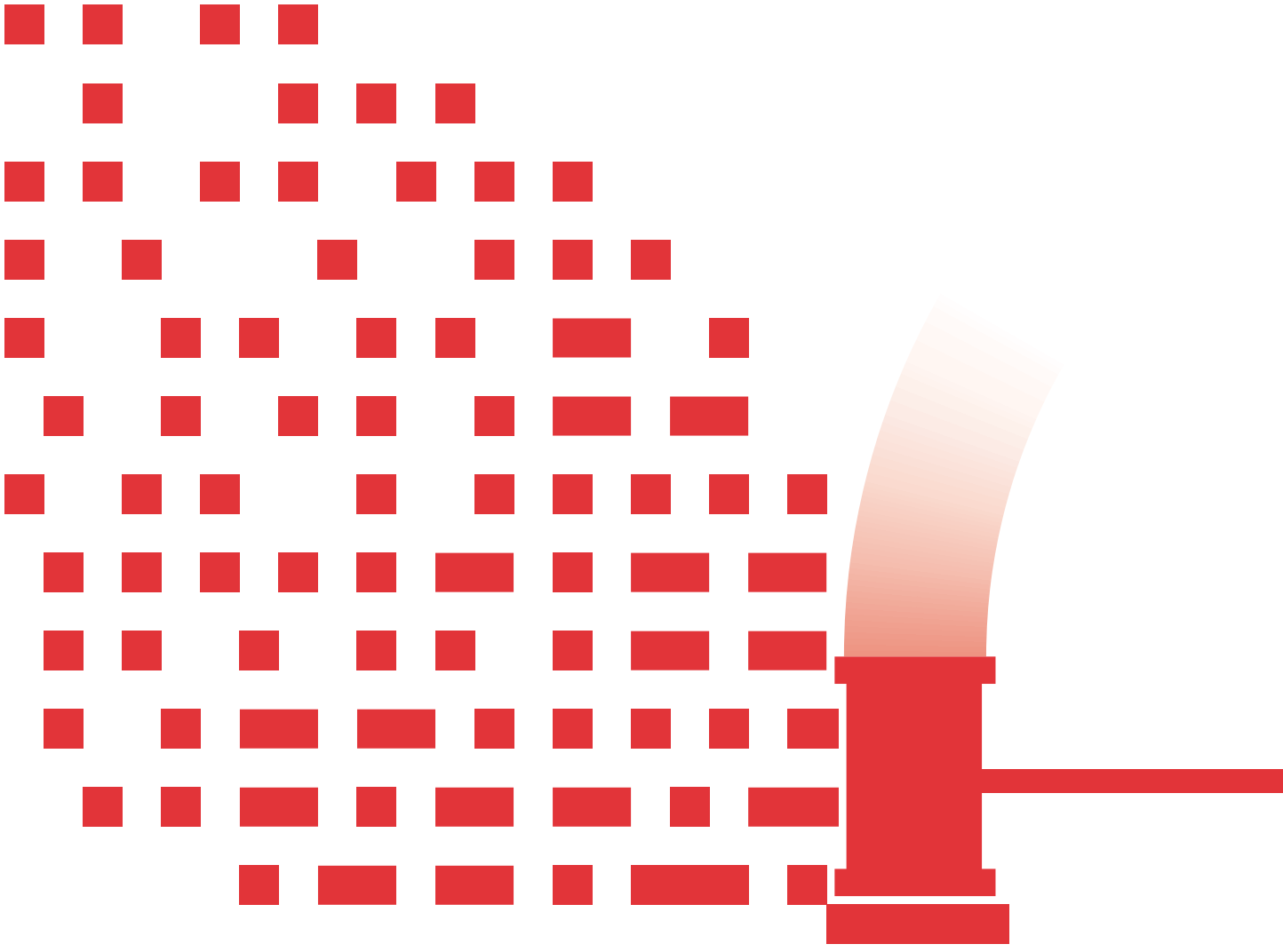
Open Courts in the Digital Age : A Prescription for an Open Data Policy



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JALDI Justice, Access & Lowering Delays in India

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November 2019

Acknowledgements

This Report is an independent, non-commissioned piece of academic work. The authors would like to thank Tata Trusts for their support. The funding for the report is part of "Vidhi-Tata Trusts Fellowship," under which fellows undertake research under the Justice, Access, and Lowering Delays in India (JALDI) project. This multi-year initiative aims to advocate for and implement evidence-based reforms to eliminate existing backlog in courts, and ensure that cases are disposed within reasonable timelines.

The authors are grateful to the participants of the conference on 'Opening up the Justice System – Does the Indian Judiciary Need an 'Open Data' Policy?' which was held on 6th September 2019 in New Delhi. The event was organized by Vidhi Centre for Legal Policy in collaboration with Agami and Indiankanoon.org. The comments and views expressed during the conference on an earlier draft of this report have added valuable insights to this final output. The authors would in particular like to thank Mr. Sushant Sinha, founder Indiankanoon.org, for his inputs on the technical aspects of this report.

The authors are also grateful to Aprameya Manthena, Jyoti Shankar Nayak, Kadambari Agarwal, Megha Katheria, Pallavi Khatri, Saachi Agrawal and Vaidik Bajpai who as interns provided assistance for this report. The authors would also like to thank the Public Information Officers of the Supreme Court and the High Courts, who responded to our applications under the Right to Information Act, 2005.

The errors, if any, rest with the authors.

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Contents

Executive Summary • 1

I India's Tryst with Open Data • 4

II Understanding the Technical Jargon used by the Open Data Movement • 7

III Open Data in the Context of Open Courts: What is the Data that Cannot be Shared with the Public? • 9

A. The Jurisprudential Underpinnings of 'Open Court' Practices • 9
B. Carving out exceptions to the principle of 'open courts' • 12

IV The Drought of Granular Judicial Data in the Age of e-courts – Can an 'Open Data' Policy Solve the Problem? • 14

A. The creation of the NJDG and the problems faced by it • 17
B. Can an open data policy help in providing better statistics? • 17
C. Do citizens have a right to demand the raw data on the e-courts system and should access be allowed for commercial applications? • 18
D. Will an open data policy spur the creation of online case registers that will adversely affect certain litigants? • 20

V Accessibility of Judicial Pleadings under the RTI Act in the Age of e-Filings • 22

A. Existing mechanisms for accessing pleadings – The tension between Court Rules and the RTI Act • 23
B. Opposing Interests: Juxtaposing "right to information" with "right to privacy" • 27
C. Judicial inclination towards closed proceedings in commercial cases • 28
D. Setting technological standards for e-filing of pleadings • 29

VI Judgments in the Age Of 'Open Data' • 31

A. The history of law reports in India • 31
B. Digitisation and Publication of Judgments • 32
C. Digitisation spurs innovation: The creation and impact of Indian Kanoon • 33
D. Transparency v. Privacy v. Right to be Forgotten in the context of judgments • 34
E. What should be the elements of an 'open data' policy for judgments? • 35

VII Audio-Video Recording of Court Proceedings and an 'Open Data' Policy • 37

A. The policy debate over live audio-video streaming of court proceedings • 38
B. The cases in which live audio-video streaming of court proceedings was allowed by the Supreme Court • 39
C. Copyright in the video footage and the bar against commercialisation or usage for satirical purposes • 39
D. Translating the proceedings of the Court • 40

VIII Opening up Legislation: What are the Legal and Technological Challenges? • 42

A. The policy debate over live audio-video streaming of court proceedings • 38
B. The cases in which live audio-video streaming of court proceedings was allowed by the Supreme Court • 39
C. Copyright in the video footage and the bar against commercialisation or usage for satirical purposes • 39
D. Translating the proceedings of the Court • 40

IX Making the Law Available in Indian Languages • 50

A. The constitutional scheme • 50
B. The statutory scheme for authorised translations of the law • 51
C. The statutory scheme for authorised translations of judgments • 51
D. Incorporating a language policy into a potential Open Data policy • 52

Conclusion • 53

Executive Summary

I. India's tryst with an open data policy

The open data movement, draws on principles of the open government movement and the open source movement. While the open government movement was based on calls for more transparency from the state, the open source movement was based on the philosophy that peer to peer collaboration on a medium like the internet would lead to more creativity and innovation. The open data movement seeks to encourage the state to release government data and information in digital formats that are accessible to citizens and which can be reused and redistributed without restrictions. In the Indian context, Indiankanoon.org is a good example of innovation that was facilitated by some basic open data practices adopted by the Indian judiciary.

The Government of India, recognising the transformative potential of open data, announced a National Data Sharing and Accessibility Policy (NDSAP). The policy traces its origins to Section 4 of the RTI Act which requires the government to proactively publish data collected with the aid of taxpayer money. Thanks to digitisation efforts of the E-committee of the Supreme Court, individual High Courts and the Ministry of Law & Justice, there is a mountain of untapped data pertaining to the judiciary in separate IT systems. Yet the judiciary does not have an open data policy in place to facilitate access to this data in a meaningful manner in order to enable innovation that will help in both, the dissemination of legal information as well as furthering judicial accountability.

II. 'Open data' in the context of 'open courts': What is the data that cannot be shared with the public?

One of the biggest concerns with any open data policy is its impact on the privacy of citizens. This issue has been significantly amplified since the Supreme Court recognized privacy as a fundamental right. However, Indian courts have always followed the principle of open courts. This principle of open courts is an age-old English principle which was meant to ensure judicial accountability. More recently this right has been constitutionalised in India since the Supreme Court linked to the fundamental right of citizens, under Article 19(1)(a) to be informed of the workings of the state. Any exception to this principle of open courts will, thus, have to be reasonable and well-defined.

In context of open courts, there are a number of statutorily recognised exceptions namely in matrimonial cases, national security cases, sexual offences cases, juvenile justice cases and trade secrets cases. It should also be possible for litigants to seek anonymisation in cases where they can establish their fundamental right privacy will be harmed by the disclosure of certain information. The onus should be on the litigants to establish possibility of harm being caused to their privacy due to the disclosure of information. A judge, will then have to balance the harm to the litigant's fundamental right to privacy against the fundamental right of citizens to access judicial records, before making a decision on anonymisation. This should take place ex-ante before the records are entered into a publicly accessible database.

III. The drought of granular judicial data in the age of e-courts – can an open data policy solve the problem?

One of the biggest challenges faced by the Indian judiciary is the lack of a system to collect and publish accurate judicial statistics. There have been several failed efforts in the past to institute a mechanism to collect judicial statistics. One of the early efforts was the Judicial Statistics Bill, 2004 which was introduced in Parliament by Mr. Fali Nariman when he was a Member of Parliament. In the years that have passed, the Law Commission, the Law Ministry and the National Court Management Systems (NCMS) have lamented over the lack of accurate judicial statistics; without which it becomes difficult to both, plan for the future of the judiciary as well as measure its performance.

With the massive e-courts project capturing granular data of cases across the district judiciary, it is theoretically possible to record litigation trends within the Indian judicial system. The National Judicial Data Grid (NJDG) was created with the intent of disseminating aggregated statistics, based on data collated from e-courts. While it represents a huge leap from what existed earlier, it lacks the granularity that is required to carry out any meaningful analysis of the judicial system. The E-committee of the Supreme Court may be better off

providing entrepreneurs with API access to the e-courts system in order to facilitate the innovation of new products that will aid in the generation of better judicial statistics and analysis of trends.

Access to such judicial information is a mere extension of the 'open courts' principle and privacy concerns can be tackled ex-ante by anonymising the names of litigants in limited categories of cases. While there is a concern that some entrepreneurs may create databases or registers of all litigants, the draft personal data protection law proposed by the Committee of Experts under the Chairmanship of Justice B. N. Sri Krishna does provide for a 'right to be forgotten' in certain circumstances.

IV. Accessibility of judicial pleadings under the RTI Act in the age of e-filings

Over the last couple of years, few courts have kickstarted the process of accepting judicial pleadings through e-filings. For many reasons, these efforts are faltering. However, it is only a matter of time before more advocates and courts embrace e-filings. There is now the possibility of making available all pleadings in one consolidated database on the lines of the PACER system put in place by the federal judiciary in the United States. This will provide a radical opportunity for judicial transparency. Such a database will prove to be a goldmine of information for lawyers, litigants, academics and journalists.

Pleadings are covered under the 'open courts' principle since any documents meant to be produced or narrated in open court cannot be denied to citizens invoking their fundamental right to information. If the information falls within the reasonable exceptions to the 'open courts' principles, it should be redacted subject to the burden of proof being on the party seeking such redaction.

The biggest obstacle in the law to making these pleadings accessible will be antiquated court rules which are being cited by the courts, including the Supreme Court Registry, as the reason for not making accessible pleadings under the RTI Act. Unlike the RTI Act, which places the onus on the state to provide reasons for denying information, the court rules usually require citizens to demonstrate a good cause to access pleadings. Moreover, the RTI Act unlike the individual court rules, provides for a very simple procedural framework to demand information. The issue of whether the RTI Act will prevail over individual court rules is sub-judice before the Delhi High Court.

Presuming the above legal obstacles are resolved in favour of a presumption that pleadings are accessible by the public, it will be necessary to look at certain technological issues. To begin with, courts must insist on pleadings being filed in machine readable formats rather than printing pleadings and subsequently scanning them. Amongst other advantages of machine-readable formats, is the fact that these are the only formats that are accessible to print disabled advocates and litigants. It is thus imperative that the courts notify 'technical standards' that are compliant with those notified under the Rights of Persons with Disabilities Act, 2016. Other issues that need to be examined by policy makers before scaling up the e-filing option is the requirement to ensure authenticity of notarised pleadings in a digital format, the issue of standardised fonts for Indian languages and the possibility of providing bulk access to a future database of e-pleadings.

V. Judgments in the age of open data

For the longest time, the judgments of the higher judiciary have been disseminated primarily through systematic publication in law reports. However, only a few privately published law reports have enjoyed the patronage of the legal fraternity. With the advent of computers, the higher judiciary was quick to make available its judgments through the internet, in digital machine-readable formats. That one act of the judiciary, made it possible for Mr. Sushant Sinha, a graduate of IIT, Madras to create Indiankanoon.org which is a free database of all judgements of the Supreme Court and all High Courts as well as most Tribunals, with an invaluable search functionality, in addition to the other useful features such as cross-links to statutes and judgments cited in the text of judgments.

A well-designed open data policy can facilitate the creation of more innovative products like Indiankanoon.org. Such a policy should ensure bulk access to judgments for all innovators through a safe and reliable mechanism rather than forcing programmers to spend time trying to scrape judgments off judicial websites. In addition, the judiciary must contemplate doing away with its reliance on proprietary citation norms, in favour of neutral citation norms. The policy must also put in place the means to authenticate print and digital versions of judgments, as well as ensuring that all judicial websites comply with accessibility norms under the Rights of Persons with Disabilities Act, 2016. Special attention must be paid to the issue of standardised open-source fonts for the district judiciary which render judgments in various Indian languages.

Regarding the concerns of litigants about their details being publicly disclosed in judgments, the open data policy should take care of privacy concerns on an ex-ante basis before records are created on the court's publicly accessible websites, for only those cases that fall within the narrow exceptions to the 'open courts' principle. The issue of 'right

to be forgotten' should be left to the future Personal Data Protection Bill, 2018 which in any event will not apply to judicial records.

VI. Audio-Visual live-streaming of court proceedings

In a recent judgment, the Supreme Court agreed to allow for audio-visual live-streaming, on a pilot basis, for important cases being heard by constitutional benches of the court. Little has been done to operationalise this judgment. Nevertheless, once the pilot does begin, the live audio-video streaming of court proceedings has the ability to revolutionise transparency and accountability of the Indian judiciary. While the court deserves credit for this bold move, it is also necessary to revisit the many restrictions laid down by the court on the use of the video footage by citizens.

The first problem is the court's assumption that the copyright in the footage will vest in itself. This may not be true as the Copyright Act appears to vest the copyright of the footage in the government. The second issue is the intention of the court to enforce its copyright to control or even prevent the reuse of the footage. This again is problematic. With regard to judgments, the Copyright Act is very clear that it will not be an infringement of copyright to reproduce judgments of a court or tribunal without the authorisation of the courts or tribunals. Parliament thus intended the free use of copyrighted material related to courts. The third issue is with regard to the court's reluctance to allow video recordings to be used for commercial purposes. This again is baffling since the courts routinely allow private publishers to profit from the publication of its judgments. Unless private players are allowed to profit, they will not create products that will aid the innovative dissemination of the footage. The fourth issue is the court's prohibition against the use of the footage for various purposes, including for satirical purposes, without providing rigorous reasoning for each new category of restrictions. Last but not the least, the Supreme Court must ensure real time translations are made available to the people of India. If this is not done only a small number of English-speaking citizens will benefit from the live-streaming of proceedings.

VII. Opening up legislation – What are the legal and technological challenges?

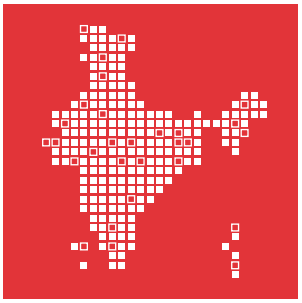
Ever since independence, the Indian government has struggled to make available the text of the law to a majority of Indian citizens. With the creation of the internet, the Law Ministry has attempted to provide better access to both parliamentary statute as well as delegated legislation through a new online website called India Code. Over the last few years, thanks to the intervention of the Delhi High Court, the functionality of the India Code website has improved but still remains far from satisfactory, especially when compared to similar websites runs by the governments of UK and Singapore. From the very large disclaimer available on the website, it is quite clear that even the legislative department does not have faith in the authenticity of the text available on the India Code website. One suggestion that has been put forth to solve some of the current problems, is to adopt the use of mark-up language such as Akomo Ntoso like many countries. This would make it possible for the Law Ministry to update legislation automatically with the advantage of being able to view a legislation as it existed at different points in time before or after specific amendments. By providing API access to a new and revised India Code website after taking care of certain specific issues pointed out in this report, the Law Ministry will be in a position to facilitate innovation that could revolutionise access to the text of the law for all Indians.

VIII. Making the law available in Indian languages

India is a multi-lingual country and any open data policy must factor in the requirement to make available the text of the law, as well as judgments in multiple Indian languages and not just English or Hindi. As per the Constitution, all such text must mandatorily be made available in the English language with the option of publishing translations into Indian languages. The enactment of the Official Languages Act, 1963 made it possible for the Central Government to provide authoritative translations of legislation and judgments of High Court into Hindi. Subsequently Parliament enacted the Authoritative Texts (Central Laws) Act, 1973 to create a legal framework to recognize authoritative translations of the law in other Indian languages. The process is however far from completion and even those legislation which have been translated are not made available on the India Code website in a machine-readable format. There is no legal framework to create authoritative translations of the Supreme Court judgments in languages other than Hindi. Clearly then, any future open data policy will first be required to answer this issue of translations while tackling the broader technological issues identified in this report.

The E-committee of the Supreme Court and the Law Ministry would be well advised to jointly initiate the process of creating an 'open data' policy whose aim should be to catalyse innovation of the kind that will strengthen the rule of law in India.

I India's Tryst with Open Data



- Government of India announced a National Data Sharing & Accessibility Policy (NDSAP) in 2012;
- The stated objective of the policy was to foster a culture of open data within the government to facilitate "national planning and development";
- An open data policy aims to make use of digital data available in a format that allows it to be reused and redistributed;
- The basis of NDSAP is Section 4 of the RTI Act, which mandates proactive disclosure by the government;
- The judiciary does not have an open data policy.

The last two decades have seen the evolution of the open data movement which largely draws upon the principles of the open government movement and open source movement.[1] The modern open government movement has its roots in the post-war politics in the USA where newspaper editors pushed for more transparency in the US government, resulting in the enactment of the Freedom of Information Act, 1967.[2] The roots of the open government movement thus lie in a political movement that demanded more accountability from government. The open source movement is of a more recent vintage and is closely linked to the rise of the internet and internet-enabled technologies. It is rooted in the philosophy that peer production through collaborative techniques on the internet, rather than proprietary modes of production, will lead to more creativity and innovation.[3]

The open data movement, sometimes also referred to as the open government data movement, has been defined in a number of ways, broadly relating to the openness, sharing and accessibility of data collected by governments and state agencies.[4] Some of the basic principles of this movement are that government data should be shared with the citizenry in an accessible manner, which allows for the data to be reused and redistributed by them without any restrictions. This would necessarily require the state to collect and publish data in an open and accessible manner, for example, using open standards instead of proprietary and closed standards. The use of open standards can spur innovation by making it easier for the citizenry to use government data to build tools that can improve governance.

A simple illustration of how an open data policy can help everyday citizens is the example of transport data of rail or bus services. If the data regarding the location of the trains or buses is made available in real time by the state, innovators can build applications that integrate this data into applications like maps thereby providing citizens with better travel and navigation options.[5] Other use cases include 'mandi price' data which is collected by the government and which can be used to make applications wherein farmers can access commodity prices in real time across jurisdictions in different languages enabling them to make more informed decisions.[6] In the context of the judiciary, Indiankanoon.org

[1] Edward Dove, 'Reflections on the Concept of Open Data' (2015) 12:2 SCRIPTed 154 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3025480> accessed 05 November 2019.
[2] Michael R. Lemov and Nate Jones, 'John Moss and the Roots of the Freedom of Information Act: Worldwide Implications' (2018) 24 Southwestern Journal of International Law <https://www.swlaw.edu/sites/default/files/2018-04/SWT101.pdf> accessed 05 November 2019; Bill Moyers, 'Bill Moyers on the Freedom of Information Act' (*PBS*, 5 April, 2002) <http://www.pbs.org/now/commentary/moyers4.html> accessed 05 November 2019.
[3] Siva Vaidhyanathan, 'Open Source as Culture-Culture as Open Source' [2005] Open Source Annual 2005, Clemens Brandt, ed., Berlin: Technische University, 2005 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=713044> accessed 05 November 2019.
[4] Laura James, 'Defining Open Data' (*Open Knowledge Foundation Blog*, 3 October 2013) <https://blog.okfn.org/2013/10/03/defining-open-data/>; "8 Principles of Open Government Data" (*Public.Resource.Org*, 7 December 2007) <https://public.resource.org/8_principles.html> accessed 05 November 2019; Barbara Ubaldi, 'Open Government Data: Towards Empirical Analysis of Open Government Data Initiatives' (2013) 22 OECD Working Papers on Public Governance <https://www.oecd-ilibrary.org/governance/open-government-data_5k46bj4f03s7-en> accessed 05 November 2019.
[5] NITI Aayog and Rocky Mountain Institute, *Data-driven Mobility: Improving Passenger Transportation Through Data* (2018) <http://movesummit.in/files/Mobility-data.pdf> accessed 05 November 2019.
[6] "Gramseva: Kisan (Mandi Prices) – Apps on Google Play" (Google) <https://play.google.com/store/apps/details?id=com.metalwihen.gramseva.kisan&hl=en_IN> accessed 05 November 2019.

is perhaps the best example of innovation that can result from some rather basic open data practices adopted by the judiciary while designing its websites.

While both of the above examples are good illustrations of improving citizen convenience, it is questionable whether the same in fact improves the accountability of the state as is envisaged by the open government movement. This has been one of the specific criticisms of 'open government data' policies.[7] These critics have argued that although the open data movement is grounded in the rhetoric of open government', it has focused primarily on securing the fuel of data for private businesses interested in building innovative information technology products, rather than fostering a political culture of transparency that is linked to a demand for accountability from the government.[8] These critics have argued that by conflating open government with open data, the overtly political focus of the open government movement has actually been diluted in countries like the United States. Additionally, business enterprises looking to sell technologies or services for digital governance projects, brand their projects in the language of open government, complicating the issue further.[9] This is a valid criticism that should be acknowledged and kept in mind while discussing the open data movement in India.

Unlike in the US, the open government movement in India began not because of demands for accountability from the editors and the press but rather due to a grassroots movement spearheaded by the Mazdoor Kisan Shakti Sangathan (MKSS). The focus of the movement was on pushing for a more open government, in order to secure the entitlements that were due to the common citizen from the state. The enactment of the Right to Information Act, 2005 (RTI Act) was a direct result of advocacy by MKSS and marked a new era in Indian democracy by creating a strong political right for citizens to demand information from the state which could be used to hold it accountable.[10] Section 4 of the RTI Act also created a requirement for public authorities in India to proactively make information available on the internet. This provision eventually became the fountainhead of the Indian Government's first open data policy in 2012. Titled the National Data Sharing and Accessibility Policy (NDSAP), the stated objective of the policy was to foster a culture of open data within the government.

The policy traced its lineage to the legal requirements of Section 4 of the Right to Information Act, which is very much couched in the language of political accountability rather than innovation.[11] Notwithstanding this reference to Section 4 of the RTI Act, the NDSAP policy is mostly framed in the language of "national planning and development" rather than political accountability.[12] In other words, the NDSAP's focus has been on using open data for development rather than accountability, per se.

While the NDSAP is certainly applicable to the government, it is silent on whether it extends to the judiciary. Over the years, thanks to multiple digitization initiatives, the Law Ministry of the Government of India and the Indian judiciary have mountains of very useful digital data. Some of this data is simple legal information that would have previously been available only from private publishers at a certain fee. The other set of data which is collected through online services aimed at easing judicial administration can provide radical new insights into the functioning of the judiciary. The question that we seek to examine in this report is whether this very valuable judicial data should be shared under a future 'Open Judicial Data' policy.

Given the blurred lines between open government and open data, referenced earlier, it is imperative that any discussion regarding an 'Open Judicial Data' policy does not make the mistake of concentrating its focus only on the issue of technological innovation without tackling the two issues that have hobbled the rule of law in India i.e. judicial accountability and dissemination of legal information to citizens. This digitisation of legal information and judicial administration provides a unique opportunity to dramatically alter the status quo on both these issues.

Translating these mountains of data into information that is useful and accessible for citizens requires innovation. India has a large number of private entrepreneurs who are in a position to aid with such innovation, provided the judiciary adopts open data policies to catalyse the process. This would require providing these innovators with access to judicial data in useful formats but only after taking care of the issues such as privacy, commercial confidence and copyright law, all of which place restrictions on the release of information into the public domain. In addition, when dealing with judicial

[7] Harlan Yu and David G Robinson, 'The New Ambiguity of 'Open Government'' (2012) 59 UCLA L. Rev. Disc. 178 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2012489> accessed 05 November 2019.
[8] ibid.
[9] ibid 201.
[10] For a detailed history of the RTI movement please see: Aruna Roy et. al., *The RTI Story: Power to the People* (2018, Roli Books).
[11] The Gazette of India, National Data Sharing and Accessibility Policy (NDSAP) - 2012 (2012), cl 1.1 <https://data.gov.in/sites/default/files/NDSAP.pdf> accessed 05 November 2019.
[12] ibid at clause 1.3.

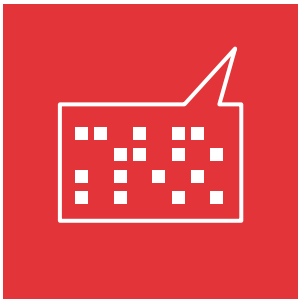
data, there are additional categories of information such as judicial pleadings which the judiciary refuses to share under the RTI Act.

For the purpose of this report, we have looked at 5 different classes of information and end with the critical issue of translating the law into more Indian languages to guarantee accessibility:

i. Judicial Data regarding case details from e-courts, websites of High Courts and other digital services;
ii. Judicial pleadings;
iii. The judgments of Courts;
iv. The video recordings of court proceedings;
v. Legislative texts;
vi. Translations into more Indian languages

We explain the historical context for each category of information mentioned above, in order to explain why an open data policy has the impact to revolutionise access to legal information and judicial accountability, both of which are critical pillars for ensuring rule of law in India. In this backdrop, this report will try to identify bright lines on contentious issues like privacy, commercial confidence and copyright law, all of which can limit the type of data that can be released in the public domain. We also thought it would be important to begin the report by briefly explaining in plain English, some of the technological foundations of open data, as well as briefly tracing the evolution of open courts in India. The discussion on the evolution of open courts is of particular importance in order to address potential privacy concerns that are likely to be raised by opponents of an open data policy.

II Understanding the Technical Jargon used by the Open Data Movement



- Some of the important elements of an 'open data' policy are:
- Machine readable formats;
- Use of mark-up languages;
- API Access;
- Standardised fonts;
- Open Source software

The open data movement, as explained earlier, is about pushing the state to design its websites and digital information processing systems using technological standards that makes it possible for others to use and reuse the same data for either analysis or for building new products. The life-cycle of data begins with the format in which a data record is created. If a government office is conducting its business primarily on paper, digitisation of the said data will begin with scanning the paper record. Most scanned paper records, cannot be read by a computer programme and hence cannot be processed by a computer programme. However, the moment the lifecycle of data begins with data being directly inputted into a computer in a digital format without any paper involved, it opens up a plethora of opportunities. For example, once such data is available in a format that can be read by other computer programs, it would be possible to search through such data as well as process it to throw up statistics and analysis that is helpful for future planning. During the course of this report, we will refer to slightly more detailed technological concepts and it may help to introduce, over here, a few of the commonly used technological terms which will make frequent appearances during the course of this report.

A. Machine readable formats: A document in a 'machine readable format' is one that can be processed by a computer programme.[13] Not all digitised documents are machine readable. A document scanned in an image format is not 'machine readable'. A 'machine-readable' document can be read directly by a computer programme. This means the data in the document can be indexed, processed and searched by computer programmes. Some of the advantages of machine-readable formats are listed below:

i. These formats are compatible with screen reading technology, which convert text to audio for the visually impaired.
ii. Statistical analysis can be carried out on data which is maintained in a specific machine- readable format. This is useful for gathering trends and projections for future planning.
iii. It allows innovators to create new computer programmes that can speak to each other and develop new services.

These advantages are clearly observable in the case of judiciary. The Supreme Court and High Courts have been making available their judgments in a machine-readable format. This has increased access to judgements to the visually challenged citizens including lawyers, thus satisfying the mandate under Rights of Persons with Disabilities Act, 2016. Moreover, it has allowed entrepreneurs to develop software and applications which have aided the legal profession. Prominent examples of these are services include Indiankanoon.org which is a consolidated searchable database of all judgments as well as litigation management applications like Provakil which uses the digital machine-readable cause-lists published by courts to provide automatic alerts about upcoming hearings.

B. Creating documents in legal mark-up language: While making available information in a machine-readable format is a good first step, the next step should be to make available the text of document in 'mark-up languages', which in turn opens the door to new functionalities that will add substantive value for public institutions. The two most popular mark-up languages are HTML, which is used for

[13] Open Data Handbook, Glossary <http://opendatahandbook.org/glossary/en/terms/machine-readable/> accessed 05 November 2019

most webpages and XML, which forms the basis of many technical standards including Akomo Ntoso.[14] These mark-up languages allow for computer readable instructions to be coded into the plain text of a document in a manner that allows computer programmes written by anybody in the same ecosystem to execute specific instructions in relation to the text. This is most useful while dealing with complex documents such as legislative texts or subordinate legislation.

For example, even today the government finds it extremely difficult to prepare a consolidated version of legislations which have been amended several times. The Income Tax Act is a good example of a legislation that has been amended every year since it was enacted in 1961. If the government were to make available the original legislative text in a mark-up language, or if the entire Gazette of India were to be published in a mark-up language, it will create the possibility for both the government and private entrepreneurs to create an array of applications with exciting functionalities. This could include the possibility of displaying consolidated versions of legislative text as they existed at different points of time in history as well as the possibility of automatically linking legislative text with subordinate texts in a manner that is useful to both government and the legal community. The possibilities are endless.[15]

C. Data scraping from website: Data scraping refers to the practice of extracting human readable information from webpages and reproducing it in a document or spreadsheet so that it can be processed further.[16] It usually involves the writing of a computer programme, called a 'script', to trawl websites extracting particular pieces of information. Data scraping should not be mistaken with unauthorised hacking of computer systems because it involves merely the automated reproduction of information that can anyway be seen by the human eye. Data scraping is not always the most efficient way to extract information.

D. Application programming interface (API): APIs are at the heart of open data practices. APIs are a form of standardized computer protocols that facilitates inter-operability between different computer programs. For example, in the context of the e-courts system, API access to external parties would allow any computer programmer to make a request for access to information from the e-courts system. This basically allows for the extraction of information in a controlled manner and without allowing the external party the right to manipulate the information at its source. API access offers a far easier alternative to data scraping which according to even the most advanced computer programmers can be rather tedious. A number of judicial websites around the world offer API access to outsiders for the development of applications.[17] The Government of India has announced a 'Policy on Open Application Programming Interfaces (APIs) for Government of India' with the aim of enabling safe and reliable sharing of information across various e-governance applications and promoting innovation through the availability of data from e-governance applications.[18]

E. Encoding fonts and characters: The ability of computer programmes to recognise and render Indian fonts and characters is a critical issue in digitization in the Indian context because India is a multilingual country. For textual information which is to be presented in Indian languages, the Indian government had developed an 'indigenous' standard (in order to allow computers to process and represent Indic languages) known as the 'Indian Script Code for Information Interchange'(ISCII)[19]. ISCII has to an extent been subsumed by a new, international standard called 'Unicode'[20], which has also rendered ISCII itself less relevant.

F. Non-proprietary, open source formats: A proprietary format is one that can be processed only by a proprietary computer programme which will have to be purchased by users for a cost. There is usually an open source and free alternative, to most non-proprietary formats that can reduce costs for the entire ecosystem which includes third party application developers as well as ultimate users.

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[14] Akomo Ntoso in detail: <http://www.akomantoso.org/?page_id=25> accessed 05 November 2019.

[15] See: Pranesh Prakash, 'Improving India's Parliamentary Voting and Recordkeeping' in New America's India-US Fellows, *The Promise of Public Interest Technology: In India and the United States* (2019) <https://www.newamerica.org/fellows/reports/anthology-working-papers-new-americas-us-india-fellows/improving-indias-parliamentary-voting-and-recordkeeping-pranesh-prakash/> accessed 1 September 2019.

[16] Data Scraping, *Techopedia* <https://www.techopedia.com/definition/33132/data-scraping> accessed 05 November 2019.

[17] Directorate-General for Justice and Consumers, *European Court Database API*, <http://data.europa.eu/euodp/data/dataset/european-court-database-api> accessed 1 September 2019; See also Kit Collingwood, Opening up data in the criminal justice system, (*MOJ Digital & Technology*, 1 December 2015) <https://mojdigital.blog.gov.uk/2015/12/01/opening-up-data-in-the-criminal-justice-system/> accessed 1 September 2019.

[18] Ministry of Communications & Information Technology, *Policy on Open Application Programming Interfaces (APIs) for Government of India* (2015) <https://meity.gov.in/writereaddata/files/Open_APIs_19May2015.pdf> accessed 1 September 2019.

[19] ISCII - IS 13194:1991; For information see <http://tdil.meity.gov.in/Standards/ISCII.aspx> accessed 1 September 2019.

[20] For information see <https://home.unicode.org/basic-info/overview/> accessed 1 September 2019.

III Open Data in the Context of Open Courts: What is the Data that Cannot be Shared with the Public?

- 'Open courts', refers to a longstanding practice, mostly in common law countries, wherein all proceedings before a court of law are held in full public view;
- The logic for open courts is that the publicity around judicial proceedings will help ensure the integrity of the process by acting as a check against arbitrariness, perjury and abuse of power;
- Over the years, the 'open courts' principle has been constitutionalised with courts in India and the United States linking it to the fundamental right to speech and information;
- There are exceptions to the 'open courts' principle, where proceedings before a court can be held 'in-camera'.
- The disclosure of information under an 'open data' policy must necessarily be linked to the 'open courts' principle.

The phrase 'open courts', refers to a longstanding practice, mostly in common law countries, wherein all proceedings before a court of law are held in full public view. If proceedings are held in full public view it follows that anybody, be it a court reporter or a journalist or an innovator like Indiankanoon.org can reproduce such data. However, there are exceptions to the general rule of open courts which excludes certain proceedings from being held in full public view. It follows that such proceedings will have to be automatically excluded from an 'open data' policy. Thus, any open data policy for the judiciary will be intrinsically linked to the principle of open courts.

In this chapter we will briefly discuss the jurisprudential underpinnings of the open courts principle, the exceptions to this principle and its relevance to a potential 'Open Judicial Data' policy.

A. The Jurisprudential Underpinnings of 'Open Court' Practices

The logic for open courts is that the publicity around judicial proceedings will help ensure the integrity of the process by acting as a check against arbitrariness, perjury and abuse of power. One of the most famous justifications for open courts was provided by Jeremy Bentham, which is as follows:

> "In the darkness of secrecy, sinister interest and evil in every shape have full swing. Only in proportion as publicity has place can any of the checks applicable to judicial injustice operate. Where there is no publicity there is no justice. Publicity is the very soul of justice. It is the keenest spur to exertion and the surest of all guards against improbity. It keeps the judge himself while trying under trial."[21]

Simply put, Bentham's utilitarian logic for open courts is that publicity of the judicial process is the best guarantee of judicial accountability. The other interesting reason put forth by the United States Supreme Court to support public trials is that "…the open processes of justice serve an important prophylactic purpose, providing an outlet for community concern, hostility, and emotion…", which would have "significant community therapeutic value" for the community in question.[22]

It is important to engage with the theory behind 'open courts' in this report on 'open data' because it will help us draw the redlines for data that cannot be disclosed under a potential 'Open Judicial Data' policy for the judiciary. The four important categories of judicial data that form the substance of the following chapters are first, the data on the e-courts websites which consists mainly of names of litigants, provisions of the law, case hearings for each

[21] Jeremy Bentham, *The Works of Jeremy Bentham*, John Bowring (ed) (William Tait, Edinburgh 1843) 316, 355.
[22] *Richmond Newspapers Inc. v. Virginia* 448 U.S. 555 (1980).

case; second, the pleadings filed before courts; third, the prospective live-streaming of proceedings and fourth, judgments by the courts especially the higher judiciary.

Each of these categories contains details of litigants which the litigants themselves may not want to be disclosed for a variety of reasons ranging from potential embarrassment to a possible violation of the fundamental right to privacy. Similarly corporations may not want information disclosed on the grounds that the information in question is a trade secret. Governments, in some cases of national security, may not want details disclosed to the general public during the course of legal proceedings. In order to understand the permissible exceptions to the principle of open courts, it is first necessary to understand the underlying theory of open courts.

In India, S. 153 of the Code of Civil Procedure[23] and S. 327 of the Code of Criminal Procedure[24] require as a general rule, all civil and criminal cases to be tried in open court, subject to the discretion of judges in certain cases. There are also certain statutes that provide for exceptions to this general rule in order to protect the privacy of litigants in cases of sexual assault, domestic violence, juvenile justice and divorce proceedings.[25] Similarly, there are statutes that allow for courts to hold in-camera proceedings to protect national security.[26] Any violation of gag orders under these provisions can be punished as being contempt of court under the Contempt of Courts Act, 1971. In addition to statutory exceptions, there are cases where judges exercise their inherent powers to prohibit the publication or reporting of statements made during the course of a public trial. One such order led to a famous precedent, that was decided by nine judges of the Supreme Court in the case of *Naresh Mirajkar v. State of Maharashtra & Anr*[27]

The case arose when a High Court judge restrained the press from reporting the statements of a witness in a trial, who had complained that his business was affected the previous time his deposition was reported in the press. The gag order was challenged before the Supreme Court on the grounds that it was in violation of the fundamental right of the press to free speech as embodied in Article 19(1)(a) of the Constitution.

The majority judgment while reiterating the importance of having open courts in order to instil public confidence in the justice system and quoting Bentham's famous justification for open courts,[28] failed to actually answer the preliminary question of whether the fundamental right to free speech in Article 19(1)(a) of the Constitution included the right of the press to attend and report on court proceedings. The majority merely concluded that High Courts could exercise their inherent powers to deviate from the principle of open courts if it was felt that a public trial would adversely affect the fair administration of justice.[29]

A concurring judgment by Justice A.K. Sarkar very specifically rejected the argument that the right to attend court proceedings and report on the outcomes was a part of the fundamental right to free speech contained in Article 19(1)(a). He held the following:

> "Suppose a court orders a trial in camera and assume it had a valid power to do so. In such a case the proceedings are not available to persons not present at the trial and cannot, for that reason at least be punished by them. Can any such person complain that his liberty of speech has been infringed? I do not think so. He has no right to hear the proceedings. Indeed, there is no fundamental right to hear. If he has not, then it should follow that his liberty of speech has not been affected by the order directing a trial in camera."[30]

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[23] Section 153B: Place of trial to be deemed to be open court.- The place in which any Civil Court is held for the purpose of trying any suit shall be deemed to be an open Court, to which the public generally may have access so far as the same can conveniently contain them:
Provided that the presiding Judge may, if he thinks fit, order at any stage of any inquiry into or trial of any particular case, that the public generally, or any particular person, shall not have access to, or be or remain in, the room or building used by the Court.

[24] Section 327.- Court to be Open: [(1)] The place in which any Criminal Court is held for the purpose of inquiring into or trying any offence shall be deemed to be an open Court, to which the public generally may have access, so far as the same can conveniently contain them:
Provided that the presiding Judge or Magistrate may, if he thinks fit, order at any stage of any inquiry into, or trial of, any particular case, that the public generally, or any particular person, shall not have access to, or be or remain in, the room or building used by the Court.

[25] For example, S. 228 of the Indian Penal Code (IPC) and Section 23 of the Protection of Children from Sexual Offences Act, 2012 makes it an offence to disclose the names of sexual assault victim. The proceedings themselves can be held in-camera, meaning that the general public is not allowed to enter the courtrooms during the course of the proceedings. Another class of cases, where in-camera trials are permitted are divorce proceedings and domestic violence cases. Section 22 of the Hindu Marriage Act, 1955; Section 33 of the Special Marriage Act, 1954, Section 11 of the Family Courts Act, 1984 and Section 43 of the Parsi Marriage and Divorce Act, 1936 allow for divorce proceedings to be conducted in-camera. Similarly, Section 16 of the Protection of Women from Domestic Violence Act, 2005 allows for the Magistrates to conduct the proceedings in-camera. Section 3 of the Juvenile Justice (Care and Protection of Children) Act, 2015 guarantees every child a right to protection of his privacy and confidentiality throughout the judicial process.

[26] Similarly, Section 44 of the Unlawful Activities (Prevention) Act, 1967; Section 17 of the National Investigation Agency Act, 2008 and Section 14 of the Official Secrets Act, 1923 allows for in-camera trials, presumably to protect national security.

[27] (1966) 3 SCR 744.

[28] ibid [20].

[29] ibid [29];

[30] ibid [71]

> "The public no doubt have a right to be present in court and to watch the proceedings conducted there. But this is not a fundamental right. It is indeed not a personal right of a citizen which, I conceive, a fundamental right must be. It is a right given to the public at large in the interests of the administration of justice. It cannot exist when the administration of justice required a trial to be held in camera for in such a case it is not in the interest of justice that the public should be present."[31]

A dissenting judgment by Justice Hidayatullah in the same case, came to the exact opposite conclusion. In pertinent part, he reasoned as follows to conclude that Article 19(1)(a) covered the right of the press to attend and report the proceedings of a court:

> "The fundamental right here claimed is the freedom of speech and expression. In *Sakal Papers (P) Ltd. v. Union of India* this Court holds that the freedom of speech and expression guaranteed by Article 19(1)(a) includes freedom of press. A suppression of the publication of the report of a case conducted in open court, for a reason which has no merit, ex facie offends that freedom. Just as the denial without any reason to a person of the right to enter a court is to deprive him of several fundamental freedoms, denial of the right to publish reports of a public trial is also to deny the freedom of the press which is included in the freedom of speech and expression".

In stark contrast to the majority opinion in the Mirajkar case, the United States Supreme Court in the case of *Richmond Newspapers Inc. v. Virginia*[32] in 1980, constitutionalised the common law practice of 'open courts' by expressly locating the right of the public and the press to attend court proceedings in the First Amendment's fundamental right to free speech and assembly. In pertinent part, the majority judgment held the following:

> "The freedoms of speech, press, and assembly, expressly guaranteed by the First Amendment, share a common core purpose of assuring freedom of communication on matters relating to the functioning of government. In guaranteeing freedoms such as those of speech and press, the First Amendment can be read as protecting the right of everyone to attend trials so as to give meaning to those explicit guarantees; the First Amendment right to receive information and ideas means, in the context of trials, that the guarantees of speech and press, standing alone, prohibit government from summarily closing courtroom doors which had long been open to the public at the time the First Amendment was adopted."[33]

As a result of linking the principle of 'open courts' to the fundamental right to free speech and its accompanying right to receive information, the American Supreme Court has placed the principle of 'open courts' on a firm constitutional foundation, thereby reducing the scope of permissible exceptions. Litigants or the state, seeking an exception to this principle would have to demonstrate compelling countervailing interests to reverse the presumption of openness of trials. Thus, judges and litigants cannot by mutual agreement decide to close proceedings to outsiders and legislative measures that curb public access to court proceedings will be subject to judicial review.

The Indian Supreme Court has moved closer to the American position in recent years with its judgment in the *Swapnil Tripathi v. Supreme Court of India*.[34] This is primarily because the Supreme Court of India has expanded the fundamental right to free speech in Article 19(1)(a) to include a fundamental right to know of the workings of the state. The most important judgment in this context was delivered by a bench of seven judges in the case of *S.P. Gupta v. President of India and Others*[35] where the court concluded that "…The concept of an open government is the direct emanation from the right to know which seems to be implicit in the right of free speech and expression guaranteed under Article 19(1)(a)." This expansive understanding of Article 19(1)(a) can be extended to the proceedings of the courts because the press cannot report about the state unless it is guaranteed the right to attend judicial proceedings and publish an account of the proceedings. The above line of reasoning was adopted by the Supreme Court of India in the Swapnil Tripathi case. In pertinent part, the court held the following:

> "The right to know and receive information, it is by now well settled, is a facet of Article 19(1)(a) of the Constitution and for which reason the public is entitled to witness Court proceedings involving issues having an impact on the public at large or a section of the public, as the case may be."[36]

On the basis of the above reasoning, the court upheld the demand for live-streaming the proceedings of important constitutional cases. The only problem with this judgment is that it makes no real attempt to reconcile its ruling with

[31] ibid [73];
[32] 448 U.S. 555 (1980)
[33] ibid 575-578.
[34] (2018) 10 SCC 639.
[35] [1981] Supp SCC 87.
[36] *Swapnil Tripathi* (n 34) 651, [3].

the *Mirajkar* precedent, where only the dissenting judgment concluded that the press had a fundamental right to report on proceedings of courts. Nevertheless, given the widespread acceptance across the higher judiciary, that the fundamental right to speech in Article 19(1)(a) includes the right to know about the state, it is unlikely that any future court will disregard the court's interpretation in *Swapnil Tripathi* that the press and citizens have a fundamental right to attend and be informed of court proceedings. There is however the danger, as already witnessed, that courts will impose procedural barriers that may end up curbing physical access to courts. For example, most High Courts and the Supreme Court require citizens to apply for an entry pass to enter their premises and in the process have severely restricted the entry of common citizens into courtrooms.[37]

B. Carving out exceptions to the principle of 'open courts'

Like any other principle, there are exceptions to the general rule that courts must open their proceedings to the public.

Under English law, courts may conduct proceedings related to wards, matrimonial proceedings and trade secrets behind closed doors.[38] In the United States, the state is required to demonstrate a compelling interest to justify any attempts to curb the general principle of open courts. The three broad categories of exemptions that may be upheld by American courts are national security, trade secrets and privacy but even then, it is up to the state or litigant, to demonstrate a compelling interest in each individual case. A law that imposed a blanket exemption prohibiting the press from reporting on judicial proceedings in cases of minor sexual assault victims was struck down by the US Supreme Court.[39] While the court did accept the state's argument that safeguarding the physical and psychological well-being of a minor might be a compelling state interest in some cases, it held that there was no justification for a blanket ban. Rather the courts would have to make case-by-case determinations that such exemptions are necessary to safeguard the minor victim.[40]

In India, as explained earlier there are several legislations that allow in-camera proceedings in primarily three categories of cases: cases of sexual assault or domestic violence, cases involving national security and official secrets and finally, cases involving divorce proceedings. In addition, the Contempt of Courts Act, 1971 recognises the power of courts to conduct in-camera proceedings on grounds of public policy or protection of 'secret processes' etc.[41]

With the recognition of privacy as a fundamental right in the *Puttaswamy* case[42], it is possible that litigants can try arguing against 'open court' proceedings in cases where their fundamental right to privacy will be affected. The Supreme Court never quite defined the precise boundaries of the fundamental right to privacy, expecting it to be developed on a case by case basis. However, the underlying theme in the 9 opinions rendered in that case, was that privacy as a fundamental right is meant to protect the autonomy, reputation and dignity of all citizens.

In context of privacy of personal information that is available online one of the 9 opinions, while recognising the rights of individuals to exercise control over his personal data in order to control his life, also recognised that the right would not be absolute and would not imply that a "criminal can obliterate his past".[43] The court also warned that the right to privacy could not operate as a "right of total eraser (*sic*) of history" and that it had to be "balanced against other fundamental rights like the freedom of expression, or freedom of media, fundamental to a democratic society."[44]

It would be fair to presume that if a litigant is able to convince a court, at the outset of legal proceedings, that their fundamental right to privacy outweighs the fundamental right to speech and information, the proceedings will have to be held 'in-camera' thereby automatically barring the publication of information that may be republished by others. This balancing exercise will have to be conducted on a case by case basis.

The one tricky issue from the perspective of an 'open data' policy is whether there should be a 'right to be forgotten' for those litigants who never objected to the proceedings being

[37] Satya Prakash, 'SC restricts entry to advocates, bar protests' *Hindustan Times* (11 November 2009) <https://www.hindustantimes.com/delhi/sc-restricts-entry-to-advocates-bar-protests/story-2k8LeHYv3SOEGKI5u6UXfP.html> accessed 2 September 2019; Kanu Sarda, 'To pass through gates, Delhi courts to have passes' *The New Indian Express* (7 May 2017) <http://www.newindianexpress.com/thesundaystandard/2017/may/07/to-pass-through-gates-delhi-courts-to-have-passes-1601912.html> accessed 2 September 2019.

[38] *Scott v Scott* [1913] AC 417, HL; *Cape Intermediate Holdings Ltd. v. Dring* [2019] UKSC 38.

[39] *Globe Newspaper Co. v. Superior Court, County of Norfolk* 457 U.S. 596; See also Note, The First Amendment Right of Access to Civil Trials After *Globe Newspaper Co. v. Superior Court*, 51 The University of Chicago Law Review 286 (1984).

[40] ibid 608.

[41] Section 7(1)(d).

[42] *K.S Puttaswamy v. Union of India,* (2017)10 SCC 1.

[43] ibid 68 [629]. [Per Justice Sanjay Kishan Kaul].

[44] ibid 68 [635].

held in 'open court' but subsequently want information to be taken off the internet because they feel that the easy accessibility of this information through search engines is causing harm to them. The 'right to be forgotten' has received increasing prominence in the recent years, after European courts and legislators recognised such a right.[45] It has been an extremely controversial right since it is in conflict with the fundamental right to free speech and depending on the breadth of such a right, it interferes with the accuracy of public records.[46] The Committee of Experts under the Chairmanship of Justice B.N. Sri Krishna has recommended that India incorporate a similar 'right to be forgotten' into any future data protection law.[47] Since the draft law does not extend to information being processed by the judicial system, the judiciary will have to lay down its own policy on the 'right to be forgotten' for information that it is processing.[48]

Such a policy can simply deny an ex-post 'right to be forgotten' on the grounds that public records once published must maintain their accuracy and instead offer litigants the right to have their name redacted ex-ante, at the very outset, or in some cases during the course of the proceedings, provided the litigants can establish that they fall within the limited exceptions to the 'open courts' principles. Once the proceedings are concluded, parties should not be able to ask for wider protection than was granted during the course of the proceedings. With regard to private databases or platforms, that are collating judicial data, it may be prudent to leave their regulation to a future personal data protection law that will be enacted by Parliament. An open data policy for the judiciary may not be the appropriate legal instrument to regulate such private databases.

We will examine this issue of 'right to be forgotten' in the subsequent chapters in the specific context of three specific datasets that are relevant for judiciary: granular data available on the e-courts website, judicial pleadings and finally, judgments.

[45] *Google Spain SL v Agencia Española de Protección de Datos* (AEPD) (Case C-131/12) [2014] QB 1022; See General Data Protection Regulations, Article 17 <https://gdpr.eu/article-17-right-to-be-forgotten/> accessed 5 November 2019.

[46] Edward Lee, 'The right to be forgotten v. free speech' ISJLP12 (2015): 85; Rolf H Weber, 'The right to be forgotten: More than a Pandora's box' J. Intell. Prop. Info. Tech. & Elec. Com. L. 2 (2011): 120; See also Owen Bowcott, 'Right to be forgotten' could threaten global free speech, say NGOs' *The Guardian* (9 September 2018).

[47] Committee of Experts under the Chairmanship of Justice B.N.Srikrishna, 'White Paper of the Committee of Experts on a Data Protection Framework for India' (2017) 81 <https://meity.gov.in/writereaddata/files/Data_Protection_Committee_Report.pdf> accessed 5 November 2019.

[48] See The Personal Data Protection Bill, 2018, cl 44.

IV The Drought of Granular Judicial Data in the Age of e-courts – Can an 'Open Data' Policy Solve the Problem?

- Academics, Parliament, the Law Commission and the Supreme Court of India have complained about the non-availability of good quality and accurate judicial statistics.
- The lack of such data makes it difficult to study the possible areas of improvement for the judicial system.
- The National Judicial Data Grid (NJDG) was setup to collate data from the e-courts system to record and publish judicial statistics from courts across India.
- Although the NJDG has great potential, it is lacking in the granularity that is required for any meaningful analysis of the judicial system.
- An open data policy for the judiciary that releases raw data from e-courts can help entrepreneurs create products that produce meaningful judicial statistics as well as assist in docket management.
- An ideal open data policy will provide API access to all citizens while taking care of privacy concerns on an ex-ante basis before data is made available on a publicly accessible system.

Historically, one of the biggest obstacles to studying or reforming the Indian judicial system has been the lack of an official system to collect and disseminate accurate judicial statistics regarding case pendency and disposal. Most of the figures quoted in Parliament or by the government, for most of India's history, appear to be approximations which hide more than they reveal. Statistics which club all pending cases into just two categories of civil and criminal cases are not helpful because these categories are simply too broad. For example, if a particular criminal court has only 10 judges and a total pendency of 5,000 cases it may appear to be a worrisome situation. But if 4,800 of those cases are relating to traffic offences, the situation may not be as grave because traffic offences do not consume much judicial time. Thus, access to granular data, especially the case-type, is critical to understanding the patterns of litigation and pendency before different district courts.

India lacks a system of collating and publishing accurate judicial statistics because most High Courts, which are responsible for judicial administration of the district courts under their jurisdiction, have never put in place well-designed systems to collect and report statistics.[49] On paper, most High Courts appear to have a statistics division, whose job is to collect and compile statistics for the entire state judicial administration. However, these divisions do not appear to be equipped with professional statisticians. In order to get a better understanding of the workings of these statistical divisions in the High Courts, we filed RTI applications with ten High Courts[50] requesting them to provide us with the following information:

a. If there was a designated statistics wing in the said High Court, its composition (along with names and qualifications), and also, if professional or trained statisticians were being employed by the High Court for such positions;
b. What kind of statistics were being maintained (along with the statistics from January, 2016 to December, 2018); and
c. Whether these statistics were being proactively disclosed under Section 4 of the RTI Act, 2005, and the languages they were being published in (other than English).

[49] Law Commission of India, *120th Report on Manpower Planning in the Judiciary: A Blueprint* (Law Comm 120, 1987) <http://lawcommissionofindia.nic.in/101-169/report120.pdf> accessed 5 November 2019.

[50] We filed RTI applications on April 16, 2019, with the public information officers of the High Courts at Bombay, Calcutta, Delhi, Gauhati, Gujarat, Jharkhand, Karnataka, Kerala, Punjab & Haryana and Patna. Out of these, we have not received any response from Delhi High Court and Karnataka High Court. Jharkhand High Court rejected our application, and Calcutta High Court sought time since they had transferred the RTI application to the relevant division and were awaiting information. However, we have not received a follow-up response from the Calcutta High Court. The RTI response numbers from the rest are as follows: Bombay HC- R.I.A. No. 475/2019, Guwahati HC- No. 78/2019, Gujarat HC- No. 302/2019, Jharkhand HC- RTIR-42-2019, Kerala HC- PIO 245/2019, Calcutta HC- Memo No. 2394-G.S., Chandigarh HC- No. 672/PIO, Patna HC- IC/327/2019
Karnataka HC- SPIO.No. 244/2019.

- Senior Advocate Fali Nariman, as a Member of Parliament in the Rajya Sabha, introduced the Judicial Statistics Bill, 2004 which was one of the first prominent efforts to put in place a system to collect judicial statistics.
- The 245th Report of the Law Commission of India in 2014 noted the "lack of complete data as a great handicap in making critical analysis and more meaningful suggestions".
- The National Court Management System committee in a report published in 2012, noted that "To [our] dismay, statistics, most of the times, have been either incomplete or incorrect."
- The NCMS urged the High Courts to hire professional statisticians and called for setting up a national network to collect judicial statistics.

Of the ten High Courts we sent our RTI applications to, six High Courts denied employing or contracting any trained professional statisticians for gathering and maintaining judicial statistics.[51] The Gujarat High Court responded by stating the non-existence of a separate statistical division, and informed us that figures on pendency were generated in an *ad-hoc* manner, when so required.

The absence of an accurate system of judicial statistics has not gone unnoticed by academics, Parliament, the Law Commission of India, the Supreme Court of India or the Government of India.

One of the first prominent efforts to put in place a system to collect judicial statistics was by Senior Advocate Fali Nariman who, as a Member of Parliament in the Rajya Sabha, introduced the Judicial Statistics Bill, 2004. This Bill aimed at creating specific authorities at the national, state and district levels, for the collection and publication of judicial statistics.[52] It further prescribed the details which must be captured in the annual statistics reports to be prepared by each of these authorities, including commentary on trends revealed by statistics,[53] and case-flow information.

Nariman's effort was inspired by similar efforts in the United States and the United Kingdom. Under American law, the Administrative Office of the United States Courts is required to provide an annual report on the caseload of the federal courts with statistical information.[54] The information is then tabled before the Judicial Conference of the United States, the Congress and the Attorney General. Similarly, in the United Kingdom, the Ministry of Justice publishes statistics related to the civil and criminal courts of England and Wales.[55] Additionally, the Ministry also provides a guide to the statistics published and the granular data in the form of machine-readable CSV formats (MS Excel) for public use.[56]

At the time, Nariman referenced a particular instance where the Delhi High Court refused to share with the Law Ministry, information relating to the time taken by it to pronounce judgments after reserving the matter. The High Court apparently told the Law Ministry that its independence has been infringed upon by the request. To which, Nariman replied saying the following:[57]

> "Judicial independence means deciding cases without being influenced by anybody. But disseminating information about how many cases get decided in the courts will not compromise judicial independence at all. This is a wrong impression that the judiciary, among all organs of the government, must remain totally secretive, and nobody must know anything that is happening in the judiciary."

He then proceeded to describe judicial statistics as being in the bosom of the judiciary and how it was critical to unlock the bosom of the judiciary to get access to judicial statistics that can aid in planning for the judiciary.[58] As with most private member's bills in India, Nariman's bill too failed to make it into law.

[51] These were the High Courts of Bombay, Gauhati, Karnataka, Kerala, Patna and Punjab & Haryana.
[52] Judicial Statistics Act, 2004 <http://164.100.24.219/BillsTexts/RSBillTexts/AsIntroduced/XII_2004.PDF> accessed 31 October 2019.
[53] Section 14 (2)(a) for the National Authority, and Section 15 (3)(a) for the State Authorities.
[54] 28 U.S.C. § 604(a)(2) <https://www.law.cornell.edu/uscode/text/28/604> accessed 31 October 2019.
[55] Ministry of Justice, Statistics at MoJ <https://www.gov.uk/government/organisations/ministry-of-justice/about/statistics#latest-statistics> accessed 31 October 2019.
[56] Ministry of Justice, Civil Justice Statistics <https://data.gov.uk/dataset/163c7366-0988-44f8-9803-6d3124311716/civil-justice-statistics> accessed 31 October 2019;
Ministry of Justice, Criminal Justice Statistics <https://data.gov.uk/dataset/fdf8acba-c5ae-47c2-a1fd-0290b17b3f27/criminal-court-statistics> accessed 31 October 2019.
[57] V. Venkatesan, 'A Private Member's Bill in Parliament seeks to address the problem of lack of data on judicial functioning by calling for the creation of government organs to collect and publish judicial statistics.' *Frontline* Volume 21 - Issue 17 (New Delhi, 14 - 27August 2004) <https://frontline.thehindu.com/static/html/fl2117/stories/20040827004003100.htm> accessed 31 October 2019.
[58] ibid.

Over the last decade, Indian academics have been consistently complaining about how the lack of access to judicial statistics, at every level of the judiciary, was impeding empirical research of the Indian judicial system.[59] As argued by some academics, litigation patterns vary across the country and in order to develop localized reforms for different states or districts, it is important to have access to local datasets of judicial information.[60] The fact that even institutions like the Supreme Court of India, which is the most important court in the country, does not formally release accurate and granular judicial statistics, has specifically come under criticism from academics who are interested in conducting empirical studies on the functioning of the Supreme Court.[61]

Apart from academics, the Law Commission of India (LCI), the Ministry of Law & Justice and even the National Court Management System (NCMS) committee of the Supreme Court have officially noted their disapproval over the lack of availability of good quality judicial statistics.

In its 245th report, the LCI noted the "lack of complete data as a great handicap in making critical analysis and more meaningful suggestions."[62] Traditionally, the LCI has had to write to different High Courts requesting them for specific data. Even then High Courts can be handicapped by the fact that they may not be maintaining statistics in the most useful manner. Furthermore, in the exceptional case where the Parliament enacted the Commercial Courts Act, 2015, specifically requiring the maintenance of judicial statistics, our research has shown that High Courts across the country have failed to comply with the legal requirement of maintaining statistics in a prescribed format.[63]

The NCMS in a report published in 2012, noted that "To [our] dismay, statistics, most of the times, have been either incomplete or incorrect." The same report also noted that the High Courts were often providing the Supreme Court with "incomplete and incorrect information" and even that was commonly delayed. Such incomplete information, according to the NCMS report "creates difficulties in planning" for the judiciary, including on the issue of number of court rooms that are required by the judiciary across the country. In conclusion, the NCMS urged the High Courts to hire professional statisticians and called for setting up a national network to collect judicial statistics. As we have already shown above, almost seven years later, the High Courts are yet to hire professional statisticians.

In the years that followed, in 2015, the Minister of Law & Justice of the Government of India wrote to the Chief Justices of the High Courts, asking them once again to work better to collect judicial statistics.[64] There appears to have been great discontent amongst the government on the lack of uniform data collection practices across the country. As per a note of the National Mission on Justice Delivery and Legal Reforms, different High Courts count institutions, disposals and pendency differently.[65] Different courts also count bail applications, interlocutory applications etc. differently. Ideally, they should have been counted as a part of the parent case from which they arise otherwise overall numbers will be skewed. This is a problem faced not just at the district and taluka courts but also at the High Courts. As per the government, some High Courts were counting the same case multiple times since every new application filed in the case was being counted as a new case rather than as a part of the main case.[66] A resolution passed by the Chief Justices Conference, 2015 had decided that "for statistical purposes, the High Courts will count the main case only towards pendency and arrears."[67] It is not clear whether this was finally implemented at the registry level of the various High Courts. Despite the confusion across the judiciary on how cases are to be counted, there does not appear to be any draft guidelines on the counting of cases or any attempt to rope in professional statisticians at the level of the High Courts to help streamline the process.

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[59] Geeta Oberoi, The curious case of Court Manager in India: From its Creation to its Desertion, *International Journal for Court Administration*, 9(1), pp.1–9 (December 2017) <https://www.iacajournal.org/articles/abstract/10.18352/ijca.245/> accessed 31 October 2019; Aparna Chandra, 'The State of Judicial Statistics in India' (*DAKSH*, 10 February 2015) <http://dakshindia.org/the-state-of-judicial-statistics-in-india/> accessed 31 October 2019.

[60] Arnab Kumar Hazra & Bibek Debroy, 'Judicial Reforms in India: Issues & Aspects', Academic Foundation (2007); Krishnaswamy S., Sivakumar S.K., and Bail S. 'Legal and judicial reform in India: A call for systemic and empirical approaches' (2014) Journal of National Law University, Vol. 2:1, 1-25, 14.

[61] Nick Robinson, 'A Quantitative Analysis of the Indian Supreme Court's Workload', Journal of Empirical Legal Studies, Vol. 10:3, 570-601; Simi Rose George, 'Releasing India's Supreme Court from the Shadow of Delay: A proposal for Policy Reform', Master's Thesis at Harvard.

[62] Law Commission of India, *245th Report on Arrears and Backlog: Creating Additional Judicial (wo)manpower* (Law Comm 245, 2014) 10.

[63] Vaidehi Misra & Ameen Jauhar, 'Commercial Courts Act, 2015: An Empirical Impact Evaluation' *Vidhi Centre for Legal Policy* (July 2019) <https://vidhilegalpolicy.in/2019/07/05/commercial-courts-act-2015-an-empirical-impact-evaluation/> accessed 05 November 2019.

[64] National Mission for Justice Delivery and Legal Reforms, *Agenda for the Ninth Meeting of the Advisory Council of the National Mission for Justice Delivery and Legal Reforms*, [p 1]. <https://doj.gov.in/sites/default/files/Agenda-Note-9th-Meeting.pdf> accessed 05 November 2019.

[65] ibid 32.

[66] Ibid.

[67] Resolution adopted in the Chief Justices Conference, 2015 <https://sci.gov.in/pdf/sciconf/Resolution%20adopted%20in%20the%20Chief%20Justices%20Conference,%202015.pdf> accessed 05 November 2019.

A. The creation of the NJDG and the problems faced by it

The consensus amongst different stakeholders on the paucity of judicial statistics led to the creation and eventually scaling up of the National Judicial Data Grid (NJDG) to collect real time information on judicial statistics from the e-court system which networks all District Courts in India. The NJDG, which was created by the National Informatics Centre (NIC) under the supervision of the E-committee of the Supreme Court, is a truly impressive attempt to create a system of judicial statistics across the country. As of today, the portal generates statistical data by drawing real time information from the e-courts system used by the District Courts across the country. As cases get instituted and disposed daily across courts and their status changes on the e-court systems, the NJDG automatically reflects the new numbers. A similar portal exists for High Court data although that is less impressive perhaps because the High Courts do not use the same kind of standardised software as the e-courts project for District Courts.

Despite the ambitious goals of the NJDG, it is far from satisfactory because the website carries a disclaimer stating that the information that it is hosting "cannot be considered a substitute for the authentic verified information i.e., by a competent authority designated by each Court" because there are several courts suffering from "connectivity constraints".[68] In other words, it is possible that some of the courts are not updating their e-dockets on a real time basis. Circulars available on the website of the E-committee do indicate that several courts are not updating the status of their cases on a regular basis.[69] As per the 'Data Monitoring' tab on the NJDG, the 3195 court complexes linked to the e-courts system across India have failed to upload 60,126,533 orders as of October 22, 2019.[70] This reflects a very serious problem with the implementation of the e-courts project.

The same disclaimer on the NJDG website, referred to above, recommends to viewers that they "contact concerned Court or Authority for complete, accurate or reliable information and please verify genuineness, veracity and authenticity of the information shown on this website." It is however not clear as to who exactly is the true custodian of statistical records at the High Courts. Academics studying the NJDG have raised similar concerns regarding the statistics available on the NJDG website for High Courts (which is different from the district court website).[71]

Separate from the lack of quality data, the most disappointing aspect of the NJDG, in our opinion, is its reluctance to provide the level of granularity that is technically possible with the e-courts system. For example, merely stating that a criminal case is a 'warrants or summons' case is of no use unless the NJDG allows the tracking of trends as per specific provisions of legislation under which the case has been filed. This data is technically available in the underlying e-courts system but is not being represented in the NJDG. Similarly, with civil cases, the NJDG provides 7 categories: civil suit, motor vehicle cases, misc. civil cases, marriage petition, arbitration, industrial court and land references. However civil suits, which account for almost 75% of the litigation is not broken down into further categories as per the different legislation under which these cases are filed. Due to a lack of granularity, the NJDG data has little value for planners in the High Courts or for academics interested in meaningful research.

B. Can an open data policy help in providing better statistics?

One way to resolve some of the issues with the NJDG and inject a measure of transparency into the functioning of the underlying e-courts system, is to make available in a machine readable format, to all Indian citizens, all of the raw data available on the e-courts system which forms the basis of NJDG data. Once the raw data from the e-courts system which contains exceptionally granular data such as the legislation type, case-hearings, judge name, party name is made available in machine readable formats, it will be possible for academics to sift through the data using specialized statistical software to generate trends and patterns to conduct a far richer, and localised, empirical analysis of the workings of the judicial system. It would be possible to conduct studies on backlogs and trends in individual court complexes, thereby allowing High Courts to plan more efficiently for courts which have higher backlogs by allocating more judges and resources to those courts. Not only will the release of this data help measure

[68] National Judicial Data Grid, Disclaimer <https://njdg.ecourts.gov.in/njdgnew/?p=main/disclaimer> accessed 31 October 2019.

[69] Office of the Pr. District & Sessions Court, Kishtwar, Circular dated May 14, 2019 <https://districts.ecourts.gov.in/sites/default/files/Circular_61.pdf> accessed 31 October 2019; Office of the Pr., District & Sessions Court, Karimnagar, Circular dated July 07, 2019 <https://districts.ecourts.gov.in/sites/default/files/scan0246.pdf> accessed 31 October 2019.

[70] See generally: National Judicial Data Grid (District and Taluka Courts of India), Information Management <https://njdg.ecourts.gov.in/njdgnew/?p=disposed_dashboard/info_mang> accessed 05 November 2019.

[71] Kshitiz Verma, 'Analyzing the HC-NJDG to understand the pendency in High Courts in India' (2018) LawArXiv <https://osf.io/preprints/lawarxiv/xryj7/> accessed 15 October 2019; Shruti Naik, 'Are judicial statistics just another sheet of paper in the pile?' (*DAKSH*, 11 June 2019) <http://dakshindia.org/are-judicial-statistics-just-another-sheet-of-paper-in-the-pile/> accessed 16 October 2019.

the performance of the e-courts system, it will also help in holding the judiciary accountable for its performance and shortcomings.

A secondary outcome of providing access to raw data, is that it will be possible to build a whole suite of software products for the legal industry and for the judiciary, allowing them to function more efficiently.

Even without an open data policy in place, some of the raw data on judicial websites has already been accessed by both academics and entrepreneurs using 'data scraping' techniques. A part of the data can be 'scraped off' publications like cause-lists which provide a list of all cases listed before a court on a weekly or daily basis. Some of these studies based on data scraping of the websites of the Supreme Court and High Courts have provided insights into the functioning of the judicial system.[72] For example, one study managed to provide novel insights into the functioning of the Supreme Court based on data 'scraped' off the display boards (which displays to lawyers in court the case that is being heard by the courtroom at any particular moment).[73]

The far richer dataset available on the e-courts website or on the High Court sites have become tougher to 'scrape' for data because of the use of the 'captcha' system to block automated data 'scraping' efforts. However, from what we understand in our conversations with experts in the field, it is possible for computer programmers with advanced skills to circumvent the 'captcha' system in order to scrape data of the e-courts system.

The other way to access data on the e-courts system is for the judiciary to provide Application Programming Interface (API) access under a well thought out, open data policy.[74] As explained earlier, APIs are a form of standardized computer protocols that facilitates inter-operability between different computer programs. In context of the e-courts system, an API would allow any computer programmer to make a request for access to information from a computer system. This basically allows for the extraction of information in a structured manner and without allowing the external party the right to manipulate the information in the system where it is being stored.

For these reasons, there has been at least one petition by a Chennai based advocate to the E-committee for API access to the e-courts system.[75] It is not clear if the petition was accepted but an RTI application that we filed with the E-committee of the Supreme Court revealed that only the Government of India has been provided API access to the e-courts system.[76] It is possible that the E-committee has taken a policy decision to deny API access.

C. Do citizens have a right to demand the raw data on the e-courts system and should access be allowed for commercial applications?

The critical question now is whether the E-committee should be persuaded to adopt an open data policy that provides all Indians with API access to the e-courts system on the grounds that all Indians have a right to access this information as part of their fundamental right to information under Article 19(1)(a) of the Constitution?

A good starting point to answer this question is the National Data Sharing and Accessibility Policy (NDSAP) which announced an open data policy for non-sensitive data held by the Government of India. In this policy document, the government explains the rationale for its open data policy by saying that data collected or developed through public investments should be made readily available to civil society.[77] The same policy also traces the duty to proactively share government data under Section 4 of the Right to Information Act, 2005.[78] If we were to use these two arguments, there is a strong case in favour of sharing of all

[72] Alok Prasanna, Ameen Jauhar, Nitika Khaitan and Faiza Rahman, 'Towards an Efficient and Effective Supreme Court' *Vidhi Centre for Legal Policy* (February 2016) <https://vidhilegalpolicy.in/2016/02/09/2016-2-8-towards-an-efficient-and-effective-supreme-court/> accessed on 31 October 2019 ; Also see Nitika Khaitan, Shalini Seetharaman and Sumathi Chandrashekaran, 'Inefficiency and judicial delay: new insights from the Delhi High Court' *Vidhi Centre for Legal Policy* (March 2017) < https://vidhilegalpolicy.in/2017/03/29/2017-3-29-inefficiency-and-judicial-delay-new-insights-from-the-delhi-high-court/> accessed on 31 October 2019; Also see Kishore Mandyam, Harish Narasappa, Ramya Sridhar Tirumalai and Kavya Murthy 'Chapter 1: Decoding Delay: Analysis of Court Data', in Harish Narasappa & Shruti Vidyasagar (eds), *The State of the Indian Judiciary: A Report by DAKSH*, *DAKSH* (April 2016) < http://dakshindia.org/state-of-the-indian-judiciary/11_chapter_01.html#_idTextAnchor009> accessed on 31 October 2019; Kishore Mandyam 'Chapter 3: Reaping the Benefits of the e-courts System', in Harish Narasappa & Shruti Vidyasagar (eds), *The State of the Indian Judiciary: A Report by DAKSH*, *DAKSH* (April 2016) < http://dakshindia.org/state-of-the-indian-judiciary/13_chapter_03.html#_idTextAnchor067> accessed on 31 October 2019.

[73] Rahul Hemrajani & Himanshu Agarwal, 'A temporal analysis of the Supreme Court of India's workload' [2019] Indian Law Review, 3:2, 125-158 <https://www.tandfonline.com/doi/full/10.1080/24730580.2019.1636751> accessed 31 October 2019.

[74] Free Law Project, 'Supreme Court Data in Bulk and Via a REST API' <https://free.law/supreme-court-data/> accessed 31 October 2019.

[75] Petition by Advocate S.R Raghunathan to E-committee of the Madras High Court (On file with authors).

[76] DY No. 552/RTI/19-20/SCI. Response to the application filed By Ameen Jauhar with CPIO, Supreme Court of India dated 29 July,2019. Copy reproduced on p 19'.

[77] NDSAP at Clause 1.1.

[78] NDSAP at Clause 1.3.

All communications should be addressed to the Registrar, Supreme Court by designation, NOT by name.

BY REGISTERED A.D.

SUPREME COURT
INDIA
NEW DELHI

Dy. No.552/RTI/19-20/SCI
Dated: July 29th, 2019

From : Ajay Agrawal,
Additional Registrar/CPIO

To : Shri Ameen Jauhar
D-359, Lower Ground Floor,
Defence Colony,
New Delhi-110024

Sub: Application under Right to Information Act, 2005

With reference to your unsigned RTI Application dated 01/07/2019 received on 02/07/2019, I write to inform you :

Point No. 1: Yes. However, details of such request are not maintained.

Point No. 2 & 3: Yes. As per the directions of e-Committee, Supreme Court of India the APIs have been shared with only Government of India viz. Ministry of Law and Justice, Ministry of Electronics and IT and Ministry of Home Affairs.

Details of the First Appellate Authority:

Name : Shri Anil Laxman Pansare,
Designation: Registrar(J-IV),
Address : Tilak Marg, Supreme Court of India, New Delhi-110201

Ajay Agrawal

(AJAY AGRAWAL)

judicial data on the e-courts system. After all, the Central Government has invested approximately Rs. 2309 crores of taxpayer money in building the e-courts system[79] and there is no doubt that the judiciary is in fact covered under Section 4 of the RTI Act.[80] Hence there is a strong case to argue that judicial data should be treated as a public resource.

Similarly on the point of providing API access to e-courts, as mentioned earlier in this report, the Government of India announced a 'Policy on Open Application Programming Interfaces (APIs) for Government of India' with the aim of enabling safe and reliable sharing of information across various e-governance applications and promoting innovation through the availability of data from e-governance applications.[81] There is no reason for the judiciary to not offer similar API access to all citizens.

The second issue that must be discussed is whether there should be limitations on the use of judicial data on the e-courts system for only non-commercial purposes. This is an important question to ask because raw judicial data can have immense commercial value for businesses involved in building new technological solutions. One set of applications could be automated tools to aid and assist lawyers and the judicial administration. For example, there already exist new applications that use data from cause-lists (which lists daily cases before all courts) to alert lawyers of their next hearing dates for specific matters.[82] These are immensely useful services for lawyers since it can take a lot of time and effort to peruse cause-lists manually.

If access to such data can foster innovation by entrepreneurs that makes the dissemination and searchability of information more efficient for the legal community, it should be encouraged by the judiciary. The judiciary after all, has allowed private publishers to profit for years by republishing its judgments in law reports. These private publishers played an important role in disseminating legal information that would have otherwise not reached lawyers and they would not have invested the required resources unless they could profit from the enterprise. Similarly, if India's new age technology entrepreneurs are in a position to use the raw data on the e-courts system to create new products, there is no reason to deny them access to such data.

D. Will an open data policy spur the creation of online case registers that will adversely affect certain litigants?

With the creation of the e-courts system, it is almost inevitable that private players will 'scrape' the data off the e-courts system to create databases or registers that are searchable. For example, since the e-courts system records a case as having been filed under Section 138 of the Negotiable Instrument Act, it would mean that the accused in the case is being prosecuted for a cheque that has not been honoured. This could be very valuable information for a credit rating bureau or banks that are conducting due-diligence. Similarly, cases regarding traffic offences, could be valuable for insurance companies making decisions on premiums based on the number of traffic tickets a citizen has received.

Similarly, such data, once made available in searchable formats, will be used by employers, landlords and even foreign embassies to conduct background checks on future employees, tenants and visa applicants. While the background checks are only to be expected, the concern is that information regarding old cases may end up leading to unfair discrimination of citizens by companies or fellow citizens. Such discrimination may be in the nature of denied rentals, jobs and services. The obvious counterpoint to these concerns is that such background checks are already conducted for private parties by both the police and private agencies and that the information on the e-courts database merely offers a new dataset.

This dilemma, we believe, is best answered by the framework put in place by any future personal data protection law which will govern any potential private registers or databases that have been created with e-courts data. An open data policy for the judiciary cannot control the actions of these private bodies. With regard to the e-courts project itself, it would be unwise to require the redaction of a published public record, especially one that belongs to the judiciary and there appears to be no precedent to this effect, anywhere in the world, where a public record has been redacted pursuant to a right to be forgotten request. At most, it should be the duty of the courts to order the anonymisation of the identity of those litigants who can establish that they fall

[79] Department-Related Parliamentary Standing Committee on Personnel, Public Grievances, Law and Justice, Ninety-Sixth Report, Demands for Grants (2018-19) of the Ministry of Law and Justice (Rajya Sabha) (14 March 2018).
[80] *Mr. C J Karira vs High Court*, 2012 SCC OnLine CIC 705
[81] Policy on Open Application Programming Interfaces (APIs) for Government of India, Ministry of Communications & Information Technology (2015). <https://meity.gov.in/writereaddata/files/Open_APIs_19May2015.pdf> accessed 31 October 2019.
[82] Some of these applications include Provakil, Vakil Desk, Libra- Legal Practice Management Software and Manage My Lawsuits.

within the exceptions to the general principle of open courts. The option to anonymise information does exist under the present version of the CIS 3.0 system used by e-courts.[83]

In conclusion, we believe that the provision of API access to the e-courts system or the sharing of the raw data in the e-courts system through any other route can be viewed as a logical extension of the fundamental right to information of Indian citizens, which as discussed earlier, is also the basis of the 'open courts' principle. Such access to judicial data on the e-courts system would help generate much better academic research into the workings of the judicial system thereby allowing for better planning and also facilitate the development of new innovative products that will be helpful for judges, lawyers, litigants and academics.

[83] Case Management through CIS 3.0, circulated by the E-committee Supreme Court of India (2018) <https://doj.gov.in/sites/default/files/CIS%203.0%20final_0.pdf> accessed 31 October 2019.

V Accessibility of Judicial Pleadings under the RTI Act in the Age of e-Filings

- Indian courts are introducing e-filing of pleadings.
- A consolidated database, of all judicial pleadings filed in all courts, will have the potential to revolutionise transparency of the judicial system.
- Currently the judiciary is reluctant to share judicial pleadings and the procedure to share these pleadings is extremely cumbersome and vests unfettered discretion with the judiciary.
- Most courts have shied away from making judicial documents like pleadings available under the RTI Act, which prescribes for a convenient and time bound procedure for obtaining copies of public records.
- An 'open data' policy should mandate technological standards that factor in concerns such as accessibility for the persons with disabilities and redaction of private and confidential information.

Another important set of judicial data, for the purposes of this report, are the pleadings filed by litigants in courts outlining their claims as well as their defence. These pleadings of a lawsuit along with the supporting documents are the most important source of information for anybody interested in understanding the nature of the dispute before a court of law. Traditionally, pleadings have always been filed as paper records but some High Courts such as Delhi[84] and Allahabad[85] have introduced the option of e-filing of cases and pleadings. Similarly, the Department of Industrial Policy and Promotion (DIPP) also has an active e-filing system for commercial cases.[86] There also appears to be an e-filing portal integrated into the e-courts system although the extent of its usage is not clear.[87] From our conversations with practising lawyers at the Delhi High Courts, the e-filing option is not used to its potential since lawyers file physical copies of their pleadings and the Registry then scans the pleadings for an extra charge. The Supreme Court has not fared any better with its e-filing options.[88]

From a theoretical perspective, e-filing of pleadings has several advantages.

The first advantage of course, is that the judiciary will be able to more efficiently manage its vast collection of records which has hitherto been paper-based. These efficiency gains would include the possibility of saving scarce physical space, the reduction of the time taken to transfer records within and between courts and the guarantee of better security of records.

The second advantage is the possibility of finally making pleadings more accessible to print disabled lawyers and litigants who have been asking for digital copies of pleadings in specific formats that can be processed by screen-reading software.[89]

The third advantage is the possibility of vastly increasing transparency of the judicial system by making available to the entire country, all pleadings and documents filed across Indian courts in one consolidated database, much like the PACER database in the United States for the federal judiciary.[90] These pleadings contain immensely valuable information regarding the substance of a legal dispute and can provide a rich source of information to inform journalists,

[84] Practice Directions For Electronic Filing (E-Filing) In The High Court Of Delhi, <http://delhihighcourt.nic.in/writereaddata/upload/Notification/NotificationFile_LC0S0PP0.PDF> accessed 28 October 2019.
[85] High Court of Judicature at Allahabad, Notice regarding E-Filing of cases under the jurisdiction of E-Court, <http://www.allahabadhighcourt.in/event/event_3764_26-05-2018.pdf> accessed 28 October 2019.
[86] Official website of Commercial Courts at <http://e-commcourt.gov.in/#> accessed 28 October 2019.
[87] eFiling - High Courts & Subordinate Court <https://efiling.ecourts.gov.in/manual/register_manual.html> accessed 28 October 2019.
[88] Alabhya Dhamija, 'Reality of E-filing in Supreme Court', Tilak Marg (2018) <https://tilakmarg.com/opinion/reality-of-e-filing-in-supreme-court/> accessed 28 October 2019.
[89] *Rajive Raturi v. Union of India and Ors*, MANU/SCOR/09936/2019.
[90] Official website of Public Access to Court Electronic Records (PACER) <https://www.pacer.gov/> accessed 28 October 2019.

academia, legal community and the general public on the happening in judicial proceedings. In the United States, the press regularly accesses pleadings filed before the court, even if it means fighting a legal battle, for the purposes of their reporting. American courts have upheld the right of the press to access pleadings under the First Amendment of the American Constitution which protects the right to free speech and the right to be informed of the working of the state.[91]

The lack of easy access to pleadings is very problematic because not everybody can travel to observe the daily proceedings of a court to follow a case of public interest. Not too long ago, while allowing live audio-video-streaming of its proceedings in select cases, the Supreme Court noted that open justice can have logistical constraints if it is confined to only physical access of court rooms, and this was one of the reasons it endorsed virtual access.[92]

If the courtroom is a public space, it follows that pleadings, which are narrated in the courtroom by lawyers to the judge, should be accessible to everybody without restrictions. Such transparency within the judicial system can only aid in boosting public confidence in the judicial system. This is especially true in a country like India, where an activist higher judiciary has been playing an increasingly prominent role in policy making and regulation of new technologies and the environment.[93] For example, in the arena of genetically modified food, the Supreme Court has taken the lead in creating a regulatory framework to regulate biotechnology and yet academics interested in accessing the pleadings and exhibits that contributed to the decision-making process of the court have been unable to access the pleadings that formed the basis of its judicial decision.[94]

The fourth possible advantage, is that a database of millions of pleadings can be used as 'fuel' for developing machine-learning and artificial intelligence products for the legal industry.

There are however significant legal and technological issues that need to be addressed, before any database of all pleadings can be created and thrown open for public access. The obstacles, solutions and prescriptions for reform are discussed below.

A. Existing mechanisms for accessing pleadings – The tension between Court Rules and the RTI Act

The Supreme Court and the High Courts have traditionally provided a mechanism, under their rules, for copying and inspecting pleadings and accompanying exhibits but subject to the discretion of the presiding judge. The problem however is that the procedure prescribed is very cumbersome and the basis on which information can be denied is remarkably vague. Under these rules, a stranger to the litigation interested in obtaining copies of pleadings of the case has to first, file an application, usually in a prescribed format[95], to an authority akin to the Registrar General,[96] Superintendent of Copyists,[97] Officer-in-charge,[98] Senior master,[99] etc. If the case is pending before the court, there is usually an additional requirement for the applicant to either show 'sufficient reasons' or 'bona fides' (neither of which is well defined) to the satisfaction of the court or other officer-in-charge and only upon this satisfaction will the information be released to the applicant.[100] Moreover, exhibits annexed to the pleadings, usually, cannot be accessed without the consent of the party who filed such exhibits.[101] The application to request access to the pleadings and the accompanying fee has to be filed in person for some

[91] *Brown Williamson Tobacco Corporation v. Federal Trade Commission* 710 F. 2d 1165.
[92] *Swapnil Tripathi* (n 34).
[93] Pratap Bhanu Mehta, 'The Rise of Judicial Sovereignty', 18 J. DEMOCRACY 70, 72, 79 (2007).
[94] Aniket Aga, "The Supreme Court Still Adamantly Refuses to Yield to RTI", The Wire (3rd Sept 2015) <https://thewire.in/law/the-supreme-court-still-adamantly-refuses-to-yield-to-rti> accessed 28 October 2019.
[95] For Example: Ch. XIII, Gauhati High Court Rules; Order11 Rule 1, Madras High Court Rules; Ch .XV Rule 15, High Court of Manipur Rules, 2019; Ch. XVI, Rule 15, Calcutta High Court Rules; Rule 7, Himachal Pradesh Civil and Criminal Courts (Preparation and Supply of Copies of Records) Rules 2000;, Ch. IV, Rule 2, Patna High Court Rules 1916.
[96] Ch. XL, Rule 2 Allahabad High Court Rules, 1952.
[97] Order 12, Rule.4, Madras High Court Rules.
[98] Rule 255, Jharkhand High Court Rules, 2001.
[99] Ch. XIX R.268 Bombay High Court Rules (Original Side), 1980.
[100] Rule 2, Order XII SCR; Ch. XIX R.268 Bombay High Court Rules (Original Side), 1980; Rule 344 Jharkhand High Court Rules, 2001; Chapter XL, Rule 7 Allahabad High Court Rules, 1952; Ch XVII R.2 Karnataka High Court Rules, 1959; Chapter XIII, Rule 2, Calcutta High Court Rules (Appellate Side); Ch. IV, Rule 9, Patna High Court Rules 1916; Ch. VII, Rule 208, Sikkim High Court (Practice and Procedure) Rules, 2011; Ch. XIII, Rule 4, Gauhati High Court Rules; , Part B, Rule 2, Delhi High Court Rules; Ch. 5, Part B, Rule 2(ii), Punjab and Haryana High Court Rules and Orders; Rule 5(ii), Himachal Pradesh Civil and Criminal Courts (Preparation and Supply of Copies of Records) Rules 2000.
[101] Ch. VII, Rule 210, Sikkim High Court (Practice and Procedure) Rules, 2011; Ch. 5, Part B, Rule 2(iv), Punjab and Haryana High Court Rules and Orders; Ch. XL, Rule 8 Allahabad High Court Rules, 1952; , and Rule 878, Rajasthan High Court Rules, 1952, etc.

High Courts.[102] For example, Rule 270 of the Bombay High Court (Original Side) Rules, 1980 provides 40 paise per folio of 100 words as charges for obtaining certified copies. Rule 271 provides for additional fee if the copy is for "private use".

The alternate, unofficial route to get access to these pleadings is to bribe the court staff manning the registry.[103] Multiple practising lawyers have confirmed to us that they are able to routinely get copies of pleadings and exhibits from virtually every court in India (unless it is in a sealed cover), via this unofficial route. This is not surprising since corruption in the registries of courts, including that of the Supreme Court, is a well-known fact in India.[104] The reason for lawyers and litigants preferring to bribe the registry to get copies of pleadings, in our opinion, is that the formal procedure prescribed under the court rules is simply too complicated and vests too much discretion with either judges or the registry.

Unlike the court rules, the RTI Act presumes all information to be public unless the state can justify a denial of information. The RTI Act also lays down a very tight procedure to control the discretion of the Public Information Officer (hereinafter "PIO") in dealing with a request of the information. It does so by clearly prescribing a time period for a response, grounds for rejection, penalties in case of a mala-fide rejection. More importantly, an RTI application can be filed by post without having to visit the premises of a court. It is therefore no surprise that multiple litigants have tried accessing court documents under the RTI Act.

While the Supreme Court and High Courts do respond to RTI requests for information regarding their administrative affairs, they do not provide, under the RTI Act, copies of pleadings filed before them. Several High Courts have gone as far as drafting their RTI rules under Section 28 of the Act to specifically include a provision prohibiting the sharing of pleadings under the RTI Act.[105] Legally speaking, no public authorities, including High Courts can create additional exceptions to the RTI Act through delegated legislation. Section 8 of the RTI Act contains an exhaustive list of exemptions listing out the grounds for non-disclosure of information. Any addition to this list through the High Court Rules was not envisioned by the parent statute and as such, are ultra vires the RTI Act. It is a settled position of law that delegated legislation cannot transgress the boundaries of the Act under which they are drafted.[106]

Even courts (including the Supreme Court) that do not have an express exception of this nature in their RTI Rules, have interpreted the RTI Act to conclude that they will not provide copies of pleadings under the RTI Act. The PIOs of these courts have concluded that despite Section 22 of the RTI Act (which clearly says that the RTI Act will prevail in case of a conflict with any other law laying down a procedure to access information), it is the court rules that will triumph in case of a conflict. However it seems clear from a reading of Section 22 that the RTI Act overrides the substantive provisions of laws where a statute prescribes a different procedural framework to access information.

The conflict between the procedure laid down by the RTI Act and the procedure laid down by other laws to access information, came up for consideration before the High Court of Delhi in the case of *Registrar of Companies and Ors. v. Dharmendra Kumar Garg and Ors*[107]. The PIO of Registrar of Companies (RoC) had denied documents to an applicant under the RTI Act on the ground that the same could be accessed under Section 610 of the Companies Act, 1956 which provides a specific mechanism to request for documents from the RoC. On appeal to the Central Information Commission (CIC), the Information Commissioner Shailesh Gandhi had decided in favour of the applicant and had directed the PIO to furnish the information under the RTI Act. While deciding the appeal against this order of the CIC, the Delhi High Court held that where information could be obtained under Section 610 of the Companies Act, 1956, the procedure under this law would not be inconsistent with the procedure laid down under RTI Act, merely because the procedure under the Companies Act is different or because a higher application fee is prescribed. It also reasoned that the existence of a different statutory mechanism mandating the sharing of information, would necessarily mean that the information

[102] Eg: Rule 348, Jharkhand High Court Rules, 2001; Ch XXXIX Rule 871 Rajasthan High Court Rules, 1952; Rule 151, Gujarat High Court Rules, Ch. XL, Rule 2 Allahabad High Court Rules, 1952 (also applicable to Uttarakhand High Court).

[103] See " Corruption in Judiciary", *Livemint* (3 May 2007) <https://www.livemint.com/Specials/gtKxByVZpA6u7QGcKKpKjP/Corruption-in-Judiciary.html> accessed 28 October 2019.; Transparency International India, "India Corruption Study 2005", <http://transparencyindia.org/wp-content/uploads/2019/04/India-Corruption-Study-2005.pdf> accessed 28 October 2019.

[104] Dhananjay Mahapatra, 'SC turns to CBI, police to curb graft in registry', *The Times of India* (8 July 2019) <https://timesofindia.indiatimes.com/india/sc-to-depute-senior-officers-from-cbi-delhi-police-to-prevent-corruption-in-registry/articleshow/70120691.cms> accessed 28 October 2019.

[105] For example Rule 26 of Allahabad (Right to Information) Rules, 2006, Chapter IV, Rule 2 of Chhattisgarh High Court, Right to Information Rules, 2005, Rule 5(e) of Gauhati High Court (Right to Information) Rules, 2008, Rule 5(i) of Orissa High Court Right to Information Rules, 2005, Rule 6(2) of Uttarakhand High Court Right to Information Rules, 2009.

[106] "We are also of the opinion that a delegated power to legislate by making rules 'for carrying out the purposes of the Act' is a general delegation without laying down any guidelines; it cannot be so exercised as to bring into existence substantive rights or obligations or disabilities not contemplated by the provisions of the Act itself." - *Kunj Behari Lal Butail and Ors. v. State of H.P. & Ors.*, 2000 (1) SCR 1054.

[107] [2012]172C Comp as412(Delhi).

ceases to be covered under "right to information" as defined under Section 2(j) of the RTI Act because it cannot be said to be "held" or be "under the control" of the public authority. This is *prima facie* illogical reasoning since the information is clearly still "held" by the public authority.

The view taken by the Delhi High Court in the above case was similar to an earlier decision of the CIC in the case of *Manish Kumar Khanna vs Supreme Court of India*[108]. Here, the appellant had requested to inspect certain files maintained by the Supreme Court but was aggrieved by the fact that the Supreme Court refused the request and asked him to follow the procedure laid down under Supreme Court Rules, 1966. The CIC in its order found that there was no "inherent inconsistency" between the Supreme Court Rules and the RTI Act and ruled in favour of the Supreme Court. Like the Delhi High Court judgment in the *Dharmendra Kumar Garg* case, this conclusion of the CIC is particularly problematic as it fails to acknowledge that the procedure under the RTI Act has been crafted to curb discretion. On the other hand, the procedure under various court rules did not originate from a mind-set where the right to information, transparency and disclosures were a norm. The stark difference in the procedural safeguards, fees and lack of adequate remedies against non-disclosure reinforce the belief that the court rules were not exactly aiming for transparency.[109]

This inconsistency between the RTI Act and the SC Rules came up once again before the Central Information Commissioner Shailesh Gandhi in the case of *R.S. Misra vs. Smita Vats Sharma, CPIO, Supreme Court of India*[110]. In his decision, Shailesh Gandhi held that since the Supreme Court Rules and the RTI Act coexist it is for the citizen to determine which route she would prefer for obtaining the information. He also concluded that the Rule 2, Order XII of SC Rules, by mandating a third party to show "good cause" for accessing information on judicial matters is inconsistent with Section 6(2) of the RTI Act which does not require the applicant to provide any reason for accessing records in custody of the state. He therefore concluded that the RTI Act would override the SC Rules by virtue of Section 22 of the RTI Act since there was clearly a conflict between the procedures prescribed under the SC Rules and the RTI Act.

An appeal was filed by the Registrar of the Supreme Court against the above order of the CIC before the Delhi High Court.[111] This appeal was allowed by the High Court in 2017 in a rather confusing and self-contradictory judgment. For instance, while the Single Judge concludes that there is no inconsistency between the Supreme Court Rules (SCR) and the RTI Act, he also admits there is procedural inconsistency between the two legislation. He notes in pertinent part that "Since both the RTI Act, 2005 and the SCR aim at dissemination of information, there is no inherent inconsistency, other than the procedural inconsistency at the highest between the RTI Act and the SCR." The procedural inconsistency, referenced by the judge, is a significant inconsistency because the entire point of the RTI Act was to put in place a procedural framework to curb bureaucratic discretion.

The other problematic aspect of this judgment is the following conclusion: "Both the RTI Act and the SCR enable the third party to obtain the information on showing a reasonable cause for the same." This is factually incorrect. Under Section 6 of the RTI Act, a citizen can request for information without the need to provide any reason for requesting the information. This is in contrast to the SCR Rules, 2013 which does not allow regular citizens to receive copies of any pleadings without showing good cause.[112] It is thus clear that the High Court fundamentally misunderstood the nature of the RTI Act. An appeal against this order of the single judge is currently pending before a Division Bench of the Delhi High Court.[113]

In our own experience, when we filed an application in the format prescribed under the provisions of Order XIII of the Supreme Court Rules 2013, we received a letter from the registry stating that we had to file the application at the counter of the Registry of the court.[114] This despite the fact that Rule 3, Order XIII of SC Rules 2013, allows an application to be sent by post to the Registrar. Traveling to New Delhi, gaining access to the Court premises and filing the petition with the Registrar can be daunting for an average citizen and would propel an applicant to engage an advocate. This in itself severely restricts access to information and closes the judicial records to the public. The RTI Act on the other hand allows citizens to file applications via post and guarantees that this information is received at the doorstep of the applicant through post.[115]

Other High Courts and CIC orders have taken similar positions on the applicability of the RTI Act to pleadings filed before the judiciary. The Karnataka High Court in

[108] *Shri Manish Kumar Khanna vs Supreme Court of India*, 24 September 2007, CIC/WB/A/2006/00940.
[109] See N Sai Vinod, Attempts to Erode RTI Mechanism, *Economic & Political Weekly*, Vol. XLIX Iss. no 6, (8 February 2014) 30-32.
[110] MANU/CI/1008/2011.
[111] *The Registrar, Supreme Court of India v. R.S. Misra*, MANU/DE/3797/2017.
[112] Order XIII, Rule 2.
[113] *R S Misra vs. the Registrar, Supreme Court of India* LPA 636/2018.
[114] Letter No. 55/Copying/2019 dated 11th March, 2019. Copy has been reproduced on page 26.
[115] Aga (n 94).

All communications should be addressed to the Registrar, Supreme Court by designation, NOT by name.

Telegraphic Address :-

"SUPREMECO"

By Registered Post A.D.

SUPREME COURT
INDIA
NEW DELHI

55/Copying/2019
Dated: 11.03.2019

From: Assistant Registrar
Copying Branch

To: Ms. Chitrakshi Jain,
R/o D-359, Lower Ground Floor,
Defence Colony, New Delhi – 110024.

Sir,

With reference to your application dated 14.02.2019 requesting therein copies of the Status Report filed by the State Governments and High Courts regarding status of vacancies and adequacy of Judicial infrastructure and Affidavits filed by the State Governments and High Courts regarding the notification of vacancies and recruitment processes and adequacy of Judicial infrastructure in Suo Moto Writ Petition (C) No. 2/2018 entitled In Re : Filling up of Vacancies and C.A. No. 1867/2006 entitled Malik Mazhar Sultan and Anr. Vs U.P. Public Service Commission Through Its Secretary and Ors. for the purpose of studies on Judicial Infrastructure and Judicial Vacancies. I am to inform you that since you are not a party in C.A. No. 1867/2006, for this you may, if so advised, move an application as per provisions of Order XIII, Rule 2, read with Order VIII, Rule 6(1) Supreme Court Rules 2013 for obtaining the desired documents in the said matter and you may file the application at the filing counter and shall wherever necessary, be accompanied by the documents required under the rules of the Court to be filed along with the said plaint, petition or appeal.

Further, you may be informed that in Suo Moto cases certified copies or documents related to the said matter will only be issued to the parties who have been issued notice.

Yours faithfully

11/3/19

ASSISTANT REGISTRAR

2009[116] and as recently as January 2019[117] held that where certified copies of documents could be obtained under the Rules of the Court, the applicant could not resort to the RTI Act. Similarly, there are a number of CIC decisions in favour of the argument that certified copies of judicial documents can only be obtained by following the procedure laid down under the Supreme Court Rules and the rules of various High Courts. It has been consistently reasoned by the CIC in these orders that the objective of the RTI Act as well as the court rules is disclosure of information and mere procedural differences do not amount to inconsistency between the rules and the RTI Act.[118] As explained earlier, this is factually incorrect.

An outlier, in this context is a recent judgment of the Punjab and Haryana High Court in the case of *Shakti Singh vs. State Information Commission, Haryana and Ors*[119] which has taken the view that the RTI Act would continue to apply for inspection or supply of documents even if an alternative mechanism is prescribed under another law. A pending PIL[120] on this point before a Division Bench of the Delhi High Court, may help resolve the conflicting decisions.

It would however be advisable for the courts to take proactive steps to recognise the procedure under the RTI Act as valid. Citizens should not have to provide reasons to access pleadings and in case of legitimate exceptions, the burden should be on the party opposing the disclosure to justify the non-disclosure of information. Until this legal issue is taken care of, judicial pleadings cannot be made available online in a consolidated database as is done in the United States.

B. Opposing Interests: Juxtaposing "right to information" with "right to privacy"

As with any other public records, privacy is obviously a concern while making judicial pleadings publicly available. This issue has become far more complicated in light of recent judicial pronouncements on the fundamental right to privacy which have been articulated in the language of autonomy, reputation and dignity as well as the right to be left alone.[121] The question now is how do we strike a balance between the right of the public to be informed and the right to privacy?

One solution is to look at the issue through the prism of the RTI Act, which has been dealing with privacy concerns for some time now. As it exists now, Section 8(1)(j) of the RTI Act exempts "information which relates to personal information, the disclosure of which has no relationship to any public activity or interest, or which would cause unwarranted invasion of the privacy of the individual unless the Public Information Officer... is satisfied that the larger public interest justifies the disclosure." The manner in which this provision has been interpreted by the Supreme Court and Public Information Officers has been harshly criticised by RTI activists for favouring a vague conception of 'privacy'.[122]

Given the *Puttaswamy* judgment declaring privacy as a fundamental right and the call for a new data protection law, the Sri Krishna Committee which proposed a new data protection law[123] recommended an amendment to Section 8(1)(j) of the RTI Act to bring it in line with the judgment. The Committee recommended that this provision should be amended to exempt disclosure of information containing 'personal data', if it causes harm to the data principal, and if such harm outweighs public interest. The phrase 'personal data' is defined, in the draft law, as any data that directly or indirectly identifies a person and the phrase 'harm' is widely defined to include phrases like 'loss of reputation

[116] *State Public Information Officer & Deputy Registrar, High Court of Karnataka vs N.Anbarasm*, Writ petition No 9418/2008(GM-Res).
[117] *State Public Information Officer & Deputy Registrar (Establishment), High Court of Karnataka Vs. Karnataka Information Commission and Ors. High Court of Karnataka* in W.P.No.26763 OF 2013 (GM-RES) C/W. W.P.No.26762 OF 2013 (GM-RES) dated 09th Jan 2019.
[118] See for example: *Shri Dwarika Prasad vs. Supreme Court of India* (SCI) (18.01.2010 - CIC); *Shri Het Ram vs. CPIO, Supreme Court of India* (03.01.2012 - CIC); *Shri Ved Prakash Singhal vs. Principal Judge Family Courts Dwarka New Delhi* (02.11.2011 - CIC); *Shri Kunal Saha Subol Apartment vs. The Central Public Information Officer, Supreme Court of India, New Delhi* (26.12.2011 - CIC); *Shri R. Sekar vs. High Court of Madras* (09.08.2010 - CIC).
[119] MANU/PH/1517/2018, 2019(1)ALLMR1, 2018(4)RC R(Civil) 935.
[120] *Shamnad Basheer vs. Union Of India & Others*, Writ Petition (Civil) No. 4676 Of 2014; see also Apoorva Mandhani, "Delhi HC issues notice on a PIL filed by Prof. Shamnad Basheer, seeking overriding powers of RTI Act against other Statutes and for declaring S.144 of Patent Act ultravires", Live Law (6 Aug 2014) <https://www.livelaw.in/delhi-hc-issues-notice-pil-filed-prof-shamnad-basheer-seeking-overriding-powers-rti-act-statutes-declaring-s-144-patent-act-ultravires-read-petition/> accessed 28 October 2019.
[121] The Supreme Court in *Puttaswamy (Retd.) and Anr. vs Union Of India and Ors* Writ Petition (Civil) No 494 Of 2012.
[122] Shailesh Gandhi, "RTI and privacy: Congruence or conflict?", *Deccan Herald* (10 February 2019) <https://www.deccanherald.com/opinion/main-article/congruence-or-conflict-717748.html> accessed 29 October 2019.
[123] Committee of Experts (n 47)

or humiliation or any discriminatory treatment'.[124] This draft law is yet to be introduced in Parliament and the final language of the provision remains to be confirmed.

Making the above determinations of harm is a difficult balancing exercise and will have to evolve on a case by case basis. If the RTI Act was ever to apply to pleadings, the Public Information Officer of the court would have to presume that the pleadings can be shared given that the open courts principle is grounded in the fundamental right to free speech and right to know. The burden of proving harm due to disclosures of the pleadings will lie on the litigant opposing the disclosure. Even presuming that the authority makes a determination that certain pleadings do contain private information that may cause harm to the litigant if released, it should be the duty of the authority to redact the private information from the document and release it, rather than deny access to the entire document.

If policy makers do go ahead with creating a PACER style consolidated database of all pleadings filed through electronic filing options, there must be an option for filing redacted versions for public viewing and non-redacted versions that can be viewed only by the court.

It goes without saying that only natural persons can assert this right. Legal entities, such as companies cannot claim a right to privacy.

C. Judicial inclination towards closed proceedings in commercial cases

In the last few years, Indian courts hearing commercial litigation have been faced with multiple requests for orders to protect the confidentiality of information disclosed during proceedings. Although India has never had a statutory trade secret law, Indian courts have protected confidential information under contract law or alternatively, even if there was no contract, such information could be protected under the equitable duty of confidence.[125] Even the RTI Act has an exemption for information that was shared with the government in commercial confidence.[126] That trade secrets cases are exempt from the traditional presumption of 'open courts' is well established, under both judicial precedent as well as in a specific exception in the Contempt of Courts Act.[127] The underlying logic for this exception is that the entire point of the legal proceedings, which is to protect a secret, will be destroyed if the information is disclosed to the public during the course of legal proceedings.

The challenge however lies in determining the information that can be covered under the definition of confidential information when there is no consensus or contract amongst the parties that said information is confidential. There are the conventional trade secrets cases such as *Mvf 3 Aps & Ors vs Mr. M. Sivasamy And Ors*[128] where the subject of the litigation was a secret formula. In that case the Delhi High Court created a 'Confidentiality Club' to restrict access to the underling confidential information. The concept of confidentiality clubs first originated in the UK and the first such order was passed by the Delhi High Court for protecting information that was exchanged in commercial confidence. The order restricted the disclosure of the required information to only certain lawyers and experts from both sides.

There are then also, the more complicated cases, such as *Ericsson v. Mercury Electronics*[129] which was actually a patent infringement case but where the court on a request by the patentee ordered the expert witness affidavits which contained claim chart mapping i.e. mapping the claims of the patent versus the different infringing elements of the defendant's phones, to be treated as confidential. Historically claim charts, which go to the heart of a patent infringement lawsuit, have never been treated as confidential. The court in this case offered little reasoning to justify treating these documents as confidential. The most likely reason that Ericsson wanted these claim charts to be treated as confidential is because it was suing multiple Indian companies for infringing the same patents, apart from also being investigated by the Competition Commission of India (CCI). The disclosure of the claim charts may have impacted its other litigation adversely. Similarly, in *Ericsson v. Lava*[130], Ericsson argued that its patent licensing agreements were confidential documents which contained sensitive commercial information. Once again confidentiality protection was given by the court without much reasoning. Ericsson most likely did not want the licensing agreements to be disclosed because its licensing rates had been challenged

[124] This new test has come under criticism by many who have expressed their concerns that the amendment tilts the law in favour of privacy as it bestows upon the PIO the power to weigh harm caused to the data principal against public interest, thus diluting transparency as envisaged by the RTI Act. See: Aniket Aga & Chitrangada Choudhury, "Opacity in the name of privacy", *The Hindu* (27 September 2018) <https://www.thehindu.com/opinion/op-ed/opacity-in-the-name-of-privacy/article25051410.ece> accessed 29 October 2019.

[125] Prashant Reddy, 'The 'Other IP Right': Is it Time to Codify The Indian Law on Protection of Confidential Information?' (2018) 6(1) Journal of National Law University 1.

[126] Right to Information Act, 2005 s 8(1)(d).

[127] The Contempt of Courts Act, 1971, s 7(1)(d); *Naresh Mirajkar v. State of Maharashtra & Anr.* (n 27) [91].

[128] I.A. No.10268/2009 in CS (OS) No.599/2007.

[129] CS (OS) No. 442 of 2013.

[130] 2016 SCCOnline Del 1354.

as an abuse of its dominant position as an owner of Standard Essential Patents (SEPs). The logical extension of the courts agreeing to protect the confidentiality of these pleadings is that even the trials and arguments would have to take place behind closed doors.

If the Ericsson cases mentioned above are any indicator, it is likely that more commercial litigants will try to procure similar orders from the courts in all kinds of commercial litigation. In the United States, where this issue has been litigated in the past, a court concluded that although "… many litigants would like to keep confidential the salary they make, the injuries they suffered, or the price they agreed to pay under a contract", the details must be revealed to the public if they are "….vital to claims made in litigation."[131] As a result, despite both parties wanting the documents sealed, the court still insisted on being provided with convincing enough reasons to grant the motion.

As with privacy, it will not be possible to clearly enumerate the categories of information that fall within the definition of confidential information. The courts will be required to make that determination on a case-by-case basis. As a starting point, the presumption must be in favour of openness and it should be the duty of the party opposing the disclosure to convince the court that the disclosure of the information will render the point of the entire legal proceedings infructuous. Commercially sensitive information, that is only incidental to the lawsuit but not the object of the lawsuit, should be disclosed to the general public.

D. Setting technological standards for e-filing of pleadings

From the perspective of an 'open data' policy, apart from the legal issues, it is also necessary to take a brief look at the technological issues. As of now, a few High Courts have laid down guidelines or practice directions to guide the process of e-filing pleadings. There is also a user manual published by the E-Committee of the Supreme Court of India that lays out the process for e-filing pleadings with High Courts and District Courts under the e-courts project.[132] There should however be a well-thought out policy on e-filing and the following issues need to be considered by policymakers in such a policy:

(i) Ensuring that machine readable formats are used for e-filing: Although the existing guidelines for e-filings for the Delhi High Court require advocates to prepare pleadings in a word format which can then be converted into PDF files, from what we gathered during our conversations with advocates, physical copies are filed with the Registry which then scans them, presumably into an image format.[133] While this technically means that pleadings are digitised, it represents the worst of open data practices and an immense wastage of time and resources because image formats are rarely ever machine-readable. This would mean that not only can the print disabled not access the pleadings through screen-reading software but even simple functionalities such as a text search function, bookmarking or hyperlinking would not be possible. It would be a pity, if these practices at the Delhi High Court spilled over into other courts in the name of e-filing.

(ii) Ensuring that the standards comply with requirements for people with disabilities: As explained earlier it is a legal requirement under the Rights of Person with Disabilities Act, 2016 for the state to keep in mind the needs for people with disabilities while providing any facilities. It has been recommended in the Guidelines for Government Websites that government websites be compliant with standards given under WCAG 2.0 (Web Content Accessibility Guidelines 2.0).[134] The WCAG standard caters to people with a wide range of disabilities including " blindness and low vision, deafness and hearing loss, learning disabilities, cognitive limitations, limited movement, speech disabilities, photosensitivity and combinations of these".[135] The existing guidelines, manuals and directions for e-filing, did not appear to have any requirement to follow the WCAG standards.

(iii) The problem of authenticity: As per the guidelines, manuals and practice directions, referred to above, all pleadings are to be prepared in a word format and then converted into PDF. The pleadings can then be e-signed by the advocates during the filing process.

The complicated issue regarding e-filings of pleadings is the authentication required under the law, for affidavits that accompany pleadings. The importance of affidavits in the Indian context can be gauged from the fact that the Code of Civil Procedure, 1908[136] was amended in 1999, to require every pleading in a civil court to be accompanied

[131] *Baxter International Incorporated v. Abbott Laboratories*, 297 F.3d 544 <https://openjurist.org/297/f3d/544/baxter-international-incorporated-v-abbott-laboratories> accessed 29 October 2019.
[132] E-Committee, Supreme Court of India, 'User Manual: E-Filing Procedure for High Courts and District Courts in India' (2018) <https://ecourts.gov.in/ecourts_home/static/manuals/efiling-User-manual.pdf> accessed 29 October 2019.
[133] Practice Directions (n 84).
[134] National Informatics Centre, Guidelines for Government Websites <https://web.guidelines.gov.in/assets/gigw-manual.pdf > accessed 29 October 2019; See also National Policy on Universal Electronic Accessibility <https://meity.gov.in/writereaddata/files/National%20Policy%20on%20Universal%20Electronics%281%29_0.pdf > accessed 29 October 2019.
[135] Web Content Accessibility Guidelines <https://www.w3.org/TR/WCAG20/> accessed 29 October 2019.
[136] Order VI Rule 4.

by an affidavit of the person verifying it. Similarly, most High Courts rules will require affidavits to accompany all pleadings. A person filing a false affidavit can be prosecuted under the Indian Penal Code. Currently affidavits have to be sworn before either notaries or oath commissioners. The process entails the deponent signing the document and the notary or oath commissioner physically stamping the documents attesting the credentials of the deponent. The entire process is usually executed on paper and it would be necessary to have access to the physically stamped documents to determine the version authenticated by the notary.

The Delhi High Court practice directions on e-filing only require parties to scan the affidavit and retain the original for production before court if and when required. The Allahabad High Court e-filing guidelines state that some oath commissioners have been equipped with finger-print scanners for taking thumb impressions of deponents and affixing them on the e-affidavit. The same guidelines also require the notarised affidavit to be retained if required to be submitted in court. The user manual published by the E-Committee of the Supreme Court, surprisingly, does not lay down any specific instructions regarding affidavits.

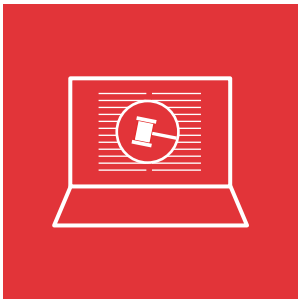
The problem with allowing scanned affidavits, even in a PDF format, is that it may be relatively easy to manipulate using simple editing tools. Manipulating the paper copy is likely to be more difficult. It may be prudent for the policy makers to conduct a wider study of this issue before prescribing uniform measures across the country for all courts rather than individual courts coming up with ad-hoc mechanisms.

(iv) Options for redactions: Any e-filing facility should offer litigants the options of filing two different versions of the pleadings – the first being an unredacted version for the courts, while the second should be a redacted version that is available for public viewing without the disclosure of private or confidential information. The e-filing facility should provide the option to litigants to redact the information in a secure manner.

(v) Fonts: Since a significant number of District Courts across the country hold their proceedings in the local language of the state, it will be necessary for any e-filing system to prescribe standards for the fonts of the various Indian language scripts. As mentioned earlier, the Indian Government had created an Indian font standard called the Indian Script Code for Information Interchange but which has been subsumed by Unicode which is one of the most widely accepted international standard for fonts. These standards for Indian fonts need to be uniform across the country to ensure inter-operability between trial courts and High Courts. The adoption of such uniform standards, will eventually open the doors to useful functionalities like automated translations into different languages, which will be of immense use for appeals related litigation since High Courts use English as their language and the entire lower court record often has to be translated into English.

(vi) Bulk Access to pleadings: The judiciary may also need to put in place a mechanism to provide citizens with bulk access to suitably redacted versions of the pleadings. One such option could be to provide bulk access through a torrents like mechanism which would facilitate the sharing of bulk information in safe and secure manner. This could open the door to further innovation of products that will be useful for the legal industry.

VI Judgments in the Age Of 'Open Data'



- In India, dissemination of judgments has been done through systematic publication in the 'law reports' by private publishers.
- This landscape which was dominated by a few private publishers has been unsettled by the voluntary, free of cost publication of judgments and orders on the websites of the High Courts and the Supreme Court.
- Basic open data practices adopted by the judiciary led to the creation of online platforms such as IndianKanoon which have democratised access to the text of judgments and orders.
- This development however has led to new dilemmas since judgments which were previously 'practically obscure' have now become very readily available through searchable databases.
- In this scenario it is critical that an open data policy be formulated by the judiciary which balances the need for transparency with privacy. The policy should also provide bulk access to judgments, guarantee authenticity of digital copies, devise a neutral citation format and comply with the accessibility guidelines.

The widespread availability of judgments rendered by a court of law is crucial to any legal system but more so in a common law system where judgements themselves are a source of law. These binding judgements, also known as judicial precedents, are critical for understanding the judicial interpretation of laws. The availability of Supreme Court and High Court judgments on the internet has been one of the most beneficial outcomes of the digitisation of judicial administration in India. The higher judiciary and the Central Government deserve due credit for making this possible.

In order to give some perspective on the revolution ushered in by the digitisation of judgments, we will begin with the manner in which judgments were disseminated in India in the print age followed by an explanation of how digitisation of judgements has opened the doors to greater dissemination of legal information when compared to the past. We will then explain how a well- planned 'open data' policy for judgments can help tap into the creativity of India's technology entrepreneurs to create more useful and innovative products like Indiankanoon.org, which was possible only because the judiciary made available its judgments on the internet in a machine readable format at a time when the government itself was still releasing documents in scanned image formats that could not be read by machines.

A. The history of law reports in India

Traditionally, judgments of courts have been disseminated to only the legal community of lawyers and judges through systematic publication in the form of monthly or weekly publications which are called 'law reports'. The Copyright Act exempts the reproduction of any judgment of a court of law from claims of copyright infringement.[137] Hence publishers never required a copyright licence from the judiciary. At most, they would be required to pay courts a small amount for a print copy of the judgment. The publishers, however, charge their readers a subscription fees for the law reports, that some may describe as expensive. The fee would cover not only print and delivery charges but also editorial services such as light copyediting of judgments, along with summaries of judgments in the headnotes and a citation format for cross-referencing the judgments. Given that these law reports had to be subscribed on a weekly or monthly basis, it was only lawyers, courts and law libraries who would be the subscribers of law reporters. The common

[137] Section 52(1)(q) of the Copyright Act, 1957.

man would rarely, if ever, have access to these judgments. Thus in essence an entire source of law was inaccessible to the general public.

Traditionally, the cost and availability of law reports were influenced by two regulatory frameworks put in place by the legislature and the judiciary to guarantee authenticity and quality of the judgments being reproduced in law reports especially the ones published by private publishers.

The legislative model of regulation dates back to the 19th century when the Governor General enacted the Indian Law Reports Act, 1875. This legislation was meant to lend a presumption of authenticity to all judgments of High Courts reported in the authorised Indian Law Reports, at a time when there were concerns about the quality and multiplicity of private reporters.[138] Judges were not bound to accept private law reporters which continued to exist. Over the years, despite the law leaning in favour of Indian Law Reporters (ILR), there were several complaints about the pace at which the judgments were made available because of which private law reports continued to thrive.[139]

The 96th report of the Law Commission had recommended the repeal of the Indian Law Reports Act, 1875 since the unofficial law reports published in India were being cited before all courts in India.[140] In the Law Commission's words, the legislation had "been a dead letter" for some time. In its 249th report, the Law Commission reiterated the repeal of the Indian Law Reports Act, 1875.[141] In 2016, the law was finally repealed by Parliament.[142]

Notwithstanding the repeal of the law, it does appear that ILRs continue to be published albeit with several delays.[143] In stark contrast to the public reporters, the law reports published by private publishers such as the Eastern Book Company (EBC), which publishes the very popular Supreme Court Cases (SCC), as well as the All India Reporter Pvt. Ltd. which publishes the AIR series have historically been popular with the legal community across India. There are several other law reports at the regional level with a focus on the local High Court or state tribunals.

The judicial model of regulating law reports is different. To begin with, the judge delivering judgments gets to decide whether the judgment is 'reportable' in a law report and traditionally only those judgments are reported in the law reports. This was probably a mechanism evolved in the age of print in order to limit the number of pages in each issue of law reports but which also became a powerful tool in the hands of judges to control the public dissemination of their judgments. In addition, High Courts have differing rules on the reports which would be entitled to obtain copies of the judgments for publication in the report. To give an example, the Rajasthan High Court Rules prescribe an approved list of law reports who are entitled to obtain copies of the judgments from the registry.[144] The rules prescribe a format for an application to be filled by the publisher of the law reports to get permission for copies of reportable judgments and impose a fee for obtaining copies per judgment.[145] Despite this, courts have been struggling to guarantee quality. In one case, a High Court on the judicial side directed its own Chief Justice to appoint a committee for proper and effective mechanism for checking the lacunae in publishing the judgments by considering the status of a publisher and its editorial board.[146]

The most potent weapon in the hands of High Courts and the Supreme Court to accept a private law reports is their power to decide which of the private law reports will be accepted during the course of arguments. This means that if the High Court or the Supreme Court refuses to recognise a particular private law report, photocopies of the same cannot be submitted to the court during oral argument, which would then mean that lawyers will no longer subscribe to the reporter in question. While this practice may have evolved to control the quality of private law reports there is no denying that it vests extraordinary power in the hands of judges to decide the fortunes of private publishers.

B. Digitisation and Publication of Judgments

Over the last 15 years, the digitisation of judicial administration has dramatically altered the manner in which judgments are disseminated at every level of the judiciary, starting with the district courts. Daily orders and judgments

[138] Indian Law Reports Act 1875, <http://legislative.gov.in/sites/default/files/legislative_references/1875.pdf> accessed 15 October 2019.
[139] Jain (n 143) 573.
[140] Law Commission of India, *Report No. 60, Repeal of Certain Obsolete Central Acts* (Law Com No 60, 1984) 9-10, <http://lawcommissionofindia.nic.in/51-100/Report96.pdf> accessed 15 October 2019.
[141] Law Commission of India, Report No. 249, *Obsolete Laws: Warranting Immediate Repeal* (Law Com No 249, 2014).
[142] Repealing and Amending Act, 2016.
[143] M.P. Jain, 'Law Reporting in India', (1982) Journal of the Indian Law Institute, Vol. 24, no. 2/3, pp. 560–574, at 573.
[144] Rule 119, Rajasthan High Court Rules, 1952 <https://hcraj.nic.in/hcraj/Allfiles/RHCRules1952.pdf> accessed 15 October 2019.
[145] For e.g. see Annexure A Rule 7 Chapter 5-B Vol. V Chandigarh High Court Rules <https://highcourtchd.gov.in/sub_pages/left_menu/Rules_orders/high_court_rules/Vol-V--PDF/chap5partBnew.pdf> accessed 15 October 2019.
[146] *State of Rajasthan v Cr. Law Reporters & Ors*, 2005 (3) WLC 235.

of most High Courts as well as the Supreme Court are being made available on the internet on the day, or a few days, after the judgment is delivered in court. This was due to the result of a conscious policy decision by the judiciary.[147] The e-courts project which has digitised all district and taluka courts does make a fair number of final judgments available online. The daily orders of these courts are yet to be made available with the same regularity and there are significant shortcomings in this regard as of now.

By providing access to judgments free of cost through the internet merely hours after their pronouncement, the judiciary has unsettled the traditional landscape wherein a few private publishers made available judgments to the legal community for a price. This development has led to many welcome changes in the ecosystem, for the status quo was deficient in more ways than one. There are several advantages offered by digital dissemination of case laws.

First, the 'reportability' of judgments and orders has been rendered futile. This means that judges of the High Courts and the Supreme Court, as well as editors of law reports can no longer control the judgments which reach the larger legal community. This may hopefully improve and increase the pool of case laws available for the legal community as a source of law.

Second, digitisation of judgments acts as an equaliser by making judgments accessible to lawyers and litigants who cannot afford access to exclusive databases controlled by publishers. This, however, does not do away with the need for lawyers to subscribe to private law reports because judicial websites are not searchable unlike private databases which are searchable. There is also a lack of clarity regarding whether courts will accept printouts from their own websites. Only some High Courts like the Bombay High Court and Chhattisgarh High Court, through judicial pronouncements, have decided to recognise printouts of judgments from their websites.[148]

Third, the digitisation and availability of judgments on the internet injects an unprecedented degree of transparency and accountability in the judicial system because now academics, lawyers and journalists sitting in any part of the country can effectively access and critique the judgments of courts across the country. There could be no better means of judicial accountability than a public debate on the quality of judicial reasoning. Such scrutiny will hopefully transform the quality of adjudication by the Indian judiciary.

Fourth, the availability of digital judgments has dramatically increased the accountability of lawyers to their clients. For the first time in Indian legal history, litigants are no longer dependent on their lawyers to provide them with copies of judgments or orders.

Fifth, the availability of digital judgments makes it possible for the print disabled to access these judgments through screen reading software.

C. Digitisation spurs innovation: The creation and impact of Indian Kanoon

One of the unintended and most welcome outcomes of making available judgments on the internet has been the creation of Indiankanoon.org which is a repository of all judgments delivered by the Supreme Court, the High Courts as well as a host of tribunals, commissions and also, some district courts. Founded by Sushant Sinha, Indiankanoon.org is a testament to the innovative potential of the internet. Sinha, who is a computer engineer trained at the Indian Institute of Technology, Madras and University of Michigan, managed to build and update Indiankanoon.org by writing computer programs that extract judgments on a daily basis.[149]

Unlike the judicial websites, Indiankanoon.org provides a powerful text-search function that allows users to conduct searches for particular legal propositions or legal terms across all judgments rendered by the courts from whose websites, judgments are being extracted. By providing users with the ability to search a huge database of judgments across the country, and that too for free, Indiankanoon.org has truly democratised access to legal information to every Indian citizen.[150]

In addition, Indiankanoon.org provides functionalities which further ease the process of doing legal research. For example, if a judgment has been cited in the text of a judgment, a hyperlink will appear in the same text, allowing for a reader to open the new judgment in a new tab without

[147] Supreme Court of India, National Policy And Action Plan For Implementation Of Information And Communication Technology In The Indian Judiciary (2005) 23 <https://sci.gov.in/pdf/ecommittee/action-plan-ecourt.pdf> accessed 15 October 2019.
[148] *Shital Dhake v Krushna Dhake* Misc. Civil Application No.244 of 2017 (Bombay High Court); See T*he Principal Commissioner C.C.E. Raipur vs. M/s Steel Authority Of India Ltd*, TAXC No. 172 of 2017 (High Court of Chhattisgarh) <http://highcourt.cg.gov.in/Afr/courtJudgementandAFR/2018/feb/TAXC172_17(27.02.18).pdf> accessed 17 October 2019.
[149] Prashant Iyengar, 'Free Access to law – Is it here to Stay?' (2010) SSRN Electronic Journal <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1778820> accessed 17 October 2019.
[150] Indiankanoon.org was awarded the Agami prize in 2018 for democratizing access to judgments and the law < https://www.agami.in/yondr-flash> accessed 17 October 2019.

having to punch in the citation once again in the search box. Similarly, all judgments from the future which have cited a judgment as a precedent, or simply cross-referenced the judgment, will be displayed on the header of the page. These are innovations that have transformed the nature and quality of research across the legal ecosystem in India. The fact that all of this could be done by one man, albeit a highly qualified and creative genius, signals the potential of what can be achieved in the future if the judiciary adopts a policy that is geared towards catalysing innovation for the legal ecosystem.

The key to future innovation, according to experts whom we spoke to is the need for the judiciary to adopt an 'open data' policy aimed at spurring future innovation and competition. Before discussing the contours of such a policy, it is necessary to first tackle the issue of privacy of litigants in context of judgments.

D. Transparency v. Privacy v. Right to be Forgotten in the context of judgments

As explained earlier, public access to courts is a principle subscribed to in most common law jurisdictions including India. Judgments have always been treated as public records and fall within the definition of a public document.[151] However, in the vocabulary used by privacy scholars, the information in these records was 'practically obscure'.[152] This meant that while the information contained in these judgments was public information there was no circumstance where widespread public disclosure would be possible. People have the right to attend court hearings, however, they are restricted by available time and cost resources to exercise such a right. With the possibility of text-based searching of judgments and orders that are uploaded regularly on court websites this information is no longer 'obscure'.

On platforms such as Indiankanoon.org where the database aggregates judgments available on all the court websites, it is possible to search the judgments of multiple courts at the same time for a particular person. Digitisation of judgments also eliminates the effects of temporality associated with physical court records which would become less relevant over time because of record keeping policies. Digital records are not subject to similar degradation in access over time.[153]

The essential question in this backdrop, is whether we should balance the fundamental right of citizens to be informed of the happenings in the courts, with the right to be forgotten and the fundamental right to privacy? Should litigants have a 'right to be forgotten' and if so, how do we ensure the accuracy of public records and the right of free speech? To what extent do we as a society want to mask judicial records and will such a masking of information affect public trust in the judicial system?

In our opinion, the appropriate standard of privacy for judgements should be tied to the standard of privacy adopted vis-à-vis the information contained in the judicial pleadings. Information that the court has agreed to be redacted at the outset of proceedings should be redacted even for judgements. As explained earlier because of the presumption of 'open courts' in India, it will be the burden of the party seeking redaction of certain information to demonstrate that the disclosure of particular information will harm it from a privacy perspective. Once identified, the said information should preferably be redacted through an ex-ante process before information is made available on the digital platforms accessible by the public. This already appears to be taking place in India although it appears that the judicial system is struggling to put in place a cogent policy in this regard.[154]

An ex-post process i.e. after the judgment is published on a court's website would essentially be an adjudication on the 'right to be forgotten'. Indian courts have been urged to recognise this right in a small number of cases. For example, Indiankanoon.org has received orders from courts, after parties have approached courts on the grounds that their identity is being disclosed in public. One case was filed by the father of a lady who was involved in a matrimonial dispute. The prayer in that case sought redaction of the lady's name on the grounds that her reputation and relationship with her husband would be jeopardised by easy availability of the order on the internet.[155] The court allowed the prayer and ordered her name to be redacted in copies of orders provided to service providers but not on the official website of the court itself. That order was served on Indiankanoon.

[151] The Indian Evidence Act, 1872, s 74.
[152] Ardia, D. S., 'Privacy and Court Records: Online Access and the Loss of Practical Obscurity' (2017) U. Ill. L. Rev., 1385.
[153] ibid 1399.
[154] Letter No. 2426 Spl/CB6 dated 26 November 2015 from Registrar General Punjab & Haryana High Court to all District and Sessions Judges and Letter No. EC/54/2013 dated 16 July 2013 from E-Committee to Central Project Coordinators High Courts <https://districts.ecourts.gov.in/sites/default/files/Instruction%20regarding%20Uploading%20of%20daily%20ordersJudgments%20on%20NJDG-%20Hiding%20Parties%20Name_0.pdf> accessed 17 October 2019.
[155] *Name Redacted v. The Registrar General*, Writ Petition No.62038 OF 2016 (GM-RES) <https://indiankanoon.org/doc/12577154/> accessed 17 October 2019; For a detailed discussion see, Sujoy Chatterjee, 'Balancing Privacy and Open Court Principle in Family Law: Does De-identifying Case Law Protect Anonymity?,' Dalhousie J. Legal Stud. 23 (2014): 91.

org to seek a redaction of the lady's name, with the hope that her name would not show up on any search engines. However, any other service provider mining data from the website of the Karnataka High Court and making it available via search engines would throw up the same result since the name on the High Court's website was not ordered to be redacted. On the question of law, the order is not very lucid. The court merely states that such an order "would be in line with the trend in the Western countries where they follow this as a matter of rule "Right to be forgotten" in sensitive cases involving women in general and highly sensitive cases involving rape or affecting the modesty and reputation of the person concerned." This appears to be a rather broad exception and it needs to be defined in narrower terms.

In another order, from the Gujarat High Court, a petitioner in a custody battle case sought the redaction of the names of the minor children and medical details in the court order.[156] The court in this case allowed redaction of the names in the original judgment on the court's website to protect the well-being of the minor children. However, even that order was ambiguous on whether private publishers or platforms were required to censor the information. The order only states that "...in the event the applicant makes any request before the law journals, print and electronic or any form of media to not publish the original order, the same may be considered by the webmasters in the particular interest and well-being of the children." The order seems to be in the nature of a request that is not mandatory.

Another area of concern is the rights of third parties whose names find their way into the text of the judgment which show up in response to search results for the third parties name. One such case was filed by an affected third party before the Delhi High Court[157], where it has remained pending for the last three years.

In our opinion, the 'right to be forgotten' cannot be extended to official public records, especially judicial records as that would undermine public faith in the judicial system in the long run. Even in the proposed Personal Data Protection Bill, 2018 drafted by the Sri Krishna Committee, judicial records are entirely exempt from the clause that creates a 'right to be forgotten'.[158] With regard to private service providers, they will anyway be covered by future personal data protection laws and cannot be subjected to a policy framed by the judiciary.

E. What should be the elements of an 'open data' policy for judgments?

The philosophy and approach behind open data policies have been discussed earlier in this report. To reiterate, the impetus for an open data policy in the Indian context flows from Section 4 of the RTI Act and is based on the assumption that data collected through the investment of public funds should be treated as a public resource that can be accessed equally by all citizens in formats that are machine readable and interoperable. While judgments are publicly available on judicial websites in a machine-readable format, there is a lot more that the judiciary can do to facilitate a competitive marketplace for innovation that will deliver better products to the legal industry and citizens.

The following are some of the key issues that need to be considered by the judiciary while designing an open data policy for its websites.

(i) Giving bulk access to judgments to all innovators: If the judiciary is interested in spurring innovation that facilitates more efficient dissemination of legal information it needs to provide entrepreneurs with bulk access to its judgments. In interviews with experts, we were told that a viable and more efficient alternative, to API access, would be to provide a mechanism such as a torrents system.[159]

In the absence of such access measures provided by the judiciary, individual computer programmers will still be able to scrape or extract data off judicial websites, except it will be more challenging for computer programmers to extract information in this manner thereby limiting access to only those computer programmers who are highly skilled. Given that judgments are public records, there is no point in making it difficult for computer programmers to accessing such data.

(ii) To guarantee authenticity: The key reasons for the growth of only a few private law reports was because they won the confidence of the Supreme Court and High Courts by guaranteeing the authentic republication of judgments without errors. In the digital age, there is virtually no question of printing errors since the version from the judicial website will be reproduced digitally without the need to retype them. However, there needs to be some means to guarantee the authenticity of the digital version of the judgements which will make it possible for judges to rely on printouts of judgments from their own websites rather

[156] *Mehdi Abbas Attarwala v. State of Gujarat* in Criminal Misc. Application (Modification of Order) No. 1 of 2019 in R/Special Criminal Application No. 1627 of 2016 dated 21 June 2019.
[157] *Laksh Vir Yadav v. UOI* WP(C) 1021/2016.
[158] The Personal Data Protection Bill 2018, cl 44(2).
[159] Interview with Sushant Sinha, founder of Indiankanoon.org.

than insisting on photocopies of private law reports. For example, a QR code on each judgment that can be scanned on a mobile phone to guarantee authenticity may suffice. Once a credible technological solution is found for ensuring authenticity, it must be standardised across the ecosystem allowing any computer programmer to use the same authentication system.

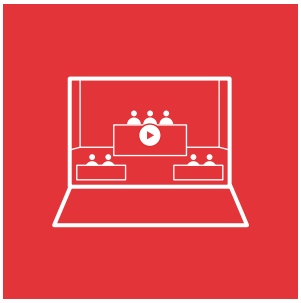
(iii) Devising a neutral citation format to replace proprietary citations of private law reporters: In order to make it possible to either cite or cross-reference judgments, private law reports use citation formats (which usually contain their trademarked brand names) which help readers to find the exact volume, page numbers or relevant cases. Even in the digital age, Indian courts continue to use the citation norms that are relevant in the context of printed reports. This is one of the main reasons that private law reporters continue to be of importance for the legal community. There is nothing preventing the judiciary from creating an automated neutral citation system for all judgments which would then make it easier for lawyers and litigants to reduce their dependence on private law reports and transition entirely to open access databases like Indiankanoon.org. The neutral citation system should not use proprietary data elements such as the publisher's acronym. Moreover, it should be noted that many of these citation formats which continue to adhere to citation norms are relevant only for print formats and are simply not relevant to online databases. By creating a neutral citation format, the judiciary will facilitate a unique identity number for each judgment which would make it much easier for developers to develop more accurate tools that allows the interlinking of judgments, thereby facilitating more accurate and convenient legal research.

(iv) Ensuring all websites and standard comply with accessibility norms: An open data policy must ensure that all court websites must be accessible by persons with disabilities. This is a legal requirement under the Rights of Person with Disabilities Act, 2016. It has been recommended in the Guidelines for Government websites that government websites be compliant of standards given under WCAG 2.0 (Web Content Accessibility Guidelines 2.0).[160] The judiciary must ensure these standards are complied with under the law.

(v) Standardising Indian language fonts: In a multi-lingual country like India, where the district judiciary in several states operates in the local language of the state, the issue of Indian fonts becomes very important because judgments will be rendered in local languages. It is essential that the Indian fonts being used by the judiciary are uniform across courts, apart from being modelled on an open-standard. One such standard which is accepted internationally is Unicode. This is a crucial issue that must be considered with all due regard.

[160] National Informatics Centre, Guidelines for Government Websites 2.0 <https://web.guidelines.gov.in/assets/gigw-manual.pdf> accessed 17 October 2019; See also National Policy on Universal Electronic Accessibility <https://meity.gov.in/writereaddata/files/National%20Policy%20on%20Universal%20Electronics%281%29_0.pdf> accessed 17 October 2019.

VII Audio-Video Recording of Court Proceedings and an 'Open Data' Policy



- There has been a long-standing demand for live audio-video streaming of proceedings in Indian courtrooms.
- In Swapnil Tripathi v. Union of India (2018) a bench of three judges of the Supreme Court of India agreed to a pilot project to live audio-video stream the proceedings in Indian courtrooms.
- Live audio-video streaming of proceedings has the potential to contribute tremendously to legal education as well as in ensuring accountability of both the bar and the bench.
- The court must revisit the restrictions imposed on the use of the video footage for commercial purposes.
- The proceedings should be available in multiple languages to ensure more Indians can access the substance of the arguments.

One of the recurring demands over the last decade by various stakeholders, including the government, has been the recording or live-streaming of judicial proceedings. The proposal to have audio-visual recordings of judicial proceedings was first mooted by the Advisory Council of the National Mission for Justice Delivery and Legal Reforms, under the Policy and Action Plan Document for Phase-II of the e-courts mission mode project, which was initiated in 2005 with the aim of implementing Information and Communication Technology in the Indian judiciary. However, this was deferred as it was felt that judicial consultation was necessary prior to making any such proposal.

In November, 2014, the E-committee of the Supreme Court rejected the Central Government's proposal to introduce audio visual recordings of judicial proceedings.[161] However in the last 5 years, the Supreme Court on its judicial side, has responded favourably to two petitions requesting for both recording of proceedings as well as live-streaming of proceedings.

In the first case of *Pradyuman Bisht v Union of India*[162], the Supreme Court of India in its order dated March 28, 2017, directed that courts in at least two districts in every state should have CCTV cameras installed. Subsequently, the Court expanded this order to every subordinate court in such manner as may be directed by the relevant High Court, and also to include tribunals such as the NCLT. These orders however appear to have been limited to only video recording rather than audio recording. The court appears to have approached the issue from a security perspective rather than a transparency perspective.

In the second case, which was the case of *Swapnil Tripathi v. Union of India*[163] a bench of three judges responded favourably to a bunch of petitions requesting for the live-streaming of the proceedings conducted before the Supreme Court. The bench, speaking through two opinions, was in favour of a pilot project to live-stream the proceedings of cases being heard by the Constitution Bench of the Supreme Court subject to a long list of exceptions. It is debatable as to whether the Supreme Court in its judicial capacity, should be taking policy decisions of this nature, which have implications for the treasury and which requires an amendment to the Supreme Court Rules, which can happen only with the approval of the President of India as per Article 145(1) of the Constitution. Nevertheless, the ruling of the Supreme Court in this matter was received positively by most stakeholders. It is a different matter that virtually no

[161] T. Mohan, 'Supreme Court's E-Committee rejected proposal to initiate Audio-Video recording of all court proceedings: Not acceptable at present' *Livelaw* (November 2014) <https://www.livelaw.in/supreme-courts-e-committee-rejected-proposal-initiate-audio-video-recording-court-proceedings-acceptable-present/> accessed 30 September 2019.
[162] (2018) 15 SCC 433.
[163] *Swapnil Tripathi* (n 34).

steps have been taken since this judgment to broadcast the many important cases heard by the Constitutional Benches of the Supreme Court in recent times.

There are four important issues that merit discussion in the context of the *Swapnil Tripathi* case. The first is the policy debate over live audio-video streaming of court proceedings. The second pertains to evolving bright lines for cases where proceedings should not be subject to audio-video streaming. The third is regarding the usage of footage of audio-video recordings and whether the conditions imposed by the Supreme Court on audio-video streaming are legal and finally, the need to ensure translation of the proceedings into multiple Indian languages.

A. The policy debate over live audio-video streaming of court proceedings

As articulated by the Supreme Court in the *Swapnil Tripathi* case, the live audio-video streaming of court proceedings is merely an extension of the 'open court' principle which is a well-accepted principle in India.[164] As discussed earlier in this report, the principle of an 'open court' should be seen as an extension of the right of citizens under Article 19(1)(a) to be informed of the workings of the various institutions of the state, subject to certain limitations such as the fundamental right to privacy, etc. This of course does not mean that citizens have a fundamental right to demand the live video streaming of proceedings. They only have a fundamental right to attend proceedings or demand transcripts of hearings that are already on the record. There are however many good reasons to encourage the live-video recording of court proceedings.

One of the most compelling reasons to support audio-video live streaming, as articulated even by the Supreme Court, is that it will facilitate the dissemination of accurate information of court proceedings.[165] For far too long, the Indian public has been very poorly informed of the workings of the Supreme Court and all too often the Supreme Court is complaining of the misreporting of its proceedings by journalists. Back in the day, the only solution proposed by the Supreme Court to tackle this issue of misinformation, was to initiate contempt proceedings or to raise the bar for accreditation of journalists.[166] In this backdrop, it is heartening to see the Supreme Court take steps to provide Indian citizens with better access to its proceedings.

The second reason, as also validly recognised by the Supreme Court is the educative value of such videos for law students, advocates and academicians.[167] While the benefits for students of law are obvious, live video-streaming will also have immense benefits for lawyers who are fresh out of college and have no understanding of the flow and timing of courtroom proceedings and require 'procedural education'. Watching experienced lawyers at work in the courtroom can bridge this gap (to a limited extent admittedly) and at least provide a baseline expectation and encourage awareness related to courtroom procedure of the courtroom the lawyer wants to practice at.[168] This also holds tremendous advantages for self-representing litigants and litigants who want to acquaint themselves with the procedures of the courtroom and be in a better position to deal with lawyers.

Further, in a country like India where litigation culture varies across high courts and states and each district court may have its own cultural peculiarities, witnessing courtroom proceedings can provide an excellent opportunity for 'attorney acculturation'.[169]

Observing the nature of interactions between the judges and the lawyers can help lawyers who wish to expand their practice or transition to other courts. The unwritten rules of the courtroom can be made available to interested participants of the system.

Last but not the least, access to courtroom proceedings would also give insights into judicial behaviour and what to anticipate from particular judges. Lawyers and litigants can use these impressions to make sure their demeanour and pleadings resonate with the expectations of the judge it would provide an avenue for continued observation of judicial behaviour and monitor the performance of the judges as well.[170]

Apart from the above educational advantages of live audio-video streaming, there is also the fact that it will help clients, who cannot otherwise visit court, to hold their lawyers accountable for non-appearances or poorly prepared arguments or poor decorum before a judge. At

[164] *Swapnil Tripathi* (n 34) 644, [106].
[165] ibid 644, [107].
[166] J. Venkatesan, 'Supreme Court to frame norms for media on reporting court proceedings', *The Hindu* (27 September 2018) < https://www.thehindu.com/news/national/supreme-court-to-frame-norms-for-media-on-reporting-court-proceedings/article3251747.ece> accessed 7 November, 2019 ; 'SC issues contempt notice to two dailies for misreporting', *Times of India* (21 September, 2012) < https://timesofindia.indiatimes.com/india/SC-issues-contempt-notice-to-two-dailies-for-misreporting/articleshow/16482782.cms> accessed 7 November, 2019.
[167] *Swapnil Tripathi* (n 34) 644, [107].
[168] Jordan M. Singer, 'Judges on Demand: The Cognitive Case for Cameras in the Courtroom', (2015) 115 Colum. L. Rev. Sidebar 79, 85.
[169] ibid 85.
[170] Jordan M. Singer, 'Gossiping About Judges', (2015) 42 Fla. St. U. L. Rev. 427, 438–50.

the same time, it will give clients an opportunity to assess other lawyers appearing more effectively before the same court. This will hopefully have a positive impact on the competitiveness of the legal profession.

Last but not the least, the live-streaming of proceedings, will increase judicial accountability. There are at times, complaints about judges not holding court for the designated hours or of instances where judges are rude or unfair in their behaviour towards lawyers, leading to boycotts by lawyers. The knowledge that their words and actions are being broadcast to the entire world and recorded for posterity will hopefully ensure greater adherence to the high standards set down by the judicial code of conduct.

B. The cases in which live audio-video streaming of court proceedings was allowed by the Supreme Court

If court proceedings are going to be live streamed, it is necessary for either Parliament or the judiciary to identify bright lines that clearly identify the general exceptions where judges may prohibit the live video-streaming of cases. The two opinions rendered by the Supreme Court in *Swapnil Tripathi* do impose restrictions on reuse of content.

The first opinion by Justice A.M. Khanwilkar on behalf of himself and the then Chief Justice Dipak Misra states that "prior consent" of both parties, to the live audio-video streaming must be insisted upon and if there is no unanimity the court may exercise its discretion to take a final call.[171] His opinion further states that the discretion of the court to grant or refuse to grant such permission must be guided by the "sensitivity of the matter" and the "larger interest of administration of justice".[172] The opinion also endorses the guidelines suggested by the Attorney General which enumerate the following specific categories of cases where live video-streaming of proceedings must not be permitted: matrimonial matters, matters involving interests of juveniles, matters of national security, to ensure that victims, witnesses or defendant depose truthfully and without fear, to protect confidential or sensitive information, to protect victims of sexual assault, cases which may "provoke sentiments and arouse passion and provoke enmity amongst communities".[173] The last category may be an example of an over-expansive restriction as it would apply to almost any case where persons accused of riots are being tried in a court of law. However, one could argue that it is in these cases that the most transparency is required in order to build public confidence in the judicial system.

The second opinion by Justice Dr. D. Y. Chandrachud lists similar exceptions albeit in language that is more narrowly tailored. His opinion does not require the courts to seek "prior consent" of the parties nor does he require the judge to assess the "sensitivity of the matters" or prohibit the streaming of cases "that may provoke sentiments and arouse passion and provoke enmity amongst communities". However, like the previous opinion, Justice Dr. D. Y. Chandrachud provides the presiding judge, with broad discretion to disallow live video-streaming in cases where it would prejudice the interests of justice.[174]

Any future policy on live video-streaming of proceedings should avoid some of the conditions prescribed above as it would defeat the very purpose of allowing live video-streaming proceedings with the aim of fostering judicial accountability. Judges should not be required to seek the consent from either party to the proceedings for allowing streaming. Rather, judges should be guided by the general principles of open courts wherein, all proceedings are presumed to be conducted in an open court, accessible to all members of the public, unless the litigants can establish that the case falls within the statutory or common law exceptions to the open court's principles. This assessment should be made on a case by case basis and a judge must be required to provide reasons for prohibiting live video-streaming of the proceedings. Even in such cases, a judge must prohibit live video-streaming only to the extent that is required to protect the privacy of the citizen or the national security interest of the state. This is in keeping with the principle of proportionality that was recognised by the Supreme Court in the *Puttaswamy* case. As per this principle, the law can restrict a fundamental right only to the extent that is required to achieve the objectives of the law.

C. Copyright in the video footage and the bar against commercialisation or usage for satirical purposes

Both opinions of the Supreme Court, in the Swapnil Tripathi case vested exclusive copyright in the video recordings of the proceedings in the Supreme Court.[175] One of the two opinions, bars the use of the video recordings for any commercial purposes, promotional purposes, light entertainment, satirical programs or advertising. The same

[171] *Swapnil Tripathi* (n 34) 677-678, [52.2].
[172] ibid 678 [52.4.2],[52.4.3].
[173] ibid 675 [49].
[174] ibid 704 [134.2].
[175] ibid 679, 706 [54.6], [154].

opinion permitted the use of recording for the purpose of news, current affairs and educational purposes.[176] The second opinion barred the re-use, re-editing or redistribution of the video recordings, or creation of derivative work or compiling of the broadcast or video footage in any form except with the written permission of the Registry of the Supreme Court.[177]

There are four significant issues with the various prohibitions listed above that must be tackled in any potential open data policy.

The first issue is with regard to the claim that the copyright in the video recordings shall vest with the Supreme Court and only it can decide how the footage is used in the future. As per Section 16 of the Copyright Act, no person shall be entitled to copyright except as provided for under the Copyright Act. As per Section 2(k) of this law, "government work", includes any work which is made or published by or under the direction of control of "any court, tribunal or other judicial authority in India". In case of such works, the government is the first owner of the copyright.[178] While the phrase "government" is not defined in the Copyright Act, the definition in the General Clauses Act, 1897 is limited to either the Central Government or State Government. It does not include the Supreme Court.[179] It is thus doubtful whether the Supreme Court can claim a copyright in the video footage.

The second issue is regarding the Supreme Court's intention to enforce its copyright to control the manner in which the copyrighted footage can be used in the future. This is not keeping with the general scheme of the limitations and exceptions enumerated in Section 52 of the Copyright Act. As per Section 52(1)(q) of the Copyright Act, it shall not be copyright infringement to either reproduce or publish "any judgement or order of a court, tribunal or other judicial authority, unless the reproduction or publication of such judgment or order is prohibited by the court, the tribunal or other judicial authority as the case may be". It is due to this provision that private publishers are able to sell law reports without being charged a royalty by the judiciary. Similarly, Section 52(1)(q) exempts the production or publication of any matter published in any Official Gazette, any Act of a Legislature (with annotations) or any report of any committee or commission of the government which has been tabled before the legislature. The general trend then in Section 52(1)(q) is to allow for the reproduction and publication of great public importance, so as to make available such information to the general public. There is no policy reason for video recordings to be treated any differently.

The third issue is with regard to the court's reluctance to allow the video recording to be used for any commercial purposes. This reluctance is baffling, given that private publishers routinely profit from the publication of judgments of the Supreme Court. It is important to provide private entrepreneurs with the incentive of future profits in order to incentivise them to create new products that will help in the dissemination of legal information. The Supreme Court must reconsider its prohibition to allow the video recording of court proceedings to be used for commercial purpose.

The fourth issue is with regard to the court's prohibition against the use of the video footage for "promotional purposes, light entertainment, satirical programs or advertising". The court needs to provide more detailed reasoning justifying these restrictions. While the prohibition against the use of the footage for promotional purposes or advertising can be justified under the tort of passing off, the court does need to explain in greater detail the restriction against the use of the footage for satirical programs. As per the Supreme Court's own jurisprudence, any restrictions on free speech need to be reasonable and well-defined under the law.[180] The only possible category of reasonable restrictions under which a prohibition against "satirical programs" can be enforced is "contempt of court" wherein a person who "scandalises the dignity of the court" could be jailed for contempt.[181] Over the years, the Indian judiciary has faced withering criticism for the frequency with which it has invoked this aspect of its contempt jurisdiction.[182]As a result, the court has progressively declined to haul up persons for "scandalising" its dignity. It would be well-advised to refrain from reviving the practice. Like all public officials the court must offer itself up for satire.

D. Translating the proceedings of the Court

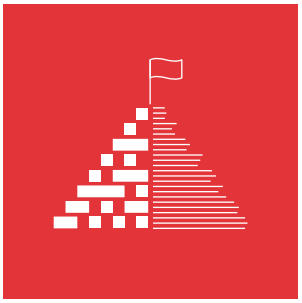
One of the issues that will arise when the Court begins live audio-video streaming of proceedings, is the ability of citizens to actually understand the oral arguments being made in English before the higher judiciary. It makes little sense to initiate live-streaming proceedings without making

[176] ibid 675, 679 [49], [54.7].
[177] ibid 706 [154].
[178] Indian Copyright Act, 1957, s 17(d).
[179] General Clauses Act, 1897, s 3 (23).
[180] *Shreya Singhal v. Union of India* (2013) 12 SCC 73.
[181] Contempt of Courts Act, 1971, s 2(c); See also *E. M. Sankaran Namboodiripad vs T. Narayanan Nambiar* 1971 SCR (1) 697.
[182] T.R. Andhyarujina, 'Sacandalising the Court- Is it Obsolete?' (2003) 4 SCC (Jour) 12 <http://www.supremecourtcases.com/index2.php?option=com_content&itemid=65&do_pdf=1&id=939> accessed 04 November 2019.

available translations to the citizens in languages that they can understand. The translations can take place either through a system of closed captions wherein translators provide real time translations of arguments with a lag of a few minutes or alternatively, audio translations should be provided in real time.

The Supreme Court must address this issue of making available translations in as many languages as possible so that all Indian citizens can effectively access the arguments being made in those courts. At the very least, multi-lingual translations should be made the norm in cases of immense public importance that are being heard by constitutional benches, failing which the live video-streaming of proceedings may serve no point and the Supreme Court will be accused of privileging only those who can comprehend the English language. While this issue did not receive any attention in the judgment, this omission can be rectified when the Court drafts its own rules under Article 145(1) on the subject matter. Given the sensitivities associated with linguistic identity in India, the Supreme Court must take care to not ignore this issue.

VIII Opening up Legislation: What are the Legal and Technological Challenges?



- The various laws enacted by Parliament are usually available to the legal community and citizens through private publishers rather than the Government of India.
- A recent initiative of the Legislative Department to make available laws through an online website titled India Code has drastically improved availability of the text of parliamentary legislation.
- However, India Code carries a disclaimer stating that it does not certify the accuracy of the content on its website.
- Countries across the world are making available legislative text in 'mark-up' languages thereby making it easier to update and crosslink laws.
- The Legislative Department must consider making available the text of Indian legislation available in mark-up language and provide API access to such a database to open the door to more innovation.

One of the fundamental requirements for any society based on the 'rule of law' is for citizens to be able to access the text of the law that governs them. This is easier said than done in a country like India, which has thousands of laws enacted by Parliament and the state legislatures, accompanied by a larger volume of delegated legislation that is drafted by the government. Even more complicated is the task of updating these legislations on a regular basis, with all amendments and making them available in a useful format across the country.

The dissemination of such legislative information is critical for the success of rule of law. There are judicial precedents on this issue, where the Supreme Court has declined to enforce a law that had not been published after being enacted by the legislature.[183] As explained in these precedents, it would be contrary to the principles of natural justice to punish a person for a law of which they could not have had knowledge even after conducting all possible due diligence. The question now is how exactly does the state accomplish this task of making available authoritative versions of legislation across the country?

Historically in India, the task of disseminating legislative information has been carried out by private publishers in addition to government publication departments. These publishers source copies of the law from the official publications of the government and reproduce the same in their own publication, with their own added annotations. These publications are then made available by private publishers to the public at a cost varying from Rs. 80 to Rs. 250, depending on the type of legislation and quality of the publisher. While a valuable source of information, private publications are technically not recognized as authoritative sources of information under the Evidence Act, 1872.

The starting point of this discussion is whether the government has a legal obligation to publish the law and make it accessible to citizens free of charge?

Until the enactment of the Right to Information Act, 2005 (more specifically Section 4 of the RTI Act), there was no express statutory requirement directing the government to proactively make available legislation to the general public. At most, the Government of India (Allocation of Business) Rules, 1961 which derive their authority from Article 77 of the Constitution entrust the Legislative Department with the responsibility of publishing all "Central Acts, Ordinances and Regulations". Despite the historic lack of a statutory requirement to publish legislation, the practice within government, even prior to the enactment of the RTI Act was for the Central or State governments to publish their legislation in their official gazettes. This requirement evolved as a practice through non-binding rules contained in publications such as the Manual of Parliamentary Procedures for the Government of India,

[183] *Harla v. State of Rajasthan* [1952] SCR 110; *Gulf Goans Hotels Co. Ltd. v. Union Of India* [2014] 10 SCC 673; Iyengar (n 149).

which requires the Ministry of Law and Justice to publish every Act in the Gazette of India Extraordinary, forward copies of the Act to all State governments for publication in their Official Gazettes and get copies of the Act printed in a suitable form for sale to the general public.[184] The Gazette is recognized under the Evidence Act, 1872, as prima facie evidence of the correctness of the text and is technically the only authoritative source of legal information.[185] In 2015, the Department of Publication under the Ministry of Urban Development, announced that it was going to stop publishing physical copies of the Gazette of India and that it was moving to a digital format wherein all future versions of the Gazette would be made available on the website – www.egazette.nic.in. It is not clear as to whether the government, prior to making this decision, carried out an assessment of how citizens were accessing the Gazette and the impact of this decision on citizens who lacked access to the internet. However, the digitized version of the Gazette of India is legally recognized under Section 8 of the Information Technology Act. Most State Governments appeared to have made this transition to digital gazettes.

Although the digital version of the Government of India's gazette can be accessed freely online, the format of these publications is hardly user friendly. It remains difficult to access older laws because the scanned versions of the Gazette have not been indexed properly. Accessing delegated legislation is far tougher. Even after the enactment of the RTI Act, most State Governments and the Central Government were not proactively publishing the law. This changed, to a limited extent after the intervention of the Delhi High Court in the case of *Union of India v. Vansh Sharad Gupta*[186]. The case and its effect on the India Code website, warrants a more detailed explanation.

A. Vansh Sharad Gupta and the India Code Website

The case began with a student of the National Law School of India University filing an appeal before the Central Information Commission (CIC) because the Law Ministry was not providing the student with the email ID of the public information officer (PIO), who is required to handle requests for information under the RTI Act.[187] The student apparently wanted copies of legislation like the Indian Christian Marriage Act, 1972 and the Code of Civil Procedure, 1908 and although some versions were available in a PDF format on India Code, which is run by the Legislative Department, these versions lacked the subsequent amendments. The CIC noted that it was important for the government to make available updated legislation failing which citizens would have to buy expensive private publications. In coming to these conclusions, the CIC framed the issue as a legal duty of the government under Section 4 of the RTI Act. Towards the end of the order, the CIC ordered the Legislative Department to pay a compensation of Rs. 10,000 to the library of the National Law School of India University for causing delay to the students by not providing the email ID of the PIO.

B. The litigation before the Delhi High Court

The Legislative Department then appealed the CIC's decision to the Delhi High Court, protesting the order to compensate the library with a sum of Rs. 10,000 on the grounds that the RTI Act had no provision for compensation to public authorities. When the High Court heard the appeal, it expressed its displeasure that the government was appealing against such a small amount of compensation. It surprisingly, then directed its focus towards the issue of whether the government was in fact making available legislation on the Indian Code website. The High Court appointed a Senior Advocate as an Amicus Curiae to provide it with inputs on how the government could do a better job in making legislation available on India Code.[188] The Amicus Curiae prepared a well-researched note identifying the following as the critical shortcoming in the India Code website[189]:

(a) Searchability: The existing laws on the website were made available typically in an inaccessible format with scanned images which precluded the possibility of machine readability and by implication automated indexing and searchability;
(b) Updation: The existing laws on the website were not being updated with the latest amendments;
(c) Cross-linking: There was no system of crosslinking various legislation to other legislation or rules or regulations to improve and aid the usability of the website;
(d) Representation: The laws on these government websites were not mobile compatible and websites ignored basic rules of design.

[184] Manual for Parliamentary Procedures 2018, Para 9.22.
[185] Indian Evidence Act 1872, ss 81-84.
[186] W.P. No. 4761 of 2016 before the High Court of Delhi at New Delhi.
[187] *Vansh Sharad Gupta v. PIO, Legislative Department* [2013] CIC 900008SA <https://ciconline.nic.in/rti/docs/cic_decisions/CIC_SS_C_2013_900008-SA_M_168160.pdf> accessed 30 September 2019.
[188] *Union of India v. Vansh Sharad Gupta*, (n 186) , Order dated 08.09.2016 <http://delhihighcourt.nic.in/dhcqrydisp_o.asp?pn=172411&yr=2016> accessed 30 September 2019.
[189] ibid, Order dated 25.05.2017 <http://delhihighcourt.nic.in/dhcqrydisp_o.asp?pn=106443&yr=2017> accessed 30 September 2019.

As a solution, the Senior Advocate's note suggested the development or adoption of better technical standards to facilitate the easier publication of legislative information. This included recommendations to use Akoma Ntoso (AKN), which is an UN accepted standard for legislative text. It is a form of Extensible Markup Language (XML) that is especially useful for structuring legal documents.[190] In simple English, mark-up languages encode text in a format that can be read and processed by other computer programmes. This allows for automated processing of the legislative text by computer programs thereby making it easier to automatically update the legislative text with amendments in the future as well providing different versions of a law at different points in time in the past. As explained earlier in this report, adopting this standard is especially useful for complex legislation like the Income Tax Act which is frequently amended. If the parent legislation and all accompanying amendments were made available in the AKN format, it should be possible for a computer programme to provide the exact text of the legislation on any given day between 1961 and 2019. Such a facility would be invaluable for both legislation and delegated legislation which is more frequently amended. Foreign governments like the UK have made available all their legislation in the AKN format.

Another suggestion, in the amicus's note was to create a new standard for Indian legislative text. This maybe a worthwhile suggestion since India is a country of diverse languages and the law has to be made available in multiple languages.

Apart from the issue of technical standards, the Amicus made several other suggestions such as making delegated legislation more accessible. Most interesting was the suggestion to convert the website into a platform that could be used even by the State Governments to upload their legislations.[191]

The High Court, clearly impressed by the suggestions made by the Amicus, directed the Secretary of the Legislative Department to convene a meeting along with all relevant stakeholders including senior officials from the National Informatics Centre (which is responsible for administering government websites) and the Directorate of Printing, Ministry of Urban Development which publishes the Gazette of India.[192]

We filed an application under the RTI Act, requesting a copy of the file notings from the Ministry, that were associated with this particular case.[193] Included in the response was a copy of the minutes of the stakeholder meeting referred to above. The minutes provide an interesting view of the deliberations.[194] A few of the key issues that are apparent from a reading of the minutes are explained below:

i. The Legislative Department, while agreeing to supply to the NIC the updated English version of all the Central Acts enacted between 1947 and 2016 (except for 7 legislation for which even the Ministry did not have updated copies), refused to take responsibility for subordinate legislation and requested that the concerned administrative Ministry/Department take responsibility for providing the subordinate legislation.;
ii. On cross-linking legislation with subordinate legislation and other laws, no firm commitment was made by any of the stakeholders;
iii. On the adoption of XML as a standard for all legislative text, the NIC requested a further meeting to determine the future course of action and while a second meeting was held on July 25, 2017, the details of the same are unavailable with us;
iv. On updating laws, the Legislative Department took the responsibility of updating existing legislation within a period of 15 days of an amendment being passed by Parliament;
v. On the issue of making the platform available to even state governments the NIC said that it would involve a lot of work and they would have to take a call on whether they could do so based on availability of financial and human resources;
vi. On the issue of designing the website to make it compatible with mobile phones, the Legislative Department committed to making available principal legislation in a user friendly and mobile friendly manner;
vii. On the critical recommendation by the Amicus to involve a professional third party to improve website design and functionality, the NIC opposed the move and insisted on improving the website design and functionality on their own;

At the next hearing before the High Court on September 22, 2017 the government made a presentation before the High Court on the new website which was under development,

[190] Akomo Ntoso (n 14).
[191] *Union of India v. Vansh Sharad Gupta*, (n 186).
[192] Ibid.
[193] F. No. 7/15/2019-RTI - RTI Application response by S K Chitkara, Public Information Officer, Legislative Department to Shreya Tripathy, Research Fellow, Vidhi Centre for Legal Policy (19 August 2019).
[194] Minutes of Meeting held on 21 July 2017 under Chairmanship of Dr G N Raju, Secretary, Legislative Department, Ministry of Law & Justice provided in response to the RTI F. No 7/15/2019.

after which the High Court specifically directed the incorporation of some features into the India Code website.[195] Some of these features are as follows:

i. That all data on the website should be in a machine-readable PDF format;
ii. All ministries, should appoint nodal officers to deal with the creation and uploading of Legislative documents;
iii. The NIC would design the website in a manner that allowed the nodal officers to upload the legislation on to the website;
iv. That the website would facilitate hyperlinking between the parent legislation and subordinate legislation;
v. That the website would be designed to enable uploading of legislative documents by state authorities;
vi. That it would be mobile friendly.

As can be noted, there is no mention of adopting AKN or any other structured markup language since NIC opted to follow PDF formats. Thereafter the matter appears to have lost steam before the court and the case appears to have been disposed by the High Court earlier this year. In order to get a better sense of the India Code website, we examined the website and while it is clear that the present version of the website is a huge improvement over the previous edition, the situation is far from satisfactory.

Some of the major improvements include the simple fact that a far larger number of updated legislations are available on the India Code website than was the case previously. Similarly, unlike earlier, the legislations are available in a HTML format with individual links for each provision of the law thereby facilitating searchability as well as cross-linking. The legislations are also available in a PDF format.

On the downside, and this is a rather significant downside, the India Code website carries a very large disclaimer refusing to certify the authenticity of the text of the legislation available on the website.[196] The refusal of the government to put in place a serious editorial policy to guarantee the authenticity of the text of the legislation destroys the very purpose of the website.

A second issue with the India Code website is with regard to the availability of delegated legislation such as rules, regulations, circulars or notifications. Access to these delegated legislations is as important as access to the text of the parent legislation. However, this section does not appear to be updated with the required frequency and even then, only rules and regulations are made available. Circulars and notifications do not appear to be updated with the required frequency.

A third and final issue is regarding the overall interface and user experience. The India Code website fares poorly when compared to its counterparts either in the United Kingdom or Singapore.[197]

Thus, while the government deserves credit for upgrading the India Code website, there is a lot more than can be done to deliver on its constitutional duty to make available the law. If nothing, the government must at the very least guarantee the authenticity of the text of the legislation so as to relieve members of the general public from having to purchase copies of the legislation from private publishers.

C. The need for a new editorial and 'open data' policy for legislative texts

The case above indicates the inadequacies of the current status of India Code as the *de facto* database for digitally accessing central laws in India. In our opinion, the government must seriously consider a new data policy for India Code, that enables it to discharge its sovereign duty to provide citizens with access to the authentic text of the law for no charge, as well as facilitate the process by which private entrepreneurs can use the India Code data to build

[195] *Union of India v. Vansh Sharad Gupta*, (n 186), Order dated 22.09.2017 <http://delhihighcourt.nic.in/dhcqrydisp_o.asp?pn=179400&yr=2017> accessed 30 September 2019.

[196] The text of the disclaimer is as follows: "Central Acts: Updating of Central Acts is a continuous process. However, to facilitate everyone, the Legislative Department in the Government of India has taken an initiative to host updated Central Acts on this web site. Material provided on this Site is provided "as is", without warranty of any kind, either express or implied, including, without limitation, warranty of fitness for a particular purpose. Legislative Department specifically does not make any warranties or representations as to the accuracy, completeness or adequacy of any such Material or the same being up-to-date. Please note that the Material available on the Site constitutes exact reproduction of officially adopted text in Pdf format. Legislative Department periodically updates the Material on this Site without notice, whenever amendments are made by Parliament.
Subordinate Legislation: The updating and uploading of Rules, Regulations, Notifications, etc., and linking them with relevant sections of the respective Principal Act under which the said subordinate legislations have been made is the proprietary of the concerned Ministry/Departments in the Government of India administering subject matter of the Legislation. Under no circumstances shall the Legislative Department for Updating and Uploading of Central Acts or concerned Ministries/Departments for updating and uploading of Subordinate Legislations are liable for any loss, damage, liability or expense incurred or suffered that is claimed to have resulted from the use of this Site, including, without limitation, any fault, virus, error, omission, interruption or delay with respect thereto. The use of this Site is at the User's sole risk. The User specifically acknowledges and agrees that the Legislative Department or concerned Ministries/Departments are not liable for any conduct of any User. Efforts have been made to divide the Acts into sections, schedules, etc., to facilitate the readers for the purpose of clarity. However, for ensuring correctness of the references, the reader may access the PDF copy of the whole Act." <https://indiacode.nic.in/disclaimer.jsp> accessed 30 September 2019.

[197] See the UK legislation portal <http://www.legislation.gov.uk/> & the Singapore legislation portal < https://sso.agc.gov.sg/> accessed 30 September 2019.

new and useful applications for the legal ecosystem. The following are some of the considerations that must be factored into a new policy:

I. The need to ensure authenticity of the text

The most critical flaw with the current version of the India Code website is the lack of any guarantee regarding the authenticity of the legislative text available on the website. The Government of India, which is responsible for enforcing the law, has a legal duty under the RTI Act to provide citizens with certified copies of the law. It cannot then claim it has no way of providing citizens with the accurate and authentic text of the law.

As explained earlier, the Evidence Act recognizes only the Gazette of India to be genuine.[198] In these circumstances, it should be the endeavour of the government to build a new version of India Code that sources all of its text from the Gazette of India. In order to do this, the government may first be required to digitize all previous editions of the Gazette of India in a format that is helpful to the ultimate goal of building a database of authentic legislation which will be presumed to be genuine under the Evidence Act. Perhaps, there is also an argument that can be made for using new technical formats for the digital version of the E-Gazette in order to facilitate the automatic updating of the law in the future with minimal human intervention. These requirements of 'quality' and 'accountability' already find mention in the NDSAP.[199]

The suggestions above require further deliberation and it is the Legislative Department that needs to take the lead in involving the Open Data community to come up with the best solution for a sustainable model.

II. The need to guarantee access to persons with disabilities

In a digital age, the accessibility of laws and legal information is intrinsically tied to the forms of technologies adopted for the publication of such laws. Technology can be both an enabler as well as an impediment to digital accessibility. For example, the use of CAPTCHA, a verification technology presently in use in several Indian government websites and databases (including legal databases), acts as a barrier to access, particularly in the case of visually impaired persons.[200] The choice of technology is therefore an important aspect of legal and policy formulation when considering the openness of legal information.

India is a party to the Convention on the Rights of Persons with Disabilities and has also enacted the Rights of Persons with Disabilities Act, 2016, ("RPWD Act"), which prescribes certain mandatory obligations for private and government establishments to ensure accessibility for persons with disabilities. Section 12(4) of the RPWD Act requires the government to ensure that all public documents are in accessible formats. Rule 15 of the Rights of Persons with Disabilities Rules, 2017, prescribes the rules for accessibility for information and communication technologies which are applicable to all establishments, including private establishments. With respect to digital accessibility, Rule 15 requires the following standards to be complied with:

"(i) website standard as specified in the guidelines for Indian Government websites, as adopted by Department of Administrative Reforms and Public Grievances, Government of India;
(ii) documents to be placed on websites shall be in Electronic Publication (ePUB) or Optical Character Reader (OCR) based PDF format."

Rule 15 also specifies that further standards of accessibility in respect shall be specified by the Central Government within a period of 6 months from the date of notification of the Rules. However, no such standards have been prescribed to date. Further, no periodic review of the standards, to keep them in line with the latest technologies, has been conducted, despite the prescription for the same under Rule 16. The deadline for the implementation of the Act and Rules by government and private establishments alike was June 15, 2019. However, there is apparent non-compliance with the Act and the Rules, by government and private establishments alike.

The Government of India has released accessibility guidelines for all government websites, which are supposedly based on global standards and best practices, including the ISO 23026 standard, the World Wide Web Consortium (W3C's) Web Content Accessibility Guidelines (WCAG 2.0).[201] The Website Guidelines make the following specific reference to the standards for accessibility of legislation and rules on websites[202]:

[198] Indian Evidence Act 1872, ss 81-84.
[199] National Data Sharing and Accessibility Policy 2012, Clause 1.2.
[200] Scott Hollier and others, 'Inaccessibility of CAPTCHA' (2019) W3C < https://www.w3.org/TR/turingtest/> accessed 30 September 2019.
[201] Guidelines for Indian Government Websites (Version 2.0), Prepared by the National Informatics Centre and adopted by the Department of Administrative Reforms and Public Grievances (DARPG), Ministry of Personnel, Public Grievances & Pension, Government of India <https://web.guidelines.gov.in/assets/gigw-manual.pdf> accessed 30 September 2019.
[202] Ibid para 7.4.2.

"a. Government websites shall have a lot of information in the form of documents such as Acts, Rules, Schemes, Gazettes, Forms, Circulars and Notifications. Accessibility and usability of these documents by all citizens is as important as that of the entire website. Departments MUST either use HTML format or any other format that makes the document accessible. In case documents are published in a format other than HTML format, departments MUST provide a link to the website from where the document reader can be downloaded free of cost.
b. When the document has been provided in a format other than HTML, websites should include a text description of the document, including the title, file type, file size, and effective date. This will ensure that visitors have a reasonable understanding of what to expect when they view the document.
c. The document should be properly tagged and should not contain scanned images of text (Ref. 6.6.1). This will ensure that the document is accessible to screen reader users (refer guidelines website web.guidelines.gov.in for details)."

As per the RPWD Act, the Website Guidelines are required to be complied with by both government and private entities. However, the extent of compliance by government and private establishments which publish legal documents is unclear.

The issue of access for the visually impaired needs urgent attention from the government and once again, this is an area where a collaborative effort can be of great help.

III. Choosing the right technological standard for legislative texts

As explained earlier, in order for legislative texts in India to be truly 'open' it is necessary to publish the text using appropriate technical standards. The amicus curiae in the *Vansh Sharad Gupta* case had recommended using Akomo Ntoso as a base for building a Legal XML standard for legislation on the India Code website.

The adoption of such standards will promote efficiency, improved collaboration, preservation, interoperability, cost-effectiveness, value addition and ease of comparative research.[203] A number of governments and independent projects around the world already utilise open XML standards for the publication of legislation. For example, Governments in the EU including the UK government uses the CEN MetaLex XML standard on its website legislation. gov.uk.[204] Another option, as pointed out by the Amicus, is the UN-backed standard of Akomo Ntoso (**A**rchitecture for **K**nowledge-**O**riented **M**anagement of **A**frican **N**ormative **T**exts using **O**pen **S**tandards and **O**ntologies), which has been implemented by a number of organisations and national projects.[205] The Akoma Ntoso XML specifications can also be appropriately modified for use in the Indian context.[206] Similarly, technologies can be integrated or built upon XML standards in order to improve the process of law-making. For example, parliamentarians in the EU have been utilising a tool known as AT4AM for authoring and tracking amendments to legislation.[207]

Given that State Governments are likely facing the very same issue as the Central Government, it may make sense to propose a model legislation that can be adopted by even State Governments in order to ensure some uniformity in standards. One important precedent that may be adopted in this regard is the Model Uniform Electronic Legal Materials Act (UELMA) in the United States of America. According to the UELMA, which has been adopted by several state legislatures in the USA, the State Government must provide for the following, in the digital publication of any law[208]:

1. Authenticate the information, by providing a method to determine that the legal material is unaltered from the version published by the state officer or employee that publishes the material;
2. Preserve the information; and
3. Ensure public accessibility on a permanent basis

The UELMA also provides guidance on the adoption of standards for the publication of legislative material, as well as requirements to archive and preserve important legislative information. India may consider adopting a similar law at the level of Union Government and drafting a similar model law to be adopted by State Governments to ensure the authentic and accessible publication of laws and legislative information.

IV. Should the Copyright Act be amended?

One of the legislative obstacles to an open data policy for legislative text is the Copyright Act, 1957. As per Section 2(k), works published by any legislature, by governments or government departments (which would include subordinate

[203] Ibid.
[204] See website by UK's National Archives <https://www.legislation.gov.uk/developer/formats> accessed 30 September 2019.
[205] *Union of India v. Vansh Sharad Gupta*, (n 186) .
[206] Prakash (n 15).
[207] Claudio Fabiani, 'AT4AM: The XML Web Editor used by members of European Parliament', (*Voxpopulii*, 15 August 2013) <https://blog.law.cornell.edu/voxpop/2013/08/15/at4am-the-xml-web-editor-used-by-members-of-european-parliament/> accessed 4 November 2019.
[208] Barabara Bintliff, 'The Uniform Electronic Legal Material Act is Ready for Legislative Action' (*VOXPOPULII*, 15 October 2011) <https://blog.law.cornell.edu/voxpop/2011/10/15/the-uniform-electronic-legal-material-act-is-ready-for-legislative-action/> accessed 4 November 2019.

legislation) as well as by any judicial authority, constitute 'government works', the copyright in which vests with the government, as per Section 17(1)(d).

Section 14 describes the rights granted under the Act, and includes the exclusive right, inter alia, to reproduce, copy, translate or adapt the work. As per Section 28, these rights exist for a period of 60 years from the publication of the work. Doing any of the above acts (reproduction, copying, translation or adaptation) without a license or the permission of the Government would constitute infringement of copyright under Section 51. However, this is subject to the provisions of Section 52, which lays down situations in which the above actions do not constitute infringement in certain situations.

Two specific exceptions to infringement apply in the case of 'Acts of legislature':

i. Under Section 52(1)(q)(ii), the reproduction or publication of any 'Act of legislature' is not deemed to be infringement of copyright, provided that such Act is reproduced or published "together with any commentary thereon or any other original matter."
ii. Under Section 52(1)(r), it is permitted to publish any translation in any Indian language, of an Act of legislature or any rules or orders made under such Act, provided that such translations are not otherwise available to the public.

The provenance of these provisions is unclear. No similar exceptions existed under the erstwhile Copyright laws of 1911 and 1914. When the Copyright Bill, 1955, was being considered by the Parliament of India, a sub-committee of a Joint Parliamentary Committee, established to look into the specific subject of "the nature and extent of protection to be given to works made or published by or under the direction or control of the Government, the Legislatures and the courts or other judicial authorities in India" indicated that "Government works which are of obvious public interest should remain in the public domain unless the competent authority otherwise directs".[209] However, this was not finally incorporated into the text of the law.

Due to the requirement to provide "commentary", ordinary citizens or private publishers cannot reproduce a copy of just the bare text of a law from a government source. They will necessarily have to provide some commentary, regardless of the quality. Most publishers usually add some excerpts of relevant case law which on most occasions are not very helpful. However, this exercise presumably increases the costs for private publishers to reproduce the text of the laws. For most part, this appears to be a provision that is never enforced by the government, yet the threat of a possible legal action for copyright infringement causes uncertainty.

The situation has also led to a Public Interest Litigation (PIL) being filed before the Delhi High Court against the Union Government as well as certain private publishers, claiming that the publication of bare texts of legislative Acts by private publishers amounts to the infringement of government copyright and should therefore be barred.[210] This PIL was filed by a lawyer, who complained about both, the pricing and quality of the bare text of the legislation being published by the private publishers. As per media reports, the government has defended the actions of the private publishers by justifying their actions as permissible under Section 52 of the Copyright Act.[211] The resolution of this case may lead to some more insight into the standard of originality required for publication of an Act of legislature to qualify for the exception under Section 52(1)(q)(i), which requires "any commentary thereon or any other original matter".

Rather than await a judicial resolution, the government can consider a possible amendment to the Copyright Act to allow the reproduction of the bare text of legislative enactments without any need to create commentary.

V. Providing API access

Last but not the least, is the issue of API access. If the government is truly serious about an open data policy that can catalyse innovation in the legal ecosystem it should seriously consider an API policy that allows anyone to legitimately and efficiently access data or services offered by the India Code website rather than being forced to scrape such data by writing their own program. Such API access would be in line with the NDSAP. An illustrative example of how an API policy should be drafted has been put forth by the Government Digital Service of the Government of the United Kingdom. A few relevant extracts have been reproduced below:

[209] Report of the Joint Parliamentary Committee on the Copyright Bill, 1955 published in the Gazette of India Extraordinary dated 1st October, 1955 at p. 969.
[210] PTI, 'Publication of bare acts don't violate copyright' *The Telegraph* (New Delhi, 7 November 2018) <https://www.telegraphindia.com/india/publication-of-bare-acts-don-t-violate-copyright/cid/1674267> accessed 30 September 2019.
[211] PTI, 'Bare acts published by private companies does not infringe govt's copyright: Centre to Delhi High Court' *The Economic Times* (New Delhi, 6 November 2018) <https://economictimes.indiatimes.com/news/politics-and-nation/bare-acts-published-by-private-companies-does-not-infringe-govts-copyright-centre-to-delhi-high-court/articleshow/66525862.cms?from=mdr> accessed 30 September 2019.

> "With legislation.gov.uk we aimed to open-up access to the government's legislation database, by creating an API first. The legislation.gov.uk API allows anyone to access the data we hold in the database, or to use the services we have built, such as the search or to dynamically create PDF documents from the data."
> "We developed the API and then built the legislation.gov.uk website on top of it. The API isn't a bolt-on or additional feature, it is the beating heart of the service. Thanks to this approach it is very easy to access legislation data - just add /data.xml or /data.rdf to any web page containing legislation, or /data.feed, to any list or search results. One benefit of this approach is that the website, in a way, also documents the API for developers, helping them understand this complex data. Since launching the API we've seen several third party applications be developed, including two different iPhone / iPad apps, as well as innovative new products, such as a service for law lecturers to create and self-publish relevant extracts of legislation for their courses."

The British government's approach to the API is a good example of a tech-savvy government that understands the true potential of an open data approach.

IX Making the Law Available in Indian Languages

- Historically, Indian legislation and judgments have been made available only in English and at most in Hindi.
- There is a necessity to make available the law and judgments in more Indian languages.
- It is the duty of the government to provide authoritative translations.
- Language must form an integral component of an 'open data' policy.

The open data movement, like the open government movement before it, has rarely ever looked at the issue of making available information in languages understandable to different sections of the population. This is because most countries in the West speak only one, or at most two, major languages. However, in the Indian context, the question of language should be given more importance by the open data and open government movements because India has spectacular linguistic diversity and the legitimacy of the law is dependent on the ability of citizens to access the law in a language that they can understand. As of now, the issue of language and the law is tackled at the level of both the Constitution, as well as legislative enactments by Parliament and State Legislatures.

A. The constitutional scheme

As per the Census of 2011, India has at least 121 spoken languages.[212] Of these, the Eighth Schedule to the Constitution recognises 22 official languages, with demands being made for more languages to be included.[213] Mere inclusion in the Eighth Schedule does not guarantee any rights to citizens to transact business with the state in those languages. Rather, Article 344 merely guarantees that a few of the persons speaking the languages in the Eighth Schedule get representation on the Official Language Commission constituted by the President of India to advise him on certain language related issues as enumerated in that provision. Only Hindi in the Devanagari script is recognised as the official language of the Union as per Article 343, with the caveat that English will be continued as an official language for 15 years post the commencement of the Constitution.

While the Constitution is most certainly tilted towards the promotion of Hindi as the official language, Article 348 does give some breathing space to regional languages while settling on English as the mandatory language for the publication of legislation and judgments. For example, while Article 348 of the Constitution specifically mandates the publication of all laws or delegated legislation by Parliament and State Legislatures in the English language, the same article of the Constitution also recognise the right of the state legislatures to mandatorily require its legislation to be published in any language other than English language. This provision was the result of a tough balancing act in the Constituent Assembly where lawmakers while cognizant of the colonial baggage of the English language were also trying to balance the demands of an efficient administration with the issue of linguistic identity of various regions.[214]

However, the same formula does not extend to judgments of the High Courts. While Article 348 of the Constitution requires all High Courts to publish their judgments and orders in the English language, there is no provision in the Constitution, which allows the state legislatures to mandate the publication of judgments in the local official language of the state. At most, Article 348(2) allows the Governor with the prior consent of the President, to authorise the High

[212] Census of India 2011, 'Paper 1 of 2018 - Languages' <http://censusindia.gov.in/2011Census/C-16_25062018_NEW.pdf> accessed on 29 September 2019. ("Census 2011").
[213] These are (1) Assamese, (2) Bengali, (3) Gujarati, (4) Hindi, (5) Kannada, (6) Kashmiri, (7) Konkani, (8) Malayalam, (9) Manipuri, (10) Marathi, (11) Nepali, (12) Oriya, (13) Punjabi, (14) Sanskrit, (15) Sindhi, (16) Tamil, (17) Telugu, (18) Urdu (19) Bodo, (20) Santhali, (21) Maithili and (22) Dogri
[214] Constituent Assembly Debates (12-14 September 1949). <https://www.constitutionofindia.net/constitution_assembly_debates/volume/9/1949-09-12>

Courts to use the Hindi language, or any other language used for official purposes of the State, for its proceedings but the judgments, decrees and orders still have to be made available in the English language. As a result, virtually all judgments of the High Courts, many of which are of constitutional importance, are published only in English which is spoken by a minority of the population in most states. The same is true for the judgments of the Supreme Court. Although recently, after requests by the sitting President, the Supreme Court has made efforts to make available its judgments in Indian languages.[215] It is however not under any legal obligation to make translations of its judgments into Indian languages.

B. The statutory scheme for authorised translations of the law

Apart from the constitutional scheme governing the languages in which legislation should be made available, there is also a statutory framework put in place by both Parliament, as well as some State Legislatures.

The first law enacted by Parliament in this regard is the Official Languages Act, 1963. It mandatorily requires the publication of all 'Central Acts' and delegated legislation by the Central Government in the Official Gazette in both English and Hindi languages. Both versions are presumed to be the authoritative text of the law. As with the Constitution, the Official Languages Act is tilted in favour of English and Hindi.[216] Presumably because there was no legal framework to provide authoritative texts of central legislation in other Indian languages, Parliament enacted a second law called the Authoritative Texts (Central Laws) Act, 1973 which recognised as authoritative, the publication of a translation of any 'Central Act' or delegated legislation, into any of the languages mentioned in the Eighth Schedule to the Constitution, under the authority of the President of India.

There however appears to be a conflict between the Authoritative Texts Act and some state legislation which recognise as authoritative, the laws translated under their respective official language laws. For example, the Karnataka Official Languages Act, 1963 states that any translation of a central law or delegated legislation, into the Kannada language which is published under the authority of the Governor of the state shall be presumed to be authoritative.[217]

More problematically, there is little transparency in how the process under the Authoritative Texts Act works on the ground. Since there was little information available in the public domain on the workings of the translation process under the Authoritative Texts Act, we filed applications under the RTI Act. From what we could piece together in the replies provided to us, the Official Language Wing (OLW) which functions under the Legislative Department of the Law Ministry overlooks the translation process under the Authoritative Texts Act.[218] From the RTI replies we understand that the OLW prepares a 'priority list' of legislation that require translation which is then sent to State Governments for preparing a translation. On receiving a translation from the state government, the OLW constitutes a working group to vet the draft after which it is published under the authority of the President in the Gazette of India.[219]

A large number of translated texts can be found on the website of the legislative department but the OLW appears to be far from making available translations of all parliamentary legislation into all languages in the Eighth Schedule. For example, an important legislation like the Indian Penal Code (IPC) is not available in Gujarati or Odiya, although it is available in Marathi, on the OLW's website. Even these translations are available only in scanned image formats, which are not machine-readable.

More tragically perhaps, the Legislative Department has failed to integrate these authoritative translations by the OLW, into the India Code website, which is otherwise supposed to be a repository of all legislation in India. The 'regional languages' tab on the India Code website goes back to the Legislative Department page rather than making available the text of the translations on India Code webpages.

C. The statutory scheme for authorised translations of judgments

Apart from legislation, another major source of law in common law countries, are judgments by the judiciary, especially the higher judiciary, which can even declare legislation as unconstitutional.

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[215] 'Supreme Court To Make Its Judgments Available in Regional Languages', *Live Law* (3 July, 2019) <https://www.livelaw.in/top-stories/supreme-court-to-make-its-judgments-available-in-regional-languages-146057> accessed 5 November, 2019.
[216] Section 3, Section 5 & Section 6.
[217] Section 5A.
[218] Legislative Department, 'Important Central Laws in Regional Languages', <http://legislative.gov.in/regional-language> accessed on 29 September, 2019 ("Legislative Department Website").
[219] CTBDO/R/2019/50003, Regarding Information under RTI Act 2005, Official Language Wing, replied on 21.02.2019.

As mentioned earlier, Article 348 of the Constitution requires the publication of all judgments, orders and decrees of the High Courts in the English language even if the proceedings of some High Courts are permitted to be conducted in a language other than English. This is unlike the district judiciary, which is permitted by the Code of Civil Procedure and Code of Criminal Procedure, to publish its judgments and hold its proceedings in a language decided by the state government.[220] As a result, many district judiciaries operate in the local languages of the state where they are located.

With regard to the judgments of the High Courts, Section 7 of the Official Languages Act, 1963 states that the Governor of a State may, with the permission of the President, require the judgments of the High Courts to be translated into Hindi or any other official language of the state. It is not clear as to how many states have invoked this power to publish authorised translations of judgments of the High Court.

Under the Central Government, a wing of the Legislative Department, called the Vidhi Sahitya Prakashan is tasked with bringing out authoritative Hindi versions of reportable judgments of the Supreme Court and High Courts.[221]

D. Incorporating a language policy into a potential Open Data policy

Despite access to justice being recognised as a right in India under Article 21[222], the scope of this right is limited in implementation.[223] In terms of access, discussions are centred on physical access to adjudicatory mechanisms, in terms of distance to courts or speed with which decisions are rendered. There are however many more considerations such as infrastructure of courts[224], accessibility of good lawyers[225] and court navigability[226] that have been excluded. This limited understanding of the access to justice, has so far, failed to recognise the right of a citizen to access the text of the law in a language that she understands. Even a progressive legislation like RTI Act has made the requirement of the state to proactively publish the information in the local language of an area contingent on the financial viability of the state.[227] Rights are rarely, if ever contingent on their financial viability.

Even international covenants such as the International Covenant for Civil and Political Rights (ICCPR)[228] as well as the Universal Declaration of Human Rights (UDHR)229 have recognized this right only in terms of access to adjudicatory mechanisms and fair and just trials. However, recent developments have shown a shift from understanding access to justice beyond mere access to court or a lawyer, to a more multidimensional approach. This approach understands the continuum of needs of a citizen[230] as including access to legal information, services and representation, adjudicatory mechanisms, fair dispute resolution processes, premises for these processes and post-resolution support etc.[231]

Thus, the promotion of certain languages as a policy measure could be continued without compromising on a citizen's basic rights of access to laws in their own languages. Delinking the political question of recognition of languages and basic access to legal text is important to ensure the multi-dimensional approach to access to justice.

Any future 'open data' policy must recognise the need to make legislation and judgments available in languages that can be understood by more Indian citizens. Once such a right is recognised, an 'open data' policy must focus on technological issues such as machine-readable formats, standardised fonts in order to open the door for entrepreneurs to innovate and create technology products that facilitate the wider dissemination of this legal information. In particular, the existing translated versions should be made available on the India Code website.

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[220] Section 137 of the CPC, Section 272 of the Cr.P.C. Some states like Uttar Pradesh have enacted specific laws such as the Uttar Pradesh Official Language (Subordinate Courts) Act, 1970 which requires the language of every judgment, decree and order passed by the District Judiciary in UP to be in Hindi.
[221] About the Legislative Department, Ministry of Law & Justice <http://lawmin.gov.in/sites/default/files/LEGISALTIVE%20DEPARTMENT%28E%29.pdf>.
[222] *Anita Kushwaha v. Pushap Sudan*, (2016) 8 SCC 509.
[223] ibid.
[224] Sumathi Chandrashekaran, Diksha Sanyal, Reshma Sekhar, 'Building Better Courts-Surveying the Infrastructure of India's Courts,' Vidhi Centre for Legal Policy (August 2019) <https://vidhilegalpolicy.in/2019/08/01/building-better-courts-surveying-the-infrastructure-of-indias-district-courts/> accessed on 29 September 2019, at page 10 ("Court Infrastructure Report").
[225] *D.K. Basu v. State of West Bengal*, AIR 1997 SC 610.
[226] Court Infrastructure Report (n 217) 24.
[227] Section 4(4).
[228] Article 14 of the International Convention for Civil and Political Rights,1966.
[229] Article 8 and Article 10 of the Universal Declaration of Human Rights, 1948.
[230] OECD, 'Understanding Effective Access to Justice', Workshop Background Paper (OECD Conference Centre, Paris, 3-4 November 2016) <http://www.oecd.org/gov/Understanding-effective-access-justice-workshop-paper-final.pdf>, accessed on 29 September, 2019 at page 4.
[231] Ibid.

Conclusion

One of the biggest challenges faced by the Indian justice system since independence, is the difficulty of disseminating legal information through the length and breadth of India, be it legislation enacted by the legislature or judgments passed by the higher judiciary. Due to the advent of the smartphone and deep penetration of internet in Indian society, the Indian state is theoretically in a position to revolutionise the ability of Indian citizens to access the text of the law, as well as other crucial information about the Indian judiciary which is necessary to guarantee judicial accountability.

However, in order to facilitate this 'revolution', it is necessary for both the Law Ministry and the judiciary to adopt an 'open data' policy that will allow Indian entrepreneurs to build new applications or products that will aid both the legal community and the ordinary citizen. A website like Indiankanoon.org is but one example of how good 'open data' practices adopted by the judiciary facilitated the creation of a new product that helped in democratising access to legal information thereby increasing the accountability of the judiciary by allowing citizens to read and comment on the quality of judicial reasoning.

An open data policy for the judiciary should be viewed in the context of the Indian judiciary's history of following the principle of open courts. The ability of the citizen to attend all court proceedings, as a result of the open courts principles, should not be viewed as a privilege granted by the courts but rather a component of the fundamental right to speech and information that is enshrined in Article 19(1)(a). As a result, any information that is communicated within the courtroom such as pleadings, judgments or even mere case-details can be shared with the general public. Privacy cannot be cited as the grounds for denying access to such information unless the litigant can establish that the information they seek to redact falls within the recognized categories of information that are excluded from the 'open courts' principle.

Once the core legal issues are addressed, the debate shifts to the issue of technological formats in which the information is made available. As explained earlier, the higher judiciary has already done well to make available judgments in a machine-readable format, which is the starting point of an efficient open data policy. The district judiciary has to do a lot more on this front. If a future open data policy can take care of some specific technological issues such as the provision of API access, use of markup languages, the use of standardised fonts and open source software, the judiciary can open the floodgates to innovation of new products by India's technology entrepreneurs for lawyers, judges, law schools and persons with disabilities who currently have limited access to legal information.

With regard to the availability of legislation enacted by Parliament and the various State Legislatures, the Legislative Department and the National Informatics Centre (NIC) deserve due credit for upgrading the India Code website, as per the directions of the Delhi High Court. However, as explained earlier in this report, there is a lot more that can be done to facilitate better access to legal information. For starters, the Legislative Department, in collaboration with the Department of Publications, must consider making available all past and future issues of the Gazette of India (especially the parts containing legislation and delegated legislation) in a markup language like Akomo Ntoso. This will open the door for the creation of new products by entrepreneurs which will help in dissemination of legislative information as well as helping both the government and legal community in accessing accurate version of both older and newer versions of their laws.

Last but not the least, both the judiciary and government must incorporate a language component within any future 'open data' policy. There is little use in making available legal information in only English and Hindi, when many Indian states are administered in other languages. The legitimacy of the justice system will only increase in the eyes of common public if they are able to access the law and judgments of the courts in languages that they can comprehend. This is an issue that must no longer be ignored.

A good starting point for achieving the above objectives is for both the judiciary and the government to formulate an 'open data' policy after consultations with the 'open data' community, which policy can then form the basis of a legislative enactment. An 'Open Judicial Data' policy that catalyses innovation for common citizens and the legal community will only strengthen the rule of law in India.

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