. It is high time that the judiciary steers towards a trajectory that harmonizes both- creativity and privacy.

*Varun Pathak is AOR, Supreme Court of India and Partner, Shardul Amarchand Mangaldas & Co, Delhi, and Mr. Intisar Aslam is Third-Year B.A. LL.B. (Hons.) Student, National University of Study and Research in Law, Ranchi*

- <sup>i</sup> Emblems and Names (Prevention of Improper Use) Act, 1950, No. 12, Acts of Parliament, 1950 (India).
- <sup>ii</sup> Express News Service, *Supreme Court seeks Mont Blanc’s response on using Gandhi’s image*, THE INDIAN EXPRESS (Dec. 08, 2009,

02:23 AM), <https://indianexpress.com/article/cities/ahmedabad/supreme-court-seeks-mont-blanc-response-on-using-gandhis-image/>.

- iii 2023:DHC:4631.
- iv (1994) SCC OnLine Del 722.
- v 1994 INSC 455.
- vi (2009) SCC OnLine All 310, ¶17.
- vii (2012) SCC OnLine Mad 3263
- viii (2003) SCC OnLine Del 2.
- ix (2022) SCC OnLine Del 4110.
- x Legal Correspondent, *What mechanism do you have against fake news, Supreme Court asks Centre*, THE HINDU (Nov. 17, 2020, 10:15 PM), <https://www.thehindu.com/news/national/what-mechanism-do-you-have-against-fake-news-sc-asks-centre/article33119647.ece>.
- xi Markandey Katju, *Media and Issues of Responsibility*, THE HINDU (Oct. 21, 2011, 11:21 PM), <https://www.thehindu.com/opinion/lead/Media-and-issues-of-responsibility/article13059658.ece>.
- xii LEGAL INFORMATION INSTITUTE, <https://www.law.cornell.edu/wex/parody> (last visited Jan. 16, 2024).
- xiii (2010) SCC OnLine Del 4790.
- xiv *Id.* at ¶14.
- xv Digital Collectibles Pte Ltd. v. Galactus Funware, 2023:DHC:2796, ¶58.
- xvi Maneka Gandhi v. Union of India, 1978 INSC 16.
- xvii *Id.*
- xviii Muskaan Mandhyan, *What is the Fair Use of Copyrights?*, MONDAQ (Jul. 28, 2023), <https://www.mondaq.com/india/copyright/1348352/what-is-fair-use-of-copyright-doctrine>.

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## ARBITRATION

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# FAST TRACK ARBITRATION ANALYSIS OF SECTION 29 (B) OF THE ARBITRATION AND CONCILIATION (AMENDMENT) ACT 2015

*Sandeep Singh*

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THE ARBITRATION & Conciliation Act of 2015 primarily focuses on Fast Track Arbitration, an alternative dispute resolution mechanism. Emphasizing expediency and cost-effectiveness in commercial dispute resolution, fast-track arbitration provides a specialized approach for swift and efficient dispute resolution. Introduced by the Arbitration and Conciliation Amendment Act of 2015 in India, this concept, as outlined in Article 30 and Annexure V of the Rules by the International Chambers of Commerce, mandates proceedings to conclude within six months. Notably, oral proceedings are not allowed; instead, resolution is expected through written pleadings. In line with recommendations from the 14<sup>th</sup> Commission, India aimed to establish 1800 Fast Track Courts by 2020,



specifically handling heinous crimes and civil cases involving women, children, and senior citizens.

### Fast Track Procedure

“Section 29-B of the Arbitration and Conciliation Act, 1996 was inserted by way of Section 15 of the Arbitration and Conciliation (Amendment) Act, 2015. This section provides for a “fast track procedure” for conducting an arbitration with an agreement of parties to the arbitration.

1. [29B. Fast track procedure.-- (1) Notwithstanding anything contained in this Act, the parties to an arbitration agreement, may, at any stage either before or at the time of appointment of the arbitral tribunal, agree in writing to have their dispute resolved by fast track procedure specified in sub-section (3).
2. The parties to the arbitration agreement, while agreeing for resolution of dispute by fast track procedure, may agree that the arbitral tribunal shall consist of a sole arbitrator who shall be chosen by the parties.
3. The arbitral tribunal shall follow the following procedure while conducting arbitration proceedings under sub-section (1):—
  - (a) The arbitral tribunal shall decide the dispute on the basis of written pleadings, documents and submissions filed by the parties without any oral hearing;
  - (b) The arbitral tribunal shall have power to call for any further information or clarification from

the parties in addition to the pleadings and documents filed by them;

- (c) An oral hearing may be held only, if, all the parties make a request or if the arbitral tribunal considers it necessary to have oral hearing for clarifying certain issues;
  - (d) The arbitral tribunal may dispense with any technical formalities, if an oral hearing is held, and adopt such procedure as deemed appropriate for expeditious disposal of the case.
4. The award under this section shall be made within a period of six months from the date the arbitral tribunal enters upon the reference.
  5. If the award is not made within the period specified in sub-section (4), the provisions of sub-sections (3) to (9) of section 29A shall apply to the proceedings.
  6. The fees payable to the arbitrator and the manner of payment of the fees shall be such as may be agreed between the arbitrator and the parties.”<sup>1</sup>

### Understanding Fast-Track Arbitration

Fast-track arbitration operates on the principle of expediency. Specially designed courts ensure speedy trials, often conducting daily hearings with minimal delays. The primary goal is to address cases promptly while maintaining the integrity of the legal process.

### Key Features That Set Fast-Track Arbitration Apart

*Simplified Procedures:* Fast-track arbitration distinguishes itself through simplified and condensed procedural rules.



This streamlined approach minimizes delays and provides a clear and efficient path to resolution.

*Limited Discovery:* In contrast to traditional arbitration, fast-track proceedings limit the scope of discovery. This targeted approach focuses on essential evidence directly relevant to the dispute, ensuring a quicker process without sacrificing thoroughness.

*Expedited Timelines:* Time is of the essence in fast-track arbitration. Strict schedules are adhered to by all involved parties, ensuring a significantly shorter resolution timeframe compared to standard proceedings.

*Single Arbitrator:* While traditional arbitration often involves a panel of arbitrators, fast-track arbitration typically opts for a single arbitrator. This not only reduces administrative burdens but also contributes to a more efficient decision-making process.

### **Benefits of Fast-Track Arbitration**

*Reduce Backlog:* Fast-track arbitration plays a crucial role in reducing the backlog of pending cases, providing relief to an overwhelmed judicial system.

*Improve Judicial System Efficiency:* By emphasizing efficiency, fast-track arbitration contributes to an overall improvement in the effectiveness of the judicial system.

*Speedy Justice for Victims:* Victims and their families find solace in the swift justice delivered through the fast-track arbitration process.

*Cost-Effectiveness:* In a world where traditional litigation can be financially burdensome, fast-track



arbitration offers a cost-effective alternative, allowing parties to save on legal expenses.

*Time Savings:* Businesses operating in a fast-paced environment benefit from the expedited timelines, preventing prolonged disputes that could impact operations.

*Expert Decision-Making:* Fast-track arbitrators are selected for their expertise in the specific area of law relevant to the dispute, ensuring well-informed and precise decisions.

### **Conclusion**

In conclusion, the enactment of fast-track arbitration stands as a compelling solution for parties seeking a prompt and cost-effective resolution to their disputes. As businesses navigate a rapidly changing landscape, the demand for efficient dispute resolution mechanisms is likely to grow. Fast-track arbitration not only addresses the urgency of resolving disputes but also offers a cost-effective alternative, making it an essential consideration for parties seeking expedited procedures. As we embrace this dynamic approach to arbitration, the legal landscape continues to evolve towards a future where swift justice is not just a necessity but a reality.

*Dr Sandeep Singh is an Advocate & Mediator*

<sup>1</sup> The Arbitration and Conciliation Act, 1996, S 29(B).

# NAVIGATING THE COMPLEXITIES OF BINDING NON-SIGNATORIES TO ARBITRATION AGREEMENTS BIRD'S EYE VIEW ON COX & KINGS JUDGMENT

*Anu B and Vanshika Mudgal*

JAMES JOYCE'S *Ulysses*, a century-old masterpiece, employs innovative narrative techniques, praised by some like Nabokov and Elliot, yet criticized by others like Woolf and Huxley. Similarly, the group of companies doctrine in arbitration law faces mixed opinions but endures as a modern challenge to tradition.

Arbitration in India witnessed a paradigm shift with key developments revolving around the Group of Companies Doctrine, pivotal cases, and legislative amendments. The journey began with the landmark Dow Chemical case, where the International Court of Arbitration emphasized that a non-signatory could benefit from an arbitration

clause if actively involved in the contract. Subsequently, India embraced this doctrine in Chloro Controls<sup>1</sup>, setting a threefold test for exceptional cases.

This doctrine was called into question purportedly on the ground that it interferes with the established legal principles such as party autonomy, privity of contract, and separate legal personality.

## Issues

The key questions addressed by the Constitution Bench included:

1. Whether the Arbitration Act permits the inclusion of a non-signatory as a party to an arbitration agreement;
2. If section 7 of the Act allows the determination of an intention to arbitrate based on the parties' conduct; and
3. The validity and applicability of the group of companies doctrine in Indian arbitration law, and the specific circumstances and conditions under which it is deemed valid.

## Observations and their Rationals

### 1. Foreign Perspectives

*French, Swiss, and English Approaches* : An extension of the Group of Companies doctrine is favoured over a deviation from the Chloro Controls<sup>2</sup> approach while examining English law. But an intriguing aspect is added by the Court's examination of Dallah Real Estate<sup>3</sup>, which highlights the significance of the "common intention of the parties derived from objective evidence."



The Court emphasizes the need of assuming the subjective intention of each party during the underlying contract's negotiation, performance, and termination, drawing on French jurisprudence in doing so. Objective behaviour should convey this subjective component, which shows the non-signatory's willingness to be bound.

According to the Swiss approach, this is in line with the idea that the subjective willingness should be expressed by contract performance or negotiation. This prepares the groundwork for a careful analysis of how signatory and non-signatory parties behaved at different points throughout the contractual arrangement.

### *2. Consent- Heart of Arbitration*

The modern and pragmatic approach to consent is seen as essential, recognizing complex relationships in multiparty, multi-contract scenarios. While respecting the sanctity of written agreements, courts should not narrowly interpret them to exclude non-signatories if their conduct and relationship with signatories suggest an intention to be bound. The group of companies doctrine is presented as a tool to analyse factual circumstances surrounding contractual arrangements and ascertain the parties' intentions in arbitration agreements within the evolving landscape of multinational business structures.

### *3. Non-Signatories- Parties to Arbitration Agreement*

Non-signatories may also be bound based on consent expressed through means other than signature as implied contracts by conduct have judicial recognition<sup>4</sup>, actions can

imply contractual obligations which extends to arbitration agreement. The UNCITRAL Model Law, upon which the Arbitration Act is based, provides a modern perspective, recognizing agreements in any form.

### *4. Group of Companies Doctrine*

The principle of separate legal personality is fundamental in corporate law<sup>5</sup>. This principle extends to corporate groups, where a parent company and its subsidiaries are considered separate legal entities. The Companies Act, 2013, acknowledges subsidiaries as distinct entities, reinforcing their separate legal identity. In the cases where the holding company dominates a subsidiary to the extent of misuse, the doctrine of "alter ego" or piercing the corporate veil may be applied.<sup>6</sup> *Balwant Rai Saluja v. Air India*<sup>7</sup> emphasized a restrictive application, limiting it to scenarios where the subsidiary was created as a mere camouflage to avoid liability.

Common shareholders or directors alone do not justify treating companies as a single economic entity. The single economic entity theory requires concerted efforts and a common endeavour among companies to be considered a single economic entity.<sup>8</sup> A modern approach, as suggested by *A Ayyasamy v. A Paramasivam*<sup>9</sup> involves imparting adopting a common-sense approach. The group of companies doctrine is applied to analyse factual circumstances surrounding contractual arrangements when a corporate entity, though not a signatory, is actively involved. This approach ensures a balanced and pragmatic framework consistent with international practices.



Multinational groups, with intricate corporate structures, involve non-signatories in transactions. The group of companies doctrine addresses challenges, allowing or compelling the inclusion of non-signatories in arbitration agreements, emphasizing shared intent and scrutinizing corporate connections among separate entities.

Courts reject simple group membership and need evidence of a corporate group's existence and mutually intended behaviour. The Dow Chemicals<sup>10</sup> ICC Tribunal strengthens consent evaluation by highlighting the group intent for non-signatories. Cheran Properties<sup>11</sup> explains the difference between alter ego and the group of firms' doctrine.

### 5. *Mutual intention*

Courts assess the corporate structure in multi-party agreements to determine group membership. Adhering to company law principles, the evaluation establishes the group's existence and mutual intent, guided by Chloro Controls<sup>12</sup>. The group of companies doctrine ensures accountability, requiring a legal relationship and the non-signatory's involvement in contract aspects. The court or tribunal has flexibility in weighing factors for doctrine applicability, aligning with the Arbitration Act's objectives for a modern and responsive Indian arbitration law.

### 6. *Party and Persons "Claiming through or under" are Different*

The term "claiming through or under" is absent in Section 2(1) (h) and Section 7, rooted in party autonomy. Sections

35 and 73 use "parties and persons claiming under them," indicating both are bound by the award or settlement. The judgment in Chloro Controls (supra)<sup>13</sup> highlighted three points:

Firstly, the use of "any person" in Section 45 expands beyond signatory parties, emphasizing derivative capacity.

Secondly, a signatory may have a legal relationship with a party "claiming through or under" based on the group of companies doctrine and;

Thirdly, in a multi-party contract, a subsidiary with a basic interest from the parent contract falls under "claiming through or under."

However, the interpretation of "any person" must consider its context, and consent is crucial in arbitration agreements. Legal or commercial connections alone don't suffice for a non-signatory to claim through or under. Therefore, the doctrine, as seen in Chloro Controls (supra), is wrongly linked it to "claiming through or under."

## Conclusion

The Cox and Kings<sup>14</sup> verdict marks a transformative moment in Indian arbitration, aligning it with global standards and reinforcing India's commitment to arbitration friendliness. Affirming the group of companies doctrine's validity, the decision provides clarity, guides stakeholders, and enhances India's arbitration practices. The judgment encourages explicit contractual language, fostering a secure arbitration environment and contributing to India's arbitration evolution.



- <sup>1</sup> *Chloro Controls India (P) Ltd. v. Severn Trent Water Purification Inc. (2013) 1 SCC 641*
- <sup>2</sup> *Chloro Controls India (P) Ltd. v. Severn Trent Water Purification Inc. (2013) 1 SCC 641*
- <sup>3</sup> *Dallah Estate and Tourism Holding Company v The Ministry of Religious Affairs, Government of Pakistan [2010] UKSC 46 (Dallah)*
- <sup>4</sup> *Haji Mohammed Ishaq v. Mohamad Iqbal, (1978) 2 SCR (3) 571*
- <sup>5</sup> *Salomon v A Salomon & Co Ltd [1896] UKHL 1, [1897] AC 22*
- <sup>6</sup> *LIC v. Escorts Ltd., 1985 SCR SUPL. (3) 909*
- <sup>7</sup> *Balwant Rai Saluja v. Air India, (2014) 9 SCC 407*
- <sup>8</sup> *D H N Food Distributors Ltd. v. Tower Hamlets London Borough Council, [1976] 1 WLR 852 (2)*
- <sup>9</sup> *A Ayyasamy v. A Paramasivam, (2016) 10 SCC 386*
- <sup>10</sup> *Dow Chemical Co. v. United States, 476 U.S. 227 (more) 106 S. Ct. 1819; 90 L. Ed. 2d 226*
- <sup>11</sup> *Cheran Properties Ltd v. Kasturi and Sons Ltd 2 (2018) 16 SCC 413.*
- <sup>12</sup> *Chloro Controls India (P) Ltd. v. Severn Trent Water Purification Inc., (2013) 1 SCC 641*
- <sup>13</sup> *Chloro Controls India (P) Ltd. v. Severn Trent Water Purification Inc., (2013) 1 SCC 641*
- <sup>14</sup> *Cox and Kings Ltd v. SAP India Pvt Ltd. (2022) 8 SCC 1*

*Anu B is AOR,  
Supreme Court of India &  
Vanshika Mudgal is Student,  
Semester VIII, The NorthCap University*

## STAMP DUTY AND ARBITRAL PROCEEDINGS BUILDING JURISPRUDENCE FOR INTERIM RELIEFS

*Henna George*

Every Legal System has its own fallouts. The Indian legal system is one amongst them and has a history of long and derailed litigation, especially in civil, commercial and insolvency matters. It is difficult for any legislation to have a foolproof mechanism to shorten the life of litigation. The provisions of interim reliefs both under the Code of Civil Procedure, 1908 (CPC, 1908) and also under the Arbitration and Conciliation Act, 1996 (ACA, 1996) have been brought in as those short and crisp mechanisms which not only help in delivering, though temporary but effective justice so as to assure the litigant that final justice shall also follow. Essentially, complex commercial litigation often requires preservation of the substratum of dispute, which is why getting protective



interim orders has always been an uphill task. Both, CPC, 1908 and ACA, 1996 stipulate specific provisions with guidelines formed by the judicial precedents for issuance of interim reliefs. But, many times, interim reliefs cannot be granted since they are subject to various other laws, such as payment of Stamp Duty on the agreement in question as per the Indian Stamp Act, 1899 (ISA, 1899). The purposes of these legislations are different and therefore, the consequences would also differ.

### 1. Aim behind Enactment of ISA, 1899

ISA, 1899 is a fiscal legislation which aims to provide revenue to the State. As per ISA 1899, any agreement which forms the basis of a dispute between the parties and is involved in litigation has to be necessarily stamped. But, it has to be borne in mind that the provisions of ISA, 1899 cannot be used as a weapon by a litigant to beat the cause of the opponent<sup>1</sup>.

### 2. Aim behind Enactment of ACA, 1996

The ACA, 1996, is an alternate mechanism for dispute resolution that avoids court proceedings to a larger extent and provides a timely and efficacious remedy. As every cloud has a silver lining, the ACA, 1996, in the past many years, has not only evolved as an effective remedy to settle commercial disputes, in particular, but it has also developed the legal science of issuance of interim orders, both under the CPC, 1908 and ACA, 1996 as an effective remedy.



### 3. Interface Between the ISA, 1899 and ACA, 1996:

#### Whether an Unstamped Arbitration Agreement Causes Hindrance in Claiming Interim Reliefs?

The intersection between ISA, 1899 and ACA, 1996 is quite interesting. But, disputes occur when the litigant wants an interim relief or wants to trigger arbitration, based on an unstamped Arbitration Agreement, which no doubt is an agreement, but being unstamped, has its own consequences. In such a scenario, grant of interim reliefs becomes questionable though the same may be extremely urgent and required immediately. After various conflicting judgments, the Supreme Court has finally cleared the air<sup>2</sup>.

#### 3.1 Earlier Judicial Trends

The Supreme Court analysed the provisions of ISA, 1899 and ACA, 1996 in the case of *SMS Tea Estates (P) Ltd.*<sup>3</sup> and held that parties cannot proceed under ACA, 1996 on the basis of an unstamped document. Two pertinent questions of law were posed before the Full Bench of Bombay High Court in *Gautam Landscapes Private Ltd.*<sup>4</sup> i.e. as to whether, in case of an unstamped or deficiently stamped arbitration agreement (i) interim relief can be granted under ACA, 1996 and (ii) whether final orders can be passed for appointment of Arbitrator pending adjudication of quantum of stamp duty. It was observed that different consequences fall from Sections 9 and 11 of ACA, 1996. Section 9, ACA, 1996 can be invoked for interim relief which is required to safeguard the substratum of the proceedings as well as the interests of the parties and it is not a substantive final relief which

can be achieved only under an arbitral award. It was also noted that for approaching a Court under Section 9, ACA, 1996, the party is only required to prove the existence of an arbitration agreement to which it is a party as the right to invoke Section 9 does not stem from the main contract. While applying the principle of severability, the Court held that the arbitration agreement needs to be detached from the principal agreement and has to be given effect to, independently. The Court held that ISA, 1899 is a fiscal legislation which aims to provide revenue to the State and after admitting a document, the same cannot be challenged subsequently at any stage. Pertinently, it was held that non-payment of stamp duty is a curable defect which can be rectified at any stage prior to admission under evidence. The Court while analysing the consequences of not granting interim relief during pending adjudication of stamp duty, which can be drastic and gravely prejudicial to the interests of the parties, concluded that even if a document does not bear any stamp duty or bears inadequate stamp duty, the Court is not precluded from passing protective interim orders. It took a similar view on the second issue also i.e. appointment of arbitrator under Section 11, ACA, 1996. Subsequently, the Supreme Court, in *Garware Wall Ropes Ltd.*<sup>5</sup>, dealt with the applicability of ISA, 1899 on Section 11 (6) of ACA, 1996. The Court took a contrary view to what was taken by Bombay High Court in *Gautam Landscapes (P.) Ltd.* While placing reliance on *SMS Tea Estates (P) Ltd.* case, it was held that if an agreement is not legally valid, then the arbitration clause present in it, also cannot be legally valid. But, interestingly, the



Court did not interfere with the Bombay High Court conclusion on the aspect of grant of interim reliefs on the basis of unstamped or inadequately stamped arbitration agreement. *Dharmaratnakara Rai Bahadur*<sup>6</sup> was another case where *SMS Tea Estates*

(P) Ltd. was followed. Review against the said Judgment also stood dismissed<sup>7</sup>. The law laid down in *Garware Wall Ropes Ltd.* was affirmed in the case of *Vidya Drolia*.<sup>8</sup> Subsequently, the SLP<sup>9</sup> against the Bombay High Court Full Bench Judgment in *Gautam Landscapes Private Ltd.* was dismissed as not pressed so the same is good law as on date and continues to hold the field with respect to the controversy between Section 9, ACA, 1996 and ISA, 1899. However, the 3 Judges' Bench of the Supreme Court took a contrary view in the case of *N N Global*<sup>10</sup> from its decision in *SMS Tea Estates (P) Ltd.* as well as *Garware Wall Ropes Ltd.* and upheld the validity of an arbitration clause even if the main contract is not stamped. While noting that contrary views have been taken by the Supreme Court on this aspect in the cases of *Garware Wall Ropes Ltd.* and *Vidya Drolia*, it found appropriate that the matter be referred to a Constitution Bench. When the issue was pending consideration before the 5 Judges' Bench, curative petition was filed in the case of *Dharmaratnakara Rai Bahadur* wherein notice was issued<sup>11</sup>. The decision in *Garware Wall Ropes* was however, upheld by the Five Judges' Constitution Bench in *N N Global*<sup>12</sup> case but the Supreme Court clearly held that it had not pronounced the judgement with reference to Section 9 of ACA, 1996. Thus, there was no bar in

passing interim orders. It would be relevant to point out that *Gautam Landscapes Private Ltd.* case, has also been followed by Bombay High Court<sup>13</sup>. However, in civil suits, Delhi High Court<sup>14</sup> has been granting interim reliefs, despite unstamped or insufficiently stamped documents.

### 3.2 The Controversy Resolved

The recent pronouncement by the 7 Judges' Bench of the Supreme Court finally removed the dust. It has declared that non-payment of stamp duty is a curable defect and improper or non-stamping does not make an instrument invalid/void. The Court has further clarified that such issues fall within the domain of the Arbitrator. Pertinently, it has also now been settled that the Courts are not required to deal with the issue of stamping at the stage of granting interim measures under Section 9, ACA, 1996. Since Section 17 of ACA, 1996 is akin to Section 9 of ACA, 1996, it can be concluded that the issue of insufficient stamping or non-stamping cannot be raised at the stage of Section 17, ACA, 1996 when urgent interim relief is sought. The Supreme Court has also held that the validity of the arbitration agreement can be adjudicated by the Arbitral Tribunal on the basis of evidence.

### Conclusion

It has to be borne in mind that at times, interim relief is urgently warranted to protect the substratum of the arbitral proceedings which can be lost if the proceedings are unduly

dragged. In such view of the matter, the 7 Judges' verdict is a pathbreaking judgment which has resolved critical issues which were restraining the courts from granting interim orders and proceeding with arbitration due to the interface between the crucial enactments being ACA, 1996 and ISA, 1899.

Henna George

*hennageorgeadv@gmail.com*

Mobile No. : 9810710951

- <sup>1</sup> *Hindustan Steel Ltd. v. Messrs Dilip Construction Company* (1969) 1 SCC 597
- <sup>2</sup> *In Re: Interplay between Arbitration Agreements under the Arbitration and Conciliation Act, 1996 and The Indian Stamp Act, 1899* (7 Judges') 2023 SCC OnLine SC 1666.
- <sup>3</sup> *SMS Tea Estates (P) Ltd. v. Chandmari Tea Co. (P) Ltd.*, (2011) 14 SCC 66.
- <sup>4</sup> *Gautam Landscapes Private Ltd. v. Shailesh S. Shah*, 2019 SCC OnLine Bom 563.
- <sup>5</sup> *Garware Wall Ropes Ltd. v. Coastal Marine Constructions and Engineering Ltd.* (2019) 9 SCC 209.
- <sup>6</sup> *Dharmaratnakara Rai Bahadur Arcot Narainswamy Mudaliar Chattram v. Bhaskar Raju and Brothers*, (2020) 4 SCC 612
- <sup>7</sup> Order dated 20.07.2021 in Review Petition (Civil) No. 704/2021 in CA No. 1599/2020
- <sup>8</sup> *Vidya Drolia & Ors. v. Durga Trading Corporation*, (2021) 2 SCC 1
- <sup>9</sup> Order dated 21.02.2022 passed by Hon'ble Supreme Court in SLP (C) No. 10232-10233/2019.



- <sup>10</sup> *NN Global Mercantile (P) Ltd. v. Indo Unique Flame Ltd. (2021) 4 SCC 379*
- <sup>11</sup> Order dated 18.07.2023 passed by Supreme Court in Curative Petition (Civil) No 44 of 2023 in Review Petition (Civil) No 704 of 2021 in Civil Appeal No 1599 of 2020
- <sup>12</sup> *NN Global Mercantile (P) Ltd. v. Indo Unique Flame Ltd. & Ors. (2023) 7 SCC 1.*
- <sup>13</sup> *Ranjit Vardichand Jain v. Nirmal Gagubhai Chhadwa & Ors. 2023 SCC OnLine Bom 1095.*
- <sup>14</sup> *Mittal Electronics v. Sujata Home Appliances (P) Ltd. & Ors. (2020) SCC OnLine Del 2658.*

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## LAWS OF COMMERCE

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# LEGAL INFIRMITIES ARISING OUT OF IMPLEMENTATION OF ARTICLE 224(5) OF THE COMPANIES ACT, 2013

*Charu Sangwan*

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CHAPTER XIV of the Companies Act, 2013 (hereinafter “**the Act**”), provides for “*inspection, inquiry and investigation*” whereunder the power to conduct an inspection has been provided to a Registrar<sup>1</sup> so also an inspector appointed by the Central Government.<sup>2</sup> Upon concluding its inspection the inspector or Registrar, as the case may be, must submit its report to the Central Government, with a further recommendation for investigation if deemed necessary.<sup>3</sup> Where the report filed under § 208 of the Act provides a recommendation for investigation, the Central Government may order an investigation and appoint an inspector for investigation.<sup>4</sup> Upon concluding the investigation, the inspector must submit its report to the Central Government and the said report is termed an “*inspector’s report*”.<sup>5</sup> § 224(5) of the Act,



provides that where “*a report prepared by an inspector*” states that “*fraud has taken place in a company*” and due to such fraud any officer-in-charge of the company or “*any other entity*”, has taken undue benefit, in any form, the Central Government may seek an order for disgorgement from the Tribunal and for holding such officer-in-charge or entity liable personally. It is pertinent to note that both under § 206 and 210 of the Act, i.e., the provisions for conducting inspection and investigation respectively, the expression used to refer to the entity conducting the inspection and investigation respectively, is “*inspector*”. Further, the expression “*inspector’s report*” has been used only w.r.t. a report prepared upon an investigation and not an inspection, since § 223(1) of the Act, uses the expression “*interim report*” conjunctively with the expression “*and on the conclusion of the investigation*”. The scheme of inspection, inquiry and investigation and action for disgorgement in pursuance thereof as provided under Chapter XIV of the Act, is fundamentally antithetical both to the Act and the Constitution of India, 1950 (hereinafter “**the Constitution**”).

### Analysis

**§ 224(5) OF THE ACT CIRCUMVENTS § 435 READ WITH § 436 OF THE ACT AND PROVIDES PUNISHMENT FOR FRAUD IN SPITE OF ACQUITTAL IN TRIAL FOR FRAUD**

That “*fraud*”, the finding whereof forms the basis for action under § 224(5) of the Act has been made an offence under § 447 of the Act. § 436 of the Act provides that offences under the Act, shall be triable only by the Special

Courts established under § 435 of the Act. Therefore, the function of determination of guilt of an offence under the Act, which inter-alia includes the offence of fraud, has been specifically assigned to the Special Court, yet in complete derogation of § 435 read with § 436 of the Act, § 224(5) of the Act, assigns the function explicitly assigned to the Special Court, to the inspector appointed by the Central Government. It is pertinent to note, that even though a person accused of offence under § 447 triable by the Special Court, may be acquitted by the Special Court, the order for disgorgement would still be passed against such person because the only consideration for the Tribunal while deciding an application under § 224(5) of the Act, is whether the report prepared by the inspector states that a fraud has taken place in a company. Further, the Securities Appellate Tribunal in a matter pertaining to disgorgement under the Securities and Exchange Board of India Act, 1992 has held that no order for disgorgement can be passed in the absence of a finding of guilt.<sup>6</sup>

**§ 224(5) OF THE ACT VIOLATES ARTICLE 14 OF THE CONSTITUTION BY VIOLATING RULE OF LAW**

§ 224(5) of the Act usurps the judicial function of the Special Courts by allowing the inspector appointed by the Central Government, i.e., a limb of the ‘Executive’, to give a finding of fraud in spite of such function being explicitly assigned to the Special Courts. The judicial function cannot be exercised by the Executive unless there is a legislative enactment to that effect.<sup>7</sup> It is trite law that separation of powers is an essential element of rule of law.<sup>8</sup> A violation



of rule of law, would amount to a violation of equality before law and hence, be a violation of Article 14 of the Constitution.<sup>9</sup>

#### § 224(5) OF THE ACT ALLOWS UNEQUAL TREATMENT OF PERSONS ACCUSED OF FRAUD UNDER A REPORT PREPARED BY AN INSPECTOR AND PERSONS ACCUSED OF FRAUD IN GENERAL

Due to the scheme of Chapter XIV of the Act, a person accused of fraud in a report prepared by an inspector is liable for action under 224(5) of the Act and resultantly vulnerable to all the legal infirmities as highlighted in the foregoing paragraphs, however, a person accused of fraud in general or in any other case except as that in a report prepared by an inspector, would not have to suffer the legal infirmities as highlighted in the foregoing paragraphs. Therefore, there is no intelligible differentia between a person accused of fraud in a report prepared by an inspector and a person accused of fraud in general or in any other case except as that in a report prepared by an inspector.

#### Conclusion

In the absence of literature on § 224(5) of the Act, much is left to the discretion of the Tribunal and Courts in so far as the scope of § 224(5) of the Act is concerned. It is possible that the Tribunals may undertake adjudication of allegations of “*fraud*” in a proceeding under § 224(5) of the Act. However, such exercise of power by the Tribunal and its source as on date are unclear. It is also unclear



what would be the effect of an acquittal by the Special Court for charges under § 447 of the Act on proceedings that stand concluded under § 224(5) of the Act. However, based on a purely literal reading of the provisions of the Act, the aforesaid issues need render § 224(5) of the Act amenable to challenge.

Charu Sangwan

*(BA.LLB, LLM - University College London) is  
Advocate-on-Record, Supreme Court of India and  
former Assistant Advocate General, State of Haryana*

<sup>1</sup> Companies Act, 2013, § 206

<sup>2</sup> Companies Act, 2013, § 206(5)

<sup>3</sup> Companies Act, 2013, § 208

<sup>4</sup> Companies Act, 2013, § 210

<sup>5</sup> Companies Act, 2013, § 223

<sup>6</sup> Karvy Stock Broking Ltd. v. Securities and Exchange Board of India [2008] SCC OnLine SAT 74 [7]

<sup>7</sup> Indira Nehru Gandhi v. Raj Narain 1975 Supp SCC 1 [321] [322] [521]

<sup>8</sup> State of T.N. v. State of Kerala [2014] 12 SCC 696 [98]

<sup>9</sup> I.R. Coelho v. State of T.N., (2007) 2 SCC 1 [129] [130]

# INTERPLAY OF SECURITIZATION AND RECONSTRUCTION OF FINANCIAL ASSETS AND ENFORCEMENT OF SECURITY INTEREST ACT, 2002 AND THE INSOLVENCY AND BANKRUPTCY CODE 2016

**Purti Gupta**

THE SECURITIZATION and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (**SARFAESI**) was brought into force with (i) the primary goal of enabling all banks and other financial institutions to take legal possession of the assets belonging to defaulters, which are mortgaged and later auction them for the purpose of recovering loans, and to complete this task hassle free, it also (ii) empowered all these institutions with the appropriate powers. It was brought into force to counter the attempt of the defaulting borrowers to

prolong the litigations and take shelter either under the provisions of the then-existing Sick Industrial Companies (Special Provisions) Act, 1985 (**SICA**) or alternatively by dragging the proceedings under the Recovery of Debts and Bankruptcy Act, 1993 (earlier known as Recovery of Debts Due to Banks and Financial Institutions Act, 1993). In short, the SARFAESI was brought in to lessen the ever-increasing hazard or nuisance of Non-Performing Assets (**NPA**) so as to realise the dues expeditiously. However, on account of protracted litigations and complexities, SARFAESI could not achieve the desired results to the optimum level. In view of the Indian Insolvency Laws, including SICA, Companies Act 2013 (earlier Companies Act 1956), and the Personal Insolvency Laws becoming obsolete to meet the Global challenges of ease of doing business, Insolvency & Bankruptcy Code, 2016 (**IBC**) was brought into force. The objective and purpose of the Insolvency Code was the quick (in a time-bound manner) Resolution of Debts by consolidation of the assets of a defaulting debtor.

## **Protective Moratorium**

It is always necessary to first protect the assets of the Corporate Debtor. In this regard, Section 14 of the IBC 2016 is well-equipped to handle such challenges and concerns. It provides for the protective moratorium, which comes into effect only when the Corporate Debtor is admitted to a Corporate Insolvency Resolution Process (CIRP).

Section 14(1)(c) of the IBC 2016, in particular, dealt with the Moratorium in respect of the SARFAESI Act



and stipulates that, as soon as the insolvency proceedings commence, the Adjudicating Authority [National Company Law Tribunal (NCLT)] appointed under the IBC 2016, is prohibited from taking any steps against the Corporate Debtor towards the recovery or enforcing the security interest, even if created, particularly towards the property, and this is inclusive of any of the actions taken under the SARFAESI Act, 2002. The Moratorium, as such, provided a reprieve to the insolvent entity vis-à-vis recovery measures, including the SARFAESI Act, especially since the Insolvency Code is a later enactment having an overriding effect. Evidently, once a company is admitted to the CIRP, the SARFAESI action has to stop. It has been observed many times that Section 14 of the IBC 2016, became an armour in the hands of the defaulting borrower who, in various instances, took refuge under the Insolvency Code to protect the auction or sale of their assets under the SARFAESI Act by the lenders.

### **1. Supreme Court on SARFAESI Act 2002 vis-à-vis IBC 2016 Clearing Clouds and Building Jurisprudence**

Recently, in the *Haldiram Incorporation Pvt. Ltd.*<sup>1</sup> case, the Supreme Court dealt with the aspect of SARFAESI vis-à-vis the IBC 2016. In this case, on the assets of the Corporate Debtor, the action was taken under the SARFAESI Act 2002, and as per the law, a Certificate of Sale was also issued just prior in time to the admission of the proceedings under section 9 of the IBC 2016,



preferred by an Operational Creditor of the Company, before the Adjudicating Authority (NCLT). However, the moratorium had been brought into force pursuant to the payment made by the auction purchaser and the sale certificate being issued. In this precarious circumstance, the Adjudicating Authority had held that both (i) the Sale Certificate and (ii) the handing over of the property to the auction purchaser were illegal. As a consequence, an appeal was preferred before the National Company Law Appellate Tribunal (NCLAT), but it is the Supreme Court who has finally settled this debate and adjudicated upon it on the 6<sup>th</sup> of December 2023.

#### **1.1 Sale Before the Declaration of the Moratorium Has Attained Finality**

The Supreme Court in the aforesaid case had taken into consideration the vital factual matrix of the case and had held that since the sale had concluded in the case in hand before the declaration of Moratorium, the Sale had attained finality and in such a scenario, the properties in question could not be treated as the assets of the Corporate Debtor for the purpose of further steps to be taken in the liquidation proceedings (since in the specific case CIRP culminated into the liquidation). The Supreme Court accordingly reversed the order of the Adjudicating Authority, setting aside the sale of the two properties of the Corporate Debtor entity, in respect to which the Sale Certificate under SARFAESI had already been issued.

### **Conclusion: *Haldiram Incorporation Pvt. Ltd (2023)* and After**

This judgment of the Supreme Court is significant because it *firstly* gave space to the statutory provisions of SARFAESI and validated the sale, which had already taken place prior to the applicability of the moratorium under section 14 of the IBC 2016. *Secondly*, the Supreme Court also held on the technical aspects of both the provisions of (i) SARFAESI and (ii) the IBC 2016, and also (iii) certain relatable provisions of the Registration Act, and relying upon the Judgments of *Esjaypee Impex Private Limited*<sup>2</sup> and *Inspector General of Registration*<sup>3</sup> which held that the SARFAESI Act, permits the Authorised Officer (AO) of the Bank, to hand over the Certificate of Sale (duly validated) to the Auction Purchase. It is also necessary to forward a copy of the Sale Certificate to the Registering Authorities<sup>4</sup> also, as had happened in this case, where the certificate of sale was issued to the auction purchaser and, in this way, has maintained the sanctity of the action, as the same is taken prior to the commencement of the CIRP. *Thirdly*, it also highlights the mischief of Section 14 of the IBC 2016 and how it nullifies recovery under the other laws. In fact, many a time, the IBC 2016 is used and more so abused by the corporate entities to take the advantage of the protective umbrella. The Judgment in this respect can certainly be termed as a landmark Judgment as it gives a reprieve to the actions under other laws, including the

SARFAESI Act, taken prior to the initiation of the process of CIRP under the IBC 2016. *Fourthly*, this Judgment is also important from the perspective that if

the moratorium had been declared prior to the issuance of the Sale Certificate, the sale under the mechanism of SARFAESI Act would have to be set aside and the resultant situation vis-à-vis the insolvent entity and its assets would have been different in view of the existing laws of Insolvency. *Fifthly*, this *Haldiram Incorporation Pvt. Ltd (2023)* case, of course, shall also have a large-scale bearing on the Indian Insolvency Law and SARFAESI Law and also may be taken as an instance of threat by the insolvent entities who may act in a more cautious way and proceed immediately to seek shelter under the IBC 2016 for the purposes of protecting (i) any precipitative action of recovery including SARFAESI if the corporate debtor suffers from an inability to pay the debts and (ii) is expected to lose its assets through recovery processes.

*Purti Gupta*

*purtimarwaha@gmail.com*

*Mobile No. : 9811697941*

<sup>1</sup> *Haldiram Incorporation Pvt. Ltd. v. Amrit Hatcheries Pvt. Ltd.* is Civil Appeal No.1773 of 2022.

<sup>2</sup> *Esjaypee Impex Private Limited v. Assistant General Manager and Authorised Officer, Canara Bank, (2021) 11 SCC 537.*

<sup>3</sup> *Inspector General of Registration v. G. Madhurambal, 2022 SCC OnLine SC 2079.*

<sup>4</sup> Refer Section 17(2)(xii) and Section 89(4) of the Registration Act, 1908.



# TO BE OR NOT TO BE GST OFFICIALS' POWERS UNDER CHALLENGE IN THE SUPREME COURT

*Ritika Kohli, Akshaya Ganpath  
and Saumya Tiwari*

IN LIGHT of the escalating instances of abuse of power by the GST officials, the Supreme Court, in a petition<sup>i</sup> under Article 32 of the Constitution of India, is poised to undertake a comprehensive examination concerning the constitutional validity of the various provisions of the Central Goods and Services Tax Act, 2017 ("CGST Act"), with particular emphasis on section 69 and section 70, endowing the GST officials with the powers to arrest and summon persons to give evidence and produce documents.

The petition primarily contests the legislative competence in enacting the aforesaid provisions under Article 246A of the Constitution, which is claimed to limitedly endow the Legislature with the power to enact laws for levy and collection of GST, without encompassing the provisions

for arrest and prosecution. The other provisions that are under challenge include sections (power of inspection, search and seizure), 132 (punishment for certain offences), 135 (presumption of culpable mental state) and 137 (offences by companies) of the CGST Act. The Supreme Court, while issuing notice on the petition, has granted the petitioner interim protection from any coercive actions.

While the challenge remains pending, various High Courts across India have been witnessing an influx of cases concerning the misuse of powers by the GST officials in conducting search and seizures.

In this context, the decision of the Telangana High Court in *Agarwal Foundries Private Limited Rama Towers Vs. Union of India*<sup>ii</sup> warrants a special mention. The petitioners therein, while citing concerning instances of violence perpetrated against them during the course of search and seizure operations conducted by the GST officials, invoked the writ jurisdiction of the High Court, *inter alia* seeking protection from any act of violence/torture by the GST officials; transfer of the inquiry against them to an alternative GST official; direction that any interrogation by GST officials be confined to the hours between 10:30 AM and 5 PM on weekdays, within the visible range of the petitioners' advocate. The High Court, while taking note of the hospital reports presented by the petitioners, indicating severe injuries sustained by them, along with police records confirming receipt of an emergency call from the petitioners during the relevant period, concluded that, *prima facie*, the potential occurrence of physical



violence could not be discounted. The High Court further explicitly condemned the actions of the GST officials in summoning one of the petitioners at midnight. The High Court emphasized that authorities cannot interrogate individuals suspected of tax evasion arbitrarily and hold them in custody indefinitely. The High Court, after a careful consideration of the matter, allowed the petition, granting all the prayers of the petitioners.

A sharp incline has also been observed in cases of coercive recovery of tax by the GST officials under the guise of voluntary payment. Section 74 of the CGST Act makes provisions *vis-à-vis* determination of tax not paid or short paid or erroneously refunded or input tax credit wrongly availed or utilized by reason of fraud or any wilful-misstatement or suppression of facts. Section 74(5) of the CGST Act provides an avenue for a voluntary resolution of the tax liability before the initiation of formal proceedings, allowing a person chargeable with tax, to pay the amount of tax, along with interest and penalty, on the basis of his own ascertainment of such tax or the tax as ascertained by the proper officer.

The Gujarat High Court in its decision in *Bhumi Associate v. Union of India*<sup>iii</sup> issued certain guidelines to be enforced by the Central Board of Indirect Taxes and Customs, whereby it was explicitly directed that no recovery, whether through cheque, cash, e-payment, or adjustment of input tax credit, should take place during search or inspection proceedings under section 67 of the Central/Gujarat Goods and Services Tax Act, 2017. Additionally, even in situations where the assessee opts to fill the

prescribed Form DRC 03 to make voluntary payment, the assessee must be advised to make the payment on the following day, subsequent to the conclusion of search proceedings and departure of the concerned officers.

The Delhi High Court, in a notable and rather exemplary demonstration of its consciousness of issues plaguing the GST framework, has, in its decision in *Sahil Jain Vs. Directorate General of GST Intelligence DGGI & Anr.*<sup>iv</sup>, restrained the GST officials from accepting any tax payments from the petitioner, noting that the petitioner had expressed his unequivocal inclination not to do so, and has additionally left it open to the petitioner to approach the court for depositing the requisite tax amount directly with the court, should such an inclination arise at any subsequent stage.

It is evident that judiciary has consistently demonstrated a zealous commitment to safeguarding the rights and interests of aggrieved individuals. However, amidst the commendable efforts of the courts, it becomes apparent that a significant void persists within the legislative framework insofar as it lacks adequate checks and balances on the powers of the GST officials, leaving room for potential misuse or overreach by GST officials. The impending decision of the Supreme Court promises the much-anticipated clarity and also potentially paves way for amendment of the legislation to provide for a more balanced and accountable system.

<sup>i</sup> Gagandeep Singh Versus Union of India & Ors.: Writ Petition (Criminal) No. 339/2023



- ii W.P. No. 28268 of 2019
- iii SCA No. 3196 of 2021, order dated 16.02.2021
- iv W.P. (C) No. 14140 of 2023

*Ritika Kohli is AOR, Supreme Court of India,  
Email id: ritika@dsnrlegal.com;  
Akshaya Ganpath is an Advocate  
Email id: akshaya.ganpath@dsnrlegal.com; Saumya  
Tiwari is an Advocate  
Email id: saumya.tiwari@dsnrlegal.com*

## SUPREME COURT RULING REGARDING THE RIGHTS OF PERSONAL GUARANTORS IN THE CONTEXT OF INSOLVENCY PROCEEDINGS

*Vaibhav Choudhary*

A THREE-JUDGE bench of the Supreme Court led by Chief Justice D.Y. Chandrachud, alongside Justices JB Pardiwala and Manoj Mishra, rendered a landmark decision in the case of ***Dilip B Jiwrarka v. Union of India & Ors.***<sup>1</sup>, wherein, the bench dismissed 384 writ petitions filed under Art. 32 of the Constitution challenging the constitutional validity of sections 95 to 100 of the IBC. These sections govern the insolvency resolution process concerning individuals and partnership firms, specifically pertaining to the insolvency process of personal guarantors to corporate debtors under the IBC.

In 2019, a notification<sup>2</sup> was implemented, granting creditors the option to initiate insolvency proceedings against the personal guarantor of a corporate debtor



under the IBC. The validity of this notification was contested in ***Lalit Kumar Jain v. UOI***<sup>3</sup>, wherein, the court held that the discharge of the corporate debtor does not automatically absolve the guarantor of liability. The challenge to the notification failed.

Following the ***Lalit Jain*** judgment, over 300 writ petitions were filed against the provisions of the personal guarantor of the IBC, amended in 2019 to facilitate recovery from personal guarantors. Since 2019, these cases have been *sub judice* in the Supreme Court and due to which approximately 2,289 cases related to personal guarantors have remain pending before different benches of the NCLTs. This has had a significant impact on claims amounting to Rs 1.63 lakh crore, according to the filed claims and report released by the IBBI.<sup>4</sup>

### Challenge Raised by Personal Guarantors

Personal guarantors contended that they are not afforded an opportunity for hearing during the filing of applications under Section 95 of the IBC by the creditor. Following the admission of the application, an interim moratorium was imposed on the PG without the right to oppose it. Subsequently, the Resolution Professional was appointed by the Adjudicating Authority with the statutory mandate to submit a report either approving or rejecting the creditor's application. The RP's report formed the basis upon which the AA made a final decision after hearing all parties, including the PG. This process was argued to violate the principles of natural justice and the due

process, especially as cycles initiated under Section 95 of the IBC progressed.

The specific issue raised by PGs was the denial of an opportunity to present their case or establish the existence of a dispute (a judicial act of the AA) after the appointment of the RP. This, according to them, rendered the entire scheme arbitrary and in violation of Article 14 of the Constitution. PGs were also concerned that the statutory report by the RP was not provided to the debtor and the PG, depriving them of the legitimate right to know the content and reasoning based on which the application was accepted or rejected. The scheme, as per the argument, bestowed unregulated powers upon the RP, who, in judging his own cause, remained unaccountable when placing the personal guarantor's assets under an interim moratorium. The overall scheme is manifest arbitrary, unconstitutional, and violative of the fundamental rights of personal guarantors.

### Response to the Challenge

In response, the respondents asserted that the time-bound resolution of insolvency was integral to the provisions of the IBC. They emphasized that the moratorium under Section 96, unlike Section 14, was for the benefit of the guarantor or the debtor. It was clarified that at the stage of an application under Section 94 or 95, no adjudication occurred. The interim moratorium under Section 96 did not impose restrictions on the alienation of assets, legal rights, or beneficial interests of the debtor.



The role of an RP under Section 99 was described as not of an adjudicatory nature but rather restricted to collating facts. The RP's report, it was argued, only contained a recommendation either accepting or rejecting the application which did not bind the AA. The principles of natural justice were asserted to come into play when the AA exercised its jurisdiction under Section 100, where a hearing was contemplated, especially when adjudication occurred, and adverse consequences ensued.

### Analysis of the Judgement

In scrutinizing the divergent dimensions, the Court delved into the comparative aspects between the procedural frameworks of Part II and Part III of the IBC. This examination extended to the distinct roles played by the RP in scenarios of corporate and individual insolvency, the ramifications of moratoriums stipulated under Section 14 vis-à-vis interim moratoriums outlined in Section 96, the adjudicatory function of the Adjudicating Authority (AA) in applications falling under Part II and Part III of the IBC, and the application of the principles of natural justice.

### Comparison of Part II & III

The Court explicitly stated that these sections govern discrete processes for resolving insolvencies. Part II pertains to corporate entities, while Part III addresses insolvencies involving individuals and partnership firms.



### Role of the RP

The Court emphasized the limited powers vested in the RP in Part III, which lacks the authority granted to its Part II counterpart. Notably, Part III does not confer the RP with the capability to assume control over the assets or business operations of an individual or partnership. Section 99 elucidates that the RP functions as a facilitator, collating pertinent information based on the application, operating in a purely recommendatory capacity, without binding authority over creditors, debtors, or the AA.

### Moratorium Dynamics

Section 14 grants the AA the power to impose a moratorium, restraining the transfer, encumbrance, or disposal of assets by the corporate debtor. In stark contrast, the protective nature of the moratorium under Section 96 aims to shield the corporate debtor from legal actions or proceedings pertaining to its debt. Importantly, the interim moratorium under Section 96 does not lead to an asset freeze but rather stays pending legal actions or proceedings related to debts.

**Role of AA:** The Court elucidated that the AA's adjudicatory role in Part III initiates post the RP's submission of a recommendatory report. The provisions governing moratoriums in Section 101(2)(c) align broadly with Section 14(1)(b) under Part II. Notably, Section 96(1)(b) lacks a counterpart to Section 101(2)(c) and operates subsequent to the admission of an application under Section 100.

## Principle of Natural Justice

The Court underscored the flexible interpretation of natural justice principles. Section 99 ensures a non *ex parte* process before the RP, with the ultimate report holding a recommendatory value. The legislative framework mandates that recommendations are made after considering information or explanations provided by the debtor. Thus, the Court dismissed the notion of bias in an RP's report nominated by a creditor. The AA's decision follows a comprehensive review of the RP's recommendation, affording full opportunity for the debtor or personal guarantor, ensuring their active participation in the application examination process.

## Conclusion & Comments

The judgement holds the potential to streamline the resolution of numerous pending petitions before various NCLTs, facilitating substantial financial recovery for banks, reaching into significant monetary sums from personal guarantors. It effectively dispels uncertainties surrounding individual insolvency, assuring a more expeditious resolution process.

The judicial clarification on the role of the Resolution Professional delineates the RP as a '*facilitator*' rather than an '*adjudicator*.' The RP's function primarily involves collating pertinent information related to a PG, with no authority to extend beyond the designated scope, avoiding the initiation of a comprehensive enquiry that could result in civil consequences for the guarantor.



With this judgment, personal guarantors find themselves bound to their obligations concerning loans or credit facilities extended to a company. The decision is poised to enhance creditor confidence, fostering a more secure environment for the initiation of insolvency proceedings against personal guarantors. This is anticipated to streamline and optimize the resolution processes, mitigating uncertainties that may have previously impeded creditor actions.

Furthermore, the ruling is expected to contribute to an upswing in financial recovery from personal guarantors, likely prompting an increase in settlements between banks and personal guarantors. Bankrupt individuals, in particular, will face a spectrum of disqualifications, including restrictions on holding directorships or public office.

In light of this judgment, there is a foreseeable impact on the mindset of promoters and individuals providing personal guarantees. The highlighted risks and stringent legal consequences may induce a more circumspect approach, even in the case of solvent companies. This cautionary effect could potentially influence the landscape of transactions involving personal guarantees, emphasizing a more judicious evaluation of associated risks.

*Vaibhav Choudhary is Advocate-On-Record,  
Supreme Court of India.*

<sup>1</sup> 2023 INSC 1018

<sup>2</sup> The notification brought into force Section 2(e), Section 78 (except with regard to fresh start process), Section 79, Section 94 to 187,

Sections 239(2)(g), (h) and (i), Sections 239(2)(m) to (zc); Section 239(2)(zn) to (zs) and Section 249 dated 15-11-2019.

<sup>3</sup> 2021 INSC 297

<sup>4</sup> IBBI Quarterly Newsletter, July-September, 2023, VOL 28[Available at <https://ibbi.gov.in/uploads/publication/b4ce3516920836e9ff9b1e816137bf97.pdf>]

## IN THE INTEREST OF FULL DISCLOSURE THE MODERN CONUNDRUM OF ANY PERSON TO COOPERATE OR NON-COOPERATE

*Malak Bhatt and Samridhi*

THE RECENT case of ***Sanket Bhadresh Modi v. Central Bureau of Investigation***<sup>i</sup> provides an ideal case-study to observe the confrontation of statutory mandate to comply with the Enforcement Directorate [‘ED’] and the Commissioner, GST [‘Commissioner’] under the Prevention of Money Laundering Act, 2002 [‘PMLA’] and the Central Goods and Services Act, 2017 [‘CGST Act’] respectively, to provide requisite information and the constitutional right against self-incrimination.

Sanket Modi had preferred a bail application before the Hon’ble High Court of Delhi who had been arrested by the CBI for his ‘failure to provide them with password’ and details pertaining to ‘his email/crypto wallet accounts



etc.'. The CBI contended that Sanket Modi had been non-cooperative with the investigation process, hence, he ought to be denied the relief. The Hon'ble Court *vide* Order dt. 18.12.2023 rightly observed that the '*Investigating Agency cannot expect anyone who is an accused... to sing in a tune which is music to their ears, more so, whence such an accused... is well and truly protected under Article 20(3) of The Constitution of India*'. The Hon'ble Court relied on **Santosh s/o Dwarkadas Fafat v. State of Maharashtra**<sup>ii</sup> to hold that Sanket Modi cannot be coerced to reveal/disclose the password(s) or any other like details.

The said case is in contrast to the judgment pronounced by the Hon'ble High Court of Karnataka in **Virendra Khanna v. State of Karnataka**<sup>iii</sup> wherein the Hon'ble Court had held that the court order to compel the accused to disclose his password did not violate his right to privacy as the said disclosure falls within the exceptions to the right culled out by the Hon'ble Supreme Court in **Mr. Justice K.S. Puttaswamy v. Union of India**<sup>iv</sup>. As per the Hon'ble Supreme Court, the right to privacy can be curtailed when there arises a legitimate state interest or the action is proportionate with a nexus between the object and means adopted to achieve them. The Hon'ble High Court also relied upon **State of Bombay v. Kathi Kalu Oghad**<sup>v</sup> to observe that providing the password to an electronic device is akin to merely providing an identification mark and does not amount to testimonial compulsion as mere presence of a document on the smartphone or email account does not '*by itself establish*



*the guilt or innocence of an accused*'. The Hon'ble High Court went to the extent of stating that in the event of non-cooperation by the accused to provide the required passwords, an adverse inference could be drawn against the accused.

In contrast, the Ld. Special Court (CBI), Delhi in the case of **CBI v. Mahesh Kumar Sharma**<sup>vi</sup> held that the accused cannot be compelled to provide information as the accused is entitled to the benefit of Section 161(2) of the Code of Criminal Procedure, 1973 ['CrPC'] as the objective of the officer is not to procure merely the password to the smartphone or email account but to access the incriminating data available on the device/account. The Ld. Court even clarified that no adverse inference can be drawn against the accused owing to Section 313 of the CrPC.

Section 161(2) of CrPC enforces the protection against self-incrimination for *any person* being examined by the police thus enabling the person to refuse to provide an answer which may '*expose him to a criminal charge or to a penalty or forfeiture*'. Whereas, Section 313 of CrPC mandates that the accused shall be protected from any punishment for his refusal to answer questions or for providing false information. Interestingly, both the provisions have been retained verbatim by the Legislature in the new Bharatiya Nagrik Suraksha Sanhita, 2023 ['BNSS'].

It can be reasonably inferred that the aforesaid provisions were incorporated in the CrPC and the recent BNSS to encourage participation by the person so summoned and

also safeguard the opportunity for the accused to mount an adequate defence.

But the aforesaid provisions of the CrPC are neither applicable to the ‘inquiry’ carried out by the ED and the Commissioner nor the provisions of PMLA and CGST Act envisage any similar protection to any person summoned for examination or to an accused.

The statutory framework of PMLA and CGST Act do not accommodate the choice of refusal to provide information to the authorities, rather it penalizes the failure to provide information. Section 50 of PMLA mandates compliance from *any person* so summoned to make statements, and produce such documents as may be required. Likewise, Section 63 of PMLA provides that any person who ‘*refuses to answer any question put to him by an authority in the exercise of its powers under this Act*’ or ‘*omits to attend or produce books of account or documents at the place or time*’ provided in the summons is liable for penalty amounting to INR 500 extendable to INR 10,000 for ‘*each such default or failure*.’

Similarly, Section 70 and 69 of the CGST Act provide identical powers to the officer under the CGST Act whereby *any person* can be summoned to give evidence or to produce a document or *any other thing* in any inquiry in the same manner. Additionally, the person is also liable to penalty for ‘suppression of facts’ under Section 74 which includes ‘*failure to furnish any information on being asked for*’.

However, it is required to consider whether the mandate for cooperation for a person can be extended to

violation of the right to privacy and the right against self-incrimination.

Interestingly, in the case of ***Vijay Madanlal Choudhary v. Union of India***<sup>vii</sup> the Petitioners had contended before the Hon’ble Supreme Court that prosecution of a person under Section 63 for failure to provide a confession amounts to denial of the right to fair trial under Article 21. It was also argued that as the person so summoned is not informed of the capacity in which he/she is summoned coupled with the inapplicability of Chapter XII of CrPC, the protection under Article 20(3) is rendered illusory as the person may be compelled to provide information under threat of arrest. Dispelling the fears of the Petitioners, the 3-Judge bench of the Hon’ble Court in ***Vijay Madanlal Choudhary*** (supra) noted that without Section 63, the inquiry undertaken by the ED will be reduced to a paper inquiry with no meaningful purpose. Thus, any person providing misleading revelations or failing to cooperate will be required to be proceeded in accordance with law.

However, the ambit of cooperation ought not to be extended to include involuntary disclosure of information and invasion of privacy in absence of any rationale or nexus of the said information with the investigation.

A 3-Judge bench of the Hon’ble Supreme Court in the case of ***Selvi v. State of Karnataka***<sup>viii</sup> had held that information induced/disclosed against a person’s will is in violation of constitutional rights under Articles 20(3) and 21.



Thus, placing an individual under arrest, as in the case of Sanket Modi, is an attempt to intrude upon the mental privacy of the individual thereby leading to a testimonial compulsion. Such intrusion upon the mental privacy of an individual in order to induce an involuntary disclosure of information was strictly forbidden by the Hon'ble Court in **Selvi** (supra).

Although the exceptions to the right of privacy include instances of legitimate public interest and proportionality, but the provisions of PMLA and CGST Act itself do not mandate the requirement to either provide specific reasons to believe to either demonstrate the legitimate public interest or establish proportionality illustrating a nexus between the password required and the objective to be achieved. The access to voluminous data may simply result in amplifying the magnitude of the inquiry to a wild goose hunt.

It is true that the powers for inquiry helmed by the agencies cannot be restricted for fear of reducing the inquiry process to a mere '*paper inquiry*', however, there also has to be a balancing act with respect to the constitutional rights of the individual. Given the modern age wherein all activities, documents and information are digitized and protected, it is essential to circumscribe that failure to provide personal information relating to digital accounts held in the individual capacity shall not step into the contours of evasiveness or non-cooperation.

Thus, a demarcation is required to be created in order to establish the need of the investigating agency to require access of an account of a commercial entity/



individual under investigation which is operated/accessed by a regular employee, and the furnishing of password for a personal account operated by the said employee/individual which may or may not contain any connection to the entity/individual under investigation. As, despite the significant disparity between the two circumstances, the failure to cooperate in both instances may leave a person under examination vulnerable to penalty or detention.

*Malak Bhatt is Advocate-on-Record,  
Supreme Court of India and Samridhi is Advocate,  
Supreme Court of India.*

- i Bail Appln. 3754/2023 Order dt. 18.12.2023
- ii 2017 INSC 1027
- iii 2021 KHC 11286
- iv 2017 INSC 801
- v (1962) 3 SCR 10
- vi 2022 SCC OnLine Dis Crt (Del) 48
- vii 2022 INSC 757
- viii (2010) 7 SCC 263

# CORPORATE MANSLAUGHTER APPROACH & LEGAL FRAMEWORK UNITED KINGDOM vs. INDIA

*Arindam Ghosh*

CORPORATE MANSLAUGHTER is a crime in several common law jurisdictions, including England, Wales and Hong Kong. It enables a corporation to be punished and censured for culpable conduct that leads to a person's death. This extends beyond any compensation that might be awarded in civil litigation or any criminal prosecution of an individual (including an employee or contractor). The existence of such a crime has been criticized, especially from the point of view of law and economics which argues that civil damages are a more appropriate means of compensation, recognition of the losses suffered and deterrence. Such arguments emphasize that, because the civil courts award compensation commensurate with the damage done, they apply the appropriate level of deterrence.<sup>i</sup> A further strand of criticism holds that only

individuals can commit crimes. It is also believed that a corporation may simply be a “veil” for an individual's activities, easily liquidated and with no reputation to protect.<sup>ii</sup>

## Corporate Manslaughter In United Kingdom Corporate Criminal Liability in UK – A Background

The Corporate Manslaughter and Corporate Homicide Act, 2007, came into force on 6<sup>th</sup> April, 2008, after a detailed consultation and policy debate. This act creates a new statutory offence of corporate manslaughter.<sup>iii</sup>

The case of ***Royal Mail Steam Packet v. Brahamiv*** which described a corporation as a ‘person’, marked the beginning of corporate criminal liability jurisprudence in the U.K. While the Criminal Law Act, 1827 further provided that the word ‘person’ in statutes could be construed to include corporations in the absence of a contrary intention,<sup>v</sup> it was not until this was repeated in the Interpretation Act of 1889, that courts began making extensive reference to it.<sup>vi</sup>

Basically, two principles have been evolved in English Law in this regard which are as follows:

1. Vicarious Liability Principle – In the early 1900's, courts in England imposed strict liability on corporations for statutory offences by using the vicarious liability principle,<sup>vii</sup> which stemmed from strict liability for statutory offences, as construed from the object of the legislation; and
2. Doctrine of Identification - During the 1940's, it



was observed in a variety of cases that a company was capable of being malicious,<sup>viii</sup> could intend to deceive,<sup>ix</sup> and could conspire<sup>x</sup> and this is how this doctrine came into being.

*Corporate Manslaughter: Early Reactions & Approach*

**R. v. Cory Bros.**<sup>xi</sup> was one of the first cases to address the issue of corporate liability for manslaughter. However, Finlay J., after examining a host of authorities,<sup>1</sup> expressed his inability to hold the corporation criminally liable for manslaughter under the law.

In 1996, the Law Commission published a Report on the Review of the Law of Involuntary Manslaughter which focused on the issue of corporate manslaughter and rejected both the Vicarious Liability and Doctrine of Identification and suggested the creation of a separate offence of corporate killing.

After being ignored for four long years, in May 2000, the Government published a Consultation Paper citing several instances which served as a wakeup call for them to act, viz. the Herald of Free Enterprise Disaster, 1987; the Kings Cross Fire, 1987; the Clapham Rail Crash, 1988 and the South Hall Rail crash, 1997.<sup>xii</sup>

The Corporate Manslaughter and the Corporate Homicide Act, 2007 – The Legal Framework

#### A. The Offence

Section 1(1) points out the essentials ingredients of corporate manslaughter which are as follows:

- i. the corporation's conduct must result in a person's death, or



- ii. it must amount to a breach of the relevant duty of care;<sup>xiii</sup>
- iii. such duty of care must be owed by the organization to the deceased;
- iv. such breach must be 'gross'; and the corporation's conduct must involve an element of 'senior management failure'.<sup>xiv</sup>

#### B. Exceptions

Sections 3, 4, 5, 6 and 7 delineate duties of care which do not qualify as "relevant" duties of care for the purposes of constituting the new offence. Section 11(2) abolishes Crown immunity by providing that a Crown organization is to be treated as owing whatever duties of care it would owe if it were a corporation that was not a servant or agent of the Crown.

#### C. Liability

Section 1(6) of the Act states that an organization found guilty of corporate manslaughter or corporate homicide is liable to pay a fine on conviction. Under this Act, individuals cannot be held liable.

#### D. Punishment

This Act provides for three kinds of penalties - remedial orders, publicity orders and fines.

### Corporate Manslaughter In India

Various judicial decisions in India have made it clear that a company/legal entity is broadly in the same position as

any individual and may be convicted of breach of statutory offences including those requiring *mens rea*.<sup>xv</sup>

However, there is no law specifically governing corporate manslaughter in India. Any disaster of the magnitude of AMRI Hospital (Kolkata) is a matter of deep concern, and while it calls for preventive and punitive actions as may be warranted, the current witch-hunt is somewhat over the top. The 2013 Act is heavily focused on Corporate Governance, without any specific reference to the issue at hand.

The Ministry of Company Affairs (MCA) had issued a Circular No. 08/2011 on 25.03. 2011, clarifying that Independent directors of listed companies who are “not charged with the responsibility”, will not be liable for any act of omission or commission by the company or its officer(s), provided it can be established that such an act occurred without his/her consent or knowledge and he/she has acted diligently. The Registrars of Companies have been cautioned to exercise extra care in implementing their powers in accusing such directors as “officers in default”.

As regards any case made out for vicarious liability, the Hon’ble Supreme Court has consistently held that it is not sufficient to make a bald cursory statement in a complaint that the Director is responsible for the offence and it should specifically define in what manner “the accused was responsible” as observed in ***National Small Industries Corporation Ltd v. Paintal***<sup>xvi</sup>. Perhaps an appropriate legal mechanism for addressing corporate manslaughter and homicide, arising out of the duty of care



that any corporation owes to its consumers and employees, should be part of the Corporate Governance reforms.

A Case Study - The 1984 Bhopal Gas Tragedy was the result of criminal negligence and that authorities allowed the tragedy to happen. The Group of Ministers (GoM) had dealt with all issues, i.e., compensation, legal issues, including that of the extradition of Warren Anderson, the legal options available to the Government of India and most importantly, remediation matters and health related matters. The Union Carbide settled its liabilities to the Indian government in 1989 by paying 470 million dollars before being brought by another US company, Dow Chemical.<sup>xvii</sup> This is a classic example of corporate homicide /manslaughter in the Indian context till date, but even then, there is absence of any specific legal framework regulating the Indian regime on corporate killings.

### Conclusion & Suggestions

Even though the laws in United Kingdom is put down in black and white which has also been well-delineated and there remains no vagueness about whom to punish for the misdoings of a corporation, but the picture in the Indian scenario is still at its budding stage with no legal framework currently in place to regulate the conduct of a corporation, except few judicial precedents, in the event of loss of human lives which must be immediately addressed by bringing a legal regime in place.

*Arindam Ghosh is Advocate-on-Record,  
Supreme Court of India.*

- i Clarkson, C. M. V. (1996). "Kicking corporate bodies and damning their souls". *Modern Law Review* 59 (4): 557.
- ii Gobert, J. (2002). "Corporate killings at home and abroad - reflections on the government's proposals". *Law Quarterly Review* 118: 72.
- iii C. Wus, *Corporations and Criminal Responsibility* 156 (2001).
- iv (1877) 2 A. C. 381.
- v See *Wills v. Tozer*, (1904) 53 W. R. 74.
- vi Section 2(1), Interpretation Act, 1889.
- vii See, *Pearks Gunston and Tee Ltd. v. Ward*, [1902] 2 K. B. 1, *Chuter v. Freeth and Pocok Ltd.*, [1911] 2 K. B. 832.
- viii *Triplex Glass Safety v. Lancegay Safety Glass*, [1939] 2 K. B. 395.
- ix *DPP v. Kent and Sussex Contractors*, [1944] K. B. 146, *Moore v. Bresler*, [1944] 2 All R. 515.
- x *R. v. ICR Haulage Ltd.*, [1944] K. B. 551, *R. v. Sorsky*, [1944] 2 All E. R. 333.
- xi [1927] 1 K. B. 810.
- xii Home Office, Reforming the Law on Involuntary Manslaughter: The Government's Proposals (May 2000), available at <http://www.homeoffice.gov.uk/documents/cons-2000-invol-manslaughter/consultation.paper.pdf>.
- xiii Section 2, The Corporate Manslaughter and Corporate homicide Act, 2007.
- xiv Section 1(3) clarifies that the involvement of the senior management, as defined under Section 1(4)(b), is essential to constitute the offence under Section 1(1).
- xv Ashok Sagar & Sumeet Kachchwa, "Corporate Crime, Fraud and Investigations: India", Q&A Guide, 2012.
- xvi (2010) 3 SCC 330.
- xvii <http://www.indianexpress.com/comments/bhopal-was-a-case-of-corporate-manslaughter-bjp/658977/>

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## DEALING WITH MANMADE ENTITIES

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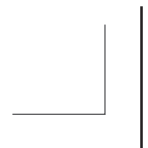
# DECODING THE DIGITAL PERSONAL DATA PROTECTION ACT 2023 AND ETHICAL AI IMPERATIVES

*Suvidutt Sundaram and Somlagna Biswas*

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## **The Confluence of Legal Guardianship and Ethical Imperatives**

IN THE intricate tapestry of India's digital governance, two pillars emerge as sentinels of the evolving landscape: the Digital Personal Data Protection (DPDP) Act of 2023 and the ethical imperative surrounding Artificial Intelligence (AI). As the nation grapples with the delicate dance of safeguarding personal data through legislative mechanisms, the ethical underpinnings of AI cast a profound shadow over the trajectory of technological evolution. This discourse delves into the intricacies of these dual narratives, where legal jargon intersects with ethical considerations, illuminating the journey towards a harmonized future.



## 1. The Legal Parabola - DPDP Act 2023 Unveiled

### 1.1 Framing the Legal Canvas: Key Features of the DPDP Act

The legislative landscape shifts as the DPDP Act comes to the fore, establishing a statutory framework governing the processing of digital personal data. Consent becomes a cornerstone, allowing personal data processing for lawful purposes and legitimate uses, granting individuals rights over their data while shackling “data fiduciaries” with obligations spanning notice, consent, security, and redressal avenues.

In this legal paradigm, the DPDP Act introduces a nuanced mechanism for data processing, threading the needle between individual agencies and the operational requirements of data fiduciaries. The emphasis on lawful purpose and legitimate uses signifies a delicate balance that seeks to accommodate both the rights of individuals and the practical needs of entities entrusted with personal data.

### 1.2 Applicability and Scope: Drawing Juridical Boundaries

The DPDP Act extends its embrace to resident Indian citizens’ data processed by Indian entities, even on foreign shores. Non-resident foreigners find protection if their data, linked to services in India, undergoes processing beyond the nation’s borders.

The territorial ambit of the DPDP Act extends its legal tendrils to encompass a wide spectrum of data subjects, both resident and non-resident. This extraterritorial application reflects an acknowledgement of the global nature of data processing, emphasizing the need for



comprehensive legal coverage irrespective of geographical boundaries.

### 1.3 Critical Scrutiny: Analysis of DPDP Act Provisions

Yet, beneath the sheen of progress lie concerns. Sweeping exemptions for state agencies and governmental discretionary powers to override provisions create a nuanced legal landscape. The design of the Data Protection Board, while a critical oversight body, raises questions about its autonomy and efficacy.

The laudable aspirations of the DPDP Act are, however, tempered by critical examinations of its provisions. The expansive exemptions granted to state agencies raise questions about the equilibrium between individual privacy rights and the imperatives of national security. Moreover, the discretionary powers vested in the government to override provisions for entities for a substantial period introduce an element of potential misuse that necessitates vigilant scrutiny.

### 1.4 Metamorphosis of Ideals: DPDP Act’s

#### Evolutionary Journey

The DPDP Act’s evolution from expansive drafts to a pragmatic enactment marks a transformation in the government’s stance. However, the enduring pedestal of the state’s national security prerogatives and the exemption of surveillance agencies from certain privacy provisions underscore persistent tension.

The legislative journey of the DPDP Act is a testament to the government’s evolving perspective on data protection.

From the ambitious drafts of yesteryears to the pragmatic enactment of today, the metamorphosis signifies a balancing act between the imperatives of data protection and the operational realities faced by entities entrusted with personal data.

### **1.5 Looking Beyond Legislation: The Horizon of Implementation**

Implementation rests on the finesse of regulations, the efficacy of the Data Protection Board, and governmental best practices. Broader imperatives such as data localization and the regulation of tech giants loom large, indirectly shaping the efficacy of the DPDP Act.

The scaffolding of the DPDP Act lays the groundwork, but the actual fortification of data privacy hinges on the finesse with which regulations are framed and implemented. The edicts issued by the Data Protection Board will serve as the lodestar, dictating compliance standards for entities subject to the law. Beyond this, the broader imperatives of data localization, the regulation of tech giants, and the exercise of sovereign control over data will exert a considerable influence on the functioning and impact of the legislation.

## **2. Ethical Imperatives – AI Governance Revealed**

### **2.1 The Rise of AI Ethical Concerns: A Call to Governance**

As AI permeates every facet of society, ethical concerns reverberate through the digital corridors. Bias, transparency, accountability, and fairness become pivotal



considerations, necessitating a robust ethical framework to govern the evolution of AI technologies.

The rise of AI brings forth a conundrum of ethical challenges that demand a conscientious response. The societal impacts of biased algorithms, the opacity of decision-making processes, and the potential for automation to exacerbate existing inequalities underscore the imperative for ethical governance in the realm of AI.

### **2.2 India's Ethical AI Framework: A Nod to Responsible Innovation**

India, cognizant of the ethical tightrope, has embarked on framing an Ethical AI framework. A call to responsible innovation, this framework envisions a future where AI aligns with societal values, avoids discriminatory pitfalls, and upholds transparency.

The formulation of an Ethical AI framework in India reflects a proactive approach to addressing the ethical concerns associated with AI technologies. It signals a commitment to responsible innovation that not only leverages the potential of AI but also ensures that its deployment aligns with the ethical values and expectations of the society it serves.

### **2.3 Legal Underpinnings: Ethical AI in the Juridical Lens**

The confluence of ethical AI and legal underpinnings involves delineating responsibilities, enforcing transparency, and addressing the potential societal impacts of AI technologies. Legal frameworks become the bedrock upon which ethical principles are actualized.

In navigating the ethical landscape of AI, legal underpinnings play a crucial role. The formulation of laws and regulations that prescribe ethical standards, delineate responsibilities, and provide avenues for accountability becomes imperative to ensure that ethical considerations are not merely aspirational but are ingrained in the fabric of AI governance.

#### **2.4 Challenges and Opportunities: Navigating the Ethical AI Landscape**

Challenges abound in translating ethical aspirations into actionable policies. Bias mitigation, explainability, and navigating the delicate balance between innovation and ethical governance pose intricate challenges. Yet, within these challenges lie opportunities for technological evolution guided by ethical compass points.

The ethical governance of AI is not without its challenges. Mitigating biases, ensuring transparency, and striking the right balance between innovation and ethical considerations present formidable hurdles. However, within these challenges lie opportunities to foster innovation that is not only technologically advanced but also ethically sound, thereby building a future where AI aligns seamlessly with societal values.

### **3. The Nexus Unwrapped - Bridging Legal and Ethical Vistas**

#### **3.1 Harmonizing Legal and Ethical Perspectives**

The intersection of the DPDP Act and ethical AI governance forms the nexus where legal frameworks and ethical



imperatives converge. As legal guardianship safeguards personal data, ethical considerations guide the trajectory of AI, creating a symbiotic relationship for a digitally responsible future.

The harmonization of legal and ethical perspectives is not merely a theoretical endeavour; it is a pragmatic necessity. The DPDP Act, with its focus on individual rights and obligations for data fiduciaries, becomes an implicit endorsement of ethical principles. Aligning AI governance with these legal principles offers a robust framework for responsible and transparent AI development.

#### **3.2 Ethical AI in the Legal Framework: A Balancing Act**

The DPDP Act, with its emphasis on individual rights and the obligations of data fiduciaries, provides a legal framework that inherently aligns with ethical considerations. This convergence offers a unique opportunity to strike a balance between the imperatives of data protection and the ethical governance of AI.

The articulation of legal jargon in the context of ethical discourse becomes imperative for a comprehensive understanding. As the DPDP Act lays the legal foundations, ethical considerations add depth to the conversation, creating a nuanced dialogue where rights and responsibilities coalesce. The intersection of legal and ethical frameworks is not a collision but a harmonious fusion that fosters a balanced and responsible digital ecosystem.

#### 4. Conclusion: Towards A Synchronised Digital Destiny

In the complex terrain of India's digital evolution, the DPDP Act and ethical AI governance stand as pivotal guardians. The legal fortification of personal data and the ethical underpinnings guiding AI's trajectory form an intricate dance of rights, responsibilities, and societal values. As the nation navigates this labyrinth, the journey toward a harmonized digital future remains a collective endeavour.

The DPDP Act's legal scaffolding and ethical AI principles, when entwined, offer a roadmap for a future where technology aligns with the nation's values, individual rights are safeguarded, and innovation walks hand-in-hand with responsibility.

The narrative is still unfolding, and within its folds lie the contours of a digital India that balances progress with ethical stewardship. The confluence of legal guardianship and ethical imperatives heralds a new era, where the digital landscape reflects not only technological prowess but also a commitment to the principles that define a just and responsible society, fostering a synchronised and responsible digital ecosystem.

*Dr Suvidutt Sundaram, (Ph D Law) is AOR, Supreme Court of India; Somlagna Biswas (BA, LLB Advocate), Supreme Court of India*

## CONCERNS REGARDING PUNJAB AND HARYANA HIGH COURT'S USE OF CHATGPT IN DECIDING A BAIL PETITION

*Siddharth Naidu and Nitesh Daryanani*

IN MARCH of last year, the Punjab and Haryana High Court rejected bail for an individual accused of assault resulting in death.<sup>i</sup> As part of its "post-reasoning" and "[t]o further assess the worldwide view on bail when the assault was laced with cruelty", the Court sought the assistance of ChatGPT by putting to it the following question:

*"What is the jurisprudence on bail when the assailants assaulted with cruelty?"*

ChatGPT's response, which was extracted in the order, is a generalized summary of legal principles relating to bail. Leaving aside the specific content of that response, this article raises questions about the Court's reference to and reliance on ChatGPT's response, including the purposes of such reliance, the quality of data underlying ChatGPT's response and its consequence.



## What is ChatGPT?

ChatGPT is a chatbot developed by Open AI based on the GPT-3.5 language model. It was optimized for dialogue using Reinforcement Learning (“RL”) with human feedback.

<sup>ii</sup> Simply put, ChatGPT “is trained to follow an instruction in a prompt [or query] and provide a detailed response”.

<sup>iii</sup> In November 2022, ChatGPT was made available to the public for free “[d]uring the research preview”.<sup>iv</sup>

## Why did the Court use ChatGPT?

The Court reasoned that recourse to ChatGPT was required “to present a broader picture on bail jurisprudence, where cruelty is a factor” because ChatGPT “has been trained with multitudinous data”.

## Why the Court was Wrong and Why it Matters?

Looking past the novelty of ChatGPT, the manner in which the Court used the tool raises several questions. ChatGPT is not nor claims to be an authority on the information provided in its responses. It has been trained to provide human-like or human sounding responses which may not, at this stage, be factually accurate or correct. Open AI cautions users that “[it] sometimes writes plausible-sounding but incorrect or nonsensical answers”. A reason why fixing this issue is challenging is because “during RL training, there’s currently no source of truth”.<sup>v</sup> There are several examples of ChatGPT ‘confidently’ providing factually incorrect responses.<sup>vi</sup> ChatGPT is also sensitive to the ‘prompts’ provided or words used in the query. Open AI has warned that “ChatGPT is sensitive to tweaks to the

input phrasing or attempting the same prompt multiple times. For example, given one phrasing of a question, the model can claim to not know the answer, but given a slight rephrase, can answer correctly”.<sup>vii</sup> Had the court altered the form or phrasing of the question but retained its substance, ChatGPT’s response might have been different or it might have even refused to answer. It is also peculiar that although the Court wanted a “worldwide view” or “broader picture” on bail jurisprudence, the question put to ChatGPT does not contain these ‘prompts’.

Further, the Court ought to have been concerned with the quality of data on which ChatGPT is trained, not merely the quantity of data (the ‘multitudinous’ data) on which it is trained. Open AI has not publicly disclosed or made available the sources of data on which the language model GPT-3.5 was trained. However, GPT-3.5 is a fine-tuned version of GPT-3<sup>viii</sup> which was trained on data from the following sources:<sup>ix</sup>

- (a) Common Crawl (filtered): which is a “corpus contains petabytes of data collected since 2008. It contains raw web page data, extracted metadata and text extractions”.<sup>x</sup>;
- (b) WebText2: which largely contains posts uploaded on Reddit<sup>xi</sup> with a score of 3 or higher.<sup>xii</sup>
- (c) Books1 and Books2: which is data likely drawn from BookCorpus, a popular text dataset for training large language models;<sup>xiii</sup>
- (d) Wikipedia: which is a widely known and used free online encyclopaedia, maintained through open collaboration by a community of users.



These ‘sources’ are merely repositories containing data created by numerous entities. This data is not without its limitations and concerns, especially regarding its purpose, components, selection and process involved in the collection of data. With regard to the use of data or information from such ‘sources’ in courts, the Supreme Court of India has urged courts to exercise caution. The Court recently observed that “[w]hile we expressly acknowledge the utility of these platforms which provide free access to knowledge across the globe, but we must also sound a note of caution against using such sources for legal dispute resolution. We say so for the reason that these sources, despite being a treasure trove of knowledge, are based on a crowd-sourced and user-generated editing model that is not completely dependable in terms of academic veracity and can promote misleading information as has been noted by this court on previous occasions also. The courts and adjudicating authorities should rather make an endeavor to persuade the counsels to place reliance on more reliable and authentic sources.”<sup>xiv</sup> Because the information from the above ‘sources’ is limited by a lack of authenticity, reliability, and freedom from bias, these limitations are baked into ChatGPT’s responses.

Even assuming the information provided by ChatGPT is true and correct, the need for the Court to refer to ChatGPT for a “worldwide view” or “broader picture” on bail jurisprudence is also questionable. There is no reason to believe that Indian jurisprudence on bail (which is well-developed and settled law) or that recourse to more conventional authorities (such as books and journals) was

inconclusive or inadequate in the facts of the case. It is also unclear whether the response of ChatGPT was made available to the accused and he was allowed to advance legal submissions regarding its veracity. This raises serious concerns regarding the breach of principles of natural justice.

By proceeding in the above manner, the High Court has incrementally legitimized the use of ChatGPT as an authority for the information it provides. This is worrying since it will likely encourage other courts (including subordinate courts) and legal professionals to use ChatGPT, in a similar manner.

*Siddharth Naidu is Advocate-on-Record,  
Supreme Court of India & Nitesh Daryanani is  
Attorney, Lewis & Llewellyn LLP Record.*

<sup>i</sup> Neutral Citation No: 2023:PHHC:044541

<sup>ii</sup> <https://help.openai.com/en/articles/6783457-chatgpt-general-faq>

<sup>iii</sup> <https://openai.com/blog/chatgpt>

<sup>iv</sup> Id.

<sup>v</sup> “Limitations”; <https://openai.com/blog/chatgpt>

<sup>vi</sup> Mike Pearl, “The ChatGPT chatbot from OpenAI is amazing, creative, and totally wrong”; <https://mashable.com/article/chatgpt-amazing-wrong>.

Zahra Tayeb, “ChatGPT will keep ‘hallucinating’ wrong answers for years to come and won’t take off until it’s on your cellphone, Morgan Stanley says”; <https://markets.businessinsider.com/>



news/stocks/chatgpt-ai-mistakes-hallucinates- wrong-answers-  
edge-computing-morgan-stanley-2023-2

vii “Limitations”; <https://openai.com/blog/chatgpt>

viii <https://blog.accubits.com/gpt-3-vs-gpt-3-5-whats-new-in-openais-latest-update/>; <https://platform.openai.com/docs/models/gpt-3>

ix Tom B. Brown, Benjamin Mann, Nick Ryder, Melanie Subbiah, Jared Kaplan, Prafulla Dhariwal, Arvind Neelakantan, Pranav Shyam, Girish Sastry, Amanda Askell, Sandhini Agarwal, Ariel Herbert-Voss, Gretchen Krueger, Tom Henighan, Rewon Child, Aditya Ramesh, Daniel M. Ziegler, Jeffrey Wu, Clemens Winter, Christopher Hesse, Mark Chen, Eric Sigler, Mateusz Litwin, Scott Gray, Benjamin Chess, Jack

Clark, Christopher Berner, Sam McCandlish, Alec Radford, Ilya Sutskever, Dario Amodei, “*Language Models are Few Shot Learners*”; <https://arxiv.org/pdf/2005.14165.pdf>

x <https://commoncrawl.org/the-data/get-started/>

xi Reddit is a social media website where users can upload posts, links, text, images and videos, which can then be voted up or down by other users.

xii <https://openwebtext2.readthedocs.io/en/latest/background/>

xiii Jack Bandy and Nicholas Vincent, “Addressing “Documentation Debt” in Machine Learning Research: A Retrospective Datasheet for BookCorpus”; <https://arxiv.org/pdf/2105.05241.pdf>

xiv Paragraph 14, *Hewlett Packard India Sales Pvt. Ltd. v. Commissioner of Customs (Import), Nhava Sheva*, 2023 INSC 50. In *Commissioner of Customs v. Acer India (P) Ltd.*, (2008) 1 SCC 382, the Supreme Court observed that “[Wikepdia] is an online encyclopædia and information can be entered therein by any person and as such it may not be authentic”.



CONTACT SCAORA @

GE-81A & GE-82, Ground Floor,  
Main Building,

East Wing,

Supreme Court of India, New  
Delhi-110001.

Phone: 011-23072352

Please send in your feedbacks to the  
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[scaora1@gmail.com](mailto:scaora1@gmail.com)