

TEAM CODE: TL-07

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**4TH SURANA & SURANA AND CUSAT SCHOOL OF LEGAL STUDIES,  
DR. A T MARKOSE MEMORIAL TECHNOLOGY LAW MOOT COURT  
COMPETITION**

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**BEFORE  
THE HON'BLE SUPREME COURT OF INDIA**

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**ON SUBMISSION TO THE HON'BLE SUPREME COURT OF INDIA UNDER  
ARTICLE 32 READ WITH ARTICLE 139A AND SECTION 25 OF THE CIVIL  
PROCEDURE CODE OF THE INDIA**

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**IN THE MATTER OF  
CG CAR COMPANY AND OTHERS  
(PETITIONERS)**

**v.**

**UNION OF INDIA  
(RESPONDENT)**

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**MEMORANDUM ON BEHALF *of* THE RESPONDENT**

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3. The Criminal Procedure (Identification) Act, 2022.

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## STATEMENT OF JURISDICTION

The Petitioners have approached this Hon'ble Supreme Court of India under Article 32<sup>1</sup> read with Article 139A<sup>2</sup> of the Constitution of India and Section 25 of the Civil Procedure Code<sup>3</sup>.

The present memorandum set forth the facts, contentions, and arguments in the present case.

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<sup>1</sup> 32. Remedies for enforcement of rights conferred by this Part-

(1) The right to move the Supreme Court by appropriate proceedings for the enforcement of the rights conferred by this Part is guaranteed.

(2) The Supreme Court shall have power to issue directions or orders or writs, including writs in the nature of habeas corpus, mandamus, prohibition, quo warranto and certiorari, whichever may be appropriate, for the enforcement of any of the rights conferred by this Part.

(3) Without prejudice to the powers conferred on the Supreme Court by clause (1) and (2), Parliament may by law empower any other court to exercise within the local limits of its jurisdiction all or any of the powers exercisable by the Supreme Court under clause (2).

(4) The right guaranteed by this article shall not be suspended except as otherwise provided for by this Constitution.

<sup>2</sup> 139A. Transfer of certain cases

(1) Where cases involving the same or substantially the same questions of law are pending before the Supreme Court and one or more High Courts or before two or more High Courts and the Supreme Court is satisfied on its own motion or an application made by the Attorney General of India or by a party to any such case that such questions are substantial questions of general importance, the Supreme Court may withdraw the case or cases pending before the High Court or the High Courts and dispose of all the cases itself: Provided that the Supreme Court may after determining the said questions of law return any case so withdrawn together with a copy of its judgment on such questions to the High Court from which the case has been withdrawn, and the High Court shall on receipt thereof, proceed to dispose of the case in conformity with such judgment

(2) The Supreme Court may, if it deems it expedient so to do for the ends of justice, transfer any case, appeal or other proceedings pending before any High Court to any other High Court

<sup>3</sup>25. Power of Supreme Court to transfer suits, etc. - (1) On the application of a party, and after notice to the parties, and after hearing such of them as desire to be heard, the Supreme Court may, at any stage, if satisfied that an order under this section is expedient for the ends of justice, direct that any suit, appeal or other proceeding be transferred from a High Court or other Civil Court in one State to a High Court or other Civil Court in any other State.

(2) Every application under this section shall be made by a motion which shall be supported by an affidavit.

(3) The Court to which such suit, appeal or other proceeding is transferred shall, subject to any special directions in the order of transfer, either re-try it or proceed from the stage at which it was transferred to it.

(4) In dismissing any application under this section, the Supreme Court may, if it is of opinion that the application was frivolous or vexatious, order the applicant to pay by way of compensation to any person who has opposed the application such sum, not exceeding two thousand rupees, as it considers appropriate in the circumstances of the case.

(5) The law applicable to any suit, appeal or other proceeding transferred under this section shall be the law which the Court in which the suit, appeal or other proceeding was originally instituted ought to have applied to such suit, appeal or proceeding.

## **STATEMENT OF FACTS**

### **BACKGROUND OF THE CASE**

On August 13, 2022, at around 7:00 a.m., a family consisting of a husband, wife, and a minor child was heading to Sundarpur National Park near the Antartaka and Aminadu border. They stopped on National Highway No 106 when they saw a car next to which a body was found lying in a pool of blood. The police arrived at the spot and after searching the premises found out that the body was of Mr Anand.

### **INVESTIGATION PROCESS**

After further investigation, police located vehicles leaving between 6:00 p.m. on August 12, 2022, based on the time of death. The Police decided to take a closer look at Mr Ian because his car took longer time for covering the distance. Mr Anand's high-end smartphone was found lying next to the body, and there was no indication of the use of force inside or outside the car. Fingerprint experts did not find any suspicious prints on his car or smartphone. After some examination, the body was sent to a government hospital in Singapore for an autopsy. The investigating authority decided to proceed against CG Car Company and Mr. Ian to access the data in Mr Ian's car through decryption under Section 69 of the IT Act.

### **CURRENT SITUATION**

Mr Ian claimed in the Antartaka High Court that his right against self-incrimination under Article 20(3) of the Constitution of Indica had been violated. Meanwhile, the headquarters of CG Car Company along with automatic car dealers and other car manufacturers in Indica filed a writ petition in the Supreme Court of Indica, alleging that Section 69 of the IT Act violates the Constitution of Indica. The Supreme Court of Indica ordered the transfer of the case from the High Court of Antartaka against Ian and decided to hear both the cases and the writ petition filed by the CG Company.

**STATEMENT OF ISSUES**

~I~

**WHETHER SECTION 69 OF THE INFORMATION TECHNOLOGY ACT, 2000 IS  
CONSTITUTIONALLY VALID?**

~II~

**WHETHER GOVERNMENTAL CONTROL OVER THE USE OF  
CRYPTOGRAPHIC TECHNIQUES IS TOO RESTRICTIVE IN NATURE?**

**SUMMARY OF ARGUMENTS**

~I~

**WHETHER SECTION 69 OF THE INFORMATION TECHNOLOGY ACT, 2000 IS CONSTITUTIONALLY VALID?**

It is humbly submitted before the Hon'ble court that Section 69 of the Information Technology Act, 2000 is constitutionally valid and is not violative of the Constitution of Indica as it aligns with the basic structure of the Constitution of Indica. The disputed section of the Act was enacted by the Parliament following the procedure established by law and came into effect after it obtained the President's assent. The Act is in the interest of the State and its people as it safeguards their interests and rights. The Section aims to maintain public order, provide security to the state, and is in the interest of the sovereignty and integrity of Indica.

~II~

**WHETHER GOVERNMENTAL CONTROL OVER THE USE OF CRYPTOGRAPHIC TECHNIQUES IS TOO RESTRICTIVE IN NATURE?**

It is humbly submitted before this Hon'ble court that the governmental control over the use of cryptographic techniques is not restrictive in nature. The government is empowered to issue directions to certain agencies in the interest of certain grounds to "intercept or monitor or decrypt" any information from the computer resource. Also, the intermediaries are liable and accountable for the decryption of the personal data access requested by the authorities.

**ARGUMENTS ADVANCED**

~I~

**WHETHER SECTION 69 OF THE INFORMATION TECHNOLOGY ACT, 2000 IS  
CONSTITUTIONALLY VALID?**

1. It is humbly submitted before this hon'ble Supreme Court of India that section 69 of the Information Technology Act, 2000 is constitutionally valid as Section 69 of the act does not infringe any fundamental rights prescribed under Part III of the Indian Constitution and is favoured by the principle of presumption of constitutionality.

**A. THE PRINCIPLE OF PRESUMPTION OF CONSTITUTIONALITY**

2. In a case, it was held by the Hon'ble Court that *"In considering the validity of a statute the presumption is in favour of its constitutionality and the burden is upon him who attacks it to show that there has been a clear transgression of constitutional principles. It must always be presumed that the Legislature understands and correctly appreciates the needs of its people and that discrimination, if any, is based on adequate grounds. It is well settled that courts will be justified in giving a liberal interpretation to the section to avoid constitutional invalidity."*<sup>4</sup> In the present case, India being a fast-growing major economy and a hub for information and communication technology services<sup>5</sup>, it was the need of the hour for the government of India to introduce a statute like the Information Technology Act of 2000.
3. *"The approach of the court while examining the challenge to the constitutionality of an enactment, is to start with the presumption of constitutionality. The court should try to sustain its validity to the extent possible. It should strike down the enactment only when it*

<sup>4</sup> Commissioner of Sales Tax M.P. Indore and Ors v. Radhakrishna and Ors AIR 1979 SC 1588.

<sup>5</sup> Moot Proposition ¶2.



*is not possible to sustain it. After all, an Act made by the legislature represents the will of the people and that cannot be lightly interfered with.*" <sup>6</sup> In the present case, Section 69 of the IT Act, 2000 also holds the presumption of constitutionality.

4. *"The court ought not to interpret the statutory provisions unless compelled by their language, in such a manner as would involve its unconstitutionality."* In the present case, through their petitions of challenging the constitutionality and proceedings to the decryption of data, the petitioners are questioning the intent of the legislature, which is not the case of interpreting statutory provisions compelled by their language. <sup>7</sup> In the present case, the Information Technology Act of 2000 and its provisions also should be elucidated in a way to validate its constitutionality as the act and its provisions are itself a dire necessity for the Republic of India.

#### **B. THE RIGHT AGAINST SELF-INCRIMINATION IS NOT INFRINGED UPON**

5. In a case, it was held by the Hon'ble Apex Court that "To invoke Article 20(3) the evidence must be incriminating by itself. This entailed that evidence could be relied upon if it is used only for identification or comparison with information and materials that are already in the possession of the investigators."<sup>8</sup> In the present case, the data stored through onboard ICT facilities of Mr. Ian's car itself is not incriminating by itself as it is relied on to confirm the information already known to the Police, which includes the facts that Mr. Ian's vehicle took longer time for covering the distance and Mr. Anand and Mr. Ian used to frequent the same eatery<sup>9</sup>.
6. The judgment was relied upon by the Hon'ble apex court in the case of Selvi and Ors. v. State of Karnataka<sup>10</sup>, wherein the U.S Supreme Court had to determine whether taking a

<sup>6</sup> State of Bihar & Ors v. Bihar Distillery Ltd. & Ors (1997) 2 SCC 727.

<sup>7</sup> ML Kamra v. New India Assurance AIR 1992 SC 1072.

<sup>8</sup> Selvi and Ors v. State of Karnataka AIR 2010 SC 1974.

<sup>9</sup> Moot Proposition ¶14.

<sup>10</sup> Selvi and Ors v. State of Karnataka AIR 2010 SC 1974.

blood sample against the defendant's will, the analysis of which led to the conviction of drunk driving, is violative of the Fifth Amendment. Answering this, the Court made a distinction between evidence of a 'testimonial' or 'communicative' nature as opposed to evidence of a 'physical' or 'real nature', concluding that the privilege against self-incrimination applied to the former but not to the latter. <sup>11</sup>

7. The Hon'ble Court in *Virendra Khanna v. State of Karnataka* held that "A direction to provide a password, passcode, biometrics would not amount to testimonial compulsion. It is only like a direction to produce a document. Mere providing access to a smartphone or e-mail account would not amount to self-incrimination since it is for the investigating agency to prove its allegation by cogent material evidence."<sup>12</sup>
8. In the present case, the police did not make Mr. Ian self-incriminate and the directions to produce the private key for decryption using an asymmetric cryptographic technique were not more than in nature to produce a document. According to the assertion by the Hon'ble Court in the aforementioned case, the direction for Mr Ian to provide the private key would not amount to testimonial compulsion.
9. "Self-incrimination must mean conveying information based upon the personal knowledge of the person giving the information and cannot include merely the mechanical process of producing documents in court which may throw a light on any of the points in controversy, but which do not contain any statement of the accused based on his knowledge."<sup>13</sup>

### **C. THE DOCTRINE OF FOREGONE CONCLUSION**

10. The US Supreme Court propounded the foregone conclusion exception, allowing the government to compel certain acts. In this case, the Court held that If the testimony

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<sup>11</sup> *Armando Schmerber v. California* AIR 2010 SC 1974.

<sup>12</sup> *Virendra Khanna v. State of Karnataka* AIR 1961 SC 1808.

<sup>13</sup> *State of Bombay v. Kathi Kalu Oghad and Ors* 1961 SCR (3) 10.

implicit in the compelled physical act is of “minimal testimonial significance,”<sup>14</sup> then the Fifth Amendment does not shield the act of production. Put differently, the government must already know of the possession, existence, and authentication of documents.” In the present case, the police were already aware of the possession, existence, and authentication of the data in the automated system of Mr Ian’s car.

11. The factors that needed to be considered while applying the foregone conclusion were laid down in a case “If the prosecution can show that the following three factors are present, a defendant may be compelled to produce a passcode to a phone or computer. The factors are: the Government knows of the existence of the evidence demanded, the defendant possessed or controlled the evidence, and the evidence is authentic.”<sup>15</sup> Mr Ian can be compelled to produce the private key for the decryption since all the factors aforementioned are present in this case. “Passcodes do not have any independent evidentiary significance and if the government establishes that a passcode exists and the accused has control over it, then the foregone conclusion doctrine is applicable and the accused can be compelled to reveal the passcode.”<sup>16</sup>

12. In the present case also. The private key alone does not have any independent evidentiary importance and since the police are aware of the existence of the private key and the control and access of Mr. Ian over it, Mr Ian can be directed to produce the private key for decryption as per the doctrine of foregone conclusion.

#### **D. NO INFRINGEMENT OF FUNDAMENTAL RIGHTS**

- **UNDER ARTICLE 14**

13. It is brought before this Hon’ble Court that the difference in the said provision is the investigation of a suspect in a crime. In the instant case, Mr. Ian is the prime suspect in

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<sup>14</sup> Fisher v. United States 425 U.S. 391 (1976); United States v. Apple Mac Pro Computer 851 F.3d 238, 249 (3d Cir. 2017); re Grand Jury Subpoena Duces Tecum 670 F.3d 1335, 1352 (11th Cir. 2012); Seo v. State 148 N.E.3d 952, 955 (Ind. 2020); Commonwealth v. Jones 117 N.E.3d 702, 707-09 (Mass. 2019).

<sup>15</sup> Commonwealth v. Davis 220 A.3d 534 (Pa. 2019).

<sup>16</sup> State v. Robert Andrews 234 A.3d 1254 (N.J. 2020).

the crime. He had travelled through the highway where the deceased was found after 6 P.M. It has been seen that traffic was not permitted after 6 P.M. to the national park, which made him more susceptible. On further interrogation, Mr. Ian admits that he was acquainted with the deceased as he had seen him at the Art Cafe. As Mr. Ian was the only suspect in the crime, the police ought to have conducted a detailed investigation even after his testimony. The Supreme Court reiterated that “Article 14 is an expression of the egalitarian spirit of the Constitution and is a clear pointer that arbitrariness is anathema under our system.”<sup>17</sup>

14. Justice Bhagwati in a case stated that “Wherever we find arbitrariness or unreasonableness there is a denial of the rule of law.”<sup>18</sup> The Supreme Court has sought to co-relate the rights conferred by Article 14 with those under Article 21 of the Constitution<sup>19</sup>. It also laid down that the norms laid down by the administration must be clearly and properly understood by the administration as well as those interacting with the administration<sup>20</sup>. The apex court held that the laws that are ‘manifestly arbitrary’ and ‘unreasonable’ violate Article 14 of the Constitution of India.<sup>21</sup>

- **UNDER ARTICLE 19.**

15. The Supreme Court has held that the expression ‘in the interest of general public’ in Article 19(6) is of wide import in comprehending public order, public health, public security, morals, economic welfare of the community, and the objects mentioned in Part

<sup>17</sup> Maru Ram v. Union of India AIR 1980 SC 2147.

<sup>18</sup> Bachan Singh v. State of Punjab AIR 1982 SC 1325; Janta Dal v. HS Choudhary AIR 1993 SC 892; Dattaraj Nathuji Thaware v. State of Maharashtra (2005) 1 SCC 590; State of Bombay v. United Motors Ltd AIR 1953 SC 252; Kochunni v. State of Madras AIR 1959 SC 725; Harbansal Sahnia v. Indian Oil Corporation Ltd AIR 2003 SC 2120; X v. Principal Health Secretary AIR 2022 SC 4917.

<sup>19</sup> M.P. Jain, Indian Constitutional Law (7th ed, 2014).

<sup>20</sup> Reliance Energy Ltd. v. Maharashtra State Road Development Corpn. Ltd (2007) 8 SCC 1; Mohinder Singh Gill v. Chief Election Commissioner AIR 1978 SC 851; M Nagaraj v. Union of India AIR 2007 SC 71; Province of Bombay v. Khushaldas Advani AIR 1952 SC 222; Maru Ram v. Union of India AIR 1980 SC 2147; Sudhir Chandra v. Tata Iron & Steel Co. Ltd. AIR 1984 SC 1064; Shayara Bano v. Union of India AIR 2017 SC 4609; D.S. Nakara & Ors v. Union of India 1983 SCR (2) 165; Bachan Singh v. State of Punjab AIR 1982 SC 1325; A.L. Kalra v. P & E Corpn of India, Ltd AIR 1984 SC 1361; Reliance Energy Ltd. v. Maharashtra State Road Development Corpn. Ltd (2007) 8 SCC 1.

<sup>21</sup> Shayara Bano v. Union of India AIR 2017 SC 4609.

IV of the Constitution.<sup>22</sup> In the instant case, Mr. Ian is a prime suspect in the murder, which is a crime affecting public security and public morality. Therefore, the restrictions imposed by Section 69 of the IT Act, 2000 are reasonable and may come under the reasonable restrictions of Article 19(6).

16. There has to be a reasonable nexus between the restriction imposed and the objects mentioned in the respective clause. Thirdly, the restriction must be reasonable. The restrictions imposed by the government under Section 69 of the IT Act, 2000 about the submission of a copy of keys that could be used for decrypting do not violate the constitution of India as the restrictions imposed are reasonable, further, the restrictions were imposed by the Authority on Control and Regulation of Cryptography which is an appropriate and competent authority.

17. In the case of Whatsapp LLC v. Union of India, it was contended by Whatsapp that it would have to break the encryption of the entire chain of communication of people to determine the first originator of the fake news. This procedure would have broken the privacy of a huge number of innocent people. However, in the instant case, the data of only one person, who is the prime suspect in the crime has been asked by the competent authority for the sole purpose of thorough investigation and gathering relevant evidence. Therefore, in the light of justice and equity, it is humbly submitted that Section 69 of the Act is not ultra vires the constitutional provisions, and the rights of the intermediary, CG Car Company are not breached.

- **UNDER ARTICLE 21**

18. It is humbly submitted before the Hon'ble Supreme Court of India that Article 21 encapsulates that no person shall be deprived of his life or personal liberty except according to the procedure established by law. The scope of Article 21 has been widened

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<sup>22</sup> State of Gujarat v. Mirzapur Moti Kureshi Kasab Jamat AIR 2005 SC 599.

by reinterpreting what constitutes life and liberty in specific circumstances.<sup>23</sup> The right to privacy is protected as an intrinsic part of the right to life and personal liberty under Article 21.<sup>24</sup>

19. In the instant case, the petitioner claims that his right to privacy has been infringed. The Supreme Court in the case of upheld that the state must carefully balance individual privacy and the legitimate aim, at any cost as fundamental rights cannot be given or taken away by law, and all laws and acts must abide by the constitution.<sup>25</sup> While dealing with this, the Court held that disclosure of passwords, etc in a criminal investigation is covered under the "legitimate interests of the State" exception carved therein as prevention and investigation of crime is a legitimate State interest.<sup>26</sup>

20. The Court in a case, held that "A passive submission to search cannot be styled as a compulsion on the accused to submit to search immunity against self-crimination extends to any incriminating evidence which the accused may be compelled to give."<sup>27</sup> The Supreme Court of India in a case, asked the accused to provide the username and password of his crypto wallet and make full disclosures to the investigating agency.<sup>28</sup> The High Court of Kerala also in a case<sup>29</sup> had directed the accused persons to deposit their

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<sup>23</sup> Maneka Gandhi v. Union of India 1978 SCR (2) 621; Common Cause Registered Society v. Union of India AIR 1999 SC 3020; Shri Bodhisattwa Gautam v. Miss Subhra Chakraborty AIR 1996 SC 922; Rajasthan State Electricity Board v. Mohan Lal AIR 1967 SC 1857; Hussainara Khatoun & Ors v. State of Bihar AIR 1979 SC 1369.

<sup>24</sup> Kharak Singh v. State of U.P. & Others 1963 SCR (1) 332.

<sup>25</sup> Justice K. S. Puttaswamy (Retd.) v. Union of India 1963 SCR (1) 332; District Registrar and Collector, Hyderabad v. Canara Bank (2005) 1 SCC 496; PUCL v. Union of India AIR 1997 SC 568; I v. Finland (20511/3) (2009) 42 E.H.R.R. 31; Thappalam Service Cooperative Bank Limited v. St. of Kerala (2013) 16 SCC 82; NM & Ors v. Smith & Ors 2007 (5) SA 250 (CC); Central Public Information Officer, SC v. Subhash Chandra Agrawal (2020) 5 SCC 48; Renu v. District & Sessions Judge (2014) 14 SCC 50; Govind v. State of Madhya Pradesh AIR 1975 SC 1378; Suresh Kumar Kaushal v. Naz Foundation AIR 2014 SC 563; Joseph Shine v. Union of India AIR 2018 SC 1676; Rayala M. Bhuvneswari v. Nagaphomender Rayala AIR 2008 AP 98; Indian Hotels & Restaurant Ass'n (AHAR) v. State of Maharashtra (2019) 3 SCC 429.

<sup>26</sup> Justice KS Puttaswamy (Retd) and Ors v. UOI & Ors AIR 2017 SC 4161; Dattaraya Govind Mahajan v. State of Maharashtra AIR 1977 SC 915; Kerala State Beverages (M&M) Corp. Ltd. v. P.P. Suresh (2019) 9 SCC 710.

<sup>27</sup> V.S. Kutlan Pillai v. Ramakrishnan AIR 1980 SC 85.

<sup>28</sup> Ajay Bhardawaj v. Union of India WP(Crl) No-000231/2019.

<sup>29</sup> P. Gopalkrishnan v. State of Kerala and Ors Crl MC No 758 OF 2020.

mobile phones with the Registry so that the prosecution could conduct a forensic examination.

21. Similarly, in the present case, it was observed that the investigating officers then issued notice through proper channels to the manufacturers of the car to provide assistance to decrypt the said protection. Simultaneously, police arrested Mr. Ian and confiscated his smartphone as he was unwilling to cooperate with the authorities to retrieve the data. The CG Car Company, which has its headquarters in Germany, responded by saying that they could not provide any assistance to the authorities because it was against the security offered by them to the customers and the owner of data in the instant case only Mr. Ian and thereby they do not have any role to play.
22. At the other end of the spectrum, non-testimonial evidence is considered to be one where the witness only lays a foregone conclusion in the sense that there is no statement made but things like blood samples, voice samples, signature specimens, fingerprints, body measurements, etc are obtained. The distinguishing factor is that these non-testimonial pieces of evidence have no independent incriminatory nature, but simply aid the investigating agencies in investigating and connecting the dots.

#### **E. TEST OF CONSTITUTIONALITY**

23. The principle that legislation relating to restrictions on fundamental freedoms could be tested on the anvil of 'proportionality' has never been doubted in India and this is called 'primary' review by the Courts of the validity of legislation that offended fundamental freedoms.<sup>30</sup> In the case of *Om Kumar and Ors v. Union of India*<sup>31</sup>, it was held by the Hon'ble Court that *"By 'proportionality', we mean the question whether, while regulating the exercise of fundamental rights, the appropriate or least restrictive choice of measures legislation or the purpose of the administrative order, as the case may be."* In the present

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<sup>30</sup> *Om Kumar and Ors v. Union of India* AIR 2000 SC 3689.

<sup>31</sup> *Om Kumar and Ors v. Union of India* AIR 2000 SC 3689.

case, the Government of Indica has imposed the least restrictions through section 69 to achieve the objective of the IT Act.

24. Regarding reasonable restriction imposed on the fundamental rights, it was held by the Hon'ble Court in the case of Chintaman Rao v. State of U.P <sup>32</sup>that “*‘reasonable restrictions’ which the State could impose on the fundamental rights ‘should not be arbitrary or of an excessive nature, beyond what is required for achieving the objects of the legislation.’ ‘Reasonable’ implied intelligent care and deliberations, that is, the choice of a course which reason dictated.*” Thus, it is humbly submitted before the Hon'ble Court of Law that there has clearly been no violation of fundamental rights, and thus, section 69 of the Information Technology Act, 2000 is constitutionally valid.

Hence, it is humbly submitted before this Hon'ble Court that the Section 69 of the IT Act, 2000 is constitutionally valid.

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<sup>32</sup> Chintaman Rao v. State of U.P AIR 1951 SC 118.



~II~

**WHETHER GOVERNMENTAL CONTROL OVER THE USE OF CRYPTOGRAPHIC TECHNIQUES IS TOO RESTRICTIVE IN NATURE?**

1. It is humbly submitted before this Hon'ble Court that the governmental control over the use of cryptographic techniques is not too restrictive in nature as the government is empowered to impose restrictions and the intermediaries are obliged to follow that.

**A. VALIDITY OF RULES MADE THEREUNDER IT ACT**

2. It is humbly submitted before this Hon'ble court that the government is empowered to issue directions to certain agencies in the interest of certain grounds to "intercept or monitor or decrypt" any information from the computer resource.<sup>33</sup> The rules may be saved by the general rule-making power contained in a statute, provided the rules do not travel beyond the scope of the Act, as has been held by the SC, "Such a power will not support attempts to widen the purposes of the Act, to add new and different means to carrying them out, to depart from or vary its terms".<sup>34</sup> In the instant case, it can be observed that the police had taken into account the investigation process where a murder had been committed and taken into account the cognizance of the offence that demanding the information from Mr. Ian was necessary for the situation.
3. The direction for interception monitoring or decryption shall remain in force, unless revoked earlier, for a period not exceeding sixty days from the date of its issue and may be renewed from time to time for such period not exceeding the total period of one hundred and eighty days. The provision states that an intermediary needs to observe due diligence while discharging its duties under the Act and observe such other guidelines as

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<sup>33</sup> Information Technology Act 2000, s 69.

<sup>34</sup> Academy of Nutrition Improvement v. Union of India (2011) 8 SCC 274; Raja Ram Pal v. Lok Sabha (2007) 3 SCC 184; Indira Nehru Gandhi v. Raj Narain Singh AIR 1975 SC 2299.

prescribed by the Central Government.<sup>35</sup> It has been held by the Supreme Court that: “It is a well-settled principle of interpretation of statutes that conferment of rule-making power by an Act does not enable the rule-making authority to make a rule which travels beyond the scope of the enabling Act or which is inconsistent therewith or repugnant thereto.”<sup>36</sup>

4. SC ruled that the delegated legislation’s conformity to the parent Act must be tested in light of the “nature, object and scheme” of the parent Act, as well as the subject matters over which power has been delegated.<sup>37</sup> In the instant case, it is pertinent to note that the demanding of information and unlocking of Mr. Ian’s phone and car was just a part of the investigation and not a process of self-incrimination by the police officials.
5. Decryption is related to obtaining information using programming language, mathematical formula, or any fixed algorithm, etc.<sup>38</sup> Power is conferred upon central government, state governments & authorized officers of central or state governments. They have the power to direct any government agency to put any computer resource on surveillance i.e., to intercept, monitor, or decrypt any information on a computer system.<sup>39</sup>
6. Along with section 69(1), rule 4 of the Information Technology (Procedure and Safeguards for Interception, Monitoring, and Decryption of Information) Rules, 2009 also provides that authorization to surveillance may be granted to any government agency by a competent authority such as central government or state government.<sup>40</sup> A prohibition from surveillance without authorization: Rule 24 of Information Technology Rules, 2009 provides for the safeguarding measure by prohibiting unauthorized interception, monitoring, or decryption of information from computer resources. Unauthorized

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<sup>35</sup> Information Technology Act 2000, s 87.

<sup>36</sup> The State of Karnataka and Another v. Ganesh Kamath & Ors 1983 SCR (2) 665.

<sup>37</sup> Kerala State Electricity Board v. Thomas Joseph Civil Appeal Nos. 9252-9253 of 2022.

<sup>38</sup> IT Rules 2009, r 2(f).

<sup>39</sup> Information Technology 2000, s 69(1).

<sup>40</sup> IT Rules 2009, r 4.

surveillance with malafide intention and knowledge of not being empowered to intercept, monitor, or decrypt is subjected to punishment under this rule.

7. The state, through the powers under Section 69, can therefore justify authorizing surveillance, purporting this to be a grave concern.<sup>41</sup> In the instant case, it is important to take into account the fact that the rules formulated under section 69 of the IT Act, 2000 are not too restrictive as they just help in aiding the investigation process, and the validity of rules by the government holds into account.

### **B. GOVERNMENT EMPOWERED TO ENFORCE RESTRICTIONS**

8. The Court in the case of CBI v. Mahesh Kumar Sharma held in reference to Section 53 of CrPC that *“an accused shall permit the police to collect his measurements by the law whenever necessary and allows the police to collect data of an accused or a convict.”*<sup>42</sup> However, the Court inferred from the definition of “measurement” under the Criminal Procedure (Identification) Act, 2022 that *“a direction for providing biometrics i.e. finger impressions, face, or iris recognition for the opening of the electronic device by the investigator can be ordered. It was observed that to protect the information emanating from “personal knowledge” biometrics are only physical evidence that does not require attribution of personal knowledge. Consequently, the giving of biometrics is not protected under the Constitution.”*<sup>43</sup>
9. The stated goal of Criminal Procedure (Identification) Act, 2000 is to “authorize obtaining measures of convicts and other persons for the sake of identification and investigation in criminal issues”. However, such an interpretation would allow police with uncontrolled and unguided access to the electronic devices of individuals regardless of

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<sup>41</sup> Information Technology Act 2000, s 69.

<sup>42</sup> Code of Criminal Procedure 1973, s 53.

<sup>43</sup> CBI v. Mahesh Kumar Sharma CBI-31/2021; Union of India and others v. S. Srinivasan (2012) 7 SCC 683; Additional District Magistrate v Siri Ram (2000) 5 SCC 451; Commanding-in-Chief v. Subhash Chandra Yadav (1988) 2 SCC 351; State of TN v. P. Krishnamurthy (2006) 4 SCC 517.

their position as an accused, a convict, or someone unrelated to the case.<sup>44</sup> Furthermore, the Court observed that “*a direction to provide a password, passcode, or biometric would not amount to testimonial compulsion as the petitioner is not answering any question that would expose the petitioner to guilt. It is only like a direction to produce a document.*”<sup>45</sup>

10. The Court in the CBI case<sup>46</sup> also held that a search warrant can also be issued by the court to search a smartphone or computer system for investigation purposes.<sup>47</sup> The Court’s reasoning enables a right in favour of the court or officer in charge of a police station to issue a summons or to order from a person’s possession production of any document for the investigation purpose. The Court treated a password/passcode/biometric as a document as provided under.<sup>48</sup> A person in possession of an electronic device/gadget must cooperate with the investigation officer by disclosing the passcode to let them gain access to the device.<sup>49</sup>

11. In the instant case, it can be seen from the information provided that Mr. Ian was on Highway no 106 when the incident took place and stayed there for a longer duration unlike the other cars that went on the highway, so it was a valid point in terms of investigation to investigate him regarding the murder also, the police know about the incident, Mr. Ian had the piece of investigation and not aiding the investigation process cannot be an excuse. It is also pertinent to note that giving a password, passcode, or biometric information would not constitute testimonial compulsion because the petitioner is not answering any questions that would expose the petitioner to guilt as in the instant case, Ian was not helping in the course of the investigation.

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<sup>44</sup> My Space Inc. v. Super Cassettes Industries Ltd (2017) 236 DLT 478 (DB).

<sup>45</sup> CBI v. Mahesh Kumar Sharma CBI-31/2021.

<sup>46</sup> CBI v. Mahesh Kumar Sharma CBI-31/2021

<sup>47</sup> Code of Criminal Procedure 1973, s 93.

<sup>48</sup> Code of Criminal Procedure 1973, s 91.

<sup>49</sup> Code of Criminal Procedure 1973, s 100.

### C. LIABILITY OF INTERMEDIARIES

12. In the instant case, intermediaries are liable and accountable for the decryption of the personal data access requested by the authorities. The intermediary observes due diligence while discharging his duties under this Act and also observes such other guidelines as the Central Government may prescribe on this behalf.<sup>50</sup> The intermediary shall exercise due diligence to prevent the commission of any offence under the Information Technology Act, 2000, or any other laws for the time being in force.

13. When can intermediaries be held liable is prescribed under Section 79 (3) of the IT Act which provides an exception to the immunity granted to intermediaries from liability for third-party information and acts under Section 79 (1) of the Act. Intermediaries can be held liable for third-party content hosted by them in the following cases:

- *The intermediary is guilty of conspiring, abetting, aiding, or inducing the commission of the unlawful act;*
- *Intermediary fails to expeditiously remove or disable access to any material residing in or connected to a computer resource upon receiving actual knowledge, or on being notified by the Government that any information residing in or connected to such computer resource controlled by the intermediary is being used to commit an unlawful act. Such removal or disabling of access has to be done without vitiating the evidence in any manner.*

14. In a case, filed against myspace.com alleging that it allows its users to share Super Cassette's copyrighted work without permission. The Court held that Sections 79 and 81 of the IT Act and Section 51(a)(ii) of the Copyright Act have to be read harmoniously. The Court also introduced the concept of 'actual or specific knowledge' to hold that the

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<sup>50</sup> Modern Dental College and Research Center v. State of Madhya Pradesh AIR 2016 SC 2601; Malak Singh v. State of P&H (1981) 1 SCC 420.

intermediaries could be held liable if they have either actual or specific knowledge of the existence of unlawful content.<sup>51</sup>

15. In the instant case, intermediaries need to aid the investigation process that is, the CG Car Company should coordinate with the authorities who are reaching out through proper channels for the retrieval of data. Mr Ian being the prime suspect of the case, the information stored in the onboard ICT facilities of his car is crucial to the investigation of the case and the CG car company not cooperating with the investigation despite having the knowledge that the retrieval of data may help in solving the case, amounting to obstruction of justice.

Hence, it is humbly submitted before this Hon'ble Court that the governmental control over the use of cryptographic techniques is not too restrictive in nature.

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<sup>51</sup>My Space Inc. v. Super Cassettes Industries Ltd (2017) 236 DLT 478 (DB).

**PRAYER**

WHEREFORE IN THE LIGHT OF THE ISSUES RAISED, ARGUMENTS ADVANCED AND AUTHORITIES CITED, SUBMISSIONS MADE HERETO ABOVE AND THOSE TO BE URGED AT THE TIME OF HEARING.

THE RESPONDENT HUMBLY PRAY THAT THIS HON'BLE TRIBUNAL MAY BE PLEASED TO ADMIT THE PRESENT APPLICATION AND DECLARE THAT:

1. Section 69 of the Information Technology Act, 2000 is constitutionally valid.
2. The governmental control over the use of cryptographic techniques is not too restrictive in nature.

AND/OR

PASS ANY OTHER ORDER, DIRECTION OR RELIEF THAT MAY DEEM FIT  
BEST IN THE INTEREST OF JUSTICE, FAIRNESS, EQUITY AND GOOD  
CONSCIENCE FOR WHICH THE RESPONDENT MAY BE DUTY BOUND  
FOREVER PRAY.

FOR THIS ACT OF KINDNESS, THE RESPONDENT SHALL BE DUTY BOUND  
FOREVER

S/D\_\_\_\_\_

ON BEHALF OF THE RESPONDENT