



Universiteit
Leiden

The Right to Privacy in Dataveillance
Schools

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Masters of Law: Advanced LLM in International Children's Rights Law

2019-2020

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Declaration Statement

Date: 10th July 2020

Location: Den Haag, The Netherlands



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Executive Summary

This thesis explores the practice of digital surveillance in schools from a child rights framework, building on the Deleuzian post-panopticon lens. It is an endeavour to fundamentally question where the digital surveillance is pervading the private realm of the child in learning and normalising this practice in school space.

Digital surveillance in school is creating a quad consisting of the school, the State, parents and the Educational Technology (EdTech) companies, negotiating space and information of children for measures of protection and then development of the child in the school. Consequently, it puts the child in a box!

Digital surveillance can be of various forms and nature. The schools where children are monitored through E-learning applications, communication and school management platforms are called 'Dataveillance Schools'. This thesis aims to focus on dataveillance schools where non-objective and evolving contents like concentration and competence are measured through data analytics and algorithmic calculations for learning and learning related behaviour *only*. The research question identified in this regard is-To what extent do these Dataveillance Schools constitute a violation of the child's right to privacy as embedded in Article 16 of the United Nations Convention of the Rights of the Child (the "CRC")?

In Chapter 1, the relationship between privacy and surveillance is laid out with respect to the aims of education. Privacy is argued to be imperative to approaching education in schools. It is the right to privacy that is instrumental in conceptualising how all processes in education can be rights respecting. Further, the foundational concepts like dataveillance and privacy are introduced to be explored later in detail in the following chapters. The Deleuzian framework is taken as a broader framework to understand the change in degree of power within the school system and the changes through the use of dataveillance technologies.

In Chapter 2, a detailed examination into the nature, process and functions of dataveillance schools is carried out. A special case study of 'ClassDojo' is used to exemplify the practice. The various modes of dataveillance practice is used to show how and to what degree the learner's privacy is invaded by these intrusive practices. The emphasis on the actions undertaken and processes of these schools is to highlight the need for substantive procedural compliance of child rights in the wake of technological advancement in dataveillance schools.

In Chapter 3, the concept of privacy is explored in detail with an aim to theorise a concept of privacy specific to the dataveillance schools. The theorised concept of privacy is manifested as a right. The right to privacy for children in dataveillance schools is seen as a crucial component to answering the research question. A block in the way to understanding right to privacy specific to dataveillance schools was the existing dichotomy of the fundamental right to data protection and privacy. This is reconciled with a borrowed categorisation of opacity tool and a transparency tool. The understanding that right to privacy even in dataveillance schools is violated, raising bigger issues than data protection itself is key to this approach of merging the two in one. This Chapter, lays out the *what* of 'right to privacy', i.e. what does this right mean in dataveillance schools.

In Chapter 4, we delve deeper into the international legal instrument that guarantees the child a 'Right to privacy' as embedded in Article 16 of the CRC. Since, the *what* of Right to Privacy has been established in the previous chapter, this chapter focuses on determining the *how* there is a violation, as the last puzzle in answering the research question. A legal and literal analysis of the Article 16 is carried out. The detailed deconstruction of the Article is to understand how is the violation taking place, i.e. by what means? By the principled reading of the article, the phrases 'arbitrary' and 'unlawful' are analysed in detailed. The proportionality test is employed on the interests and purposes of dataveillance schools, i.e. for checking arbitrariness of the practice of dataveillance. Additionally, in relation to other rights of the Convention the legality principle is used to see the extent of impact on other rights identified, i.e. for examining the unlawfulness of the practice. It is through this analysis that *the extent* of the impact on privacy of children is fleshed out. The functioning of dataveillance schools' interference with the child's right to privacy is exposed through the use of legal principles.

In Chapter 5, a plea is made for taking the child out of the box. This is symbolic of the emancipatory role of child rights in empowering the schoolchildren in the practice of dataveillance in schools. It concludes that the practice of dataveillance schools shall account for the *extent* of the impact dataveillance has on limiting the students' private 'space' and how this will not damage the overall aims of education. Additionally, a way forward is suggested both from a legal perspective and the pedagogical perspective. A need for an interdisciplinary research is proposed in this area for a theory-driven approach.

Overview of Main Findings

The increasing reliance on dataveillance technologies is inevitable, and therefore requires that there are in place adequate safeguards and mechanisms that address the impact of dataveillance schools on children, particularly on their right to privacy. The right to privacy is read in line with achieving the aims of education in these dataveillance schools.

Literature on privacy for children is limited, and even less so from a child rights framework. The thesis follows a theory-driven approach to reconceptualise the concept of privacy and subsequently the right to privacy specific to children in dataveillance schools. A new definition of the concept of privacy for children in dataveillance schools is advanced which is developed into a comprehensive right to privacy. This concept of right to privacy is read into Article 16 of the CRC. The theoretical framework is brought to context in the existing international legal instrument for a demonstration of its use in praxis. The theorisation was adopted for the purpose of answering the research question in this thesis. This required an understanding of “what” the violation of right to privacy is of children in dataveillance schools. The detailed examination of ‘how’ the violation may take place was shown by using the proportionality principle and the legality to explicate ‘arbitrariness’ and ‘unlawful’ written in Article 16, respectively. The what and how analysis focuses specially for education in schools.

The whole analysis showed that, there is a need for a comprehensive understanding of right to privacy in school space, in the first place and in dataveillance schools in particular. There is a need for a definition of the learning analytics data created through these dataveillance schools to be protected under data protection laws. Dataveillance schools raise a peculiar problem with respect to data protection rights. But, the processing and analysis of the data is only a segment of the broader aspect of privacy. It is not an and/or framework. The existing regulation and regional instruments on data protection in school space do not even adequately define learning analytics data. This is specific to its use and misuse for purposes of education and achieving the aims of education as stipulated in Article 29 of the CRC. Therefore, the right to privacy conceptualised in this thesis looks at the concept of privacy holistically. Where intellectual privacy is the privacy to freedom of critical thought and processing learning/thinking, autonomy privacy is the transparency of the process that aids in one having a clear choice to decision making and development of one’s capacity in school. While, concerns arising out of the metadata created and use of personal data protection is read into informational privacy.

The thesis also highlights that right to privacy alone accounts for only a part of the problem. All rights are interdependent and there is a simultaneous violation of other rights of the CRC identified during research in dataveillance schools. The interdependency of rights is the call for the holistic reformulation of dataveillance schools that uphold the rights of the child.

The traditional school space is inclusive of the child-actor relationship between the School, the State and the Parents, while the addition of the EdTech companies in dataveillance schools creates a quad. This quad puts the child in a box with multiple actors as surveillants. Through the child rights framework, the child shall be elevated as an empowered child, where her rights to participate, their best interests and their evolving capacities are respected and realised. The children are given the space through procedural and structural change to be an active participant in the dataveillance practice of the school and come out of the box!

List of Abbreviations

UNCRC: United Nations Convention on the Rights of the Child

ICCPR: International Covenant on Civil and Political Rights

UDHR: Universal Declaration on Human Rights

ECtHR: European Court of Human Rights

GDPR: General Data Protection Regulation

FERPA: Family Educational Rights and Privacy Act

COE: Council of Europe

EU: European Union

Chapter 1: Introduction

1.1 Background

Schools are moving towards mobility, where the digitisation of the environment within school systems has muddied the standard demarcations of time and space, form and practice and the physical and digital. The school is identified as a space attuned for learning and development of the child albeit a surveilled environment. The informational technology developed over the last decade has guided the development of surveillance practices to a new, more sophisticated, and extensive process. Numerous surveillance apparatuses have been installed in the schools that attempt to identify, sort, track, analyse and quantify a child's thoughts, movements and actions.¹

The inevitable use of technology for surveillance in classroom space is not a change in kind of surveillance but in degree. The practice is intended to be situated along a spectrum ranging from care to control.² Development in technology was accompanied by change in society and the subsequent threats within. The school environment responded adequately out of care for better safety and in order to gain better control over the situation, the students and the environment. But the intensity of the surveillance practice changed significantly with the coming of data driven surveillance technologies. The acceleration in use was triggered in the wake of the Covid-19 pandemic, when a lot of schools in high income countries shifted to online education. However, the practice of using E-learning analytics and school management platforms in schools predates this event. Most of the 'Educational Technology' or EdTech companies capitalized on this changing momentum. A glimpse of which can be had in the title of their video tutorials to the likes of- "How Emergency School Closures Can Improve Education?"³ While surveillance practices become omnipresent with time and a norm in school space, there is a need to critically engage with this practice. The sophistication and potency of the use of technology for surveillance in a child's everyday environment may have some consequences, both in the short term and the long term. The intensity of surveillance experienced by children in school space could be a potential threat to their individual rights and dignity. It is also important to situate this development in the backdrop of the inescapable life of children in digital space-offline or online, which rendered it important for the Committee on the Rights of the Child (the "Committee") to draft a General Comment on Digital Technology and the Rights of the Child (awaiting release).

In this thesis, the focus is on these emergent dataveillance school, i.e., schools that use E-learning analytics and management platforms to observe and monitor children in and beyond the created digital classroom spaces.

¹ E. Taylor and T. Rooney, *Surveillance Futures*. London: Routledge, <https://doi.org/10.4324/9781315611402>, (2017), at Preface

² D. Lyon. *Surveillance As Social Sorting : Privacy, Risk, and Digital Discrimination*. London ; New York :Routledge, (2003), at 4

³<https://www.youtube.com/watch?v=larM18UvoB8>, Last visited (27-06-2020)

1.2 Schools: A Descriptive Representation

1.2.1 Glimpse into a traditional school

A typical classroom in a school premise can be conceptualised as a rectangular physical space with an established understanding of the power dynamics between the one guiding the class and those being guided. This power dynamics in the school is pre-established and understood by the school children themselves. The teacher is perceived as the authority responsible for monitoring the students' behaviour. The stated goal is to enhance learning and to have regular formative assessments of the child's learning outcome. The teacher is the gatekeeper of knowledge and enforcer of discipline in a classroom, where deviation from rules by a student may lead to punitive action. The role of the school as a whole is to guide the child towards its future career trajectory and nurture responsible citizenship. The school itself as an establishment, is accountable both to the parents and to the Government.

1.2.2 What is a dataveillance school?

The Schools which use of digital surveillance, specifically through the use of e-learning analytics and school management platforms are what is coined as 'Dataveillance schools'. These schools use learning analytics which capture data from children's educational activities to feed analysed data back into the system for enhancing learning outcomes.⁴ The unique teacher-student relationship is guided and constituted by the analysed data collected by the learning analytics platform. The change in degree of surveillance practices due to technology in schools is raising concerns with respect to the otherwise clear range of care to control. There is a transcendence of the school space beyond the walls and boundaries into the family, the home and to the mind of the children by an extent not yet known. As Bauman and Lyon state that the "architecture of electronic technologies through which power is asserted in today's mutable and mobile organizations makes the architecture of walls and windows largely redundant."⁵ In this thesis the phrase 'school space' shall be used to refer to virtual and physical spaces of the dataveillance schools.

1.3 The Child Rights Framework

The child rights framework is based on the principle that children as rights holders should be active agents in their environments and thereby in these emerging forms of surveillance practices. United Nations Convention on the Rights of the Child (the "CRC")⁶, recognized children as rights holders in 1989. The contents of CRC are summarized by the so called 'three P's including protection rights,

⁴B. Williamson, Calculating Children In The Dataveillance School: Personal And Learning Analytics. In: Taylor, E, Rooney, T (Ed.) Surveillance Futures: Social And Ethical Implications Of New Technologies For Children And Young People. London: Routledge, Pp. 50–66 (2017), at 50

⁵Z. Bauman and D. Lyon, Liquid Surveillance: A Conversation. Malden, MA: Polity Press (2013), at 4

⁶ UN General Assembly, Convention on the Rights of the Child, 20 November 1989, United Nations, Treaty Series, vol. 1577, p. 3, available at: <https://www.refworld.org/docid/3ae6b38f0.html> [accessed 9 July 2020]

provision rights and participation rights.⁷ The balance of the-recognition of capacity of the child and need for protection is key to the three P's framework of the Convention. Children as independent right holders have an independent right to exercise these rights independently and/or in lieu of their evolving capacities⁸ in every context.

In a rights-based framework, the State has an obligation towards these children irrespective of the children's membership in a private or public school. This is guaranteed not only in Article 28 and 29 of the CRC but also in Article 13 of International Covenant on the civil and political rights⁹ (the "ICCPR"). The State also has an interest in these children as future citizens capable of voting and shaping the future of the country. Therefore, the State should aid the schools in achieving the 'Aims of education'¹⁰, while upholding the rights of the child. Rights *in* education, have an intersectional component of content and relations in the process of acquiring education.¹¹ The rights in education is the education process- the experience based learning and participation.¹² The focus of this thesis is, how these new school spaces uphold the rights *in* education, ensuring a certain standard where the contents and the educational processes uphold the rights of the child. For this reason, the right to privacy is identified as being of utmost importance in upholding the rights of the child in dataveillance schools. In order to enable the children to actively negotiate the new technological space in schools the child as right holder cannot be independent, of what is argued in this thesis, without exercising a certain 'right to privacy'. Embedded in Article 16 of the CRC, the right to privacy has, as discussed in this thesis, a key role that must be realized in a school space given the surveillance structure. From a right based perspective, the key to achieving the aims of education is tantamount to realization of these rights. As the Committee of the Rights of the Child (the "Committee") made explicit, "children do not lose their human rights by virtue of passing through the school gates."¹³

The interests, duty and role of the various actors towards children in school space may be different, value-ridden and often be in conflict but, the primary objective is the child's protection, their overall development and mental well-being. The identified actors in a traditional school are located within the

⁷See for E.G, K.Hanson, Schools of Thought in Children's Rights. In: Children's Rights from Below. Studies in Childhood and Youth. Palgrave Macmillan, London, (2012), at 8

⁸Article 5, UN General Assembly, Convention on the Rights of the Child, 20 November 1989, United Nations, Treaty Series, vol. 1577, p. 3, available at: <https://www.refworld.org/docid/3ae6b38f0.html> [accessed 8 July 2020]

⁹UN General Assembly, International Covenant on Civil and Political Rights, 16 December 1966, United Nations, Treaty Series, vol. 999, p. 171, available at: <https://www.refworld.org/docid/3ae6b3aa0.html> [accessed 20 June 2020]

¹⁰Article 29, *Supranote 6*

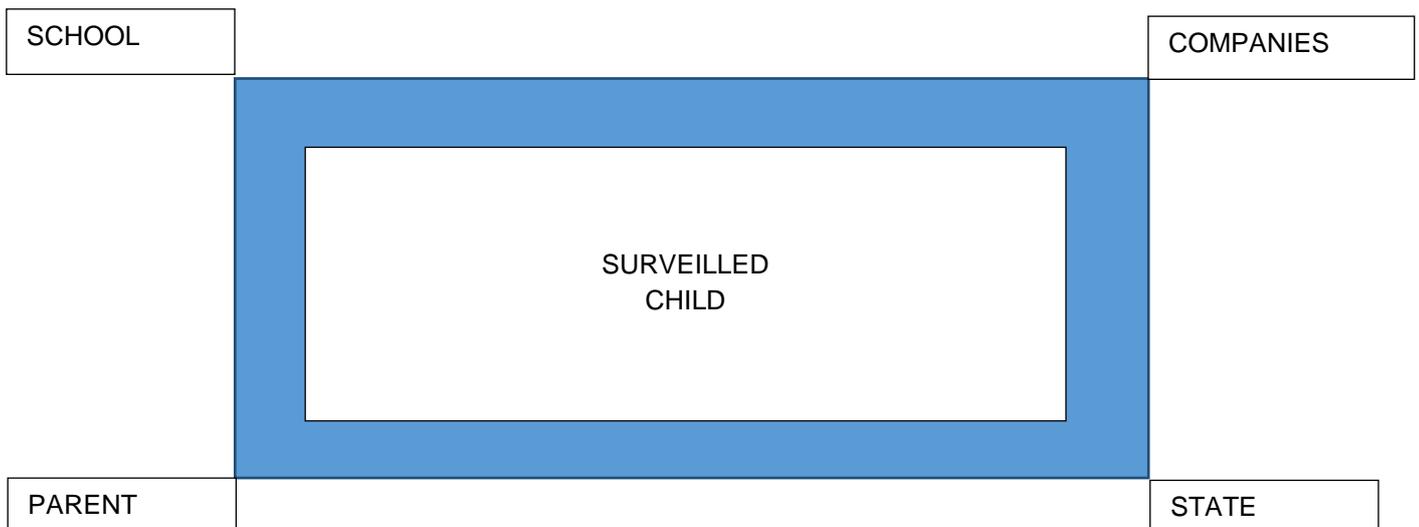
¹¹A. Quennerstedt, Education and Children's Rights, in Routledge International Handbook of Children's Rights Studies in Ed. Vandenhole, Desmet, Reynaert, Lembrechts, Vandenhole, Wouter, Desmet, Ellen, . . . Lembrechts, Sara. Routledge international handbook of children's rights studies (Routledge international handbook series 318125021). London ; New York: Routledge, Taylor & Francis Group, (2015), at 202

¹²*Id*, at 202

¹³UN Committee on the Rights of the Child (CRC), General comment No. 1 (2001), Article 29 (1), The aims of education, 17 April 2001, CRC/GC/2001/1, available at: <https://www.refworld.org/docid/4538834d2.html> [accessed 10 June 2020], at Para 8

School, in connection to the State and the Parents. This additional dimension of the technology in Dataveillance schools also brings in an additional actor in the school space- the businesses that provide these technologies to schools-the EdTech companies.

The dataveillance schools' renewed power structure is creating a quad consisting of the school, the State, Parents and the Companies, negotiating space and information of children. Consequently, it puts the child in a box! (See image below) This requires that there are adequate measures of protection and then development of the child in the school space with the change in relation. Further, it raises ethical concerns of the consent of the child to such monitoring. The concern is not just the data collection and data retention, but also the impact of these practices on their senses and concept of privacy in a school space.



What is important to account for in the dataveillance schools is the emancipatory aspect towards children as rights holders *in* education. The primary objective of the use of the child rights framework is that school children must emerge as active agents in this changing landscape of surveillance with adequate provisions of protection and developmental rights. This runs parallel to the objective of schools in enhancing learning of children and providing them adequate care, albeit in a controlled environment. The focus in this thesis is on children between the age group of 13 to 18 years.

1.4 Theorizing dataveillance schools

The changing power dynamics in the school space and the multiplicity of actors requires a theoretical framework for examination of the nature and impact of the power itself. While, the child rights framework provides a tool for the empowerment of the child, the use of the 'theory of power' is the critical approach to the practice of dataveillance itself. The critical approach makes use of some important theoretical tools for understanding the complexity of dataveillance as a practice, in polity, society and the market as a phenomenon and its impact. The critical approach shall strengthen the child rights framework to garner a holistic frame that goes beyond the scope of legal action.

The discussion around surveillance has been predominated by the discourse drawn from Foucault's (1977) panopticon.¹⁴ Panopticism as a theoretical framework is routinely drawn upon by scholars to explain and analyse the power structure in spaces including school. However, in this thesis we use the post-panopticon framework provided by Deleuze's¹⁵ (1992) rhizomatic structure to account for the fluidity of the dataveillance practice and the invisible system of control through data.

The intention here is not to mount a critique of the post-panopticon model of surveillance, but rather to contribute to a broader understanding of the changing nature of the post-panopticon framework-the rhizome. To flesh out the dynamics of privacy and dataveillance in the context of school space is the primary aim of the thesis and the post-panopticon framework is used to highlight how the dataveillance schools are reflections of the control society. For Deleuze, the control of dataveillance is characterized by dissolution of structures to fluid, networked and more invasive forms of power.¹⁶ This fluidity of power is characterised by the collection and collation of computerized information and datasets that identify, tag and track the students at any given time, mostly without them being aware of this process.¹⁷ Certainly, the techniques of dataveillance in schools could be beneficial for the children and the school itself, but it also raises ethical concerns regarding trust, normalization to such practices, value of children's data and the changing goals of education.

1.5 Aim of the Research and research question

The primary research question of the thesis is-to what extent do Dataveillance Schools constitute a violation of the child's right to privacy as embedded in Article 16 of the United Nations Convention of the Rights of the Child (the "CRC")?

The aim of the research is to throw light on the changing nature of surveillance in schools and its impact on the aims of education. Violation of privacy can very well negate the objective of schooling and therefore, the purpose behind dataveillance. However, the thesis shall also highlight that right to privacy is not a standalone right. Over the course of research the possible violation of some other rights pertinent to dataveillance schools also surfaced. Therefore, the thesis shall attempt to expose the underpinnings of surveillance practices and discuss the impact on other rights like: (i) aims of education (Article 29) (ii) child's right to play, (Article 31), where children require intimate spaces free from surveillance, (iii) encouragement and respect to their right to optimal development (Article 6 CRC)¹⁸, (iv) child participation with respect to the use of the digital surveillance in light of Article 12 CRC¹⁹ and lastly (vi) the impact on the identity of the child (Article 8 CRC).

¹⁴M. Foucault, *Discipline And Punish: The Birth Of The Prison*. New York, Pantheon, (1977)

¹⁵ G. Deleuze, *Postscript on the Societies of Control*, *October* 59: 3-7 (1992)

¹⁶*Supranote 4*, at 51

¹⁷*Supranote 4*, at 51

¹⁸ Keymolen, Esther, Van der Hof, Simone, "Can I still trust you, my dear doll? A philosophical and legal exploration of smart toys and trust", *Journal of Cyber Policy*, 1st March 2019, Accessed on 7th February 2020, <https://doi.org/10.1080/23738871.2019.1586970>, (2019) at 12

¹⁹ See for E.G, Michael Birnhack, Lotem Perry-Hazan & Shiran German Ben- Hayun, "CCTV surveillance in primary schools: normalisation, resistance, and children's privacy consciousness", *Oxford Review of Education*,

1.6 Methodology

In this thesis, a review of several technical papers and relevant literature has been carried out for an understanding into the functioning and processes of dataveillance in schools and privacy concerns for children. The research methodology is qualitative research involving desk research. The thesis shall employ literature, relevant case laws and reports from legal frameworks of surveillance and privacy, and other social and neuroscientific findings on the nature and impact of digital surveillance on children and their sense of privacy.

1.7 Outline of the Chapters

The rise in dataveillance schools is the primary premise of this thesis. How, it affects the right to privacy of children in achieving the aims of education in schools is the matter of investigation. The thesis shall proceed with an exploration into the practice and functioning of dataveillance schools in Chapter 2. To understand what constitutes the violation of the right to privacy in dataveillance schools, the concept of privacy is analysed further and a new reconceptualised right to privacy is arrived at in Chapter 3. Chapter 4 examines how the violation may occur. In Chapter 5, the broader question on the emancipatory role of child rights framework is shown while addressing the limited role of law and the challenges it poses on the overall aims of education.

Chapter 2: Dataveillance Schools

2.1 The History of School Surveillance

The intensified practice of dataveillance in schools raise concerns regarding surveillance which has been a key feature in traditional schools. To delve deeper into dataveillance schools the practice of surveillance in schools needs to be traced out, since surveillance is foundational to the concept of dataveillance itself.

Lyon in 2007 defined surveillance as “any *systematic, routine, and focused* attention to personal details for a given purpose (emphasis added)”²⁰, such as schooling. The systemic way surveillance is practised and routinised within the microcosm of the classroom and overall in the school space is what sustains the power dynamic. This is seen as an efficient system that produces an effective way of sustaining the supervision²¹ in a controlled manner. There is a clear understanding of who exercises power and how it is exercised between the different participants of the surveillance in the school particularly the teachers and the students.

However, surveillance technique by itself is data-rich. Technological development introduced efficient aids to surveillance but which still required manual, time-consuming processes and involvement of the teacher or parent in some form or other. This is exemplified by the infiltration of CCTV networks into schools;²² student drug testing systems²³; biometric tracking²⁴; national and international school performance assessments²⁵ and emergent screen capture technology.²⁶ This does not exhaust the set of practices of surveillance used within education; however, it is illustrative of the extent to which practices are used within contemporary education to track and monitor students.

²⁰D. Lyon, *Surveillance Studies: An Overview*. Cambridge: Polity: 13–16(2007)

²¹ J. Manolev, A. Sullivan and R. Slee, The datafication of discipline: ClassDojo, surveillance and a performative classroom culture, *Learning, Media and Technology*, 44:1, 36-51, DOI: 10.1080/17439884.2018.1558237, <https://doi.org/10.1080/17439884.2018.1558237>, (2019), at 38

²²See for E.G. A. Hope, “CCTV, School Surveillance and Social Control.” *British Educational Research Journal* 35 (6): 8, 91–907. doi:10.1080/01411920902834233. (2009)

²³See for E.G. Taylor, Emmeline. Student Drug Testing and the Surveillance School Economy: An Analysis of Media Representation and Policy Transfer in Australian Schools. *Journal of Education Policy* 33 (3): 383–397. doi:10. 1080/02680939.2017.1337228. (2018)

²⁴See for E.G. S. Nemorin, Post-panoptic Pedagogies: The Changing Nature of School Surveillance in the Digital Age, *Surveillance and Society* 15 (2): 239–253. (2017)

²⁵See for E.G. Hardy, Ian, and Steven Lewis. 2018. “Visibility, Invisibility, and Visualisation: The Danger of School Performance Data.” *Pedagogy, Culture & Society* 26 (2): 233–248. doi:10.1080/14681366.2017.1380073.

²⁶ Pinkerton, Laura R. 2017. “How Gaming in the Classroom Prepares Children for Life in a Surveillance State.” *The Conversation*, May 13. <https://theconversation.com/how-gaming-in-the-classroom-prepares-children-for-life-in-a-surveillance-state-77287>.

These technological advancements over time introduced E-learning analytics and school management platforms for behaviour tracking and management like ClassDojo.²⁷ They use adaptive learning technologies that record students' key-strokes, answers and response times²⁸ and data-driven decision-making tools for teachers.²⁹ This shifted humane involvement of teachers and parents to some extent to involvement with the data garnered by these platforms of the child *only*. Williamson defines the use of dataveillance in school space as a “socio-technical surveillant assemblage of human and non-human tasks including future risk-thinking, algorithmic calculation, machine learning predictivity and automated pre-emption, as a means to knowing and managing social behaviour”.³⁰ The potency of surveillant practices through more sophisticated and invasive apparatuses has changed the characteristic and the use of the school space.

This shift in the nature of surveillance from a single vantage point to multiple modes and points of surveillance resembles the post-panopticon framework of Deleuze. The Deleuzian framework is used later in the chapter to show how the power dynamics has intensified in the school setup and how it impacts the microcosm of the school-the classroom.

2.2 Diving Deeper into dataveillance schools

Over the course of this section, we shall seek to unfold the dynamics of dataveillance schools to understand these key questions: What kind of information is now collected? who has access to it and who considers it of their interest?

2.2.1 Datafication: The transformative potential of data

The change in the nature of this information collected, paves the path to understanding the nature of data collected and the necessity of it. The overall datafication is happening in childhood both at home and in school. The key characteristic of which is the immediacy by which such generation, collection and measurement of the childhood is taking place through data.³¹ ‘Datafication’ is understood here as the rendering of myriad forms of information about learning into “machine-readable digital data, which can then be subjected to sophisticated forms of ‘processing, calculation, analysis, interpretation, visualisation and circulation.”³² The practice of acquiring the data, the use and reuse of it is made systemic, like surveillance in school space, through a routinized operation consisting of a manifold of

²⁷See for E.G, Supranote 21,

²⁸See for E.G, F. Boninger and A. Molnar, Learning to be Watched: Surveillance Culture at School – The Eighteenth Annual Report on Schoolhouse Commercializing Trends, 2014–2015. Boulder, CO: National Education Policy Centre, (2016)

²⁹ See for E.G, J. Jarke and A. Breiter, Datafying Education: How Digital Assessment Practices Reconfigure the Organisation of Learning, Paper presented at the Soziologie der Bewertung Workshop, Bremen, December 10–11 (2015) and See Johnson, Bruce, Murray Oswald, and Kym Adey. “Discipline in South Australian Primary Schools.” *Educational Studies* 19 (3): 289–305. doi:10.1080/0305569930190305. (1993)

³⁰Supranote 4, at 55

³¹G. Mascheroni, Researching datafied children as data citizens, *Journal of Children and Media*, 12:4, 517-523, DOI: 10.1080/17482798.2018.1521677, (2018), at 518

³²B. Williamson, *Big data in education : The digital future of learning, policy and practice*. (2017), at xv

digital devices and systems.³³ What datafication has essentially done is to augment conventional surveillance and supplant it³⁴ with the *systemic methods* of surveillance which go beyond the scope of the tangible and the visible sites of traditional surveillance techniques.

The datafication, is intentional, purposeful and it is systematically sustained. It is essentially datafication of surveillance that have been mobilized into making unquantifiable properties of human beings like people's behaviours, sentiments, thoughts and feelings seemingly intelligible by being continuously tracked and datafied.³⁵

2.2.2 Towards dataveillance schools

2.2.2.1 The datafied student

The datafication, leads to the creation of the datafied student, the sole subject of surveillance and subsequently datafication in a dataveillance school.

Datafied student is created out of the data collected from the learning platforms and their analysis, which creates what is called the 'metadata' of each student. So, what is metadata? Metadata is nothing but piles of code with each being value ridden, are multivalent and are also multi-interpretable texts.³⁶ Simply put each child is subject to various algorithms or interpretation depending on the way the system is administered to find out various aspects of the child. This may need to be analysed, known or even disseminated. A database of the child is generated out of a collection of all the analytics and algorithms. The data duly analysed, profiled and sorted leads to the creation of a new *data personae*.³⁷ The notions of identity and entity of the student gets enmeshed with the creation of the new *data personae*. This could raise concerns both from the perspective of identity of the child and privacy to build this identity, in a formative space like the school. In some sense we could say as Raley argues that the dataveillance is a form of continuous surveillance through the use of (meta)data.³⁸

This partly answers the question, to the nature of the information collected by the dataveillance schools.

2.2.2.2 Processes and Functioning

³³ Juliane Jarke & Andreas Breiter (2019) Editorial: the datafication of education, *Learning, Media and Technology*, 44:1, 1-6, DOI: 10.1080/17439884.2019.1573833, at Page 1

³⁴ Clarke, Roger. *Dataveillance - 15 Years On*, n.d., (2003) 6.

³⁵ J. van Dijck, *Datafication, Dataism and Dataveillance: Big Data between Scientific Paradigm and Ideology.* *Surveillance & Society* 12, no. 2 (May 9, 2014): 197–208. <https://doi.org/10.24908/ss.v12i2.4776>, (2014) at 202

³⁶ *Id.*, at 202

³⁷ *Supranote* 34

³⁸ R. Raley, *Dataveillance and Countervailance*. In: *'Raw Data' is an Oxymoron*, ed. L. Gitelman, 121-146. Cambridge, MA: MIT Press. (2013), at 129-130

The metadata created is analysed by the platform analytics and feeds back into the system creating another heap of meta data. The reintegration of the analysed data into the education system is the sustenance of the dataveillance practice. It is the feeding back of the system that aims at behavioural manipulation for greater control of the student. Lyon elucidates that any dataveillance practice would have these key features of: (i) real-time tracking and monitoring and (ii) construction of computational models and classification of social activities for (iii) social sorting and (iv) pre-emptive practices like 'predictive policing'.³⁹ How it differs from other forms of purposeful surveillance is located in the practice of "continuous tracking of meta-data for unstated present purposes" (emphasis added).⁴⁰ First, there is an identification of the student. Identification refers to recognition of an individual's identity through the analysis of an object of that individual's feature, like name or date of birth.⁴¹ Tracking refers to "the possibility of tracing, or chasing, an object, or a subject, once each of them has been identified."⁴² Analytical intervention refers to the "use of analytics as a method of organizing the information collected into usable knowledge-this results from identification and tracking."⁴³ Analytics is a process of searching for patterns through the analysis of raw data. The real-time tracking and monitoring create a perpetual sense of surveillance which is not limited to the six-hour school period. The analysis is a more complex and detailed kind of profiling of a child. The metadata generated out of the monitoring and tracking is further classified for use in other activities that may go beyond the school realm and are often for unstated purposes like marketing. The sorting and profiling are to trace the child's trajectory and have data points of reference (literally) for identifying 'at risk' children.⁴⁴ Profiling has a definite purpose of first- to identify children at risk and then intervene adequately with an aim to shape their life.⁴⁵ Each phase of monitoring, analysis and tracking, has a range of detailed actions that systemically and minutely record, identify and track, that leads to the outcome of analytic intervention and behavioural manipulation⁴⁶ for all students in dataveillance schools.

To understand what happens to the data collected and its flow within the system of the school, a closer look is taken into the learning analytics platform called the 'ClassDojo'.

³⁹D. Lyon, Surveillance, Snowden, and Big Data: Capacities, Consequences, Critique, *Big Data & Society* 1, no. 2 (July 10, 2014): 205395171454186. <https://doi.org/10.1177/2053951714541861>, (2014) at 4-7

⁴⁰J. van Dijck, Jose. "Datafication, Dataism and Dataveillance: Big Data between Scientific Paradigm and Ideology." *Surveillance & Society* 12, no. 2 (May 9, 2014): 197–208. <https://doi.org/10.24908/ss.v12i2.4776>, (2014) at 205

⁴¹Supranote 24, at 250

⁴²S. D. Esposti, When big data meets dataveillance: The hidden side of analytics. *Surveillance & Society* 12(2): 209-225., (2014) at 211

⁴³Supranote 24, at 250

⁴⁴P.A Bernal, PhD Thesis "Do deficiencies in data privacy threaten our autonomy and if so, can informational privacy rights meet this threat?", London School of Economics and Political Science, Department of Law, September 2011, at 152

⁴⁵Supranote 4, at 55

⁴⁶Supranote 24, Page 248

2.2.3 The Case of 'ClassDojo'

ClassDojo is a learning analytics and classroom management platform designed for use in schools and classrooms by teachers, school administrators, students and parents. It was first launched as a behaviour tracking and feedback tool; and quickly evolved to function with a much broader purpose and scope. It incorporates a prominent gamified behaviour shaping function providing school communities with a centralized digital network in which access to the interaction between members of the school community takes place.⁴⁷

ClassDojo works according to the logic of behaviourism. It induces a user-friendly participatory model with a positive and negative feedback mechanism. It sends weekly updates to parents on the basis of the child's progress made and not made. All data points gathered over the course of the child's endeavour in school are stored for an unstated period of time in the database.⁴⁸ The points gained through task-based activities on ClassDojo can be further used in the real classroom space for extra points or grades. It also uses points to create incentives for conduct and effect. The idea is that the public display of performance may serve as a behaviour controlling mechanism.⁴⁹

The purpose and objective as stated by the EdTech companies are:⁵⁰

- Adaptive learning systems that enable materials to be tailored to each student's individual needs through automated real-time analysis.
- New forms of data-analytics that are able to harvest data from students' actions, learn from them and generate predictions of individual students' probable future performances.
- Automated personal tutoring software that monitors students passively and gives constant real-time support and shapes the pedagogic experiences.

The primary task of these platforms is customisation of education for students through achieving learning related behavioural change. However, the learner centric point of view due to increased datafication is becoming more of data-centric. The data gathered by these platforms can be classified into-the learning analytics data and the personal/emotional analytics data. The learning analytics track educational tasks and activities in real-time and the emotional analytics track emotional learning during the performance of tasks.⁵¹ These are explained in detail as follows.

A. Learning Analytics

⁴⁷Supranote 21, at 36

⁴⁸Id, at 40

⁴⁹Id, at 41

⁵⁰Supranote 4, at 56

⁵¹D Lupton and B. Williamson, *The datafied child: The dataveillance of children and implications for their rights* DUKnew media & society, Vol. 19(5) 780–794 © The Author(s) 2017 Reprints and permissions: sagepub.co.uk/journalsPermissions.nav <http://dx.doi.org/10.1177/1774/6114641444841861668866328> journals.sagepub.com/home/nms, pp 790-791, (2017), at 785

Learning analytics (LA) has been defined by the International Conference on Learning Analytics as “the measurement, collection, analysis and reporting of data about learners and their contexts, for purposes of understanding and optimising learning and the environments in which it occurs.”⁵² The field of learning analytics is concerned with developing an evolving learner model that would incorporate data beyond those that measure cognitive abilities, including psychometric profiles and indicators of student interactions during learning activities. It is also able to capture data on student’s mindset, learning media genre preference and see their level of perseverance and persistence to create predictive learner models.⁵³

B. Emotional and Personal Analytics

The other classified data are of personal analytics and emotional analytics:

Personal analytics in dataveillance schools is of wearable technology to compare health and other physical activities.⁵⁴

Emotional Analytics is the identification and measurement of psychological indicators through “machine emotional intelligence systems that mine children’s emotions and with interested affordance to continuously measure facial and voice expression with tablets and smartphones, and monitor learners’ state of emotion on a real-time basis”.⁵⁵

For the scope of brevity, as mentioned previously, the thesis shall only focus on learning analytics and their use of emotional indicators.

2.2.4 Different Actors

A closer look into one of the learning platforms like ClassDojo shows the various actions that are undertaken to maintain the dataveillance in the school space. While answering the question of who has access to the flow of this data beyond the physical classroom, we observed the involvement of various actors.

The example also showed that there is a distinction between processing within school for learning purposes and the use of data by EdTech companies for other (un)stated purposes.⁵⁶ In the latter case, a direct relationship between the child and the company is created that can have far reaching consequences on children. It is interesting to note how in examination of one of these learning platforms, findings by Norwegian Consumer illustrated that certain norms and values are built into the technical design and in guiding the interaction with the child.⁵⁷ This raises a question on the

⁵² <https://tekri.athabascau.ca/analytics/>

⁵³ Pea R Learning analytics 2014 cited by Williamson, B, *Supranote 4*, at 56

⁵⁴ *Supranote 4*, at 60

⁵⁵ R. Bart and B.A Rivers, Measuring and Understanding Learner Emotions: Evidence and Prospects, Learning Analytics Community Exchange, Learning Analytics Review 1, 10th December 2014, (2014), at 15

⁵⁶ <https://jenpersson.com/consent-models-fails-school-children-so-lets-fix-it/>, 23rd November 2019

⁵⁷ *Supranote 17*, at 10

pedagogical efficiency, which is the stated objective, being value ridden. As Selena, argues in her reflections on dataveillance schools in Australia, the EdTech companies in advocating the efficacy of these platforms may not even have the best interests of the students in mind.⁵⁸

This layout shows the flow of information, which now includes the EdTech companies in dataveillance schools, and specifically their involvement even in the microcosm of the school space-the classroom.

A child is put to a school, where the primary obligation of the School and the State is to maintain the standards of education and to achieve the aims of education. The primary care givers share an equal responsibility with the School, while the Schools hold an additional accountability to the parents. However, the dataveillance schools show varying actors who now have access, control and ability to modify or use this data who can and may have competing interests over the purpose, objective and use of the data. How this interest is negotiated among the (i) Schools, the (ii) State parties and the (iii) Businesses who own these platforms and the (iv) parents must be studied from a child rights framework to ensure that they too keep the best interests of the child at its core. As the Committee notes that, "...the best interests of the child – once assessed and determined – might conflict with other interests or rights (e.g. of other children, the public, parents, etc.)...bearing in mind that the right of the child to have his or her best interests taken as a primary consideration means that the child's interests have high priority and not just one of several considerations. Therefore, a larger weight must be attached to what serves the child best."⁵⁹

From a child rights based framework, the State has the primary obligation to ensure that the school space is an important forum to facilitate the child in exercising these rights according to their evolving capacities. And that the 'Aims of Education' enshrined in Article 29 of the CRC, are achieved by upholding the child's rights, primarily the right to privacy among others. Companies negotiate with schools to argue that data privacy arguments hinder their ability to work. There is even assurance that the school can have complete ownership of data.⁶⁰ How this impacts privacy of children, will be discussed at length in the following chapters. The takeaway is that there is a need for greater attention for protecting young people's data in schools to reform the commercially oriented nature of dataveillance schools.⁶¹

2.3 The Deleuzian lens

To capture the complexity of the dataveillance schools, we have to critically evaluate the practice itself. The Deleuzian framework is used to throw light on the change in power and the enmeshing of the identity and entity of the child (See section 2.2.2.1). The Deleuzian approach highlights the mobile and invisible nature of this exercise of control and the way it depends on involuntary participation of

⁵⁸Supranote 24, at 250

⁵⁹Para 39, UN Committee on the Rights of the Child (CRC), *General comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration (art. 3, para. 1)*, 29 May 2013, CRC /C/GC/14, available at: <https://www.refworld.org/docid/51a84b5e4.html> [accessed 20 June 2020]

⁶⁰ F. Macgilchrist, *Cruel optimism in Edtech: when the digital data practices of educational technology providers inadvertently hinder educational equity*, *Learning, Media and Technology*, 44:1, 77-86, DOI: 10.1080/17439884.2018.1556217, <https://doi.org/10.1080/17439884.2018.1556217>, (2019) at 81-82

⁶¹*Id*, at 83

individuals subjects (the children).⁶² It is this mobile and immaterial form of surveillance where power structures are more dispersed and involves heterogeneous actors which constitute the rhizomatic surveillance.⁶³

Firstly, the dataveillance schools are reflections of a control society in this post-panoptic framework. Surveillance economy is primarily based on the back bone of cooperation of power towards one identified subject. The interest of the private in the dataveillance need not be in sync with the interests of students. EdTech companies may float the idea that using metadata is for the benefit of learning outcomes. States, too may have a vested interest. As Williamson argues that dataveillance schools are being formed as prototype laboratory sites for creating mode of Governance that values compliance. The public-private partnership between EdTech companies and the State for data processing is a threat to the introduction of any kind of regulation on data processing.⁶⁴ The gaze of the State to know and control citizens can become a predominant theme by normalizing the use of surveillance technologies to monitor each and every aspect of the child.⁶⁵

Secondly, analytics platforms achieve a constant and seamless collection of millions of data points from students and translate them into statistical models without direct awareness of the child.⁶⁶ This creates the possibility where children are not looked at as active participants in learning in classroom but mere data assemblages put together for surveillance purposes in the *designed* school space.⁶⁷ This leads to the creation of the data personae through metadata which Deleuze (1992) explains is the process by which the individuals become *dividuals* and form bank of data. The data-double created is no more an identifier of the individual but of the analysed data.⁶⁸ *Dividuals* are simpler to control, and are easily accessible, observable, manageable and (*made*) predictable (emphasis added).⁶⁹ Deleuze further explains how this *dividual* acts back on the data to govern the change of the subject towards an expected behaviour. That is the data tells the student who they are and what they should become.⁷⁰ Deleuze looks at this going beyond the physical confinement of schools as symptomatic of control not discipline. Students are seen as no more than these *dividuals* or data-doubles, more controllable than before.

⁶²Supranote 39, at 7

⁶³Supranote 24, at 242

⁶⁴Supranote 40, at 203

⁶⁵Supranote 4, at 63

⁶⁶Supranote 4, at 57

⁶⁷Supranote 51, at 790-791

⁶⁸Deleuze, G. (1992) 'Postscript on the Societies of Control.' *October* 59: 3-7

⁶⁹B. Simon, The Return of Panopticism: Supervision, Subjection and the New Surveillance, in *Surveillance & Society*, 2005, 3(1): 1-20 [http://www.surveillance-and-society.org/articles3\(1\)/return.pdf](http://www.surveillance-and-society.org/articles3(1)/return.pdf), at 15

⁷⁰Supranote 39, at 7

The application of this Deleuzian lens to dataveillance schools explains:⁷¹

1. Increased connectivity from schools to numerous external agents allowed involvement of a range of heterogeneous actors and continuous tracking occurred in real-time from diverse remote locations.
2. Increased connectivity implies more than one actor, with control.
3. Sustenance of the gaze of the authorities in school in physical as well as virtual enclosure.
4. Creation of more controllable subjects, like the *dividuals* for more invasive data driven control of the subjects.

2.4 Preliminary conclusion

The important parts of education in school, reside in the processes of education. Therefore, it is essential that the processes and functioning of dataveillance schools adequately address the rights of the child. In this Chapter, a part of the research question was sought to be addressed. An exploration into the functioning and processing of dataveillance schools is key to highlight how these processes may affect the pedagogical aims that E-learning analytics and management platforms state to achieve.

However, first the datafication of the pedagogical efficacy must answer the questions of what is the nature of the data? How does it flow? And who has control over it? These questions were answered in order to explain the relationship between dataveillance and the subsequent privacy issues that they raise. The datafied student created is more controllable and by various actors, non-essential in a school space. The Deleuzian framework shows that the children are disassembled into an array of databases and then constantly recomposed from their data traces into numericized data doubles and visualizations⁷² for greater control than administering discipline. This tips the balance of care and control to control. This datafication leading to creation of the datafied student raises concerns of content and changing relations *in* education. What possible conceptualisation of privacy could protect the rights in education for dataveillance schools? The next chapter shall try to unpack the elements of the right to privacy that constitute the child's right to privacy in a school.

⁷¹Supranote 24, at 245-246

⁷²Supranote 4, at 64

Chapter 3: Privacy in School Space

3.1 Introduction

The underlying theme of dataveillance schools is to maintain the authoritarian surveillance practice, but raise issues in relation to privacy of children for/in learning. To ensure protection of privacy for/in learning and procedural rights for participating adequately in the dataveillance practice-students need to know what is being looked at and what is the dataveillance practice geared towards.

With perceptions of privacy based primarily on adults' perspective, the concerns specific to children have been largely overlooked. Moreover, the subordinate position of children in dataveillance schools echoes the perception of children being perennially dependent on any adult in a private sphere. What would this mean in a public sphere like schools? It is certain that processes in school space raise equal claims to privacy, but what does this 'privacy in public'⁷³ entail for children?

This chapter is an exploration into the concept of privacy to establish a reading of the right to privacy that is informed by the specificities of privacy for children in a school space. We discuss existing regional instruments and domestic legal frameworks, particularly the European and American law, for protecting children's data in dataveillance schools. The limitations of the existing legal framework in protecting privacy, identified in the analysis is an opportunity to provide a holistic approach to the study of privacy for children in school space. The aim of delving deeper into privacy as a concept is to help formulate a reconceptualised notion of privacy for children in this Information Age. This shall make clear what privacy claims are being proposed in relation to their violation in this thesis. This renewed theorisation of privacy is translated into a right to privacy. The reconceptualised right to privacy shall be able to address the question-*what exactly* is there a violation of in this right to privacy claimed in dataveillance schools.

3.2 Theorising Privacy for Children

Privacy, has been variously theorised in discourse over the course of time. A theory of privacy that holistically approaches children's right to privacy in dataveillance schools is a new endeavour in this field. What is essential to building a robust theory for privacy has been elucidated by Cohen as that which "requires an understanding of the *processes by which selfhood comes into being* and is negotiated through the *contexts over time*" (emphasis added).⁷⁴ This characterization is pertinent because conception of a child's privacy would significantly differ for an adult due to the stage of development that a child is in. Therefore, the process of 'being' requires 'processes' that facilitate that development and further negotiates through 'contexts over time' like-from home to school.

⁷³H. Nissenbaum, Protecting Privacy in an Information Age: The Problem of Privacy in Public. *Law and Philosophy* 17, 559–596 (1998). <https://doi-org.ezproxy.leidenuniv.nl:2443/10.1023/A:1006184504201>, at 559

⁷⁴ J. E. Cohen, Privacy, Autonomy, And Information, Configuring The Networked Self, Yale University Press. (2012), <https://www.jstor.org/stable/J.Ct5vm24d.8>, Accessed 4th May 2020, at 114

Scholars have looked at privacy both from an elemental perspective⁷⁵ as well as from a contextual perspective.⁷⁶ Scholars like Priscilla Regan, Colin Bennet argue that privacy protection promotes equality. The traditional method of conceptualisation of privacy is by 'per genus et differentiation'- a common set of necessary and sufficient elements that single out privacy as unique from other conceptions.

The pioneering privacy advocate Solove has a different take. He argues that privacy serves multiple good both for the individual and the collective and is intimately bound in everyday experience.⁷⁷ With no one essence of value, privacy for him is to be understood within a particular practice.⁷⁸ What is pertinent to our discussion is that he looks at privacy as a common pool of similar characteristics.⁷⁹ It is more like an umbrella term that refers to wide and disparate group of related things.⁸⁰ This contextual approach to privacy, helps nail down privacy to the context of relevance to the thesis, i.e. what does it mean in terms of the processes in school space.

This reconceptualised privacy requires delving into the specificities of the practice, i.e. the 'context and contingency'.⁸¹ Nissenbaum, explicating Solove's thesis further adds to the value dimension of the integrity of the 'space' or the environment. She highlights the importance of contextual integrity-privacy,⁸² which is about rules and expectations between the subject and the environment.

Borrowing from Solove and Nissenbaum, it is gathered that 'privacy for children in school space' (the "Privacy for Children") shall be context specific and have a value of integrity attached to it. The value-ridden conceptualization of Privacy for Children shall further be based on the established expectations between the subject and the environment of the subject. The child in a school space has an expectation of this privacy in the environment to enable him/her to evolve as a person. Moreover, the integrity of the school environment must also value the uniqueness of the child and the teacher-student relationship. The public-school space is where the student is evolving while also being dependent on the adults and the environment itself. Therefore, it is the environment that shall facilitate the development of the child in lieu of the child's evolving capacities.

⁷⁵J. Q. Whitman, The Two Western Cultures Of Privacy: Dignity Versus Liberty." *The Yale Law Journal*, N.D., 72, at 1206

⁷⁶ D. J. Solove, Conceptualizing Privacy, *California Law Review*, Vol. 90, No. 4 (Jul., 2002), Pp. 1087-1155
Published By: California Law Review, Inc., [URL:https://www.jstor.org/stable/3481326](https://www.jstor.org/stable/3481326), Accessed On 14th May 2020, at 1144-1146

⁷⁷*Id.*, at 1095-96

⁷⁸*Id.*, at 1144-1146

⁷⁹*Id.*, at 1088

⁸⁰D. J. Solove, *Understanding Privacy*, Harvard University Press, Cambridge, Massachusetts, London, England (2008), at 20-21, 28-29

⁸¹*Supranote 76*, At 1127

⁸²H.F. Nissenbaum, H. F., *Privacy In Context : Technology, Policy, And The Integrity Of Social Life*, Stanford, Calif., Stanford Law Books. Pp 82-83, (2010), at 82

Anita Allen while stating the role of 'accessibility to a person' in privacy states that "the degree of inaccessibility is an important necessary condition for the apt application of privacy".⁸³ Dataveillance schools extend this accessibility to various actors both in the process and in its outcome. Furthermore, the process of learning of a child is constantly under scrutiny and monitoring by the teacher and parents. The creation of metadata, as discussed in the previous chapter shows that the *dividual* of the child is by default, subject to more control. Moreover, the feeding of the data back into the system for pedagogical efficacy only aims to alter behaviour to identify 'at risk' students, where this behaviour is ideally the 'private realm' of learning for children.

Therefore, the Privacy for Children, shall read as- *an exclusive access to oneself and one's data acquired in the process of learning and learning related behaviours associated with emotional changes in a school space, that respect the dignity of the learner (student) while retaining the integrity of the learning environment by limiting boundaries of such accessibility to others actors.*

3.3 Understanding Privacy as a Right

The development in the discourse of privacy also led to the development of its conceptualization as a Right. From the 1970s, scholars came to emphasize the autonomy of the individual and moved away from the aspect of 'privacy as a property'.⁸⁴ This individualization of privacy separated matters from 'private life' to privacy as an individual right. The scope of privacy became inclusive of person's social and physical identity. Therefore, privacy was as much a right in the private realm as it was of remaining private in a public sphere.

The four most common components of right to privacy are:

- Informational privacy- Involves the individual's ability to avoid disclosure of hidden personal matters. It protects against the unauthorized collection, storage, use, and disclosure of personal information in ways that would embarrass or otherwise compromise with the individual concerned.⁸⁵
- Physical privacy- It is the right to seclusion and solitude, and involves respect for a person's physical integrity, home, and correspondence, and the respect to one's surrounding environment.⁸⁶
- Decisional privacy-Also called substantive privacy or autonomy privacy is about respect for personhood, with personhood being defined in terms of individual's capacity to choose⁸⁷ and evolve into autonomous beings.

⁸³A.L Allen, *Uneasy Access: Privacy For Women In A Free Society* 7 (1988), at 10

⁸⁴S. Keulen and R. Kroeze, *Privacy From A Historical Perspective*, In *The Handbook Of Privacy Studies Book Subtitle: An Interdisciplinary Introduction*, Ed. By Bart Van Der Sloot And Aviva De Groot, Amsterdam University Press , (2018), at 36, n. 63

⁸⁵ Benjamin Shmueli& Ayelet Blecher---Prigat, "Privacy For Children," 2011, at 28, n. 23

⁸⁶*Id*, at n. 24

⁸⁷*Supranote 76*, at 1117

- Intellectual Privacy- Postulated by Richards, freedom of thought, thinking and expression is essential to our vital liberties and requires development of ideas and beliefs which take place in solitary contemplation or private spaces of collaboration.⁸⁸

Whitman shows that eventually there formed two predominant schools of privacy in the rights discourse-the Continental privacy law and the American privacy law.⁸⁹ Continental privacy protections are at their core a form of protection of a right to respect and personal dignity.⁹⁰ The core continental privacy rights are rights to one's image, name and reputation and what Germans call the right to informational self-determination.⁹¹ American privacy law is imbued with the values of liberty while European law is framed within the orbit of dignity.⁹²

These two distinct legal discourses also set forth different State obligations to fulfil these rights. First, it must be established that for privacy to be a positive right means that there is freedom to do something like develop, communicate, and develop ones' personality to the fullest.⁹³ For it to be a negative right means that no other legal entity can violate this right, by any kind of invasion or intrusion. Then, privacy as a positive obligation is when States should actively use their power to protect privacy or facilitate personal development of its citizens.⁹⁴ Privacy as a negative obligation is when the states shall refrain from any activity that shall impede the development of the person.⁹⁵ While the EU tradition emphasized on the negative obligation of the State, the American law focused on the positive obligation.

The influx of technology had significant influence on the privacy discourse, and data protection as a separate right. Two different frameworks emerged creating a division even within the EU law tradition. The following section is dedicated to understand this development in brief.

3.3.1 The Two-Pronged Fork: Data Protection vs Privacy

What is pertinent to the discussions of dataveillance schools and privacy is that dataveillance schools raise a peculiar issue of data protection rights and privacy rights simultaneously.

⁸⁸N.M. Richards, Intellectual Privacy, Texas Law Review, Vol. 87, No. 2, December 2008, P. 387-446. Heinonline, (2008), at 389

⁸⁹Supranote 75, at 1161

⁹⁰Id

⁹¹Id

⁹²Id, at 1163

⁹³B. Van Der Sloot, Privacy From A Legal Perspective, The Handbook Of Privacy Studies: An Interdisciplinary Introduction, Edited By Bart Van Der Sloot, Aviva De Groot, Amsterdam University Press, <https://www.jstor.org/stable/j.ctvcxmp.6>, Accessed On 14th May 2020, (2018), at 82

⁹⁴Id

⁹⁵Supranote 75, at 7

An independent right to data protection emerged in the European Union (the 'EU') and sits alongside the right to privacy.⁹⁶ The Charter of Fundamental Rights of EU ("the Charter") contains a right to protection of personal data in Article 8, alongside the right to respect for private life in Article 7.⁹⁷ The need arose when more and more data started getting breached in terms of privacy. The coming of the General Data Protection Regulations (the "GDPR") was a huge step in that direction. GDPR separated the right to data protection from data privacy. Data protection had an increased scope with respect to privacy violations of data. Article 1(2) of General Data Protection Regulations (the "GDPR") clearly affirms that the regulation protects fundamental rights and freedoms of natural persons and *in particular* their right to the protection of personal data.⁹⁸ Data protection rights focused on protection of personal data. Sloot describes personal data as inclusive of public and non-sensitive data.⁹⁹ Identifiability of data was a key aspect of personal data. But under GDPR data which is not identifying anyone but is likely to do so in future can still be considered personal data.¹⁰⁰ However, it must also be noted that in EU law neither the right to privacy nor the right to data protection as contained in the Charter, directly creates obligations for private parties, i.e. the companies or corporates.¹⁰¹ As GDPR applies when: 1) Activity must involve personal data, (2) the data is processed and (3) the data controller is the person or organization that decided that data should be processed and how.¹⁰² The GDPR is seen as more fundamental as it is the direct implementation of Article 8 of the European Charter of Fundamental Rights (the "Charter") and has direct effect.¹⁰³

The European Court of Human Rights (the "ECtHR") as a separate human rights instrument continues to read data protection in Article 8, depending on nature of data, context and the way it was used.¹⁰⁴ According to ECtHR, as Sloot claims, what distinguishes the right to privacy, under the interpretation of ECtHR from other rights under the Convention is that in principle it only provides protection to individual interests. Cases that do not regard such matters, are rejected under Article 8.¹⁰⁵ Article 8 contains four elements of private life, family life, home and correspondence. Personal development, education and even right to data protection is to be read under private life.¹⁰⁶ Interference requires

⁹⁶ C. Fried, C. Privacy. *Yale Law Journal*, 77(3), 475-493. (1968), at 475

⁹⁷ *Supranote 75*, at Page 3

⁹⁸ *Supranote 75*, at 4

⁹⁹ *Supranote 93*, at 83

¹⁰⁰ *Id*, at 85

¹⁰¹ J. Kokott and C. Sobotta. "The Distinction Between Privacy And Data Protection In The Jurisprudence Of The CJEU And The Ecthr." *International Data Privacy Law* 3, No. 4 (November 1, 2013): 222–28. <https://doi.org/10.1093/ldpl/lpt017>, at 225, n. 32

¹⁰² *Supranote 93*, at 105

¹⁰³ *Id*, at 86

¹⁰⁴ *Supranote 75*, at 5

¹⁰⁵ *Supranote 93*, at 92

¹⁰⁶ *Id*, at 97

justification under Article 8 ECtHR-to be lawful, have legitimate aims and must be necessary in a democratic society to achieve those aims.¹⁰⁷ The M.M case of ECtHR on privacy stated that limitations to data protection must be clearly defined, necessary and proportionate.¹⁰⁸

On the other hand, the American law continues to read data protection into privacy laws.

This dichotomous reading of data-protection and privacy, can raise concerns of whether dataveillance schools cause violation of data protection or privacy? Do children need a separate right to data protection or does this fall within the privacy framework?

As De Hert and Gutwirth argue that the establishment of data protection in the Charter added emphasis to the fundamental rights dimension of the Directive.¹⁰⁹ Other authors have argued that data protection is a practical legal issue whereas privacy is an issue of civil liberties and human rights.¹¹⁰ De Hert and Gutwirth have described both fundamental rights as opposite rights: the right to data protection is calling for transparency rather than imposing normative content while the fundamental right to respect for privacy is providing opacity tools and should protect those aspects of an individual life that embody the conditions of his or her privacy and autonomy.¹¹¹ They further argue that by default, privacy is an opacity tool and data protection a transparency tool.¹¹²

A formulation exclusively from the data protection right perspective can fail to capture the need for privacy, which we defined as the *'limited access to oneself and one's learning process and behaviour'* (See Section 3.2). While the source is definitely that of the metadata, the resultant manifestation is greater than the concerns of protection of the data itself. To understand what obligations the reconceptualised right to privacy for children in dataveillance schools shall have, we must first look into the existing domestic laws and case laws.

3.3.2 Existing Legislation on the Right to Privacy

To understand the existing legislation on the right to protection of children from data processing in school space, case studies from domestic legislation of the United States of America, a GDPR compliance case from Sweden and a brief on COE's modernised Convention 108+ have been considered.

¹⁰⁷ European Court of Human Rights Case, ECtHR, *M.M. v UK* App no. 24029/07 (13 November 2012), at para. 188.

¹⁰⁸As cited by CJEU, Case 136/79 National Panasonic V Commission [1980] ECR 2033, Paras 17 Et Seq., And Case C-62/90 Commission V Germany [1992] ECR I-2575, at Para. 23

¹⁰⁹Els J. Kindt, *Privacy and Data Protection Issues of Biometric Applications: A Comparative Legal Analysis*. Dordrecht: Springer Netherlands, <https://doi.org/10.1007/978-94-007-7522-0>, (2013), at 234

¹¹⁰*Id*, at 234

¹¹¹*Id*, at 237

¹¹² S. Gutwirth And P. De Hert, Chapter: Regulating Profiling In A Democratic Constitutional State, Chapter · January 2008 DOI: 10.1007/978-1-4020-6914-7_14, at 271

3.3.2.1 Case Study 1: FERPA

Family Educational Rights and Privacy Act of 1974 (FERPA) requires educational institutions to grant students or parents access to student records, establishes procedures to challenge and correct information and limits disclosure to third parties. In FERPA, the parents have access to children's school record, even if their children object and provide complete control over disclosure of these records till the age of 19 years.¹¹³ FERPA seeks to prevent inaccurate or inappropriate information about students from being incorporated into decision which are pertinent to pedagogical, academic and employment aspects of the child.¹¹⁴

The law allows 'legitimate education interests' to be applied as for the school official as an exception. This means that it is possible to equate educational purpose with actions performed by educators or with school direction. FERPA was introduced to remedy the system through unauthorized inappropriate release of personal data.

Other Acts like California's Student Online Personal Information Protection Act ("SOPIPA") and the related Student Use Privacy in Education Rights Act "SUPER Act," regulates data operators directly and prohibits profiling students for other than 'K-12 purposes'.¹¹⁵

3.3.2.2 Case Study: Swedish Data Protection Authority

In one of the earliest cases against surveillance technologies there was a case by the Swedish Data Protection Authority's (the "SDPA") decision on facial recognition. The Authority found that:

"Processing of CCTV camera data was unnecessary, invasive and unlawful by evoking:

1. A.5 of GDPR by processing student's personal data in the manner that is more intrusive as regards personal integrity and encompasses more personal data than is necessary for the specified purpose of monitoring and attendance.
2. Article 9 by having processed special categories of personal data (biometric) without having a valid derogation from the prohibition or the processing of special categories of personal data, and
3. Article 35 and Article 36 by failing to fulfil the requirements for an impact assessment and failing to carry out prior consultations".¹¹⁶

¹¹³Supranote 85, at 20

¹¹⁴Zeide, Elana, The Limits of Education Purpose Limitations. University Of Miami Law Review 71 (n.d.): 34, (2017), at 497

¹¹⁵/d, at 512, K-12 literally means kindergarten to 12th grade and is commonly referred to the use of educational technology in US Grades system

¹¹⁶ Swedish Data Protection Authority Decision On: 20.08.2019, Reference Number: DI-2019-2221, Skellefteå, Municipality, Secondary Education Board, Skellefteå Kommun, Gymnasienämnden, Supervision Pursuant To The

SDPA has noted that if the intrusion is substantial and it entails monitoring and surveillance of an individual's personal circumstances a separate legal basis will be required.¹¹⁷ The order to determine if the infringement is non-compliant, the public authority must carry out a proportional assessment where the necessity of performing the processing is weighed against interest of data subject¹¹⁸ or the best interests of the child. When assessing infringement of an individuals' personal integrity, emphasis should be placed on the factors such as the sensitivity of the data, the nature of processing and the setting of the data subjects. The degree to which data will be disseminated and the risk of further processing for purposes other than the fact for which it was collated must also be accounted for.

This judgement accounts for protection with respect to the use of surveillance technology that collects special categories of personal data of children in an environment where they are in a position of dependence.¹¹⁹ This is the most comprehensive judgment in EU law on the role of schools towards data-protection of children in school space.

3.3.2.3 Council of Europe's Convention 108+

This Convention 108+¹²⁰, is the modernised version of Convention on the protection of individuals with regard to processing of personal data. This established a specific right to protection of processed data, like those created by algorithmic functions in E-learning platforms. The learning analytics data can be brought under the purview of the automated processing data as defined in the Convention in Article 2(b). However, the specific provision that mentions children is only with respect to the role of supervisory authorities in raising awareness with respect to protection of children's processed data in Article 15(e)(iii).

3.3.3 Limitations of the existing legal framework

The limitations of the existing framework have been chalked out to help formulate a right to privacy that adequately responds to these gaps identified.

The EU framework itself looks at data protection as different from privacy. The differentiation of data protection from privacy, invisibilizes the power imbalance in a school space. At the heart of the failure, is the concept of 'consent'. Contract between children and companies do not rest- Article 6 (b) doesn't apply because school determines the need for and the nature of processing in education.¹²¹

Processing of data that is based on what is deemed to be an unfair term under unfair contract 'Terms

General Data Protection Regulation (EU) 2016/679 – Facial Recognition Used To Monitor The Attendance Of Students, at 2(14)

¹¹⁷Id, at 5 (14)

¹¹⁸Id,at 7 (14)

¹¹⁹Id, at 10 (14)

¹²⁰ Council of Europe, Modernised Convention for the Protection of Individuals with Regard to the Processing of Personal Data, 17-18 May 2018 , ETS 108, available at: https://search.coe.int/cm/Pages/result_details.aspx?ObjectId=09000016807c65bf [accessed 6 July 2020]

¹²¹<https://Jenpersson.Com/Consent-Models-Fails-School-Children-So-Lets-Fix-It/>, 23rd November 2019

Directive' will generally not be consistent with the requirement under Article 5 (1) (a) of GDPR that requires that processing is lawful and fair.¹²² But, with respect to the school as a public space it must be noted that the scope for voluntary consent within public sphere is limited.¹²³ The GDPR believes that consent cannot constitute a legal basis for processing of operations which this supervision regards.¹²⁴ It's difficult to read learning analytics data within this framework directly while also noting that does the school have complete authority to make decisions with respect to the data collected.

On the other hand, the inherent problem with the FERPA law is that it fails to protect what it claims to. It uses 'student privacy' as access control and permits disclosures without consent of other schools, accrediting organisations, and third parties acting on behalf of the school. However, passive disclosures can take place through network and cloud computing. Data is collected in a detailed way and analysed later,¹²⁵ with no legal protection. The US law has weakened the system by having a too expansive "school official exceptions" in FERPA. It is a weak model but offers a sample to reply on what contractual agreement is permitted.¹²⁶

The Convention 108+ doesn't provide special protection to children with respect to automated data processing and neither defines in particular the learning analytics data.

3.4 Theorizing Right to Privacy for Children in School Space

Drawing from the above discussion, 'Right to privacy for children in dataveillance in schools' (the "Right to Privacy") can be enclosed with specific components that are informed by the reconceptualized theory of Privacy of Children (see section 3.2). Further, drawing from the discussions with respect to right to data protection and privacy, both obligations arising out of opacity tools and transparency tools have been incorporated into the Right to Privacy.

3.4.1 Elements of Right to Privacy

Drawing from the above formulations of privacy and its manifestation into Right to privacy, the renewed envisioning of Right to Privacy (for children in dataveillance schools), shall have the following components of privacy:

- Informational privacy is the control, access and ownership of the learning data
- Intellectual Privacy is the privacy with respect to learning and the development of cognitive ability, given the private realm to thought
- Decisional privacy/Autonomy Privacy is about the autonomy of the child. It is about the school's respect for personhood, with personhood being defined in terms of individual's capacity to choose and evolve to selfhood. For the sake of clarity, decisional privacy shall be referred to as Autonomy Privacy in the course of this thesis.

¹²²*Id*

¹²³*Supranote 116, at 4 (14)*

¹²⁴*Id*

¹²⁵*Supranote 114, at 509*

¹²⁶<https://Jenpersson.Com/Consent-Models-Fails-School-Children-So-Lets-Fix-It/>, 23rd November 2019

Informational and Intellectual Privacy are called here as procedural rights, which shall be instrumental in achieving the aims of education and what the integrity of a school or learning environment should facilitate. Autonomy privacy is what is called the substantive right. A right relevant in and by itself irrespective of school space but crucial in the school space for learning.

To begin with, let us illustrate what 'Intellectual Privacy' is. Expounded by Neil Richards, 'Intellectual Privacy' is the "need for spaces-physical, social or otherwise- to allow us to think freely, in space and time, without the legal protections, free thought becomes merely empty promises. The theory of intellectual privacy articulated allows us to imagine, test and develop ideas free from the deterring gaze or interfering actions of others."¹²⁷ As cognitive processes increasingly become mediated by computers or other devices in school space, we face the challenge of deciding what norms of privacy and confidentiality should accompany this migration of thought and speech to the electronic environment.¹²⁸ This requires a certain intellectual privacy for the process of mediation of thought and speech to remain private before it turns into publicly available material.

Second, is the aspect of Informational Privacy. This Privacy in the Information age is, as Westin argued "the claim of individual groups or institutions to determine for themselves when, how and to what extent (communication) information about them is communicated to others."¹²⁹ The question of who should be allowed to contribute to the development of one's image is complicated by the fact that technology has enabled people to create a robust personal digital history.¹³⁰ A person's personal data can be seen as part of what might be considered the 'extended person'.¹³¹ Since, learning data is more detailed and it includes aspects of personal, sensitive and meta data related to learning and of learning related behaviour, the use of behavioural characteristics and learning related data should be non-invasive to the child's right.

A redefined definition of data collected in school space could be: *Learning Analytics data is that a) which is based on the unique or distinctive biological or behavioural characteristics of students learning behaviour in schools, and (b) are processed in whole or in part by automated means and (c) allows specific use of the characteristics, in particular identifiability.*¹³²

The third component is of Autonomy Privacy. This follows from Informational Privacy as well. As Bernal explains, that if autonomy is to be taken seriously, then autonomy needs to be exercisable over

¹²⁷Richards, Neil M. "Intellectual Privacy." *Texas Law Review*, Vol. 87, No. 2, December 2008, P. 387-446. Heinonline, Page 425

¹²⁸*Id.*, at 444

¹²⁹Kindt, Els J. *Privacy and Data Protection Issues of Biometric Applications: A Comparative Legal Analysis*. Dordrecht: Springer Netherlands, 2013. <https://doi.org/10.1007/978-94-007-7522-0>, (2013) at 242, n. 630

¹³⁰S. Sorenson Protecting Children's Right to Privacy in the Digital Age: Parents as Trustees of Children's Rights. *Children's Legal Rights Journal*, vol. 36, no. 3, 156-176. HeinOnline, (2016), at 162

¹³¹*Supranote 55*, at 206

¹³² The reformulation has been borrowed from Kindt in her attempt to redefine biometric data collected in her book Kindt, See *Supranote 129*, at 149

this extended person¹³³ that is the data personae, the *dividual*. Autonomy has been defined by Raz as “an autonomous person who is a (part) author of his own life.”¹³⁴ Privacy is the protector of autonomy which makes it crucial in the digital world.¹³⁵ But, what is autonomy and why does it matter?

Firstly, autonomy allows for choices; it allows for changes to be made continually and it must allow choices to come into action in reality as well as in theory. To be autonomous, there has to be a meaningful choice, appropriately informed and an opportunity to make those choices free from coercion, restraint or excessive undue influence. This means that choices must be exercisable/available and that these choices must be meaningful too.¹³⁶

Second, autonomy is the capacity to make an independent judgment, the willingness to exercise it, and the conducive environment to act on the results of this exercise even when the judgment is not a popular one.¹³⁷ This is essential to building the identity of the child. It is important to note that individuals cannot construct identity without having the choice to *selectively* revealing information about themselves. These revelations are often neither completely voluntary nor completely involuntary.¹³⁸ But, this value of autonomy privacy doesn't stem just from its consequence of reducing the child to a *dividual* but also to protect the processes in life of child in school that require autonomy. This component shall guarantee that the cognitive achievements of the self can be kept private for one's own and not subject to data objectivity.

From a child rights perspective, the participatory rights include children's claims to decision-making rights and are close to adult human rights, such as right to freedom and expression.¹³⁹ It is crucial to look into the perception of child's vulnerabilities as a child in school space, when discussing the rights of the child. There's an inherent relationship to be balanced between the children's roles as 'beneficiaries of intervention by adults' and 'competent social agents in their own right'.¹⁴⁰ Eekelaar (1986) identified three categories of interests that a child may claim- 1. Basic (physical, emotional and intellectual), 2. Development (equal possibilities to maximize available resources), 3. Autonomy (freedom to choose lifestyle and enter into social relations). All these interests interact with each other.

¹³³Supranote 44, at 206

¹³⁴ J. Raz, *The Morality of Freedom*, Oxford, Clarendon. (1986), at 369

¹³⁵Supranote 44, at 21

¹³⁶Supranote 44, at 29

¹³⁷ R. Gavison, *Privacy And The Limits Of Law*, *The Yale Law Journal*, Vol. 89, No. 3 (Jan., 1980), Pp. 421-471
Published By: The Yale Law Journal Company, Inc.; <https://www.jstor.org/stable/795891>, Accessed On 14th May 2020,(1980), at 449

¹³⁸ A. Nabhan, *A Review Of TECHNOLOGYANDPRIVACY: THENEWLANDSCAPE*, Edited By Philip E. Agre& Marc Rotenberg." Cambridge, Mas~7.: MIT Press. 1997. <http://mitpress.mit.edu>, *Harvard Journal Of Law And Technology*, Volume 11, Number 3 Summer 1998, (1998), at 880

¹³⁹ M. Macenaite, *From Universal towards Child-Specific Protection of the Right to Privacy Online: Dilemmas in the EU General Data Protection Regulation*. *New Media & Society* 19, no. 5 (May 2017): 765–79.
<https://doi.org/10.1177/1461444816686327>, (2017), at 767

¹⁴⁰Boylon and Verson, 2000 as cited in *Id*, at 767

The right to privacy, must be protected in dataveillance schools despite the positive objectives these schools aim to achieve. The vulnerabilities require a certain degree of care but the rights also ensure that this care is not weighed towards control. It is a delicate balance, as Freeman (2013) rightly stated that the irony is that “Children who are not protected whose welfare is not advanced will not be able to exercise self-determination: on the other hand, a failure to recognize the personality of their protection with children reduced to objects of intervention”.¹⁴¹

As Shmueli and Prigat argue that the right to privacy as articulated in the CRC, doesn't fit neatly within the characterization of autonomy or that of need.¹⁴² It remains contextual even in its own determination of where it raises concerns of protection and where of respect of the right. Shmueli et al argue in fact that children need privacy from an individual entity external to the family is recognised both in law and academic literature.¹⁴³ However, what does this mean in the context of public spheres (referred to as 'privacy in public', previously) like schools which is a place where privacy claims seem to be missing. The discussion on reconceptualization Right to Privacy, aimed to answer to this concept of privacy in the public-school space.

Now, that we have a reconceptualised understanding of Right to Privacy, we need to draw out the obligations it creates as a right.

3.4.2 Obligations in the Right to Privacy

Emphasis on data protection rights could also possibly imply that dataveillance schools are concerns *only* of data protection of children. However, a holistic formulation of the Right to Privacy requires a reconciliation of both the opacity and the transparent tools. The formulation of two separate rights, within the context of school space for children raise two separate but harmonious obligations. Opacity tools protect individuals, their liberty and autonomy against state interference and also interference from other private actors.¹⁴⁴ It is linked to individual autonomy and self-determination. Hence, creating a positive obligation. While, transparency tools are opacity tools when they become mainly regulatory and regulate accepted exercise of power.¹⁴⁵ Hence, creating a negative obligation. The envisioning of Right to Privacy, shall be inclusive of both opacity tools and transparency tools aspect. While child's right to autonomy and self-determination in a school space become crucial to learning, so does the right against excessive invasion and interference by the various actors in the course of functioning in a dataveillance school.

¹⁴¹M. Freeman, *The Future of Children's Rights*. Leiden: BRILL, (2014) Accessed June 28, (2020)at 42

¹⁴²*Supranote* 85, at 10

¹⁴³*Id*, at 11

¹⁴⁴S. Gutwirth and P. de Hert, Chapter: Regulating Profiling In A Democratic Constitutional State, Chapter · January 2008 DOI: 10.1007/978-1-4020-6914-7_14, (2008), at 276

¹⁴⁵*Id*, at 283

Solove explains that formulation of dataveillance as privacy-destroying technology¹⁴⁶ omits decisional freedom from the realm of privacy and focuses too exclusively on individual choice.¹⁴⁷ Therefore, conceptualisation of data protection is too narrow because they reduce privacy concerns to informational concerns and decisions relating only to protection of data processed.

Privacy for children in dataveillance schools is a more structural problem, as exposed by the Deleuzian framework and requires a more holistic framework. The process of 'becoming' is aided primarily by the environment it provides and the relationships that are built through at the intersections of power dynamics in school space. Therefore, both opacity tools and transparency tools are relevant and complementary to the purposes of dataveillance schools. While, the opacity tools emphasize on the child's right to autonomy and self-determination in a school space, the transparency tools highlighted the right against excessive invasion and interference by the various actors functioning in a dataveillance school.

3.5 Preliminary conclusion

In this chapter we made an attempt to unfold the concept of privacy and tease out its various aspects. Privacy for Children is established as a new concept of privacy that is specific to privacy that is relevant to children in dataveillance schools for maximizing their learning experience and outcome in a school environment. It is important to remember that the stated aim of the use of the E-learning analytics and management platforms is to maximize learning outcome. In this respect their upholding of the child's right to privacy is essential for achieving this aim and the overall aims of education. The three elements of Right to Privacy that echo the definition of Privacy for Children is essential to understand how privacy claims are greater than data protection claims. The instrumental role of privacy in learning is chalked out through the procedural framework of Informational Privacy and Intellectual privacy. But, the role of privacy in building autonomous being in a protective and performative space like the school is also crucial. This Chapter also lays out the obligations of the Right to Privacy in this regard by the reconciliation of the opacity and transparency tools. This exercise was pertinent to understanding *what* exactly is the violation of? It remains to be seen *how* the dataveillance practice is violating the direct right to privacy of children embedded in Article 16 of the CRC.

¹⁴⁶A. M. Froomkin, *The Death Of Privacy?*, May 22, 2000, By A. Michael Froomkin And The Board Of Trustees Of The Leland Stanford Junior University, (2000), at 1467

¹⁴⁷*Supranote* 76, at 1116

Chapter 4: Right to Privacy for Children and Beyond

4.1 Introduction

Right to privacy has been established in various international instruments. However, the direct right to privacy for children is embedded in Article 16 of the CRC, which grants every child a protection in law in any procedure and/or setup. The right to privacy in CRC has been informed by its discourse in other international and regional instruments. Therefore, before divulging into Article 16, it is essential to see how right to privacy features variously in international and regional instruments. Since, CRC is also embedded within the 3 Ps framework, other rights of the CRC necessary for the reading of Article 16 has also been chalked out.

Later, during the course of this chapter a comprehensive reading of Article 16 of CRC has been undertaken. The purpose of a detailed reading into Article 16 is to now determine how the violation of the right to privacy is taking place. In an examination of the *how*, the proportionality and legality principle is employed. In the determination of the violation, the to what extent the dataveillance schools violate the child's right to privacy is attempted to be answered. It must however be noted here again that right to data protection has been considered under Informational Privacy, within the right. Therefore, no separate violation of the right to data protection shall be made out in this thesis. As the Handbook on European Law relating to the rights of the child observed that: "Under international law, the right to data protection is part of the child's right to privacy contained in Article 16 CRC, this right must be respected by everybody."¹⁴⁸ This is crucial to the determination of the extent of violation of right to privacy as going beyond the concerns of data protection.

4.1.1 International Legal Framework and the CRC

The right to privacy has been recognized as a fundamental human right in various international legal instruments, including in the 1948 Universal Declaration of Human Rights of the United Nations, in Article 8 of the European Convention on Human Rights of the Council of Europe in 1950 and in Article 17 the International Covenant on Civil and Political Rights (the "ICCPR") of the United Nations in 1966 and since recent, in the Article 7 of the EU Charter on Fundamental Rights. Various national states also explicitly mention the right to privacy in their legislation as a constitutional right.¹⁴⁹

Right to privacy is not a standalone right and must be placed within the CRC framework in conjunction with Article 5, Article 12 and Article 3(1) of the CRC. Article 5 of the CRC aims to ensure balance between the role of parents and the evolving capacities of the child which is crucial. To realise the right to privacy for children, the evolving capacities of children is an important dimension. The important question is- could autonomy rights then be granted to children in stages according to their evolving capacities? Capacities are presumed to evolve with age, an idea that Eekelaar refers to as

¹⁴⁸European Union Agency for Fundamental Rights, *The Handbook on European Law relating to the rights of the child*, (2005), at 193

¹⁴⁹Detailed analysis to this regard has not been carried out, but some aspects of privacy like of biometric data, of private lives have been constitutionalized in Belgium (Facial Imaging), Netherlands (the DNA Act) and Germany. Look at Chapter 3 of Kindt, Els J. *Privacy and Data Protection Issues of Biometric Applications: A Comparative Legal Analysis*. Dordrecht: Springer Netherlands, 2013. <https://doi.org/10.1007/978-94-007-7522-0>, for detailed discussion. Furthermore, recently Right to Privacy was read into Right to life and personal liberty (Article 21), by the Supreme Court in the Indian Constitution.

'dynamic self-determinism'.¹⁵⁰ Thus Articles 3 and 5 of the CRC presumes that there will be occasions when the vulnerability of a child demands that parents and adults must act on behalf of children to protect their best interests. However, at other times the mere possibility of harm isn't sufficient to take interventionist measures to prevent children from undertaking self-determining activities. CRC also grants children the 'Right to Participation' in Article 12. Article 12 is considered as one of the pillars of CRC and the Committee emphasizes that "Article 12 reinforces the status of the young child as an active participant in the promotion, protection and monitoring of their rights".¹⁵¹

The evolving capacities of the child, the best interest principle and the importance of right to participation for children has been taken as a guidance for the reading of Article 16, CRC.

4.2 What is Article 16 of the CRC?

To understand what constitutes a violation under this Right to privacy, we shall deconstruct the Article itself. The Article is worded thus,

Article 16

1. No child shall be subjected to **arbitrary or unlawful interference with his or her privacy**, family, home or correspondence, nor to unlawful attacks on his or her honour and reputation.
2. The child has the **right to the protection of the law against such interference** or attacks.

4.3 Legal Analysis

This right imposes clear legal obligations on State Parties to recognize this right and ensure its implementation by ensuring that no interference with the child's privacy, family, home or correspondence takes place by using the word 'shall'. States primarily have an obligation not to engage in an arbitrary or unlawful interference (obligation to respect).¹⁵²

The wording of the right is in the negative in Paragraph 1 of the Article to mean that child's privacy shall not be interfered with. The State Parties shall do the needful to ensure that the child receives all necessary safeguards and information concerning this interference, if any.

State Parties also have a positive obligation as stated in Paragraph 2 of the Article to ensure that there is a domestic law or regulatory framework that protects the child from invasion of privacy, in particular for the misuse that may happen at the hand of private parties or other legal individuals. Further, the

¹⁵⁰ J. Eekelaar, 'The Interests of the Child and the Child's Wishes: The Role of Dynamic Self Determinism', in P. Alston (ed.), *The Best Interests of the Child: Reconciling Culture and Human Rights* (Oxford University Press, Oxford, 1994), at 54.

¹⁵¹ Committee on the Rights of the Child, *General Comment No. 7: Implementing Child Rights in Early Childhood*, cr/C/gc/7/Rev.1, 2007, at para. 14

¹⁵²W. Vandenhoe, Entry on 'Right to Privacy' in *Children's Rights: A Commentary on the Convention on the Rights of the Child and Its Protocols*, 2019 at Para 16.08

State party has the duty to provide the child access to complaint redressal mechanisms or other appropriate remedies in case of alleged violations of their privacy rights.¹⁵³

Article 16 by the virtue of being a child-specific translation of existing human rights standard of Article 17, ICCPR, further manifests that the child be seen as a right holder of all other rights that have influence on her or his life with respect to privacy. That is to emphasize that if an interference were to occur it would not just be a violation of his right to privacy but also of those rights derived from her or his vulnerability (protection) or dependency on adults (provision).¹⁵⁴ Some considerations of children's privacy rights are similar to those of adults with respect to say-use and analysis of data, algorithms directed automated decisions and surveillance by the employer/state. In other aspects, as Vandenhoele argues the child's vulnerability maybe disadvantageous or even exploitative¹⁵⁵ like in a school space. This may include (i) a duty to protect and regulate the gathering and holding of data without a stated purpose, (ii) limiting access to children's records, stored or disseminated and restrict predictive analysis and (iii) routine standardizations. Also, with respect to enforcing surveillance in schools. In light of the power dynamics of the various actors with different or conflicting interests, children are more vulnerable to violations of their privacy-rights.

The right to privacy can be of an individual child or a group of children. In this case, the dataveillance, is towards a mass body of children and leads to a mass dataveillance practice. This is a concern not just of individual children but also children as a 'group' under a similar environment and system.

4.4 Literal Analysis

Returning now to 'how' does the violation, if any, will be made out. This is spelled out in the phrases- 'arbitrary' and 'unlawful interference'. To understand these phrases, the analysis has been broken down to a separate explanation of each. The following literal analysis has been inspired by the work of other scholars and international handbooks on international law.

4.4.1 Arbitrary interference

The reference to arbitrariness means that even if the interference is justified by law or is not contrary to established legal principles, it should still be reasonable and proportionate to the particular circumstances of the case.¹⁵⁶ This means that the invasion should comply with specific procedural and substantive standards, but in particular with the principle of proportionality.¹⁵⁷

¹⁵³*Id*, at n. 41

¹⁵⁴Borrowed from General Comment No.12, UN Committee on the Rights of the Child (CRC), General comment No. 12 (2009): The right of the child to be heard, 20 July 2009, CRC/C/GC/12, available at: <https://www.refworld.org/docid/4ae562c52.html> [accessed 24 June 2020], at Para 18

¹⁵⁵*Supranote* 152, at Para 16.03

¹⁵⁶*Supranote* 152, at Para 16.08

¹⁵⁷ UN HRC, 'Human rights and arbitrary deprivation of nationality: Report of the Secretary-general', 19 December 2013, A/HRC/25/28

The three step review process for the principle of proportionality has been borrowed from the case law of ECtHR as explained by Kindt in her analysis of proportionality principle for use of biometric data.¹⁵⁸ The proportionality principle in the case law of ECtHR has a three step review process: (i) Interference in accordance with law, (2) interference has a legitimate aim and (3) such interference is necessary in a democratic society.¹⁵⁹ Interference shall in addition be 'relevant and sufficient' and there must be (a) efficiency of processing and a (b) review of alternative and less infringing means to reach the same goal.¹⁶⁰ Less intrusive are the less harmful measures, also referred to as the need of taking subsidiarity of measures for protection.¹⁶¹ The latter states that the processing should have appropriate safeguards to prevent any unnecessary intrusion. From the perspective of data protection, Article 6(1) of GDPR- the proportionality implies that data should be "adequate, relevant and not excessive".¹⁶² There is a close relationship between proportionality and the purpose specification principle in this definition. It is like the one referred to in FERPA, where purpose specification implies that there are specified purposes to the processing of data, which makes the means taken legitimate for achieving the stated purpose. However, proportionality principle accounts for the long term impact and goes beyond the stated purpose even if it is found to be reasonable.

For the sake of simplicity, the invasion of privacy shall be understood under this modified proportionality test with a three step review process of:

1. Must serve a legitimate purpose
2. Be the least intrusive means
3. Be proportionate to the interest to be protected (relevant and not excessive)

In this respect, the notion of arbitrariness applies to all private and state action- legislative, administrative and judicial. To see whether the analysis, tracking, profiling and controlling of the school environment through the use of E-learning platforms are proportionate with the objectives of the processing of data and use for educational purposes, we shall pursue the proportionality test. In other words, the objectives aimed at must be achieved without an adverse impact on the best interests of the child. It is important to note that the proportionality review should not be equated with the balancing of interest test.¹⁶³ The balancing of interest, would involve the interests of the other actors, including the school and the parents. The proportionality test is carried out to understand the extent of impact, through the use of E-learning platforms in schools, on children.

¹⁵⁸Supranote 129, at 454

¹⁵⁹Id, at 454

¹⁶⁰Id, at 483

¹⁶¹Id, at 488

¹⁶²Id, at Page 419

¹⁶³Supranote 129, at 404-405

4.4.2 "Unlawful Interference"

The reference to lawfulness corresponds to the adherence to the legality principle. Legislation must specify in detail under which precise circumstances an interference can be permitted.¹⁶⁴ Moreover, the law that allows for an interference must itself be in accordance to the provisions, aims and objectives of the Convention.¹⁶⁵ In other words, unlawful shall mean that the invasion has been carried out without the considerations of all legal provisions where lawful includes a 'Fundamental Human Rights' check.¹⁶⁶ The legality principle is often incorrectly put on the same line as the legitimacy of the purposes. The legality of the processing is a different issue from the legitimacy of the processing and of the stated purposes.¹⁶⁷ The legality principle refers to the fact that the processing shall be in conformity with all applicable laws and not contrary to any law including but not limited to the data protection legislation.

4.5 Privacy in Context

To see if there is an interference, we shall apply the proportionality test to the practice of dataveillance in school space. The violation through 'arbitrariness' has been conducted for both the substantive and procedural element of the 'Right to Privacy'. The three point review starts with:

1. It must serve a legitimate purpose- The schools state that the dataveillance technologies are beneficial to the child for their customized learning outcomes, better feedback mechanisms and for furthering educational goals from the range of options that the online space offers.
2. Be the least intrusive means- The learning platforms are designed to make learning fun and more accessible and therefore it is in the interests of the school to continue its usage for better learning interface, standardizing testing and additional role that the platforms can play in aiding the teachers. Therefore, the platforms are only intrusive so far as it benefits the child.
3. Proportionate to the interest to be protected- The stated interest to be protected is that of children's learning outcomes, and the means is-collection, storage, analysis and dissemination of data. The means employed meets the need, but is it proportionate?

How does the legitimate purpose unfold in practice?

1. Personalised Learning-Serving education purposes and aligns with students' broader academic interest.¹⁶⁸ Schools predictive analytics for identifying students who need early intervention, and take necessary steps in advance.

¹⁶⁴*Supranote* 152, at Para 16.08

¹⁶⁵ *Id*, at n. 38

¹⁶⁶*Supranote* 129, at 406

¹⁶⁷*Id*, at 435, no.140

¹⁶⁸*Supranote* 114, at 515

2. Permanent Records- The change in medium of education has shifted in content, metrics and goals towards personalized goals and real time analysis adds to the personalisation.¹⁶⁹ All minutiae of activities carried out by the child is permanently recorded.
3. Real-Time Monitoring- It creates an architecture of data-web beyond the physical space of the school environment. The real-time monitoring is beyond the temporal dimension of the six hour school time and gives students more accessibility to learning. There are new spatio-temporal entanglements and transformed translocal relationships¹⁷⁰ of the between the teachers, the parents and the students on the E- learning platforms. Parents can engage and stay informed more effectively leading to new forms of participation.¹⁷¹
4. Data objectivity- The profiling and analysis of data is aimed not only for enhancing the achievement of the students but also exposing inequities. So, that the school or teachers can bring in objective frameworks and assessments for ensuring equality.

These are only some of the stated purposes of using E-learning analytics platforms, which look legitimate with respect to educational aims.

Since, the least intrusive means was the traditional school space with limited access of technology, we know that this is not the least intrusive means to achieve these aims. The change to dataveillance schools does add value in terms of the new stated purposes but without additional safeguards, transparency and adequate information to the child, which makes it intrusive. Additionally, the Deleuzian framework has shown how it puts the child in a box, creating a *dividual* for greater control not disciplining.

The third aspect examines if the interest is indeed proportionate to the purpose stated. The following impacts can be made out which is disproportionate and potentially violates all the three components of right to privacy for children in dataveillance schools to a significant extent.

A. Substantive Right

a. **Autonomy Privacy**

1. Children are getting identified through their data-doubles- Minutiae of children's lives, emotions and their bodies can become visible for scrutiny and inspection through their data doubles.¹⁷² The practices, values and subjectivities shift focus on production and analysis of data.¹⁷³ This perceives the child as an evolving 'being' to a static data point. The creation of a data-double and

¹⁶⁹*Id*, at 522

¹⁷⁰J. Jarke and A. Breiter, Editorial: the datafication of education, *Learning, Media and Technology*, 44:1, 1-6, DOI: 10.1080/17439884.2019.1573833, (2019), at 3

¹⁷¹*Id*, at 3

¹⁷²*Supranote 4*, at 62

¹⁷³A. Bradbury, Datafied at four: the role of data in the 'schoolification' of early childhood education in England, *Learning, Media and Technology*, 44:1, 7-21, DOI: 10.1080/17439884.2018.1511577, <https://doi.org/10.1080/17439884.2018.1511577>, (2019) at Page 7

the naturalization of data as the most sensible medium for thinking and teaching in schools,¹⁷⁴ is both alarming and dehumanizing. The child as a data-double is stripped of its uniqueness and the created *dividual* is subject to visibility¹⁷⁵ and identification through invisible networks.¹⁷⁶ This exercise takes away from the process of learning itself, leaving no scope for autonomous thinking or reflection. There is also an excessive reliance on data being ultimately true rather than on self-reporting, which could potentially make the child question his or her own autonomous thinking capacity.

2. Excessive parental engagement- This changes the nature of parental participation and even the mode. The real-time monitoring of the child while in school by parents is invasion into the child's learning space away from the parents. The excessive intervention by parents in real time make them constant observers of the child's progress which reduces the child's space to make mistakes and be independent in learning.

B. Procedural Right

a. Informational Privacy

1. Permanence of data-The analysis gets stored within servers and information storage systems of major commercial organisations such as Knewton and ClassDojo, which use data to give what they call 'actionable insights', without informed consent of children.¹⁷⁷ Further, there is no transparency of the means used to achieve this 'insight'. The embedded assessment feature not only creates a myriad of datasets of performance but also memorializes them without the child's knowledge.

2. Data collected by school have commercial value.¹⁷⁸ Complications of 'Beta' education through the use of data analysis and innovative technologies on students have not been vetted out.¹⁷⁹ Rohan Samarajiva discusses what he calls "the surveillance imperative" which leads businesses to collect more personal information.¹⁸⁰ Education and non-education purposes are no longer binary and mutually exclusive. In particular, the boundaries demarcating processing in-school and by third parties are blurred. Children's data may not be owned by children or their primary care-givers and the EdTech companies retain ownership after completion of schooling. The data itself collected is of unidentifiable learning analytics and has less to do with the child and more to do with the commercial value of the metadata itself.

3. Profiling- The primary purpose of the learning analytics platform is to predict outcomes and prescribe forms of pedagogic interventions that are scalable and customizable for children. This has

¹⁷⁴*Id.*, at 8

¹⁷⁵*Id.*, at 10

¹⁷⁶Keymolen's invisible visibility in *Supranote 17*

¹⁷⁷*Supranote 4*, at 62

¹⁷⁸*Supranote 114*, at 514

¹⁷⁹*Supranote 114*, at 516

¹⁸⁰P. E. Agrei and M. Rotenberg Technology and privacy: The New Landscape, Edited By Philip E. Agrei & Marc Rotenberg." Cambridge, Mas-7.: Mit Press. 1997. [Http://Mitpress.Mit.Edu](http://Mitpress.Mit.Edu), (1997), at 278-81

implications for how children are treated at individual level where they may be circumscribed by algorithms.¹⁸¹ The profiling, standardisation of emotions and learning behaviour leave massive amounts of digital traces which determine how the children live their lives.¹⁸² This leads to hierarchical sorting, keeping some in the lower end of the scale while the others thrive at the higher end. This data-based perception also changes the way in which students see themselves.

b. Intellectual Privacy

1. Pedagogical Effect to learning- It neglects pedagogical effects of data-driven education. The platforms are pervasive and impact the intellectual privacy of a child. It makes the child show less experimental behaviour and reduced participation and expression. The effects of constant monitoring are directly on the learning ability of the child.¹⁸³ The learning analytics platforms can track and assess students' data over time, link them to behavioural models and then combine those data to project likely future progress, actions and outcomes.¹⁸⁴ This stunts the child's reflective capacity.
2. Shift in role of teachers- Learning platform encourages teachers to enact disciplinary practices underpinned by input on child's behaviour produced by data analytics platforms.¹⁸⁵ Further, there is a redistribution of agency across socio-technical¹⁸⁶ apparatuses and away from human agency. This means that data takes up the responsibility of determining ability. This reduces the child's trust and risk-taking standards.¹⁸⁷ The data collected only leads the teachers to see students at quantifiable points and the aspects are so detailed that it leaves no place for the child to be 'private' in his or her learning.

The impact seems disproportionate to the aims of these educational platforms on first analysis. The extent of invasion of privacy by dataveillance schools can be seen on the violation of the components of these rights. Moreover, the lack of procedural framework for the child to have a choice, a voice, and complete information of the process makes it a systematic violation of child's right to privacy. The child's lack of awareness and knowledge coupled with double vulnerability within the school space makes the practice of dataveillance a systemic of violation of privacy without sufficient protective safeguards.

4.6 The Right to Privacy and link to other provisions in the CRC

Now, the 'unlawful' aspect can be scrutinized with respect to the legality principle. The lack of domestic laws in most countries and the existing gaps in the ones that do have a law in this regard, highlights the need for legislation and constitutionalizing of the right to privacy for children. However,

¹⁸¹Supranote 4, at 62

¹⁸²*Id.*, at 65

¹⁸³Supranote 114, at 518

¹⁸⁴Supranote 4, at 56

¹⁸⁵Supranote 21, at 37

¹⁸⁶Supranote 170, at 4

¹⁸⁷Supranote 114, at 520

to see if the violation is not commensurate with the aims of the CRC itself the next section analyses the effect of violation of privacy in relation to other rights of the Convention. These rights surfaced during the course of research on dataveillance schools and needed to be addressed on priority while all other rights are equally important in the broader scope.

4.6.1 Article 16 and Article 2

Right to Non-Discrimination

We must bear in mind, that the valorisation of data is also because of the objectivity it seeks to achieve. But, ultimately the person in a school framework acting on the prediction showing 'at risk students' is a teacher. It is the teacher who then needs to rely on its own subjectivity to view the data objectively with a particular viewpoint, ideological framework, values, assumptions and biases.¹⁸⁸

The more chilling effect of surveillance is to understand that one's data is being processed, in scores of that which cannot be revived, understood or challenged.¹⁸⁹ Who owns and has access to the data shall determine what happens to the data. The opaqueness of the technique by which data is being processed is something that cannot be understood, therefore cannot be claimed to be a violation of 'discriminatory practice'. Unknown unfairness can never be challenged let alone corrected without mandating transparency. However, the inherent biases in the society can creep into the algorithmic analytics. The ability to change this data, and the unknown algorithm that is used, can potentially destroy the reputation of a child by adding false information in order to hide discrimination.¹⁹⁰ Racial and ethnic information collected always has the risk of exclusion and discrimination.¹⁹¹ Though, existing laws prohibit overt uses of data but stigmatic profiling can take place over processing of other non-sensitive data like eating, drugstore prescription, kind of game played, what toys were bought etc.¹⁹² Therefore, in the aim of achieving objectivity it very well ends up being subjective. Child becomes a subject of data objective discrimination and whose identity is instantly determinable by purely mechanical means and subject to external controls. This is a potential violation of the child's right against discrimination.

4.6.2 Article 16 and Article 6

Right to Development

The role of privacy is instrumental to a child's development as we have seen in the discussion on autonomy and intellectual privacy. General Comment No.5 of CRC stresses that "The Committee

¹⁸⁸Supranote 51, at 789

¹⁸⁹F. Pasquale, Frank, And D.K Citron. "Promoting Innovation While Preventing Discrimination: Policy Goals For The Scored Society." Washington Law Review 89 (N.D.), (2014), at 1418

¹⁹⁰Id, at 1423

¹⁹¹Supranote 129, at 390

¹⁹²Supranote, 189, at 1422

expects States to interpret “development” in its broadest sense as a holistic concept.”¹⁹³ The privacy of space for development is constitutive of the private realm needed for thinking and being outside the scope of the dataveillance gaze. Moreover, aspects of development like cultural vibrancy and creativity are also heavily dependent on freedom.¹⁹⁴ The constant datafication of the child’s learning ability and standardization of the child’s learning can lead to an ontological insecurity. As Ball explains, when performative ability is commodified it leads to “ontological insecurity which is a sense of uncertainty, dissatisfaction and guilt about whether one is doing enough.”¹⁹⁵ That is, if children cannot exercise being themselves amidst all the measurement and assessment they cannot develop adequately.

What the learning analytics platform claims to do is state that by standardizing children, they have the ability to potentially shape students’ possibilities for action. Literally, one of the learning platforms uses their selling point as ‘they create actionable insights’.¹⁹⁶ Moreover, dataveillance schools freeze the dynamic growth of a child in data-points also in the predictive future¹⁹⁷ through profiling and predictive analysis. The prediction analytics is more harmful for the development of the child both towards her personality and evolving capacities. By putting the child in a bracket and stunting its growth in terms of restricting creative space and learning, the dataveillance schools are in violation of the child’s right to development. Birnhack emphasized that for children to value education the schools must maintain pedagogic processes and education goals that enable children to have ethos of growth.¹⁹⁸

4.6.3 Article 16 and Article 8

Right to Identity

The learner represented in a dataveillance school is disembodied as a graphical display of data points on the data dashboards. On the basis of this the child is visualized through a temporarily aggregated data points or as Raley calls them just ‘flecks of identity’.¹⁹⁹ It is this *dividual* that is indeed in direct violation of a child’s right to identity. These data items represent an identity which used to distinguish

¹⁹³UN Committee on the Rights of the Child (CRC), *General comment no. 5 (2003): General measures of implementation of the Convention on the Rights of the Child*, 27 November 2003, CRC/GC/2003/5, available at: <https://www.refworld.org/docid/4538834f11.html> [accessed 6 July 2020], at Para 12

¹⁹⁴R. Clarke, *Dissidentity.*” *Identity in the Information Society* 1, no. 1 (December 2008): 221–28. <https://doi.org/10.1007/s12394-009-0013-Z>, (2008), at 223

¹⁹⁵Ball (2003) as cited in Keddie, Amanda. “Children of the Market: Performativity, Neoliberal Responsibilisation and the Construction of Student Identities.” *Oxford Review of Education* 42, no. 1 (January 2, 2016): 108–22. <https://doi.org/10.1080/03054985.2016.1142865>, (2016), at 110

¹⁹⁶*Supranote 4*, at 58

¹⁹⁷ R. Clarke; Graham Greenleaf, “Dataveillance Regulation: A Research Framework,” *Journal of Law, Information and Science* 25, no. 1: Bir104-122 , (2017), at 110

¹⁹⁸*Supranote 18*, at 217

¹⁹⁹R. Raley, *Dataveillance And Countervailance*. In: ‘Raw Data’ Is An Oxymoron, Ed. L. Gitelman, 121-146. Cambridge, Ma: Mit Press. (2013), at 127

its own identity for other instances in the same category.²⁰⁰ This shows multiplicity of the data-double which doesn't authentically represent the multiplicity of talent of the child. Since, this *data-double/dividual/digital personae* is not the underlying entity but, only that which is *associated* with it.

Another important aspect of Right to identity is accounting for the space for expressing 'dissent'. Clarke's formulation of the term, 'dissidenty', is pertinent in this respect. Clarke on emphasizing the need and space for dissent also links it to identity. He states that there is a "need to embrace the idea of 'dissidenty' as people need to be free to think, argue and act. A dissident tries to affirm his own human identity and rejects what it is alienating in their lives."²⁰¹ A cluster of freedom relating to human identities is fundamental to cultural, economic and political innovation: that is the freedom to have and use multiple identities and to be them freely.²⁰² In exploring the impact of the use of CCTVs in schools, Birnhack reflected that the children value privacy and have intuitive constitutional perceptions as to the proportionate derogation of privacy in schools.²⁰³ An uncritical absorption of the dataveillance practice is an attack on the child's right to not just identity but freedom of expressing one's identity.

4.6.4 Article 16 and Article 12

Right to Participation

Child's right to participation is in violation not just through informational privacy and the idea of consent but also in terms of Autonomy Privacy and the lack of voice in the whole dataveillance practice.

It is clear that the processing of the learning analytics data without transparency and accountability mechanism shows that even in the GDPR framework: 1. The consent model is broken and that 2. It is inappropriate to use consent when processing a child's data aged 13 or above, as they even may not know what they are consenting to.²⁰⁴ This power imbalance in a school space is at the heart of the failure of consent procedures to be lawful if taken, at all. Further, contract between children and companies do not rest and doesn't apply because school determines the need for and the nature of processing in education.²⁰⁵

Additionally, the Right to privacy is an important participatory right particularly for children of all age groups. Individuals autonomy is a necessary precondition of participation (See Clarke's dissidenty in section 4.6.3). The child should have a say in ownership of the data and information of the processes in the dataveillance schools. This is key to aiding the child towards its capacity and evolution of selfhood in line with the evolving capacities of the child.

²⁰⁰Supranote 194, at 222

²⁰¹*Id*, at 224

²⁰²*Id*, at 227

²⁰³Supranote 18, at 217

²⁰⁴<https://Jenpersson.Com/Consent-Models-Fails-School-Children-So-Lets-Fix-It/>, 23rd November 2019

²⁰⁵*Id*

Lastly, children should have access to adequate safeguards through remedies and complaints redressal mechanism present both at the level of school and the level of the national policy framework.

4.6.5 Article 16 and Article 17

Right to Information

It follows from Article 12 that information is key. Children are not aware of the surveillance instruments or have wrong assumptions about their location and technical abilities. The timing of their installation, the objectives of their usage and the identity of people who have access to this footage must be made adequately available to children. Therefore, a pedagogical discussion with respect to this intervention through analytics platform is important.²⁰⁶ If there is lack of information, rather transparency with respect to the impact and nature of dataveillance in school space, the child is brought up under a veil, literally and metaphorically. This is to a great extent a violation of the child's right to information.

4.6.6 Article 16 and Article 29

Right to Education

OECD recommendation on protection of children online (2011) states that Right to Education means: "You should have access to digital education and knowledge in order to exercise your rights and freedoms. This should enable you to critically analyse the accuracy and trustworthiness of content and applications and services that you access or wish to access."²⁰⁷ The right to privacy in school space directly ties into the right to education of children. The aims and goals in an educational space is crucial to understanding the relation with privacy. General Comment No. 1 in explaining the aim of education states that "the function of education is to reinforce, integrate and complement a variety of other provisions (read rights)"²⁰⁸ and "be provided in a way that respects the dignity and enables the child."²⁰⁹

It is the degree of invasion of the dataveillance schools that takes place in creating the environment of control, that defeats the purpose of forming capacity for critical thinking for students. Furlong (1991)²¹⁰ elucidates the idea of schooling as having three key aims:

²⁰⁶Supranote 18, at 214

²⁰⁷Livingstone, Sonia. "Realizing Children's Rights in Relation to the Digital Environment," n.d., 14, Page 500

²⁰⁸UN Committee on the Rights of the Child (CRC), *General comment No. 1 (2001), Article 29 (1), The aims of education*, 17 April 2001, CRC/GC/2001/1, available at: <https://www.refworld.org/docid/4538834d2.html> [accessed 10 June 2020], Para 6

²⁰⁹UN Committee on the Rights of the Child (CRC), *General comment No. 1 (2001), Article 29 (1), The aims of education*, 17 April 2001, CRC/GC/2001/1, available at: <https://www.refworld.org/docid/4538834d2.html> [accessed 10 June 2020], Para 8

²¹⁰ Furlong, V. J. 1991. "Disaffected Pupils: Reconstructing the Sociological Perspective." British

1. The production of ability- School identifies itself as catering for the proscribed ability of the students. This production of ability through the structures of power within schools affirms a largely preordained group of students (Bourdieu) and is a negative and damaging experience for others.²¹¹

2. Production of values- Values enshrined in formal schooling and values about aspirations for the future become structures for pupils. Values are not neutral and are enshrined in the curriculum, processes and culture of schools.²¹²

3. Production of occupational identity- Schools also determine occupational trajectory.²¹³ In the educational context these digital personae as constructed from an individual's data set, which effectively serves to inhibit educational opportunities.²¹⁴

If dataveillance schools are not ensuring these mere processes in their education aims, then there is a violation of the child's right to education.

4.6.7 Article 16 and Article 31

Right to play

This unique right specific to children is crucial to childhood development. Surveillance itself brings the potential to threaten the possibilities within the children's play experiences by depriving them of the more private and creative spaces needed for experimental and playful encounters with the others.²¹⁵ It has been observed that "children play differently when they do not feel they are being observed".²¹⁶ However, children's play acts as a site for encouraging the ways children come to engage with and bring meaning to surveillance practice in their early play experiences.²¹⁷ One of the benefits of privacy is the way it provides a space where there is a "reprieve from scrutiny and public judgement."²¹⁸ Aitken (2001) draws on Morris's formulation of privacy to show that children's play spaces may begin to disappear as children are subject to increasing forms of control through dataveillance technologies. He argues that there are many instances where privacy is a condition of play and if children's play spaces

²¹¹R. Slee, Beyond a Psychology of Student Behaviour. *Emotional and Behavioural Difficulties* 20, no. 1 (January 2, 2015): 3–19. <https://doi.org/10.1080/13632752.2014.947100>, (2015), at 6

²¹²*Id.*, at 6

²¹³*Id.*, at 6

²¹⁴A. Hope, A. Foucault's toolbox: Critical insights for education and technology researchers. *Learning, Media and Technology*, 40(4), 536-549. (2015), at 547

²¹⁵T. Rooney, *Spy kids too: encounters with surveillance through games and play*. Surveillance Futures. Routledge, 161-173. (2016), at 151

²¹⁶Opie and Opie, cited in Nlan and McBride, 2013 cited *in Id.*, at 152

²¹⁷*Id.*, at 150

²¹⁸Morris (2000), as cited *Id.*, at 153

are subject to surveillance, then there is a loss of opportunity for different ways of being.²¹⁹ Importance of play is also for them to be able to “spatialize their lives according to their own rather than adult agendas.”²²⁰ Privacy is important for child’s development as the gradual evolution of the capacity to be alone is essential to imagination, play and the ‘symbol-making’ at the heart of creative process and essential to development of an authentic self.²²¹

This is true not just for young children but also for the youth. Youth make meaning in their interactions and engagement with texts and technologies and social environments. These exchanges and activities are subject to scrutiny of educators loaded with interpretations, entities and assumptions.²²² Thus, the need for the freedom from surveillance is prerequisite to right to play and the lack of it a potential violation.

4.6.8 Article 16 and Article 42

Knowledge of Human Rights

One of the most crucial aspects of privacy is the development of the consciousness of privacy. The concept of children’s rights consciousness is- the development of rights consciousness. It is the process that motivates individuals to define problems and obstacles in terms of rights. If children experience rights they are likely to recognize these rights as more significant.²²³

Normalization of the surveillance is problematic to understanding, exercising and respecting the right to privacy for children, as children and as adults. Development of rights consciousness depends not only on conveying knowledge pertaining to availability of rights but also on practices that reinforce the experience of these rights.²²⁴ Hence, experience of right to privacy is necessary to enjoy the right to knowledge of human rights.

4.7 Role of the Stakeholders

To implement the right to privacy in school space, the stakeholders have to assume responsibility and work in harmony to achieve the best possible realization of the child’s right to privacy. These obligations are only indicative and show the way to a principled approach to ensuring best interests of the child is kept at the heart of the dataveillance practice.

²¹⁹*Id.*, at 153

²²⁰*Id.*, at 153

²²¹Winnicott 1971 cited in van Brakel, Rosamunde. "The Rise of Preemptive Surveillance: Unintended Social and Ethical Consequences1." *Surveillance Futures*. Routledge, 199-211, (2016), at 192

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²²³*Supranote* 18, at 206

²²⁴*Id.*, at 215

4.7.1 Obligation to state parties

The right itself obligates the State parties towards both positive and negative obligations. Negative obligations require that businesses and third parties are kept in check. Government approaches should involve multiple stakeholders including business and children, and should be independently evaluated to ensure their effectiveness. The State parties shall introduce appropriate legislation that ensure appropriate conditions within school space and ensure realization of child's right to privacy. Teachers, parents and school authorities should be trained on the use of learning analytics platform judiciously and their possible impact.

4.7.2 Obligation to Private entities

EdTech companies have a huge responsibility and role to play in minimising collection and processing of learning analytics data. The CRC in General Comment No.5 told businesses to “implement child rights due diligence in their activities.”²²⁵ The data collected by learning analytics company and platform shall keep in mind the best interests of the child when there is an undeniable impact on the children.²²⁶

4.7.3 Obligation to Primary Caregivers

Parents have a crucial role to play in understanding their role as a parent and understanding the nature of the growth of the child in schools. Primary caregivers/parents must create a more accountable framework within the schools, specifically with respect to what happens to the learning analytics data collected, who controls it, who has access to it and who owns it. Their own role is also pertinent to guiding the child in this changed environment and atmosphere and creating a space of trust and security with respect to learning. That data is not the ultimate word nor are the algorithmic results must be understood by parents. It is also important that parents demand greater safeguard both from State parties and private entities.

4.7.4 Obligation to Schools

Schools, have to resituate their roles in the society and their accountability towards children first. The changing landscape of the schools is less about the data, and more about the intent of the use of the data towards exercising control and its own ranking in the national and international set up. In this respect they must reflect on their aims of use of dataveillance practice.

²²⁵UN Committee on the Rights of the Child (CRC), General comment no. 5 (2003): General measures of implementation of the Convention on the Rights of the Child, 27 November 2003, CRC/GC/2003/5, available at: <https://www.refworld.org/docid/4538834f11.html> [accessed 10 June 2020]

²²⁶UN Committee on the Rights of the Child (CRC), *General comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration (art. 3, para. 1)*, 29 May 2013, CRC /C/GC/14, available at: <https://www.refworld.org/docid/51a84b5e4.html> [accessed 10 June 2020], Para 40

4.8 Conclusion

This chapter is the final piece in the puzzle of answering the research question. It shows *how* the violation of the right to privacy is taking place by delving deeper into the reading of Article 16. The phrases “arbitrary” and “unlawful” are further explicated with the use of proportionality and legality principle. The analysis through its course of examination showed the extent of violation of dataveillance schools on the child’s right to privacy. The impact on the three components of privacy- the informational privacy, autonomy privacy and intellectual privacy, has long term impact on the child. Moreover, the legality principle shows the interdependence of rights. For the scope of brevity, the obligations of various stakeholders were drawn out indicatively and not as guidance. The extent of the violation of Article 16 is chalked out in the analysis of the proportionate aims of the learning analytics platforms and the interdependency of rights within the CRC.

Chapter 5: Conclusion

5.1 Could there be a change through law alone?

In chronicling the steady rise of dataveillance schools, the practice of dataveillance schools was problematised from, but not limited to the child rights perspective. The COVID-19 pandemic accelerated its use. Dataveillance schools remain an inevitable response to emergency school closures for continuation of education through schools. In this thesis, a discussion was carried out on the nature, meaning and the extent of the impact of 'dataveillance schools' on school children. The trajectory from datafication of school space in the information age to the creation of dataveillance schools was traced. Two aspects were highlighted in the process- what kind of dataveillance processes are being installed in changing the school landscape and what is the impact on children.

Further, the functioning of the dataveillance schools was looked at critically from the Deleuzian concept of power. This exposed the changing nature of power dynamics in the change in practice of 'surveillance' in school spaces. This raised the question that could then the change in power dynamics in the dataveillance schools among other rights be violating the child's right to privacy?

Children are rights holders with special rights to protection and participation which they shall be able to exercise, enjoy and be protected from right violations in *any* environment. It is in this context that dataveillance schools were brought under the purview of the child rights framework. This thesis was set out to examine to what extent the dataveillance schools are violating the right to privacy of children as embedded in Article 16 of the CRC.

For the purpose of explication of what the right to privacy shall entail-reconceptualising privacy for children specific to dataveillance schools was the first segment of the thesis. Subsequently, the Right to Privacy i.e., the privacy right specific for children in dataveillance schools was analysed through the reconceptualised concept of privacy.

In summary, the detailed formulation showed that the element of 'Intellectual Privacy' focused on the process of schooling, the impact on the '*accessibility to the learner's process of learning and the learning related behaviour*'. The element of 'Information Privacy' divulged into the debate of data protection and (limited) access to one's '*data*' of the process of learning and learning related behaviour. 'Autonomy Privacy', which facilitates the autonomy of the child echoed the aims of education itself.²²⁷ It was the aim to protect the right of the child in the school environment and how it must restrict the accessibility of the child by other actors and by itself. This reflected the part of the definition that stated Privacy for Children shall '*respect the dignity of the learner (student) and retains the integrity of the learning environment by limiting boundaries of such accessibility to other actors.*'

The determination of *how* there was a violation of Article 16 revealed the *extent of the violation* in the process. The matter of concern is-where relinquishing of privacy in school space in a traditional school was symptomatic of disciplining, does it in the dataveillance schools amount to control? The

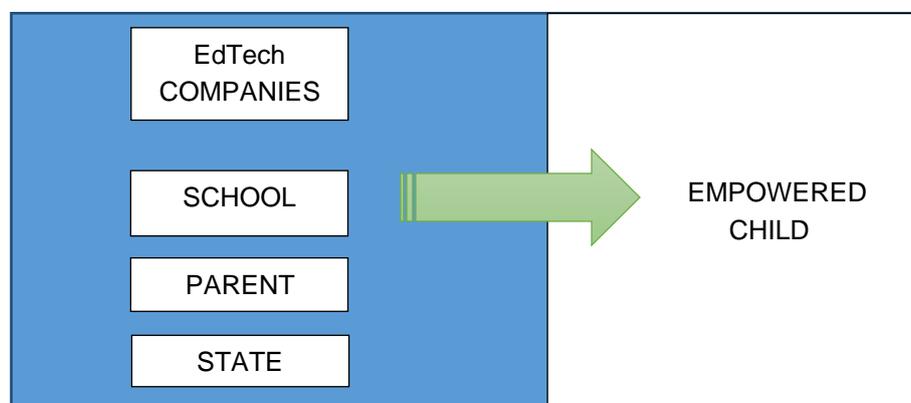
²²⁷For Piaget, autonomy was the aim of education, See Kamii, C. 1984. Autonomy: The Aim of Education Envisioned by Piaget. The Phi Delta Kappan, 65(6), 410-415. Retrieved from <http://www.jstor.org/stable/20387059>

'arbitrariness' of the practice of dataveillance exposed the tipping of the balance towards control, more than the aspect of care. As the dataveillance schools were subjected to the test of the proportionality principle, we observed that there was a possible violation of all the three elements of Right to Privacy albeit in varying degrees. The legitimate aims claimed by schools and EdTech companies were affecting the child disproportionately. The interdependency and interlinkages of other rights with right to privacy, goes beyond the debate around data protection and/or privacy for children. The limitations of existing legal framework show theoretically there is a need for a legal framework that is informed by the holistic conceptualisation of Article 16. But, the question is will transposition of Article 16 CRC for protection of privacy in dataveillance schools into the domestic legal framework be enough?

The child rights framework is a leverage to guide the practice of dataveillance schools towards recognition of the interdependency of all other children's rights. However, does law answer questions as to how are the children from different age groups affected and what is the impact on their evolving capacities? What about the future identity of the child? What impact does this have on experiences of liberties and freedom?

Additionally, the critical analysis through the Deleuzian framework also showed the complexities related to the issue of privacy as claimed by the dataveillance schools. It also raises concerns to broader issues like -What kind of public-private partnerships are we looking at in schools? Are dataveillance schools normalising surveillance for children? Does State exercise control through the schools?

Privacy was only an exemplar of the extent of violation of rights taking place on account of introduction of technology in school space. The recognition of children as rights holders is not just to provide solutions to the problematised issues of dataveillance but to throw light on the increasing use of invasive technologies both at home and in public spaces. Putting the child in a box is metaphoric of putting the discourse around children's rights around these actors, their roles and their conflicting interests. To place children on a (learning analytics) platform is to disengage the child as an entity, an active agent and an actor by itself in this changing landscape. The aim of the child rights framework is to take the child out of the box and make them an active actor for the engagement and development in the dataveillance schools. This balancing of interests is achieved when all actors facilitate the empowerment of the child, as an equal party to the dataveillance practice. (See image below)



However, the national legal framework needs more envisioning than a mere protection of right to privacy or data protection. This thesis has barely scratched the surface of this complex field addressing the various dynamics involving the actors, interactions and interceptions happening in dataveillance schools. Substantial research from fields of Psychology, Sociology and pedagogy have continued to highlight the risks, challenges and opportunities that arise in the dataveillance schools. The legal child rights framework needs to respond adequately to the changes in modernisation like the neoliberal approach to school systems and its functioning.

4.2 Are we achieving the 'Aims of Education'?

If the CRC states that education should aim to inculcate values in the child which are in conformity with "*The preparation of the child for responsible life in a free society*" then are the dataveillance schools achieving the aims of a '*free society*'?²²⁸

5.2.1 Do you trust me?

The awareness of dataveillance technologies in schools is transferring human responsibility to technology, thereby blurring the boundaries between school discipline and control. An important question is what implications would this have on children's understanding of trust?

The continuous monitoring is transforming expectation not just of privacy but also of trust.²²⁹ If children feel monitored all the time in different ways and in varying degrees, they would learn to trust less, and doubt more. The expectations of trust mean limiting space for nurturing a self-responsibilising agent. If children are not shown that they can be trusted, could they then imbibe the virtue of trusting others and/or becoming trustworthy?

5.2.2 Does this size fit me?

Traditional schooling is focused on the very economical approach to learning that- one size fits all! Dataveillance schools aim to transform this belief by catering to individual learning needs and learning behaviour of children. However, it is achieving the exact opposite of what it aimed to demolish in the first place.

Children's process of learning, their learning outcomes and learning behaviour are getting transformed into quantifiable data. Overtime, this is all standardised into data points and every child's future learning ability is predicted based on the analysis of the metadata. As quality of behaviour is framed against numerical parameters of behavioural aspects, it causes changes in behaviour.²³⁰ So, then what remains of the child that is intrinsically making the child unique? This customization of learning is,

²²⁸Article 29(1)(d) UN General Assembly, Convention on the Rights of the Child, 20 November 1989, United Nations, Treaty Series, vol. 1577, p. 3, available at: <https://www.refworld.org/docid/3ae6b38f0.html> [accessed 13 December 2019]

²²⁹E. Taylor, I Spy with My Little Eye: The Use of CCTV in Schools and the Impact on Privacy." *The Sociological Review*, vol. 58, no. 3, Aug. 2010, 381-405 doi:[10.1111/j.1467-954X.2010.01930.x](https://doi.org/10.1111/j.1467-954X.2010.01930.x), (2010) at 391-392

²³⁰Supranote 18, Page 37

in fact affecting creativity, expression and development of the child.²³¹

5.2.3 Can I be bought?

While indisputably the supreme aim of learning shall be towards development, the issue of data commodification and the fight against data ownership and processing reduces it to a mere economic right.²³² Data about children has an economic value attached to it, but should this mean that classrooms become a place for experimenting and maintaining the market for digital economies? The meta-data collected becomes relevant only to the point of its value and utility in the world.²³³ In the guise of tailoring education to individual learning it actually narrows a person's educational opportunities based on that predetermined algorithm, valuable²³⁴ but valuable to the market alone.

5.3 Paving the way Forward

5.3.1 The Legal Approach

Echoing the sentiment of Persson, it needs to be seen whether shifting the power balance back to schools and their care-givers where the children could uphold the rights of the child?²³⁵ States in response to the rise in use of learning platforms in schools that there is a need where the families, students and the schools can “trust school staff to work with suppliers not overstepping the boundaries of lawful processing.”²³⁶ This requires more principled approach than specific legislative changes. While implementation of laws remains context specific, these principles from the Asilomar Convention are proposed to be followed by schools, state parties and private companies for protection of children's privacy in dataveillance schools- (i) Respect for the rights and dignity of learners, (ii) Beneficence-Individuals and organizations conducting learning research have an obligation to keep in mind the best interests of the child, (iii) Justice- All rights shall be upheld to ensure equality, (iii) Openness-The school system is sustained through transparent, participatory processes and (iv) The humanity of learning- Insight, judgment, and discretion are essentials to learning. Digital technologies can enhance, do not replace, and should never be allowed to erode the relationships that make learning a humane enterprise.²³⁷

5.3.2 The Pedagogical Approach

Schools need to re-envision the use of dataveillance technologies in school spaces to fulfil the holistic aims of education. Students need a space to connect and mull over their learnings and this distortion

²³¹ *Supranote 229, at 387*

²³² Clarke, Roger. “Dataveillance - 15 Years On,” n.d., 6.

²³³ *Supranote 62, at 787*

²³⁴ Mayor and Cuckier as cited in *Supranote 5, at 58*

²³⁵ Jen Persson, <https://jenpersson.com/a-fresh-start-for-edtech-maybe-but-i-wouldnt-start-from-here/>, 25th April 2020

²³⁶ *Id*

²³⁷ The Asilomar Convention for Learning Research in Higher Education, called Asilomar Convention, available at <http://asilomar-highered.info/asilomar-convention-20140612.pdf> (2014)

in 'space' of learning would only create what Davis calls 'thin skills'.²³⁸

Aim of education is learning, which requires thinking and "privacy provides an appropriate environment for quality thinking."²³⁹ The over reliance on apparatuses for analytics, algorithms and real-time tracking as authoritative source of schooling, requires revisiting. What is required in some measure is that the apparatuses of dataveillance in school space shall not be omnipresent.

5.3.3 Towards an interdisciplinary approach

The study of complexities of a dataveillance school entails invocation of various disciplines. The cross cutting and intersectional study of privacy and dataveillance requires more interdisciplinary research where child rights concerns are centric to the debate. It is only pertinent now more than ever, that the child rights discourse questions the new modernisation frameworks and multiple modes of control in our contemporary society.

5.4 Concluding Remarks

In this thesis, the various complexities and dynamics of the dataveillance practice were unfolded. Further, a deeper probe was undertaken to investigate the interactions of children in the school space, which could violate privacy rights of the child. Whilst digital surveillance practices continue to redefine spaces of integration of children into digital spaces, we have to continue to gauge the depth of these changes to understand its possible implications. The examination of the changing definitions in space and time of the physical and digital is to reevaluate and identify social problems that the child rights framework expose, but does not necessarily address.

In conclusion, this was an attempt to create that rupture in the interface between dataveillance practice in schools and the children to unravel the legal, ethical and social dimensions of these structures. It is time to raise pertinent questions to all the actors, regarding how we envisage the future of the childhoods and what this means for the inviolable child rights framework. In view of the encroachment of the rapidly advancing technology in the childhood space, it is an imperative to address the issue of whether the frameworks intended to protect, educate and empower the children are actually failing to address their concerns.

²³⁸A. Davis, *Do Children Have Privacy Rights in the Classroom?* *Studies in Philosophy and Education* 20: 245–254, Kluwer Academic Publishers, Netherlands, (2001), at 252

²³⁹ *Id.*, at 253

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