

RIGHT TO PRIVACY AND ELEMENTARY EDUCATION OF HIV/AIDS CHILDREN IN INDIA: LEGAL DIMENSIONS

*Shruti V. Kamat Dalal**

ABSTRACT

HIV/AIDS children are the most deserted fragile section of the society that seeks the attention of the government, monitoring authorities and the stakeholders. Violation of human rights of this vulnerable community is rampant worldwide. Legislative actions and the judicial pronouncements of the Apex Court of India have been instrumental to answer the unvoiced grievances of this defenseless section of the society. The right to education at the elementary stage and the right to privacy emanating as fundamental rights has solicited the responsiveness of India to review the legitimate interest of such children. However, there is no mechanism devised by the government that can evaluate the extent of invasion of privacy of such children during implementation of the provision of 25 percent reservation under Right to Education Act of 2009. Nation looks forward towards the executive's action to resolve the dilemma between the interest of HIV/AIDS children and the legitimate state claims.

Keywords : *Children, HIV/AIDS, Privacy, Elementary education, Right*

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I. Introduction

HUMAN RIGHTS have always been an evolving and conscious wave that attracts the global responsibility to build civilized nations. Future of a child cannot be overlooked when progress of

* Assistant Professor and Ph.D. Research Scholar, V. M. Salgaocar College of Law, Miramar, Goa University.

a Nation is involved. The truth, that human rights are entangled with the impact of Human Immunodeficiency Virus (HIV) and Acquired Immune Deficiency Syndrome (AIDS) on children is bitter. The 2019 global HIV statistics reflects a figure of 38 million people living with HIV out of which 1.8 million were children of less than fifteen years of age.¹

The birth of a child affected by HIV/AIDS makes them so vulnerable, that in every step of their life, they succumb to all sorts of discrimination and violence. The stigmatic impression of the disease is visible within family, community and in different sectors such as education, health care and others. The smudge of HIV splashes a proportional disrespect for realization of human rights. This engraves practicing inequality, thereby resulting in poverty, and education is the only means that can eradicate this practice and bring the desired changes. In fact, the education system in India rejuvenated, when, right to education besides being a fundamental right for the age group of six to fourteen years, was also made a statutory right as per the Right to Education (RTE) Act of 2009. This was a delight moment for the Nation as the statute constructed a roadmap for every child including the vulnerable community, to access and avail school education.

However, yet another question that invokes fear in the minds of this section of society is their HIV status. The consequence of disclosure of their status is stigmatizing, hence it becomes imperative to protect their privacy. The decision of Apex Court of India in pronouncing 'Right to Privacy' as a Fundamental Right turned out favourable for these children.² An addition to this was implementation of a statute³ protecting the human rights of silent victims affected by HIV/AIDS. Despite these efforts to elevate this susceptible section of society, the right to education seems to be a deserted journey for these children. There is a lacuna in the executive action that needs to be addressed appropriately in the interest of these children.

It is pertinent to project the census data of children in India. This population in the age groups of six to ten years and eleven to thirteen years reflects a count of 13,13,92,444 and 7,68,77,388 respectively and the same is indicated in Table 1 below.

¹ UNAIDS AIDS info Global factsheets 2019, *available at*: <http://aidsinfo.unaids.org/> (last visited on Jan. 17, 2022).

² *Justice K.S. Puttaswamy (Retd) v. Union of India* (2017) 6 MLJ 267 (SC).

³ The Human Immunodeficiency Virus and Acquired Immune Deficiency Syndrome (Prevention and Control) Act, 2017 (Act 16 of 2017).

Table 1Population of children less than fourteen years⁴

State	Six to ten years			Eleven to thirteen years		
	Male	Female	Total	Male	Female	Total
India	68646416	62746028	13,13,92,444	40152669	36724719	7,68,77,388

Data Source: Government of India, Ministry of Education website

The 2016 projected population in the age groups of six to ten years and eleven to thirteen years are 13,01,54,678 and 7,28,26,991 respectively and the data reflects in Table 2 below.

Table 2Children less than fourteen years projected population⁵

State	Six to ten years			Eleven to thirteen years		
	Male	Female	Total	Male	Female	Total
India	68332110	61822568	130154678	39134565	33692426	72826991

Data Source: Government of India, Ministry of Education website

Considering massive population of India, the hard core fact is, people of all age groups are touched by the dreadful disease AIDS. The year of 2017 estimated a total count of 0.61 Lakh children of less than fifteen years of age with HIV.⁶ Further, the infection is dominant in 0.22 percent of the Indian adults between the age group of fifteen to forty nine years as per the 2019 report.⁷ The said year also indicated to have around 69.22 thousand new HIV infections in India.⁸ The statistical number is insignificant, as right to education of every child matter. Though education is the only medium for uplifting these children, innumerable impediments crosses their path while enforcing the right.

⁴ Government of India, Population in Different Age Group – Census 2011”, p.no.1 (Ministry of Education, 2011).

⁵ Government of India, “Projected Population in Different Age Group – 2016”, p.no.1 (Ministry of Education, 2016).

⁶ Government of India, , “Annual Report 2019-2020”, p.no. 397 (Ministry of Health & Family Welfare, 2020).

⁷ Government of India, “Annual Report 2020-2021”, p.no. 129 (Ministry of Health & Family Welfare, 2021).

⁸ *Ibid.*

II. Right to Education and its Violation at School level

Right to Education for children affected by HIV/AIDS is a misnomer. Non accessibility of education or decline in pursuing “elementary education”⁹ from first to eighth class is the result of poverty, stigma and isolation experienced by the children identified with HIV/AIDS. Such children have to forego their basic rights, that includes liberty to think and express, their freedom is curtailed and they are treated with inequality. The evil consequences accompanying the disease, psychologically and emotionally affects their mind too.¹⁰

There are numerous hurdles these children, including at times their parents or guardians have been facing during, or post enrollment of their children in schools. There is no much difference with respect to obstacles encountered by them in the years, pre and post implementation of RTE Act. Schools authorities, parents of other children and the society are equally responsible, towards the discerning and dissuading approach carried towards this vulnerable community.¹¹ This susceptible section of society include the children infected by such diseases and those children who live with HIV/AIDS infected parents.¹²

Children who have revealed the status of being HIV positive have been denied access to schools.¹³ On account of school fees or transportation charges, and further balancing the family livelihood, the infected parents were also reluctant to send their children to schools, and this has even led the children to drop out from educational institutions.¹⁴ Educational expenditure and other debts add to the household expenses and this compels the children to leave schools for earning and supporting their family members.¹⁵

⁹ The Right of Children to Free and Compulsory Education Act, 2009 (Act 35 of 2009), s. 2 cl. (f).

¹⁰ Rosa Tariro Mahlasera, *The Psychological Impact of HIV*, AIDS 2020 23rd International AIDS Conference, (6 – 10 July 2020), available at: <https://www.aids2020.org/the-psychological-impact-of-hiv/> (last visited on Jan 17, 2022).

¹¹ S. Solomon, N Kumarasamy, SJ Challacombe, “The Social Impact of HIV/AIDS in India” 22 (Suppl. 1) *Oral Diseases* 17 (2016).

¹² Tatenda P. Zinyemba, Milena Pavlova, Wim Groot, “Effects of HIV/AIDS on Children’s Educational Attainment: A Systematic Literature Review” 34 *Journal of Economic Surveys* 35 – 36 (2020).

¹³ *Supra* note 11.

¹⁴ Human Rights Watch, *Future Forsaken Abuses Against Children Affected by HIV/AIDS in India* 9, 11 (2004).

¹⁵ P. Taraphdar, Rray T. Guha, D. Halder, A Chatterjee, A. Dasgupta, B. Saha, S. Mallik, “Socioeconomic Consequences of HIV/AIDS in the family system” 52(4) *Nigerian Medical Journal* 250 – 253 (2011).

Thinking about the remotest possibility that HIV may be contracted through playground injuries, such children have been excluded from the School's sphere.¹⁶ Further, such children have even experienced expulsion from schools if they, or even their parents have been identified with this disease.¹⁷ Most of the children preferred attending schools concealing the fact of being HIV infected, but lack of attendance becomes an issue due to frequent absenteeism on ground of ill health.¹⁸ They equally feared for disclosing these problems before media on account of stigmatization.¹⁹ People being unaware of the causes of transmission of the disease, look at these children with discriminatory approach, and the consequence of this exploitation has created deterring results.²⁰ Such children or their family members prefer isolating themselves and are mentally discouraged from even availing treatment or other measures.²¹

The exploitation meted by children affected by HIV has continued even after the enactment of RTE legislation. A couple of these children were expelled from a school in the State of Tamil Nadu out of fear that the infection would spread to others by contact.²² This expulsion to utter dismay was supported by the State panchayat and the parents.²³ An erroneous fear of transmission of the disease was so prominent that, parents of children in a Goa based school demanded removal of even non HIV students who mingled with HIV affected children admitted in the same educational institution.²⁴ It can thus be presumed that revelation of their HIV status substantially affects their right to education.

Despite there being legislations that speak in favour of this section of society, these children still continue to be victims of ignominy and ostracism. Hence, it is imperative that the Indian government must take lead to recognize the plight of these unheard voices in the interest of justice. Also, at the global level, India has committed to achieve the targets of the "Sustainable

¹⁶ Human Rights Watch, *Future Forsaken Abuses Against Children Affected by HIV/AIDS in India* 64 (2004).

¹⁷ *Id.*, at 9.

¹⁸ *Id.*, at 63, 65.

¹⁹ *Id.*, at 70.

²⁰ *Id.*, at 10.

²¹ *Id.*, at 9, 66.

²² "TN school accused of throwing out 29 HIV+ve students", *The Times of India*, May 31, 2011, available at: <https://timesofindia.indiatimes.com/city/chennai/TN-school-accused-of-throwing-out-29-HIVve-students/articleshow/8654550.cms> (last visited on Jan. 1, 2022).

²³ *Ibid.*

²⁴ Mayabhushan Nagvenkar, *Goa: HIV plus kids chased out of school, parents want others gone too*, (July 12, 2014), available at: <https://www.firstpost.com/living/goa-hiv-plus-kids-chased-school-parents-want-others-gone-1615769.html> (last visited on Jan. 9, 2022).

Development Goals”²⁵ (SDGs) by the year 2030, where education is one of the focused agenda on its framework. Therefore, the burden lies on the State to ensure the Right to Education of these silent victims.

III. National Education Policy 2020 and a way ahead

The year of 2030 seeks to ensure education that would be all inclusive, equitable and would support, learning opportunities for life for all and this reflects on the SDG4 agenda.²⁶ The National Education Policy 2020 (NEP) aligns itself with this vision to revamp and reconfigure the entire education system of the country. The policy document ensures education that would be hurdle free and would be accessible even to marginalized, underrepresented and disadvantageous groups of the society.²⁷ The Policy text believes that social and economic mobility can be guaranteed through education.

For Indians, Eighty – sixth Amendment of the year 2002 to the Indian Constitution marked a glaring note, where right to free and compulsory education for children was realized as a Fundamental Right under article 21A and the country was further obligated to determine this right by bringing a law in force.²⁸ This resulted in implementation of the RTE Act of 2009 that turned out to be a noteworthy upgradation between the preceding Education Policy of 1986 and the current one, in context with its objective to provide elementary schooling. Creating an education system that would be violence free, student friendly, offering a conducive learning environment is something that the Education Policy of 2020 encompasses.²⁹ It’s principles also state that, the individuals nurtured by the education system must comprehend values, cultivate the ability to think and act rationally, be compassionate and must behave as good human beings.³⁰

As indicated above, one of the striking feature of the NEP 2020 of the Indian Government is to make the education inclusive on equity basis for the socio - economically disadvantaged groups (SEDGs) that would also include the children from vulnerable atmospheres and thereupon

²⁵ UN, Department of Economic and Social Affairs, Sustainable Development, *available at*: <https://sdgs.un.org/goals> (last visited on Jan. 7, 2022).

²⁶ *Ibid.*

²⁷ Government of India, , “National Education Policy 2020”, p.no. 4 (Ministry of Health & Family Welfare, 2020).

²⁸ M.P. Jain, *Indian Constitutional Law* 1301 (Lexis Nexis, Nagpur, 2013).

²⁹ *Supra* note 27 at 5.

³⁰ *Supra* note 27 at 4 and 5.

simultaneously create a school culture that would be responsible in respecting the dignity and privacy of such individuals.³¹ Thus, birth or background would not be a barrier for a child to learn and excel in the education world.

The policy definitely is expected to provide a way forward for the children living with HIV (CLHIV)³² in terms of pursuing school education. Added to this, was the ruling of Apex Court of India upholding that, Right to Privacy is a Fundamental Right but subject to restrictions relatable to Part III of the Constitution.³³

However, the question that needs to be answered is, whether the Fundamental Right to pursue free and compulsory education at the elementary stage, and the right to privacy can be enjoyed absolutely within their spheres by the children affected by HIV/AIDS. Secondly, whether disclosure of their HIV status before schools, would allow these children to pursue violence free and non-discriminatory education. The State is finally answerable keeping in mind implementation of NEP 2020 in letter and spirit.

IV. Indian Constitutional Perspective

The Constitution of India, guarantees justice in all its forms i.e. liberty, equality and fraternity and these concepts are rooted in forms of Fundamental Rights and Directive Principles of State Policy (DPSP) in laws of the land. The Indian Constitution manifests Equality before Law under article 14 to all persons by embracing the principle of non-discriminatory state action. The concept of protective discrimination among citizens, whereby the state is empowered to make laws in the interest of socially and educationally backward community, women and children and Scheduled Castes and Scheduled Tribes under article 15 further strengthens the roots of equality.

The ambit of life and personal liberty of a person under article 21 thereby ensures right to privacy and confidentiality.³⁴ However, exercise of freedom is conditioned by reasonable restrictions, and is enshrined under article 19 of the Indian Constitution.

Judiciary in the past also carved the road of Right to Education through Right to Life under article 21 and added that education is the means to promise a life with dignity.³⁵ A step further, it

³¹ *Supra* note 27 at 24 and 28.

³² Government of India, "Annual Report 2020-2021", p.no. 147 (Ministry of Health & Family Welfare, 2021).

³³ *Supra* note 2.

³⁴ *Supra* note 28.

was held that, even though the right to education is not expressly stated as a fundamental right but is implicit therein and flows from article 21 and that State is obligated to provide free education up to fourteen years.³⁶ Apex court observed that, it was article 21A that provided access to education, whereas earlier, education was simply placed under article 21 within the ambit of Right to Life.³⁷ In fact, the provision of free and compulsory education was state responsibility to be ensured in a period of ten years from the date of promulgation of the Constitution and this was expressed as DPSP in article 45 prior to Eighty – Sixth Amendment Act 2002 of the Indian Constitution, but it took more than fifty long years to induct article 21A through a Constitutional Amendment as a Fundamental Right.³⁸ This gave birth to free and compulsory education for children as a guaranteed right under article 21A.

The State is also obligated to take positive steps to ameliorate the socio economic conditions of the people at large. The framers of the Indian Constitution have structured the DPSPs in that direction. To state a few, promotion of people's welfare is brought within the purview of article 38; whereas, article 39 aims to direct the states policy in securing a dignified healthy living free from exploitation; article 41 ensures right to education, a provision of aid in cases of sickness but the fulfillment is subject to State's economic parameters, and then article 47 promises to endeavor improvisation of public health to its citizens.

Further, it's a Fundamental Duty expressed through article 51A(k) where every parent or guardian is duty bound towards his child between the age of six to fourteen years to provide prospects for education.

V. International Legal Outlook

India voted in favour of the Universal Declaration of Human Rights (UDHR) which has documented various fundamental human rights. Thereupon, dignity, rights and freedom is ensured equally to all human beings without discrimination.³⁹ Further, States are bound to safeguard the privacy of their people and enforce a legal regime to provide protection in cases of

³⁵ *Miss Mohini Jain v. State of Karnataka*, AIR 1992 SC 1858.

³⁶ *Unni Krishnan, J.P. v. State of Andhra Pradesh* 1993 SCR (1) 594.

³⁷ *Unaided Private Schools of Rajasthan v. Union of India* 2012 SC 236.

³⁸ Statement of objects and reasons of the Constitution (eighty – third amendment) bill, 1997, referred in *Pramati Educational & Cultural Trust . v. Union of India*, 2014 SC 166.

³⁹ The Universal Declaration of Human Rights 1948, art. 1 and 2.

arbitrary interference.⁴⁰ There is also a mention of right to education that encompasses study at all levels, with special emphasis on free and compulsory elementary level education, as a fundamental human right.⁴¹

Education has been recognized as an empowering human right which provides a platform for realizing other essential human rights, which has been expressed by the Committee on Economic, Social and Cultural Rights.⁴² This obligates the States to create discrimination free atmosphere and to make education accessible to all including the most susceptible groups.⁴³

The Convention on the Rights of the Child (CRC) defines the 'Child' to be a human being below the age of eighteen years.⁴⁴ The Convention states the essence of education by providing a premise, not just for the complete development of a child but also to inculcate values and respect for human rights.⁴⁵ Child rights emanating in various forms are given prime importance and the state is obligated to secure these rights without discrimination.⁴⁶ To mention a few would be, Right to Privacy and the consequential reputation; Right to Education at all stages with special emphasis on free and compulsory primary study.⁴⁷

The States were urged by the CRC committee to frame non-discriminatory provisions in support of children orphaned, infected or affected by HIV/AIDS, that would allow them free access to education and would ensure their stay in schools.⁴⁸ The provisions were to be framed by the States taking into consideration their health condition and status.⁴⁹ As discrimination on the ground of HIV/AIDS status denies equality and accessibility to vital services, the States were also obligated to enact laws that would guarantee the right to privacy and confidentiality to a vulnerable child.⁵⁰ It was also recommended that necessary action through National policies and programmes are required, to address the complaints as to violation of rights of such children and

⁴⁰ *Id.*, art. 12.

⁴¹ *Id.*, art. 26 cl. (1).

⁴² UN Human Rights, *d) General Comment No. 13: The right to education (article 13) (1999)*, E/C.12/1999/10, (December 8, 1999), para 6(b)(i).

⁴³ *Ibid.*

⁴⁴ The Convention on the Rights of the Child 1989, art. 1.

⁴⁵ *Id.*, art. 29.

⁴⁶ *Id.*, art. 2.

⁴⁷ *Id.*, art. 16 and art. 28.

⁴⁸ UN CRC Committee on the Rights of the Child, *General Comment No. 3 (2003) HIV/AIDS and the rights of the child*, CRC/GC/2003/3, March 17, 2003, para. 18.

⁴⁹ *Ibid.*

⁵⁰ *Id.*, para. 40(c).

this would further demand constitution of state level bodies before whom such complaints would be raised.⁵¹

India by adopting the Declaration of Commitment (DoC) on HIV/AIDS vouched to battle against the global epidemic and simultaneously protect, and further promote human rights and fundamental freedoms of the vulnerable.⁵² Accessibility to education and other sectors by eliminating discrimination in all forms, respecting privacy and confidentiality and at the same time confronting the sensitive issues of stigma and societal exclusion, were few of the major issues to be addressed through adopting and implementing legal measures.⁵³ Duration of two years was given to achieve this vision.⁵⁴ Every Country's progress was to be monitored, reviews were to be conducted periodically, evaluation mechanisms were to be adopted and monitoring systems to be established.⁵⁵ Global concern were expressed over the fact that, by end of the year 2000 there were 36.1 million people affected by the disease, and that the developing countries constituted 90 percent of such people.⁵⁶

The India's progress report on the DoC of HIV/AIDS failed to take into consideration the accessibility to "elementary education"⁵⁷ of child affected by such epidemic over and above the societal stigma and discrimination.⁵⁸ The targets of the Declaration that were to be met to address the global crisis of HIV/AIDS were reviewed at the 2006 Declaration⁵⁹. Then there was another review after a period of five years at 2011 Declaration⁶⁰ and finally all the preceding Declarations were reviewed at the 2016 Declaration⁶¹. The State Governments at the International level were committed to achieve the objectives of battling the disease. In view of that, every new Declaration pledged to achieve the unaccomplished goals of the preceding Declaration.

⁵¹ *Id.*, para. 40(d).

⁵² Declaration of Commitment (DoC) on HIV/AIDS, 2001, para. 37.

⁵³ *Id.*, para. 58 and para. 63.

⁵⁴ *Supra* note 52.

⁵⁵ *Id.*, para. 94, 95, 96, 97 and 100.

⁵⁶ *Id.*, para. 3.

⁵⁷ *Supra* note 9.

⁵⁸ NACO Ministry of Health and Family Welfare Government of India, "UNGASS India Report, Progress Report on the Declaration of Commitment on HIV/AIDS", (2005).

⁵⁹ UN General Assembly, 60/262. *Political Declaration on HIV/AIDS*, A/Res/60/262, (June 15, 2006), para. 1.

⁶⁰ UN General Assembly, 65/277. *Political Declaration on HIV and AIDS: Intensifying Our Efforts to Eliminate HIV and AIDS*, A/Res/65/277, (July 8, 2011), para. 1.

⁶¹ UN General Assembly, 70/266. *Political Declaration on HIV and AIDS: On the Fast Track to Accelerating the Fight against HIV and to Ending the AIDS Epidemic by 2030*, A/RES/70/266, (June 22, 2016), para. 2 and 32.

Thus, besides ensuring advancement and protection of human rights for the HIV affected ones, the year of 2006 and 2011 through Declarations committed at the global level, to combat the disease and in a way achieve the “Millennium Development Goals”⁶² (MDGs).⁶³ Building discrimination free environment, ending societal elimination when it came to people affected by HIV/AIDS and ensuring their accessibility to education along with other sectors, were again few of the major issues that were emphasized.⁶⁴ The Declarations also lay prominence on the right to privacy and maintaining confidentiality of this vulnerable community, strengthening financial tools and on laying down appropriate laws and regulatory mechanisms that would guarantee their protection.⁶⁵

The commitment to fight against HIV/AIDS continued even at the 2016 Declaration with a similar objective of safeguarding human rights and fundamental freedoms of the susceptible community, along with a concern as to their Right to Education, Privacy and Confidentiality and elimination of stigma and discrimination attached due to their HIV status.⁶⁶ The Joint United Nations Programme on HIV/AIDS (UNAIDS) strives to meet the commitments reflecting in the 2016 Declaration, there by supporting the agenda of the SDGs to bring an end not only to the dreadful disease but also the stigma and discrimination incidental thereto.⁶⁷ The five years strategy of UNAIDS from 2016-2021 focuses on certain goals that indicates, realization of rights of HIV infected individuals, their access to legal services, end to discrimination specially in educational setup and framing appropriate legislation that would protect their rights.⁶⁸

VI. Legislation on Prevention & Control of HIV/AIDS in India

The CRC Committee in the year 2014, expressed its concern over the discrimination faced by the HIV/AIDS children in India with regard to access to education and their other rights.⁶⁹ Further,

⁶² UNDP India, *available at*: <https://www.in.undp.org/content/india/en/home/post-2015/mdgoverview.html> (last visited on Jan. 8, 2022).

⁶³ *Supra* note 59, para. 29 and *Supra* note 60, para. 51, 77, 82 and 99.

⁶⁴ *Ibid.*

⁶⁵ *Supra* note 59, para. 29, 36, 39 and 41 and *Supra* note 60, para. 83, 86, 92 and 94.

⁶⁶ UN General Assembly, 70/266. *Political Declaration on HIV and AIDS: On the Fast Track to Accelerating the Fight against HIV and to Ending the AIDS Epidemic by 2030*, A/RES/70/266, (June 22, 2016), para. 63(c).

⁶⁷ ABOUT: Saving lives, leaving no one behind, *available at*: <https://www.unaids.org/en/whoweare/about> (last visited on Jan. 6, 2022).

⁶⁸ UNAIDS, “On the Fast-Track to end AIDS”, (2016-2021), p.no. 11.

⁶⁹ UN CRC Committee on the Rights of the Child, *Concluding observations on the combined third and fourth periodic reports of India*, CRC/C/IND/CO/3-4, (July 7, 2014) para. 31.

the Committee suggested India to implement law on HIV/AIDS that would address the needs of such vulnerable section of society in tune with CRC.⁷⁰

India arose to create the most epic moment for this vulnerable section, through a legislation which came into force in the year 2018 on September 10.⁷¹ The Statute not only aims to prevent and control the spread of the unprecedented catastrophe of the disease but also values the human rights of the affected and provides penalty for violation of these rights. The rules that were framed under the Act, came into force in the year 2018 on September 17.⁷²

It is pertinent to mention the definition of ‘Child’ as per the Statute. Thus, person who is HIV positive and is below eighteen years of age is a child affected by HIV.⁷³ Further, the ambit of the definition also includes a child who resides with the parent or guardian who is HIV positive or such a parent or guardian has died due to AIDS, or the AIDS orphaned child resides in a house where such children are fostered.⁷⁴

Some of the key features of the Act that support the Right to Education of HIV/AIDS affected persons are as follows:

a) A HIV positive person or any other person who has cohabited or is cohabiting with HIV positive individual is defined as a “Protected Person”,⁷⁵ and such a person cannot be denied or discontinued or given unfair treatment in an educational sector.⁷⁶ Such a treatment shall amount to discrimination.⁷⁷ This would include isolation or segregation of such persons as well.⁷⁸ In addition, even HIV test as a precondition for accessing or continuing education shall be considered as discriminatory.⁷⁹

b) Any act by signs or visible representations or otherwise which inculcates or propagates feelings of hatred, discrimination or physical violence against the protected person is

⁷⁰ *Id.*, para. 68(a).

⁷¹ *Supra* note 3.

⁷² The Human Immunodeficiency Virus and Acquired Immune Deficiency Syndrome (Prevention and Control) Rules, 2018.

⁷³ *Supra* note 3, s.2 cl.(c).

⁷⁴ *Ibid.*

⁷⁵ *Supra* note 3, s.2 cl.(s).

⁷⁶ *Supra* note 3, s.3 cl.(d).

⁷⁷ *Supra* note 3, s.3.

⁷⁸ *Supra* note 3, s.3 cl.(k).

⁷⁹ *Supra* note 3, s.3 cl.(l).

prohibited.⁸⁰ Its violation is punishable by law in the form of, imprisonment which shall not be less than three months but may extend to two years and with a fine that can be maximum of one Lakh rupees or both.⁸¹

c) A person cannot be forced to reveal his HIV status except by the orders of the court.⁸²

d) A person shall not reveal the HIV status or private information of another person that has been disclosed in confidence or in a relationship of fiduciary nature, except with the consent of that other person or persons' representative.⁸³ Also, it is mandatory that the consent should be recorded in writing.⁸⁴

(e) All establishments⁸⁵ that includes an organization or an institution or co-operative society or body corporate involved in the production, supply or distribution of services or goods for a minimum period of one year, have the onus of maintaining confidentiality of records of HIV related information of "protected persons"⁸⁶ by adopting measures for protecting the records as per the guidelines⁸⁷ given by the Central government.⁸⁸ Such measures include adoption of procedures for non-disclosure of information, accessing the information, protecting the information, and mechanism involving liability and responsibility of persons in establishments.⁸⁹ For this, HIV and AIDS policy for Establishments shall be notified by National AIDS Control Organization (NACO) in case of Central Government and State AIDS Control Society (SACS) in case of State Government.⁹⁰

f) The Governments both at the Central and at the State level shall formulate HIV & AIDS related programmes for creating awareness and educating the masses on the dreadful disease.⁹¹

g) The State Governments shall appoint Ombudsman to inquire into the matters that involve infraction of the statutory provisions or any default in providing required health care or otherwise

⁸⁰ *Supra* note 3, s.4.

⁸¹ *Supra* note 3, s.37.

⁸² *Supra* note 3, s.8 cl.(1)(i).

⁸³ *Supra* note 3, s.8 cl.(1)(ii).

⁸⁴ *Ibid.*

⁸⁵ *Supra* note 3, s.2 cl.(f).

⁸⁶ *Supra* note 75.

⁸⁷ NACO, Government of India, "Data Sharing Guidelines", (Ministry of Health and Family Welfare, 2018).

⁸⁸ *Supra* note 3, s.11.

⁸⁹ *Ibid.*

⁹⁰ *Supra* note 72, r.4.

⁹¹ *Supra* note 3, s.17.

to the “protected person”⁹² as mandated by the Statute.⁹³ The Ombudsman shall also be empowered to seek information of the matters under inquiry before him and any default in providing the information by the person required to do, shall attract penalty.⁹⁴

h) A person who is above twelve years but below eighteen years of age and whose family is affected by HIV and AIDS shall be competent to act as guardian of other sibling whose age is below eighteen years.⁹⁵ This is a beneficial provision under the law as it allows the person to act as a guardian in the interest of the family especially in the cases of admission in educational institutions, care and needed protection and for carrying out other duties as a guardian.⁹⁶

The legislation is comprehensive, which deals with protecting the privacy and confidentiality; encompasses equal, non-discriminatory and violence free treatment to be given to the vulnerable individuals; and lays down mechanism to redress their grievances. But the question of concern is, what standard/mandate should be followed by the educational institutions in the country, to safeguard the HIV status revealed by the vulnerable children at the time of their admission in such Educational Institutions. Breach of confidentiality may create deterrent effect on the concerned child. Also, NACO and/or SACS have not laid down any policy on this aspect in the interest of these children and for the aid of Educational Institutions. In such a situation, it would be arduous for the States to balance Right to Education on one side and Right to Privacy of these children on the other side.

VII. Legislation on Free and Compulsory Education in India

It took a long way for the Government to introduce Right to Education as a Fundamental Right as this right was earlier a non-justiciable right. The much awaited dream of the masses turned true, when a law on Right to Education (RTE) came into force on April 1, 2010.⁹⁷ The primary objective of the statute is to provide free and compulsory education to all children between the

⁹² *Supra* note 75.

⁹³ *Supra* note 3, s.23 and s.24 cl.(1).

⁹⁴ *Supra* note 3, s.24 cl.(2).

⁹⁵ *Supra* note 3, s.32.

⁹⁶ *Ibid.*

⁹⁷ The Right of Children to Free and Compulsory Education Act, 2009 (Act 35 of 2009).

age group of six to fourteen years.⁹⁸ In fact the statute is a consequential legislation enacted to give effect to article 21A under the Constitution of India.

It was stated by the Constitutional bench comprising Hon'ble Justices R.M. Lodha, A.K. Patnaik, Sudhansu Jyoti Mukhopadhaya, Dipak Misra and Fakkir Mohamed Ibrahim Kalifulla that, the RTE law was the result of independent power made available to the State under article 21A of the Constitution, and that this law determined the manner in which education would be freely and compulsorily provided to all children of specific age group.⁹⁹ The RTE Act casts duty on the Government¹⁰⁰ and "Local Authorities"¹⁰¹ to provide and implement the right to education in letter and spirit.¹⁰² Further, both are obligated to ensure that the "child belonging to weaker section"¹⁰³ and "child belonging to disadvantaged group"¹⁰⁴ also avail the benefit of pursuing education without discrimination or prevention of any kind.¹⁰⁵ Thus, by providing equal opportunities to all, the Statute fortifies the democratic principles of the nation and strives to attain the universal elementary level of education.

As per the Statute, private unaided schools are required to admit a minor percentage of children belonging to weaker and disadvantaged sections of society.¹⁰⁶ Observing that such an admission would achieve equality of opportunity and social justice, which are the constitutional goals reflecting in the Preamble of the Constitution, it was held by the Apex Court that, this kind of

⁹⁸ *Ibid.*

⁹⁹ *Pramati Educational & Cultural Trust v. Union of India*, 2014 SC 166.

¹⁰⁰ *Supra* note 97, s.2 cl.(a) "Appropriate Government" means – (i) In relation to a school established, owned or controlled by the Central Government, or the administrator of the Union territory, having no legislature, the Central Government; (ii) In relation to a school, other than the school referred to in sub-clause(i), established within the territory of – (A) a State, the State Government; (B) a Union territory having legislature, the Government of that Union territory.

¹⁰¹ *Supra* note 97, s.2 cl.(h) "Local Authority" means a Municipal Corporation or Municipal Council or Zila Parishad or Nagar Panchayat or Panchayat, by whatever name called, and includes such other authority or body having administrative control over the school or empowered by or under any law for the time being in force to function as a local authority in any city, town or village.

¹⁰² *Supra* note 97, s.8 cl.(a) and s. cl.9(a).

¹⁰³ *Supra* note 97, s.2 cl.(e) "Child belonging to weaker section" means a child belonging to such parent or guardian whose annual income is lower than the minimum limit specified by the appropriate Government, by notification.

¹⁰⁴ *Supra* note 97, s.2 cl.(d) "Child belonging to disadvantaged group" means a child belonging to the Scheduled Caste, the Scheduled Tribe, the socially and educationally backward class or such other group having disadvantage owing to social, cultural, economic, geographical, linguistic, gender or such other factor, as may be specified by the appropriate Government, by notification.

¹⁰⁵ *Supra* note 97, s.8 cl.(c) and s.9 cl.(c).

¹⁰⁶ *Supra* note 99.

reservation in private schools made by the legislation would not infract their right to carry on occupation, envisaged by article 19(1)(g) of the Constitution.¹⁰⁷

In fact, the legislation vouches for a homogenous, child friendly school environment for all children irrespective of their gender, caste, creed, status or any other grounds of distinction or discrimination. The Apex Court of India in *Naz Foundation (India) Trust v. Union of India*¹⁰⁸ took a leading step to protect the right of HIV/AIDS children being the most vulnerable section of the society, whereby the State Governments and the Union Territories were directed to issue a notification that any HIV affected child would be defined as disadvantaged group child under the RTE Act. The advantage of this notification is, as per the RTE provisions the “specified category schools”¹⁰⁹ and the unaided schools should reserve 25 percent of the strength of class first for the “children belonging to weaker section”¹¹⁰ and “children belonging to disadvantaged group”¹¹¹ and further provide free and compulsory elementary level education to such children till its completion.¹¹² Thus, HIV/AIDS children upon admission in these schools shall pursue cost free education in the above mentioned schools.

For getting enrolled under 25 percent reservation, HIV status mandatorily has to be disclosed by the affected child to the school. Considering the stigma and exploitation attached to the disease, whether the child would be confident to disclose the HIV status? Secondly, whether the Educational Institutions would welcome the child in the school sphere to enforce right to education? However, in the alternative, the legislation lacks the procedure to be adopted by the schools for maintaining the confidentiality of the records of the HIV status of such children. In turn Right to Privacy of these silent victims is at stake and the implementation of the 25 percent reservation provision seem to be futile in terms of these children.

VIII. Supreme Court on Privacy as a Fundamental Right in India

¹⁰⁷ *Supra* note 99.

¹⁰⁸ LNINDORD 2017 SC 8430.

¹⁰⁹ *Supra* note 97, s.2(p) “Specified Category”, in relation to a school, means a school known as Kendriya Vidyalaya, Navodaya Vidyalay, Sainik School or any other school having a distinct character which may be specified, by notification, by the appropriate Government.

¹¹⁰ *Supra* note 103.

¹¹¹ *Supra* note 104.

¹¹² *Supra* note 97, s.12 cl.(1)(c).

Over the period of time, Judiciary has played a pivotal role to either strengthen the roots of legislations or to trigger the legislature to enact a domestic law. Privacy as a human right already had its roots in the international law. Further, it is also referred in codified laws.¹¹³

In fact, the domain of privacy that impacts the vulnerable groups features in differing contexts.¹¹⁴ Privacy besides being crystallized in the Preamble of the Indian Constitution, is also intrinsically linked to the Fundamental Rights. Human personality that is characterized by ability to think, express, formulate ideas, develop ideologies, make choices that would create a zone of seclusion and deviate from the uniform demands of the society, paves towards privacy.¹¹⁵ Exercise of liberty is the foundation of privacy, and the term liberty that speaks of thought and expression finds its reference in the Preamble of the Indian Constitution.¹¹⁶

The connotation privacy even finds space within the expression life and liberty under article 21, where liberty includes ability to make decisions concerning life, thereby retaining autonomy, and the same is integral to exercise of freedom under article 19 and individual dignity.¹¹⁷ Further the principle of equality inhibits state actions that are discriminatory and any unwarranted interference in the individual personal space affects this guarantee against arbitrariness.¹¹⁸ Thus any intrusion of privacy demands reasonability and such invasion should essentially be in accordance with law.¹¹⁹ Therefore, privacy is interwoven by articles 14, 19 and 21 of the Indian Constitution and removal of privacy makes fundamental rights vulnerable.¹²⁰

Privacy is one of the predominant aspect in life of HIV/AIDS person and silence on the enrollment of these children under 25 percent reservation at the elementary level of study would affect their Fundamental Right to Education. Privacy simply means the right to control the dissemination of personal information.¹²¹ When this information is shared voluntarily, it gives

¹¹³ The Indian Penal Code, 1860 (Act 45 of 1860); The Indian Evidence Act, 1872 (Act 1 of 1872); The Information Technology Act, 2000 (Act 21 of 2000); Right to Information Act, 2005 (Act 22 of 2005); The Aadhaar (Targeted Delivery of Financial and Other Subsidies, Benefits and Services) Act, 2016 (Act 18 of 2016); *Supra* note 3.

¹¹⁴ *Supra* note 2; *Navej Singh Johar v. Union of India, Thr. Secretary Ministry of Law and Justice* (2018) 4 MLJ (CRL) 306.

¹¹⁵ *Supra* note 2.

¹¹⁶ *Ibid.*

¹¹⁷ *Supra* note 2.

¹¹⁸ *Ibid.*

¹¹⁹ *R. Rajagopal v. State of Tamil Nadu* (1994) 6 SCC 632; *Sharda v. Dharmpal* (2003) 4 SCC 493; *Mr. X v. Hospital Z* (2003) 1 SCC 500.

¹²⁰ M Sridhar Acharyulu, *Privacy As Secrecy* 161 (S.P. Gogia c/o Asia Law House, Hyderabad, 1st edn., 2018 – 19).

¹²¹ *Supra* note 2.

rise to confidentiality. The hallmark of freedom is control over one's life, and the same is lost when this confidentiality is breached, thereby amounting to breach of trust.¹²² The Supreme Court, through its Nine Judges Constitutional bench has ruled that:¹²³

“The Right to Privacy is protected as an intrinsic part of the Right to Life and Personal Liberty under Article 21 and as a part of the freedoms guaranteed by Part III of the Constitution”.

As Justice Madan B Lokur observed:¹²⁴

The balance between transparency and confidentiality is very delicate and if some sensitive information about a particular person is made public, it can have a far-reaching impact on his or her reputation and dignity.

It is expressed by the Supreme Court that, dignity emanates from exposition of article 21 and it cannot be assured without privacy, therefore there is intimate knitting between privacy and dignity.¹²⁵ Individual autonomy identifies privacy and that assures dignified life accompanied by all freedoms as guaranteed by the Constitution.¹²⁶

Apex Court of India in its judgement¹²⁷ referred to the decision of Constitutional Court of South Africa in the case titled, *N.M. v. Smith*¹²⁸ decided by Justice Madala, where it was held that:¹²⁹

Private and confidential medical information contains highly sensitive and personal information about individuals. The personal and intimate nature of an individual's health information, unlike other forms of documentation, reflects delicate decisions and choices relating to issues pertaining to bodily and psychological integrity and personal autonomy. Individuals value the privacy of confidential medical information because of the vast number of people who could have access to the information and the potential harmful effects that may result from disclosure. The lack of respect for private medical information and its subsequent disclosure may result in fear jeopardizing an individual's

¹²² *Ibid.*

¹²³ *Supra* note 2.

¹²⁴ *Supreme Court Advocates on Record Association v. Union of India* (2015) 7 MLJ 753.

¹²⁵ *Supra* note 2.

¹²⁶ *Ibid.*

¹²⁷ *Supra* note 2.

¹²⁸ 2007 (5) SA 250 (CC).

¹²⁹ *Ibid.*

right to make certain fundamental choices that he/she has a right to make. There is therefore a strong privacy interest in maintaining confidentiality.

Supreme Court of India has categorically expressed that, the State is restrained from invading the life and liberty of a citizen which is the negative content of privacy; whereas on the other hand State is duty bound equally, to take measures protecting the privacy of the individual which is the positive content of privacy.¹³⁰

IX. Suggestions

Keeping in view the inclusive equitable education for the SEDGs and with the objective of building a just and a plural society, as reflecting in the NEP 2020, it is pertinent for the State to configure the legal dimensions of Right to Education that shall be free and compulsory at the elementary school level and the Right to Privacy, in the interest of HIV/AIDS affected children. In fact, a major part of creating awareness among the stakeholders and public at large should be explored to its full potential. In order to safeguard the Fundamental Rights proportionally of this susceptible section of society, here are few suggestions that requires consideration:

1. The Government¹³¹ has to lay down comprehensive guidelines under the RTE law of 2009 covering the issues of admission of HIV/AIDS children without any discrimination and maintenance of their confidentiality by the concerned schools.
2. The central government should notify HIV/AIDS policy for educational institutions for adopting measures to protect the records of HIV/AIDS status of children under the HIV/AIDS Prevention Act of 2017.
3. The Government¹³² or “Local Authorities”¹³³ in collaboration with NACO and / or SACS must lay down a confidential mechanism to monitor the total count of HIV/AIDS children, those admitted, attending and having completed the elementary stage of education.
4. State Governments should appoint Ombudsman for the redressal of grievances as indicated in the HIV/AIDS Prevention Legislation of 2017.

¹³⁰ *Supra* note 2.

¹³¹ *Supra* note 100.

¹³² *Ibid.*

¹³³ *Supra* note 101.

5. The Government¹³⁴ has to announce an incentive in the form of honour or award for concerned schools who take steps to admit such children under the 25 percent reservation.

6. NACO and/or SACS has to work in harmony with the “Local Authorities”¹³⁵ or Government¹³⁶ under the RTE Act of 2009 to devise awareness programmes for the School Authorities, “School Management Committees”¹³⁷ and the parents or guardian of the children to bring an acceptable societal change towards HIV/AIDS children being enrolled in concerned schools, under 25 percent reservation.

X. Conclusion

On one side is the Right to Privacy or the fear of breach of confidentiality and on the other side is the right to pursue school education at the elementary stage. HIV/AIDS children or their parents or guardian have to reveal their status of being HIV/AIDS infected to the school authorities so as to avail of the benefit of 25 percent reservation. There is no mechanism of checks and balance devised by the State that can determine the extent of invasion of privacy of such children while they pursue their elementary schooling.

Considering the societal stigma, violent hardships and the discrimination attached to such children, whether disclosure of their status would make such children procure admission in the schools as per the protocol? In the alternative, if such children are admitted in schools, whether they will be able to pursue cost free education at the elementary level enjoying all freedoms under Part III of the Indian Constitution? This gives rise to a turbulent dilemma between the two Fundamental Rights for such children, and therefore elementary study by virtue of reservation sounds practically difficult in view of the conflicting claims.

The fear is, their medical disclosure might cut off the right of children to pursue this school education from the unaided and “specified category schools”¹³⁸. Therefore, there is a need to strike a sensitive balance between the HIV/AIDS affected child’s interest and the legitimate

¹³⁴ *Supra* note 100.

¹³⁵ *Supra* note 101.

¹³⁶ *Supra* note 100.

¹³⁷ *Supra* note 97, s. 21 cl.(1) A school, other than a school specified in sub-clause (iv) of clause (n) of section 2, shall constitute a School Management Committee consisting of the elected representatives of the local authority, parents or guardians of children admitted in such school and teachers: Provided that at least three-fourth of members of such committee shall be parents or guardians: Provided further that proportional representation shall be given to the parents or guardians of children belonging to disadvantaged group or weaker section.

¹³⁸ *Supra* note 109.

trepidations of the State. The State aims would include imparting of elementary schooling that would be cost free, non-discriminatory, without any distinction on any grounds and stigma free and further allowing obstacle free admission and enrollment of such vulnerable community under the 25 percent reservation. From the perspective of HIV/AIDS children, a structured regime that would lay a strong edifice protecting the confidential information of the status of such children is a matter of policy, and this mandates urgent attention.