REPORTABLE

IN THE SUPREME COURT OF INDIA

CIVIL ORIGINAL JURISDICTION

WRIT PETITION (CIVIL) NO. 494 OF 2012

JUSTICE K.S. PUTTASWAMY (RETD.)
AND ANOTHER .....PETITIONER(S)

VERSUS

UNION OF INDIA AND OTHERS .....RESPONDENT(S)

WITH

TRANSFERRED CASE (CIVIL) NO. 151 OF 2013

TRANSFERRED CASE (CIVIL) NO. 152 OF 2013

WRIT PETITION (CIVIL) NO. 833 OF 2013

WRIT PETITION (CIVIL) NO. 829 OF 2013

TRANSFERRED PETITION (CIVIL) NO. 1797 OF 2013

WRIT PETITION (CIVIL) NO. 932 OF 2013

TRANSFERRED PETITION (CIVIL) NO. 1796 OF 2013

CONTEMPT PETITION (CIVIL) NO. 144 OF 2014
IN
WRIT PETITION (CIVIL) NO. 494 OF 2012

TRANSFERRED PETITION (CIVIL) NO. 313 OF 2014

TRANSFERRED PETITION (CIVIL) NO. 312 OF 2014

SPECIAL LEAVE PETITION (CRIMINAL) NO. 2524 OF 2014

WRIT PETITION (CIVIL) NO. 37 OF 2015

WRIT PETITION (CIVIL) NO. 220 OF 2015

CONTEMPT PETITION (CIVIL) NO. 674 OF 2015
IN
WRIT PETITION (CIVIL) NO. 829 OF 2013

TRANSFERRED PETITION (CIVIL) NO. 921 OF 2015

CONTEMPT PETITION (CIVIL) NO. 470 OF 2015
IN
WRIT PETITION (CIVIL) NO. 494 OF 2012

WRIT PETITION (CIVIL) NO. 231 OF 2016

CONTEMPT PETITION (CIVIL) NO. 444 OF 2016
IN
WRIT PETITION (CIVIL) NO. 494 OF 2012

CONTEMPT PETITION (CIVIL) NO. 608 OF 2016
IN
WRIT PETITION (CIVIL) NO. 494 OF 2012

WRIT PETITION (CIVIL) NO. 797 OF 2016

CONTEMPT PETITION (CIVIL) NO. 844 OF 2017
IN
WRIT PETITION (CIVIL) NO. 494 OF 2012

WRIT PETITION (CIVIL) NO. 342 OF 2017

WRIT PETITION (CIVIL) NO. 372 OF 2017

WRIT PETITION (CIVIL) NO. 841 OF 2017

WRIT PETITION (CIVIL) NO. 1058 OF 2017

WRIT PETITION (CIVIL) NO. 966 OF 2017

WRIT PETITION (CIVIL) NO. 1014 OF 2017

WRIT PETITION (CIVIL) NO. 1002 OF 2017

WRIT PETITION (CIVIL) NO. 1056 OF 2017

A N D

CONTEMPT PETITION (CIVIL) NO. 34 OF 2018
IN
WRIT PETITION (CIVIL) NO. 1014 OF 2017

J U D G M E N T

A.K. SIKRI, J.
(For Chief Justice, himself and A.M. Khanwilkar, J.)

Introduction and Preliminaries:

It is better to be unique than the best. Because, being the best makes you the number one, but being unique makes you the only one.

2) 'Unique makes you the only one' is the central message of Aadhaar, which is on the altar facing constitutional challenge in these petitions. 'Aadhaar' which means, in English, 'foundation' or 'base', has become the most talked about expression in recent years, not only in India but in many other countries and international bodies. A word from Hindi dictionary has assumed secondary significance. Today, mention of the word 'Aadhaar' would not lead a listener to the dictionary meaning of this word. Instead, every person on the very mentioning of this word 'Aadhaar' would associate it with the card that is issued to a

person from where he/she can be identified. It is described as an 'Unique Identity' and the authority which enrols a person and at whose behest the Aadhaar Card is issued is known as Unique Identification Authority of India (hereinafter referred to as 'UIDAI' or 'Authority'). It is described as unique for various reasons. UIDAI claims that not only it is a foolproof method of identifying a person, it is also an instrument whereby a person can enter into any transaction without needing any other document in support. It has become a symbol of digital economy and has enabled multiple avenues for a common man. Aadhaar scheme, which was conceptualised in the year 2006 and launched in the year 2009 with the creation of UIDAI, has secured the enrolment of almost 1.1 billion people in this country. Its use is spreading like wildfire, which is the result of robust and aggressive campaigning done by the Government, governmental agencies and other such bodies. In this way it has virtually become a household symbol. The Government boasts of multiple benefits of Aadhaar.

3) At the same time, the very scheme of Aadhaar and the architecture built thereupon has received scathing criticism from a section of the society. According to them, Aadhaar is a serious invasion into the right to privacy of persons and it has the

tendency to lead to a surveillance state where each individual can be kept under surveillance by creating his/her life profile and movement as well on his/her use of Aadhaar. There has been no other subject matter in recent past which has evoked the kind of intensive and heated debate wherein both sides, for and against, argue so passionately in support of their respective conviction. The petitioners in these petitions belong to the latter category who apprehend the totalitarian state if Aadhaar project is allowed to continue. They are demanding scrapping and demolition of the entire Aadhaar structure which, according to them, is anathema to the democratic principles and rule of law, which is the bedrock of the Indian Constitution. The petitioners have challenged the Aadhaar project which took off by way of administrative action in the year 2009. Even after Aadhaar got a shield of statutory cover, challenge persists as the very enactment known as Aadhaar (Targeted Delivery of Financial and Other Subsidies, Benefits and Services) Act, 2016 (hereinafter referred to as the 'Aadhaar Act') is challenged as constitutionally impermissible. The wide range of issues involved in this case is evident from the fact that it took almost four months for the parties to finish their arguments in these cases, and the Court witnessed highly skilled, suave, brilliant and intellectual advocacy, with the traces of passions as

well.

4) The issue has generated heated public debate as well. Even outside the Court, there are groups advocating in favour of the Aadhaar scheme and those who are stoutly opposing the same. Interestingly, it is not only the commoners who belong to either of the two groups but intelligentsia is also equally divided. There have been number of articles, interviews for discourses in favour of or against Aadhaar. Those in favour see Aadhaar project as ushering the nation into a regime of good governance, advancing socio-economic rights, economic prosperity etc. and in the process they claim that it may make the nation a world leader. Mr. K.K. Venugopal, learned Attorney General for India, referred to the commendations by certain international bodies, including the World Bank. We clarify that we have not been influenced by such views expressed either in favour or against Aadhaar. Those opposing Aadhaar are apprehensive that it may excessively intrude into the privacy of citizenry and has the tendency to create a totalitarian state, which would impinge upon the democratic and constitutional values. Some such opinions of various persons/bodies were referred to during the arguments. Notwithstanding the passions, emotions, annoyance, despair,

ecstasy, euphoria, coupled with rhetoric, exhibited by both sides in equal measure during the arguments, this Court while giving its judgment on the issues involved is required to have a posture of calmness coupled with objective examination of the issues on the touchstone of the constitutional provisions.

5) Initiative in spearheading the attack on the Aadhaar structure was taken by the petitioners, namely, Justice K.S. Puttaswamy (Retd.) and Mr. Pravesh Khanna, by filing Writ Petition (Civil) No. 494 of 2012. At that time, Aadhaar scheme was not under legislative umbrella. In the writ petition the scheme has primarily been challenged on the ground that it violates fundamental rights of the innumerable citizens of India, namely, right to privacy falling under Article 21 of the Constitution of India. Few others joined the race by filing connected petitions. Series of orders were passed in this petition from time to time, some of which would be referred to by us at the appropriate stage. In 2016, with the passing of the Aadhaar Act, these very petitioners filed another writ petition challenging the *vires* of the Act. Here again, some more writ petitions have been filed with the same objective. All these writ petitions were clubbed together. There are number of interventions as well by various individuals, groups, NGOs, etc., some opposing the petitions and some supporting the Aadhaar

scheme.

6) Before we go into the premise on which the attack is laid on the constitutional validity of the Aadhaar project and the Aadhaar Act, it would be apposite to take note of the events in chronological order that shaped the formulation, take off and implementation of the Aadhaar scheme.

7) On March 03, 2006, approval was given by the Department of Information Technology, Ministry of Communications and Information Technology, Government of India for the project titled 'Unique Identification for BPL Families' to be implemented by the National Informatics Centre (NIC) for over a period of twelve months. As a result, a Processes Committee was set up on July 03, 2006 to suggest the process for updation, modification, addition and deletion of data and fields from the core database to be created under the Unique Identification for BPL Families project. This Committee, on November 26, 2006, prepared a paper known as 'Strategic Vision Unique Identification of Residents'. Based thereupon, the Empowered Group of Ministers (EGoM) was set up on December 04, 2006, to collate the National Population Register under the Citizenship Act, 1955 and the Unique Identification Number project of the Department

of Information Technology. The EGoM was also empowered to look into the methodology and specific milestones for early and effective completion of projects and to take a final view on these projects. The EGoM was composed of the then Ministers of External Affairs, Home Affairs, Law, Panchayati Raj and Communications and Information Technology and the then Deputy Chairman, Planning Commission.

8) Various meetings on the Unique Identification (hereinafter referred to as 'UID') project were held from time to time. In the fourth meeting held on December 22, 2006, various aspects of proposed data elements and their formats were discussed. Thereafter, in its fifth meeting held on April 27, 2007, it was decided that the evolution of UID database would be in three stages in principle. The Committee further decided that linkage with major partner databases such as Household Survey of RD and the individual State Public Distribution System (PDS) databases should be taken up in a phased manner. On June 11, 2007, at the final stage of the project, a presentation on the UID project was made to the then Prime Minister by the Cabinet Secretary. The sixth meeting of the UID project was held on June 15, 2007. The Committee, *inter alia*, took the following decisions:

(i) The numbering format of 11 digits was approved.

(ii) The need for UID authority to be created by an executive order under the aegis of the Planning Commission was appreciated in order to ensure pan-departmental and neutral identity for the authority.

(iii) The proposal for creation of Central and State UIDs was approved.

(iv) Department of Information Technology (DIT) was directed to work out modalities for linkage with Election Commission and initiate discussions with MoRD and PDS for linkage.

(v) In principle, approval of proposed sequence for phasing plan was granted.

9) In the seventh meeting held on August 30, 2007, the proposed administrative framework and structure of UID authority and manpower requirement, including financial implications, was discussed. It was decided that a detailed proposal based on the resource model be presented to the Committee for its 'in principle' approval. At this stage, EGoM convened its first meeting on November 27, 2007. At this meeting, a consensus emerged on the following points:

(i) There is a clear need for creating an identity related

resident database, regardless of whether the database is created on a *de novo* collection of data or is based on an already existing data (such as the Election Commission's Voter List).

(ii) Additionally, there is a critical need to create an institutional mechanism that would 'own' the database and be responsible for its maintenance and updating.

(iii) The next meeting is to consider topics relating to collating the National Population Register (NPR) and UID schemes, including methodology, effective implementation techniques, identification of the institutional mechanism stated above, and the time schedule for putting the scheme into operation.

A series of meetings took place thereafter to work out the modalities of the programme. Certain issues were raised therein and to address those issues, a Committee of Secretaries was formed. The said Committee gave its recommendations which were discussed by EGoM. After approving the Aadhaar Scheme in principle, it instructed the Cabinet Secretary to convene a meeting to finalise the detailed organisational structure of the UID.

10) After considering the recommendation of the Cabinet Secretary, Notification No. A-43011/02/2009-Admn.I was issued on January

28, 2009 by the Government of India which constituted and notified the UIDAI as an attached office under the aegis of the Planning Commission. Consequent to the constitution of UIDAI, allocation of Rs.147.31 crores for Phase I of Aadhaar enrolments was approved by the Finance Minister on the recommendation of the Standing Committee on Finance. Demo-Official letter dated February 25, 2009, was sent by the Secretary, Planning Commission to all Chief Secretaries of 35 States/Union Territories apprising them of their roles and responsibilities of the States/Union Territories in implementation of UIDAI, such as appointment of the State/UT UID Commissioners, logistics support and coordination with various departments and State units.

As they say, rest is history, which we recapitulate in brief hereinafter.

11) A core group was set up to advice and further the work related to UIDAI. Budgets were allocated to UIDAI to enable it to undertake its task. Staff was also allocated to it. Meetings of the core group took place from time to time. The core group, *inter alia*, decided that it was better to start with the electoral roll database of 2009 for undertaking the UIDAI project. The status of digitisation of

PDS records, state-wise, was sought to be sent from the Department of Food and Public Distribution to the Standing Commission/UID. This and other steps taken in this direction culminated in issuance of Notification dated July 02, 2009 whereby Mr. Nandan Nilekani was appointed as the Chairman of UIDAI for an initial tenure of five years in the rank and status of a Cabinet Minister. He assumed charge on July 24, 2009. Thereafter, the Prime Minister's Council of UIDAI was constituted on July 30, 2009 which held its first meeting on August 12, 2009 where the Chairman of UIDAI made detailed representation on the broad strategy and approach of the proposed UID project. One of the proposals was to provide a legislative framework for UID at the earliest so that it could have the legal sanction to perform its function. Some other Committees like the Biometrics Standard Committee, Demographic Data Standards and Verification Procedure Committee were set up as a support system to the project, which submitted their respective reports in December 2009. Even a Cabinet Committee on UID was constituted vide orders dated October 22, 2009 which was headed by the Prime Minister with the aim to cover all issues relating to UIDAI, including its organisation, policies, programmes, schemes, funding and methodology to be adopted

for achieving its objectives.

12) The matter was addressed in the Seventeenth Finance Commission Report also which was tabled in the Parliament on February 25, 2010. In this report, the Finance Commission suggested targeting of subsidies through UIDAI. By April 2010, UIDAI came out with its Strategy Overview. This Overview describes the features, benefits, revenue model and timelines of the UIDAI project. Furthermore, it outlined the goal of the UID to serve as a universal proof of identity, allowing residents to prove their identities anywhere in the country. The project would give the Government a clear view of India's population, enabling it to target and deliver services effectively, achieve greater returns on social investments and monitor money and resource flows across the country. It was felt that crucial to the achievement of this goal is the active participation of the central, state and local Governments as well as public and private sector entities. Only with their support will the project be able to realise a larger vision of inclusion and development in India.

13) A Cabinet Note bearing No. 4(4)/57/2010/CC-UIDAI for the Cabinet Committee on UIDAI was submitted on May 12, 2010. The Note outlined a brief background of UIDAI, proposed an

approach for collection of demographic and biometric attributes of residents for the UID project and sought approval of the Cabinet Committee for adoption of the aforesaid approach and suggested that the same standards and processes be adhered to by the Registrar General of India for the NPR exercise and all other Registrars in the UID system. Rationale for inclusion of iris biometrics was also submitted with the aforesaid Cabinet Note to explain the need for capturing iris scans at the time of capturing biometric details.

14) By September 2010 enrolment process of Aadhaar began with the nationwide launch of the Aadhaar project. In December 2010, UIDAI came out with a report on enrolment process known as 'UID Enrolment Proof-of-Concept Report' studying enrolment proof-of-concept in three rural areas of Karnataka, Bihar and Andhra Pradesh published by the UIDAI. According to this report, 'the biometric matching analysis of 40,000 people showed that the accuracy levels achieved by both iris and ten fingerprints were more than an order of magnitude better compared to using either of the two individually. The multi-modal enrolment was adequate to carry out de-duplication on a much larger scale, with reasonable expectations of extending it to all residents of India'.

15) Going by the recommendation of the Chairman of UIDAI for providing legislative framework to UIDAI, a Bill was introduced in the Rajya Sabha on December 03, 2010 known as 'National Identification Authority of India Bill, 2010'.

16) Various other steps were taken to smoothen the process of enrolment. There were studies from time to time on the effectiveness of the enrolment process. Notifications/orders were also issued by the Reserve Bank of India stating that an Aadhaar letter would be recognised by Banks to open bank accounts for a resident. Similar Orders/Notifications were issued by other authorities as well. On the first anniversary of Aadhaar launch, which fell on September 29, 2011, announcement was made that 10 crores enrolments and generation of more than 3.75 crores of Aadhaar had taken place. Some of the reports submitted in due course of time, which are relevant for our purposes, are taken note of at this stage:

(i) Report of the Task Force on an Aadhaar-Enabled Unified Payment Infrastructure for the direct transfer of subsidies on Kerosene, LPG and Fertilizer.

(ii) In March 2012, Fingerprint Authentication Report was submitted to UIDAI. This Report showcased the high accuracy

rates of using fingerprints to authenticate identities. The study conducted in the rural setting representing typical demography of the population established that it is technically possible to use fingerprint to authenticate a resident in 98.13% of the population. The accuracy of 96.5% can be achieved using one best finger and 99.3% can be achieved using two fingers. Further improvement is possible if the device specifications are tightened to include only the best devices and certain mechanical guide is used to aid proper placement of the finger. It was also demonstrated through benchmarking that the authentication infrastructure is able to sustain one million authentications per hour.

(iii) Fifty Third Report of the Standing Committee on Finance on the 'Demands for Grants (2012-13)' of the Ministry of Planning was presented to the Lok Sabha and Rajya Sabha on April 24, 2012. This Report summarises the objectives and financial implications of the UID scheme being implemented under the aegis of the Planning Commission.

(iv) Iris Authentication Accuracy Report was submitted to UIDAI on September 12, 2012. This Report based on an empirical study of 5833 residents demonstrated iris authentication to be viable in Indian context. With current level of device readiness for

iris capture, it is capable of providing coverage for 99.67% of population with authentication accuracy of above 99.5%. Suggestions made in this document for the vendors, once implemented, will improve the rates further. The overall systems – network and software – have shown to meet desired requirements in real life condition. Finally, six different devices with variety of form and function are available to provide competitive vendor eco-system.

(v) Background Note on Introduction to Cash Transfers was prepared by the National Committee on Direct Cash Transfers in its first meeting on November 26, 2012. This Report outlines the advantages of cash transfers in the Indian context stating that a unique ID for all is a prerequisite for this purpose.

17) At this juncture, Writ Petition (Civil) No. 494 of 2012 was filed in which show-cause notice dated November 30, 2012 was issued by this Court. As pointed out above, this writ petition assailed Aadhaar scheme primarily on the ground that it violates right to privacy which is a facet of fundamental rights enshrined in Article 21 of the Constitution.

18) Counter affidavit thereto was filed by the Union of India as well as UIDAI. The stand taken by the respondents, *inter alia*, was that

right to privacy is not a fundamental right, which was so held by the eight Judge Bench judgment in *M.P. Sharma and 4 Others* v. *Satish Chandra Distt. Magistrate, Delhi and 4 Others*[1]. This is notwithstanding the fact that thereafter in many judgments rendered by this Court, right to privacy was accepted as a facet of Article 21. Contention of the respondents, however, was that those judgments were contrary to the dicta laid down in *M.P. Sharma* and were, therefore, *per in curium.* The matter on this aspect was heard by a three Judge Bench and after hearing the parties, the Bench deemed it appropriate to make the reference to the Constitution Bench. A five Judge Bench was constituted, which after considering the matter, referred the same to a nine Judge Bench to resolve the controversy in an authoritative manner. The nine Judge Bench judgment has given an unanimous answer to the Reference with conclusive, unambiguous and emphatic determination that right to privacy is a part of fundamental rights which can be traced to Articles 14, 19 and 21 of the Constitution of India.

19) We may also record at this stage that in this petition certain interim orders were passed from time to time. We may give the gist of some of the relevant orders:

1 1954 SCR 1077

(a) Order dated September 23, 2013 (two Judge Bench)

"All the matters require to be heard finally. List all matters for final hearing after the Constitution Bench is over.

In the meanwhile, no person should suffer for not getting the Aadhaar card in spite of the fact that some authority had issued a circular making it mandatory and when any person applies to get the Aadhaar card voluntarily, it may be checked whether that person is entitled for it under the law and it should not be given to any illegal immigrant."

(b) Order dated November 26, 2013 (two Judge Bench)

"After hearing the matter at length, we are of the view that all the States and Union Territories have to be impleaded as respondents to give effective directions. In view thereof, notice be issued to all the States and Union Territories through standing counsel.

xx xx xx

Interim order to continue, in the meantime."

(c) Order dated March 16, 2015 (three Judge Bench)

"In the meanwhile, it is brought to our notice that in certain quarters, Aadhaar identification is being insisted upon by the various authorities, we do not propose to go into the specific instances.

Since Union of India is represented by learned Solicitor General and all the States are represented through their respective counsel, we expect that both the Union of India and States and all their functionaries should adhere to the order passed by this Court on 23rd September, 2013."

(d) Order dated August 11, 2015 (three Judge Bench)

"Having considered the matter, we are of the view that the balance of interest would be best served, till the matter is finally decided by a larger Bench, if the Union of India or the UIDAI proceed in the following manner:

1. The Union of India shall give wide publicity in the electronic and print media including radio and television networks that it is not mandatory for a citizen to obtain an Aadhaar card.

2. The production of an Aadhaar card will not be condition for obtaining any benefits otherwise due to a citizen.

3. The Unique Identification Number or the Aadhaar card will not be used by the respondents for any purpose other than the PDS Scheme and in particular for the purpose of distribution of food grains, etc. and cooking fuel, such as kerosene. The Aadhaar card may also be used for the purpose of LPG Distribution Scheme.

4. The information about an individual obtained by the Unique Identification Authority of India while issuing an Aadhaar card shall not be used for any other purpose, save as above, except as may be directed by a Court for the purpose of criminal investigation."

(d) Order dated October 15, 2015 (Constitution Bench)

"3. After hearing the learned Attorney General for India and other learned senior counsels, we are of the view that in paragraph 3 of the order dated 11.08.2015, if we add, apart from the other two Schemes, namely, P.D.S. Scheme and L.P.G. Distribution Scheme, the Schemes like The Mahatma Gandhi National Social Assistance Programme (Old Age Pensions, Widow Pensions, Disability Pensions), Prime Minister's Jan Dhan Yojana (PMJDY) and Employees' Provident Fund Organisation (EPFO) for the present, it would not dilute earlier order passed by this Court. Therefore, we now include the aforesaid Schemes apart from the other two Schemes that this Court has permitted in its earlier order dated 11.08.2015.

4. We impress upon the Union of India that it shall strictly follow all the earlier orders passed by this Court commencing from 23.09.2013.

5. We will also make it clear that the Aadhaar card scheme is purely voluntary and it cannot be made mandatory till the matter is finally decided by this Court one way or the other."

(e) Order dated September 14, 2016 in WP (C) No. 686/2016

> "Having regard to the facts and circumstances of the case, the material evidence available on record and the submissions made by learned senior counsel, we stay the operation and implementation of letters dated 14.07.2006 (i.e. Annexure P-5, P-6, P-7) for Pre-Matric Scholarship Scheme, Post-Matric Scholarship Scheme and Merit-cum-Means Scholarship Scheme to the extent they have made submission of Aadhaar mandatory and direct the Ministry of Electronics and Information Technology, Government of India, i.e. respondent No.2, to remove Aadhaar number as a mandatory condition for student registration form at the National Scholarship Portal of Ministry of Electronics and Information Technology, Government of India at the website..."

20) It is also relevant to point out that against an order passed by the High Court of Bombay at Panaji, in some criminal proceedings, wherein the Authority was directed to pass on biometric information on a person, UIDAI had filed Special Leave Petition (Criminal) No. 2524 of 2014 challenging the said order with the submission that such a direction for giving biometric information was contrary to the provisions of the Aadhaar Act and the Authority was not supposed to give such an information, which was confidential. In the said special leave petition, order dated March 24, 2014 was passed staying the operation of the orders of the Bombay High Court. This order reads as under:

> "Issue notice.
>
> In addition to normal mode of service, dasti service, is permitted.

> Operation of the impugned order shall remain stayed.
>
> In the meanwhile, the present petitioner is restrained from transferring any biometric information of any person who has been allotted the Aadhaar number to any other agency without his consent in writing.
>
> More so, no person shall be deprived of any service for want of Aadhaar number in case he/she is otherwise eligible/entitled. All the authorities are directed to modify their forms/circulars/likes so as to not compulsorily require the Aadhaar number in order to meet the requirement of the interim order passed by this Court forthwith.
>
> Tag and list the matter with main matter i.e. WP (C) No. 494 of 2012."

21) Likewise, in Writ Petition (Civil) No. 1002 of 2017 titled *Dr. Kalyan Menon Sen* v. *Union of India and Others*, where constitutional validity of linking bank accounts and mobile phones with Aadhaar linkage was challenged, interim order was passed on November 03, 2017 extending the last date of linking to December 31, 2017 and February 06, 2018 respectively. This order was extended thereafter and continues to operate.

22) We would also like to refer to the order dated September 14, 2011 passed in *People's Union for Civil Liberties (PDS Matter)* v. *Union of India & Ors.*[2], wherein various directions were given to ensure effective implementation of the PDS Scheme and in the process to also undertake the exercise of eliminating the task and

2 (2011) 14 SCC 331

ghost ration cards. In the same manner, vide order dated March 16, 2012 it was noted that the Government had set up a task force under the Chairmanship of Mr. Nandan Nilekani to recommend, amongst others, an IT strategy for the PDS. Mr. Nilekani was requested to suggest ways and means by which computerization process of the PDS can be expedited. Computerisation of PDS system was directed to be prepared and in this hue the process of computerisation with Aadhaar registration was also suggested.

In the same very case above, which also pertained to providing night shelters to homeless destitute persons, some orders were passed on February 10, 2010[3] as well as on September 14, 2011[4].

23) Again, in the case of *State of Kerala & Ors.* v. *President, Parent Teachers Association SNVUP School and Ors.*[5], where the Court was concerned with the problem of fake or bogus admissions, it was felt that instead of involving the Police in schools to prevent fake admissions, more appropriate method of verification would be Unique Identification (UID) card as means of verification.

Architecture of the Aadhaar Project and the Aadhaar Act:

3 (2010) 5 SC 318
4 (2010) 13 SCC 45
5 (2013) 2 SCC 705

24) Before adverting to the discussion on various issues that have been raised in these petitions, it would be apposite to first understand the structure of the Aadhaar Act and how it operates, having regard to various provisions contained therein. UIDAI was established in the year 2009 by an administrative order i.e. by resolution of the Govt. of India, Planning Commission, vide notification dated January 28, 2009. The object of the establishment of the said Authority was primarily to lay down policies to implement the Unique Identification Scheme (for short the 'UIS') of the Government, by which residents of India were to be provided unique identity number. The aim was to serve this as proof of identity, which is unique in nature, as each individual will have only one identity with no chance of duplication. Another objective was that this number could be used for identification of beneficiaries for transfer of benefits, subsidies, services and other purposes. This was the primary reason, viz. to ensure correct identification of targeted beneficiaries for delivery of various subsidies, benefits, services, grants, wages and other social benefits schemes which are funded from the Consolidated Fund of India. It was felt that the identification of real and genuine beneficiaries had become a challenge for the Government. In the

absence of a credible system to authenticate identity of beneficiaries, it was becoming difficult to ensure that the subsidies, benefits and services reach to intended beneficiaries. As per the Government, failure to establish identity was proving to be major hindrance for the successful implementation of the welfare programmes and it was hitting hard the marginalised section of the society and, in particular, women, children, senior citizens, persons with disabilities, migrant unskilled and organised workers, and nomadic tribes. After the establishment of the Authority, vide the aforesaid notification, it started enrolling the residents of this country under the UIS. These residents also started using Aadhaar number allotted to them. It was found that over a period of time, the use of Aadhaar number had increased manifold. This necessitated ensuring security of the information contained in Aadhaar number as well as the information that generated as a result of the use of Aadhaar numbers. It was, thus, felt desirable to back the system with a Parliamentary enactment.

25) With this intention, the Aadhaar Bill was introduced with the following Introduction:

> "The Unique Identification Authority of India was established by a resolution of the Government of India in 2009. It was meant primarily to lay down policies and to

implement the Unique Identification Scheme, by which residents of India were to be provided unique identity number. This number wold serve as proof of identity and could be used for identification of beneficiaries for transfer of benefits, subsidies, services and other purposes.

Later on, it was felt that the process of enrollment, authentication, security, confidentiality and use of Aadhaar related information be made statutory so as to facilitate the use of Aadhaar number for delivery of various benefits, subsidies and services, the expenditures of which were incurred from or receipts therefrom formed part of the Consolidated Fund of India.

The Aadhaar (Targeted Delivery of Financial and Other Subsidies, Benefits and Services) Bill, 2016 *inter alia*, provides for establishment of Unique Identification Authority of India, issuance of Aadhaar number to individuals, maintenance and updating of information in the Central Identities Data Repository, issues pertaining to security, privacy and confidentiality of information as well as offences and penalties for contravention of relevant statutory provisions."

26) After mentioning the reasons recorded above, Statement of Objects and Reasons for introducing the Bill also highlight the salient features thereof in the following manner:

"5. The Aadhaar (Targeted Delivery of Financial and Other Subsidies, Benefits and Services) Bill, 2016, inter alia, seeks to provide for—

(a) issue of Aadhaar numbers to individuals on providing his demographic and biometric information to the Unique Identification Authority of India;

(b) requiring Aadhaar numbers for identifying an individual for delivery of benefits, subsidies, and services the expenditure is incurred from or the receipt therefrom forms part of the Consolidated Fund of India;

(c) authentication of the Aadhaar number of an Aadhaar number holder in relation to his demographic and biometric information;

(d) establishment of the Unique Identification Authority of India consisting of a Chairperson, two Members and a Member-Secretary to perform functions in pursuance of the objectives above;

(e) maintenance and updating the information of individuals in the Central Identities Data Repository in such manner as may be specified by regulations;

(f) measures pertaining to security, privacy and confidentiality of information in possession or control of the Authority including information stored in the Central Identities Data Repository; and

(g) offences and penalties for contravention of relevant statutory provisions."

27) The Bill having been passed by the Legislature, received the assent of the President on March 25, 2016 and, thus, became Act (18 of 2016). Preamble to this Act again emphasises the aim and objective which this Act seeks to achieve. It reads:

> "An Act to provide for, as a good governance, efficient, transparent, and targeted delivery of subsidies, benefits and services, the expenditure for which is incurred from the Consolidated Fund of India, to individuals residing in India through assigning of unique identity numbers to such individuals and for matters connected therewith or incidental thereto"

28) Section 2 of the Act provides certain definitions. Some of the definitions can be noted at this stage itself, while other relevant definitions would be mentioned at the appropriate stage.

"(*a*) "Aadhaar number" means an identification number issued to an individual under sub-section (3) of Section 3;

(b) "Aadhaar number holder" means an individual who has been issued an Aadhaar number under this Act;

(c) "authentication" means the process by which the Aadhaar number along with demographic information or biometric information of an individual is submitted to the Central Identities Data Repository for its verification and such Repository verifies the correctness, or the lack thereof, on the basis of information available with it;

(d) "authentication record" means the record of the time of authentication and identity of the requesting entity and the response provided by the Authority thereto;

xx xx xx

(f) "benefit" means any advantage, gift, reward, relief, or payment, in cash or kind, provided to an individual or a group of individuals and includes such other benefits as may be notified by the Central Government;

(g) "biometric information" means photograph, finger print, Iris scan, or such other biological attributes of an individual as may be specified by regulations;

(h) "Central Identities Data Repository" means a centralised database in one or more locations containing all Aadhaar numbers issued to Aadhaar number holders along with the corresponding demographic information and biometric information of such individuals and other information related thereto;

xx xx xx

(j) "core biometric information" means finger print, Iris scan, or such other biological attribute of an individual as may be specified by regulations;

(k) "demographic information" includes information relating to the name, date of birth, address and other relevant information of an individual, as may be specified by regulations for the purpose of issuing an Aadhaar number, but shall not include race, religion, caste, tribe, ethnicity,

language, records of entitlement, income or medical history;

(l) "enrolling agency" means an agency appointed by the Authority or a Registrar, as the case may be, for collecting demographic and biometric information of individuals under this Act;

(m) "enrollment" means the process, as may be specified by regulations, to collect demographic and biometric information from individuals by the enrolling agencies for the purpose of issuing Aadhaar numbers to such individuals under this Act;

(n) "identity information" in respect of an individual, includes his Aadhaar number, his biometric information and his demographic information;

xx xx xx

(r) "records of entitlement" means records of benefits, subsidies or services provided to, or availed by, any individual under any programme;

xx xx xx

(u) "requesting entity" means an agency or person that submits the Aadhaar number, and demographic information or biometric information, of an individual to the Central Identities Data Repository for authentication;

(v) "resident" means an individual who has resided in India for a period or periods amounting in all to one hundred and eighty-two days or more in the twelve months immediately preceding the date of application for enrolment;

(w) "service" means any provision, facility, utility or any other assistance provided in any form to an individual or a group of individuals and includes such other services as may be notified by the Central Government;

(x) "subsidy" means any form of aid, support, grant, subvention, or appropriation, in cash or kind, to an individual or a group of individuals and includes such other subsidies as may be notified by the Central Government."

29) Chapter II of the Act deals with enrolment. Section 3 in this Chapter entitles every resident to obtain the Aadhaar number by submitting his demographic information and biometric information. As noted above, demographic information includes information relating to the name, date of birth, address and 'other relevant information of an individual, as may be specified by regulations for the purpose of issuing an Aadhaar number'. Photograph, fingerprint, iris scan, 'or such other biological attribute of an individual as may be specified by regulations' are treated as biometric information. Sub-section (2) of Section 3 stipulates that the enrolling agency shall, at the time of enrolment, inform the individual undergoing enrolment of the following details in such manner as may be specified by regulations, namely:

(a) the manner in which the information shall be used;

(b) the nature of recipients with whom the information is intended to be shared during authentication; and

(c) the existence of a right to access information, the procedure for making requests for such access, and details of the person or department in-charge to whom such requests can be made.

30) Section 4, *inter alia*, provides that Aadhaar number issued to an individual shall not be reassigned to any individual. In this sense,

it makes an Aadhaar number given to a particular individual 'unique'. Section 5 delineates special measures for issuance of Aadhaar number to certain categories of persons and reads as under:

> "**5. Special measures for issuance of Aadhaar number to certain category of persons**.— The Authority shall take special measures to issue Aadhaar number to women, children, senior citizens, persons with disability, unskilled and unorganised workers, nomadic tribes or to such other persons who do not have any permanent dwelling house and such other categories of individuals as may be specified by regulations."

31) Section 6 enables the Authority to update demographic and biometric information of the Aadhaar number holders from time to time.

32) Chapter III deals with 'authentication', which has generated the maximum debate in these proceedings. Section 7 falling under this Chapter mandates that proof of Aadhaar number would be necessary for receipt of certain subsidies, benefits and services etc. meaning thereby for availing such subsidies, benefits and services, it would be necessary for the intended beneficiary to possess Aadhaar number. In case of an individual to whom no Aadhaar number has been assigned, he/she would be required to show that application for enrolment has been given. Where the Aadhaar number is not assigned, proviso to Section 7 lays down

that the individual shall be offered alternate and viable means of identification for delivery of subsidy, benefit or service. Section 8 deals with authentication of Aadhaar number and provides that on submission of request by any requesting entity, the Authority shall perform authentication of Aadhaar number. This authentication is in relation to biometric information or demographic information of an Aadhaar number holder. Before collecting identity information for the purpose of authentication, the requesting entity is to obtain consent of an individual and also to ensure that the identity information of that individual is only used for submission to the Central Identities Data Repository (CIDR) for authentication. Sections 7 and 8 read as under:

> "**7. Proof of Aadhaar number necessary for receipt of certain subsidies, benefits and services, etc**.— The Central Government or, as the case may be, the State Government may, for the purpose of establishing identity of an individual as a condition for receipt of a subsidy, benefit or service for which the expenditure is incurred from, or the receipt therefrom forms part of, the Consolidated Fund of India, require that such individual undergo authentication, or furnish proof of possession of Aadhaar number or in the case of an individual to whom no Aadhaar number has been assigned, such individual makes an application for enrolment:
>
> Provided that if an Aadhaar number is not assigned to an individual, the individual shall be offered alternate and viable means of identification for delivery of the subsidy, benefit or service.
>
> **8. Authentication of Aadhaar number**.— (1) The Authority shall perform authentication of the Aadhaar number of an Aadhaar number holder submitted by any

requesting entity, in relation to his biometric information or demographic information, subject to such conditions and on payment of such fees and in such manner as may be specified by regulations.

(2) A requesting entity shall—

(a) unless otherwise provided in this Act, obtain the consent of an individual before collecting his identity information for the purposes of authentication in such manner as may be specified by regulations; and

(b) ensure that the identity information of an individual is only used for submission to the Central Identities Data Repository for authentication.

(3) A requesting entity shall inform, in such manner as may be specified by regulations, the individual submitting his identity information for authentication, the following details with respect to authentication, namely—

(a) the nature of information that may be shared upon authentication;

(b) the uses to which the information received during authentication may be put by the requesting entity; and

(c) alternatives to submission of identity information to the requesting entity.

(4) The Authority shall respond to an authentication query with a positive, negative or any other appropriate response sharing such identity information excluding any core biometric information."

33) Under Section 10, the Authority is given power to engage one or more entities to establish and maintain the CIDR and to perform any other functions as may be specified by regulations.

34) Chapter IV deals with the Establishment of the Authority. As per Section 11, the Central Government, by notification, shall

establish an Authority to be known as the Unique Identification Authority of India. Notification dated July 12, 2016 was issued by the Central Government establishing the Authority. Other provisions in this Chapter deal with the composition of the Authority, qualifications for appointment of the Chairperson and Members of Authority; term of their office and their removal; and restrictions on their employment after cessation of office. It also provides for the functions of Chairperson as well as office of the Chief Executive Officer (CEO) and his functions and the meetings of the Authority etc. Powers and functions of the Authority are stipulated in Section 23.

35) Chapter V talks of grants to the Authority by the Central Government as well as accounts and audit and annual report of the Authority.

36) Chapter VI deals with the important aspects pertaining to 'protection of information'. Section 28 of the Aadhaar Act puts an obligation on the Authority to ensure the security of identity information and authentication records of individuals. Likewise, Section 29 imposes certain restrictions on sharing information i.e. core biometric information collected or created under the Act or the identity information. The biometric information collected and

stored in electronic form, in accordance with this Act and regulations made thereunder, is treated as 'electronic record' and 'sensitive personal data or information' by virtue of Section 30 of the Act. As these are very material and significant provisions of the Act, the same are reproduced verbatim in their entirety:

> "**28. Security and confidentiality of information**.— (1) The Authority shall ensure the security of identity information and authentication records of individuals.
>
> (2) Subject to the provisions of this Act, the Authority shall ensure confidentiality of identity information and authentication records of individuals.
>
> (3) The Authority shall take all necessary measures to ensure that the information in the possession or control of the Authority, including information stored in the Central Identities Data Repository, is secured and protected against access, use or disclosure not permitted under this Act or regulations made thereunder, and against accidental or intentional destruction, loss or damage.
>
> (4) Without prejudice to sub-sections (1) and (2), the Authority shall—
>
> (a) adopt and implement appropriate technical and organisational security measures;
>
> (b) ensure that the agencies, consultants, advisors or other persons appointed or engaged for performing any function of the Authority under this Act, have in place appropriate technical and organisational security measures for the information; and
>
> (c) ensure that the agreements or arrangements entered into with such agencies, consultants, advisors or other persons, impose obligations equivalent to those imposed on the Authority under this Act, and require such agencies, consultants, advisors and other persons to act only on instructions from the Authority.

29. Restriction on sharing information.— (1) No core biometric information, collected or created under this Act, shall be—

(a) shared with anyone for any reason whatsoever; or

(b) used for any purpose other than generation of Aadhaar numbers and authentication under this Act.

(2) The identity information, other than core biometric information, collected or created under this Act may be shared only in accordance with the provisions of this Act and in such manner as may be specified by regulations.

(3) No identity information available with a requesting entity shall be—

(a) used for any purpose, other than that specified to the individual at the time of submitting any identity information for authentication; or

(b) disclosed further, except with the prior consent of the individual to whom such information relates.

(4) No Aadhaar number or core biometric information collected or created under this Act in respect of an Aadhaar number holder shall be published, displayed or posted publicly, except for the purposes as may be specified by regulations.

30. Biometric information deemed to be sensitive personal information.— The biometric information collected and stored in electronic form, in accordance with this Act and regulations made thereunder, shall be deemed to be "electronic record" and "sensitive personal data or information", and the provisions contained in the Information Technology Act, 2000 (21 of 2000) and the rules made thereunder shall apply to such information, in addition to, and to the extent not in derogation of the provisions of this Act.

Explanation.—For the purposes of this section, the expressions—

(a) "electronic form" shall have the same meaning as assigned to it in clause (r) of sub-section (1) of Section 2 of the Information Technology Act, 2000 (21 of 2000);

> (b) "electronic record" shall have the same meaning as assigned to it in clause (t) of sub-section (1) of Section 2 of the Information Technology Act, 2000 (21 of 2000);
>
> (c) "sensitive personal data or information" shall have the same meaning as assigned to it in clause (iii) of the Explanation to Section 43-A of the Information Technology Act, 2000 (21 of 2000)."

37) Section 32 provides that the Authority shall maintain authentication records in such manner and for such period as may be specified by regulations and enables every Aadhaar number holder to obtain his authentication record in such manner as may be specified by regulations. This provision also puts an embargo upon the Authority to collect, keep or maintain any information about 'purpose of authentication'. Section 33, however, creates an exception to the provisions of Section 28(ii) and (v) as well as Section 29(ii) by stipulating that the information can be disclosed pursuant to an order of a court not inferior to that of a District Judge. It also carves out another exception in those cases where it becomes necessary to disclose the information in the interest of national security in pursuance of a direction of an officer not below the rank of Joint Secretary to the Government of India specially authorised in this behalf by an order of the Central Government.

38) Sections 34 to 47 in Chapter VII of the Act enumerate various kinds of offences and provide penalties for such offences. For our purposes, relevant Section is Section 37 which makes act of disclosing identity information as offence which is punishable with imprisonment for a term which may extend to three years or with a fine which may extend to ten thousand rupees. In the case of a company, this fine can extend to one lakh rupees. Likewise, Section 38 provides for penalty for unauthorised access to the CIDR. Penalties for tampering with data in CIDR (Section 39) and unauthorised use by requesting entity (Section 40) are also stipulated.

Cognizance of offences under this Chapter can be taken by a court only on a complaint made by the Authority or any officer or person authorised by it.

39) Section 50 of the Act empowers the Central Government to issue directions to the Authority in writing from time to time and the Authority shall be bound to carry out such directions on questions of policy. Section 53 empowers the Central Government to make rules to carry out the provisions of the Act generally as well as the specific matters enumerated in sub-section (2) thereof. Section 54 empowers the Authority to make regulations consistent with the Act and Rules made thereunder, for carrying out the

provisions of the Act and, in particular, the matters mentioned in sub-section (2). Such Rules and Regulations are to be laid before the Parliament, as provided in Section 55.

40) Section 57 provides that the Aadhaar Act would not prevent the use of Aadhaar number for establishing the identity of an individual for any purpose and reads as under:

> "**57. Act not to prevent use of Aadhaar number for other purposes under law**.— Nothing contained in this Act shall prevent the use of Aadhaar number for establishing the identity of an individual for any purpose, whether by the State or any body corporate or person, pursuant to any law, for the time being in force, or any contract to this effect:
>
> Provided that the use of Aadhaar number under this section shall be subject to the procedure and obligations under Section 8 and Chapter VI."

41) If any difficulty arises in giving effect to the provisions of the Act, the Central Government is empowered to make provisions to remove those difficulties, provided that such provisions are not inconsistent with the provisions of the Act. Section 59, which is the last provision in the Act, is an attempt to save all the acts and actions of the Central Government under Notification dated January 28, 2009 vide which the Authority was established or the Department of Electronics and Information Technology under the Cabinet Secretariat Notification dated September 12, 2015. This

provision is couched in the following language:

> "**59. Savings**.— Anything done or any action taken by the Central Government under the Resolution of the Government of India, Planning Commission bearing Notification Number A-43011/02/2009-Admin. I, dated the 28th January, 2009, or by the Department of Electronics and Information Technology under the Cabinet Secretariat Notification bearing Notification Number S.O. 2492(E), dated the 12th September, 2015, as the case may be, shall be deemed to have been validly done or taken under this Act."

42) Regulations have been framed under the Act, namely, (1) The Aadhaar (Enrolment and Update) Regulations, 2016; (2) The Aadhaar (Authentication) Regulations, 2016; (3) The Aadhaar (Data Security) Regulations, 2016; and (4) The Aadhaar (Sharing of Information) Regulations, 2016. The relevant provisions in these Regulations are reproduced below:

> "The Aadhaar (Enrolment and Update) Regulations, 2016
>
> 4. **Demographic information required for enrolment.** — (1) The following demographic information shall be collected from all individuals undergoing enrolment (other than children below five years of age):
> (i) Name;
> (ii) Date of Birth;
> (iii) Gender;
> (iv) Residential Address.
>
> (2) The following demographic information may also additionally be collected during enrolment, at the option of the individual undergoing enrolment:
> (i) Mobile number
> (ii) Email address
>
> (3) In case of Introducer-based enrolment, the following additional information shall be collected:
> (i) Introducer name;

(ii)Introducer's Aadhaar number.

(4) In case of Head of Family based enrolment, the following additional information shall be collected:
(i) Name of Head of Family;
(ii) Relationship;
(iii) Head of Family's Aadhaar number;
(iv) One modality of biometric information of the Head of Family.

(5) The standards of the above demographic information shall be as may be specified by the Authority for this purpose.

(6) The demographic information shall not include race, religion, caste, tribe, ethnicity, language, record of entitlement, income or medical history of the resident.

The Aadhaar (Authentication) Regulations, 2016

3. **Types of Authentication.**— There shall be two types of authentication facilities provided by the Authority, namely—

(i) Yes/No authentication facility, which may be carried out using any of the modes specified in regulation 4(2); and

(ii) e-KYC authentication facility, which may be carried out only using OTP and/ or biometric authentication modes as specified in regulation 4(2).

4. **Modes of Authentication.** — (1) An authentication request shall be entertained by the Authority only upon a request sent by a requesting entity electronically in accordance with these regulations and conforming to the specifications laid down by the Authority.

(2) Authentication may be carried out through the following modes:

(a) Demographic authentication: The Aadhaar number and demographic information of the Aadhaar number holder obtained from the Aadhaar number holder is matched with the demographic information of the Aadhaar number holder in the CIDR.

(b) One-time pin based authentication: A One Time Pin (OTP), with limited time validity, is sent to the mobile

number and/ or e-mail address of the Aadhaar number holder registered with the Authority, or generated by other appropriate means. The Aadhaar number holder shall provide this OTP along with his Aadhaar number during authentication and the same shall be matched with the OTP generated by the Authority.

(c) Biometric-based authentication: The Aadhaar number and biometric information submitted by an Aadhaar number holder are matched with the biometric information of the said Aadhaar number holder stored in the CIDR. This may be fingerprints-based or iris-based authentication or other biometric modalities based on biometric information stored in the CIDR.

(d) Multi-factor authentication: A combination of two or more of the above modes may be used for authentication.

(3) A requesting entity may choose suitable mode(s) of authentication from the modes specified in sub-regulation (2) for a particular service or business function as per its requirement, including multiple factor authentication for enhancing security. For the avoidance of doubt, it is clarified that e-KYC authentication shall only be carried out using OTP and/ or biometric authentication.

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7. **Capturing of biometric information by requesting entity**.— (1) A requesting entity shall capture the biometric information of the Aadhaar number holder using certified biometric devices as per the processes and specifications laid down by the Authority.

(2) A requesting entity shall necessarily encrypt and secure the biometric data at the time of capture as per the specifications laid down by the Authority.

(3) For optimum results in capturing of biometric information, a requesting entity shall adopt the processes as may be specified by the Authority from time to time for this purpose.

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9. **Process of sending authentication requests.**— (1) After collecting the Aadhaar number or any other identifier

provided by the requesting entity which is mapped to Aadhaar number and necessary demographic and / or biometric information and/ or OTP from the Aadhaar number holder, the client application shall immediately package and encrypt these input parameters into PID block before any transmission, as per the specifications laid down by the Authority, and shall send it to server of the requesting entity using secure protocols as may be laid down by the Authority for this purpose.

(2) After validation, the server of a requesting entity shall pass the authentication request to the CIDR, through the server of the Authentication Service Agency as per the specifications laid down by the Authority. The authentication request shall be digitally signed by the requesting entity and/or by the Authentication Service Agency, as per the mutual agreement between them.

(3) Based on the mode of authentication request, the CIDR shall validate the input parameters against the data stored therein and return a digitally signed Yes or No authentication response, or a digitally signed e-KYC authentication response with encrypted e-KYC data, as the case may be, along with other technical details related to the authentication transaction.

(4) In all modes of authentication, the Aadhaar number is mandatory and is submitted along with the input parameters specified in sub-regulation (1) above such that authentication is always reduced to a 1:1 match.

(5) A requesting entity shall ensure that encryption of PID Block takes place at the time of capture on the authentication device as per the processes and specifications laid down by the Authority.

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18. **Maintenance of logs by requesting entity.** — (1) A requesting entity shall maintain logs of the authentication transactions processed by it, containing the following transaction details, namely:—
(a) the Aadhaar number against which authentication is sought;
(b) specified parameters of authentication request submitted;

(c) specified parameters received as authentication response;
(d) the record of disclosure of information to the Aadhaar number holder at the time of authentication; and
(e) record of consent of the Aadhaar number holder for authentication, but shall not, in any event, retain the PID information.

(2) The logs of authentication transactions shall be maintained by the requesting entity for a period of 2 (two) years, during which period an Aadhaar number holder shall have the right to access such logs, in accordance with the procedure as may be specified.

(3) Upon expiry of the period specified in sub-regulation (2), the logs shall be archived for a period of five years or the number of years as required by the laws or regulations governing the entity, whichever is later, and upon expiry of the said period, the logs shall be deleted except those records required to be retained by a court or required to be retained for any pending disputes.

(4) The requesting entity shall not share the authentication logs with any person other than the concerned Aadhaar number holder upon his request or for grievance redressal and resolution of disputes or with the Authority for audit purposes. The authentication logs shall not be used for any purpose other than stated in this sub-regulation.

(5) The requesting entity shall comply with all relevant laws, rules and regulations, including, but not limited to, the Information Technology Act, 2000 and the Evidence Act, 1872, for the storage of logs.

(6) The obligations relating to authentication logs as specified in this regulation shall continue to remain in force despite termination of appointment in accordance with these regulations.

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26. **Storage and Maintenance of Authentication Transaction Data.** — (1) The Authority shall store and maintain authentication transaction data, which shall contain the following information:—
(a) authentication request data received including PID block;

(b) authentication response data sent;
(c) meta data related to the transaction;
(d) any authentication server side configurations as necessary Provided that the Authority shall not, in any case, store the purpose of authentication.

The Aadhaar (Data Security) Regulations, 2016

3. **Measures for ensuring information security.** — (1) The Authority may specify an information security policy setting out inter alia the technical and organisational measures to be adopted by the Authority and its personnel, and also security measures to be adopted by agencies, advisors, consultants and other service providers engaged by the Authority, registrar, enrolling agency, requesting entities, and Authentication Service Agencies.

(2) Such information security policy may provide for:—
(a) identifying and maintaining an inventory of assets associated with the information and information processing facilities;
(b) implementing controls to prevent and detect any loss, damage, theft or compromise of the assets;
(c) allowing only controlled access to confidential information;
(d) implementing controls to detect and protect against virus/malwares;
(e) a change management process to ensure information security is maintained during changes;
(f) a patch management process to protect information systems from vulnerabilities and security risks;
(g) a robust monitoring process to identify unusual events and patterns that could impact security and performance of information systems and a proper reporting and mitigation process;
(h) encryption of data packets containing biometrics, and enabling decryption only in secured locations;
(i) partitioning of CIDR network into zones based on risk and trust;
(j) deploying necessary technical controls for protecting CIDR network;
(k) service continuity in case of a disaster;
(l) monitoring of equipment, systems and networks;
(m) measures for fraud prevention and effective remedies in case of fraud;
(n) requirement of entering into non-disclosure agreements with the personnel;

(o) provisions for audit of internal systems and networks;
(p) restrictions on personnel relating to processes, systems and networks.
(q) inclusion of security and confidentiality obligations in the agreements or arrangements with the agencies, consultants, advisors or other persons engaged by the Authority.

(3) The Authority shall monitor compliance with the information security policy and other security requirements through internal audits or through independent agencies.

(4) The Authority shall designate an officer as Chief Information Security Officer for disseminating and monitoring the information security policy and other security-related programmes and initiatives of the Authority.

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5. **Security obligations of service providers, etc.** — The agencies, consultants, advisors and other service providers engaged by the Authority for discharging any function relating to its processes shall:
(a) ensure compliance with the information security policy specified by the Authority;
(b) periodically report compliance with the information security policy and contractual requirements, as required by the Authority;
(c) report promptly to the Authority any security incidents affecting the confidentiality, integrity and availability of information related to the Authority's functions;
(d) ensure that records related to the Authority shall be protected from loss, destruction, falsification, unauthorised access and unauthorised release;
(e) ensure confidentiality obligations are maintained during the term and on termination of the agreement;
(f) ensure that appropriate security and confidentiality obligations are provided for in their agreements with their employees and staff members;
(g) ensure that the employees having physical access to CIDR data centers and logical access to CIDR data centers undergo necessary background checks;
(h) define the security perimeters holding sensitive information, and ensure only authorised individuals are allowed access to such areas to prevent any data leakage or misuse; and

(i) where they are involved in the handling of the biometric data, ensure that they use only those biometric devices which are certified by a certification body as identified by the Authority and ensure that appropriate systems are built to ensure security of the biometric data.

The Aadhaar (Sharing of Information) Regulations, 2016.

3. **Sharing of information by the Authority.** — (1) Core biometric information collected by the Authority under the Act shall not be shared with anyone for any reason whatsoever.

(2) The demographic information and photograph of an individual collected by the Authority under the Act may be shared by the Authority with a requesting entity in response to an authentication request for e-KYC data pertaining to such individual, upon the requesting entity obtaining consent from the Aadhaar number holder for the authentication process, in accordance with the provisions of the Act and the Aadhaar (Authentication) Regulations, 2016.

(3) The Authority shall share authentication records of the Aadhaar number holder with him in accordance with regulation 28 of the Aadhaar (Authentication) Regulations, 2016.

(4) The Authority may share demographic information and photograph, and the authentication records of an Aadhaar number holder when required to do so in accordance with Section 33 of the Act.

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6. **Restrictions on sharing, circulating or publishing of Aadhaar number.** — (1) The Aadhaar number of an individual shall not be published, displayed or posted publicly by any person or entity or agency.

(2) Any individual, entity or agency, which is in possession of Aadhaar number(s) of Aadhaar number holders, shall ensure security and confidentiality of the Aadhaar numbers and of any record or database containing the Aadhaar numbers.

> (3) Without prejudice to sub-regulations (1) and (2), no entity, including a requesting entity, which is in possession of the Aadhaar number of an Aadhaar number holder, shall make public any database or record containing the Aadhaar numbers of individuals, unless the Aadhaar numbers have been redacted or blacked out through appropriate means, both in print and electronic form.
>
> (4) No entity, including a requesting entity, shall require an individual to transmit his Aadhaar number over the Internet unless such transmission is secure and the Aadhaar number is transmitted in encrypted form except where transmission is required for correction of errors or redressal of grievances.
>
> (5) No entity, including a requesting entity, shall retain Aadhaar numbers or any document or database containing Aadhaar numbers for longer than is necessary for the purpose specified to the Aadhaar number holder at the time of obtaining consent."

43) To sum up broadly, the Authority is established under the Act as a statutory body which is given the task of developing the policy, procedure and system for issuing Aadhaar numbers to individuals and also to perform authentication thereof as per the provisions of the Act. For the purpose of enrolment and assigning Aadhaar numbers, enrolling agencies are recruited by the Authority. All the residents in India are eligible to obtain an Aadhaar number. To enable a resident to get Aadhaar number, he is required to submit demographic as well as biometric information i.e., apart from giving information relating to name, date of birth and address, biometric information in the form of photograph, fingerprint, iris scan is also to be provided. Aadhaar number given to a particular

person is treated as unique number as it cannot be reassigned to any other individual.

Insofar as subsidies, benefits or services to be given by the Central Government or the State Government, as the case may be, is concerned, these Governments can mandate that receipt of these subsidies, benefits and services would be given only on furnishing proof of possession of Aadhaar number (or proof of making an application for enrolment, where Aadhaar number is not assigned). An added requirement is that such individual would undergo authentication at the time of receiving such benefits etc. A particular institution/body from which the aforesaid subsidy, benefit or service is to be claimed by such an individual, the intended recipient would submit his Aadhaar number and is also required to give her biometric information to that agency. On receiving this information and for the purpose of its authentication, the said agency, known as Requesting Entity, would send the request to the Authority which shall perform the job of authentication of Aadhaar number. On confirming the identity of a person, the individual is entitled to receive subsidy, benefit or service. Aadhaar number is permitted to be used by the holder for other purposes as well.

44) In this whole process, any resident seeking to obtain an Aadhaar number is, in the first instance, required to submit her demographic information and biometric information at the time of enrolment. She, thus, parts with her photograph, fingerprint and iris scan at that stage by giving the same to the enrolling agency, which may be a private body/person. Likewise, every time when such Aadhaar holder intends to receive a subsidy, benefit or service and goes to specified/designated agency or person for that purpose, she would be giving her biometric information to that requesting entity, which, in turn, shall get the same authenticated from the Authority before providing a subsidy, benefit or service. Whenever request is received for authentication by the Authority, record of such a request is kept and stored in the CIDR. At the same time, provisions for protection of such information/data have been made, as indicated above. Aadhaar number can also be used for purposes other than stated in the Act i.e. purposes other than provided under Section 7 of the Act, as mentioned in Section 57 of the Act, which permit the State or any body corporate or person, pursuant to any law, for the time being in force, or any contract to this effect, to use the Aadhaar number for establishing the identity of an individual. It can be used as a proof of identity, like other identity

proofs such as PAN card, ration card, driving licence, passport etc.

45) Piercing into the aforesaid Aadhaar programme and its formation/structure under the Aadhaar Act, foundational arguments are that it is a grave risk to the rights and liberties of the citizens of this country which are secured by the Constitution of India. It militates against the constitutional abiding values and its foundational morality and has the potential to enable an intrusive state to become a surveillance state on the basis of information that is collected in respect of each individual by creation of a joint electronic mesh. In this manner, the Act strikes at the very privacy of each individual thereby offending the right to privacy which is elevated and given the status of fundamental right by tracing it to Articles 14, 19 and 21 of the Constitution of India by a nine Judge Bench judgment of this Court in *K.S. Puttaswamy & Anr.* v. *Union of India & Ors.*[6]. Most of the counsel appearing for different petitioners (though not all) conceded that there cannot be a serious dispute insofar as allotment of Aadhaar number, for the purpose of unique identification of the residents, is concerned. However, apprehensions have been expressed about the manner in which the Scheme has been rolled out and

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implemented. The entire edifice of the aforesaid projection is based on the premise that it forces a person, who intends to enrol for Aadhaar, to part with his core information namely biometric information in the form of fingerprints and iris scan. These are to be given to the enrolment agency in the first instance which is a private body and, thus, there is risk of misuse of this vital information pertaining to an individual. Further, it is argued that the most delicate and fragile part, susceptible to misuse, is the authentication process which is to be carried out each time the holder of Aadhaar number wants to establish her identity. At that stage, not only the individual parts with the biometric information again with the RE (which may again be a private agency as well), the purpose for which such a person approaches the RE would also be known i.e. the nature of transaction which is supposed to be undertaken by the said person at that time. Such information relating to different transactions of a person across the life of the citizen is connected to a central database. This record may enable the State to profile citizens, track their movements, assess their habits and silently influence their behaviour. Over a period of time, the profiling would enable the State to stifle dissent and influence political decision making. It may also enable the State to act as a surveillant state and there is a propensity for it to

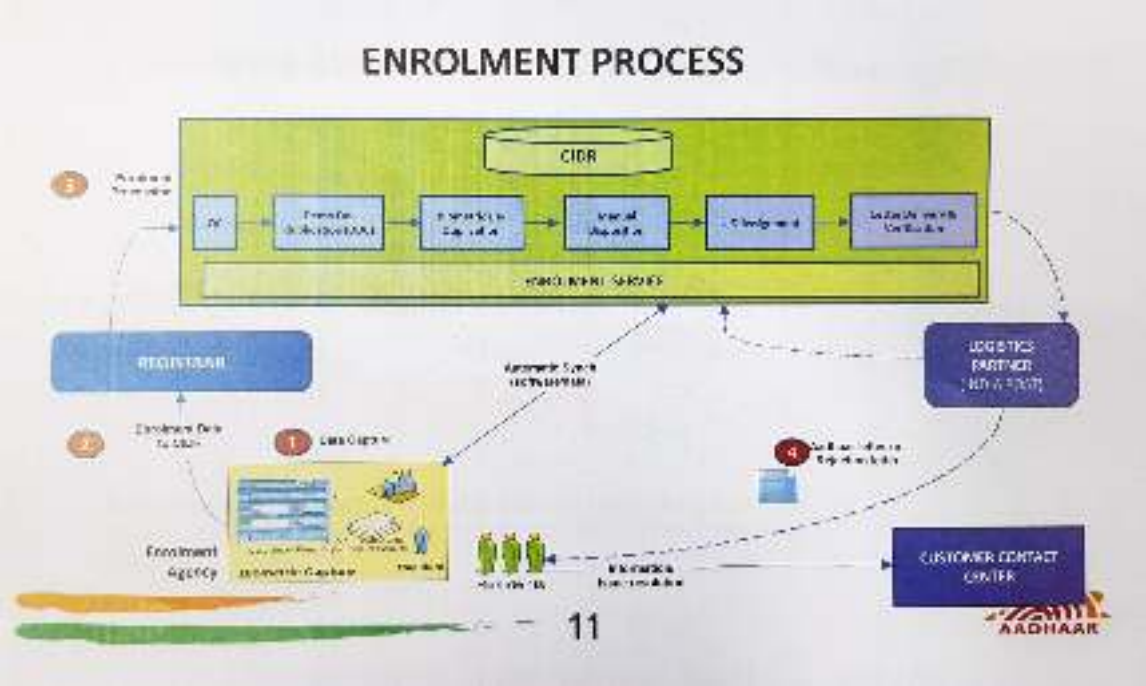
become a totalitarian state. It is stressed that at its core, Aadhaar alters the relationship between the citizen and the State. It diminishes the status of the citizen. Rights freely exercised, liberties freely enjoyed, entitlements granted by the Constitution and laws are all made conditional, on a compulsory barter. The barter compels the citizen to give up her biometrics 'voluntarily', allow her biometrics and demographic information to be stored by the State and private operators and then used for a process termed 'authentication'.

To put it in nutshell, provisions of the Aadhaar Act are perceived by the petitioners as giving away of vital information about the residents to the State not only in the form of biometrics but also about the movement as well as varied kinds of transactions which a resident would enter into from time to time. The threat is in the form of profiling the citizens by the State on the one hand and also misuse thereof by private agencies whether it is enrolling agency or requesting agency or even private bodies mentioned in Section 57 of the Act. In essence, it is stated that not only data of aforesaid nature is stored by the CIDR, which has the threat of being leaked, it can also be misused by non-State actors. In other words, it is sought to be highlighted that there is no assurance of any data protection at

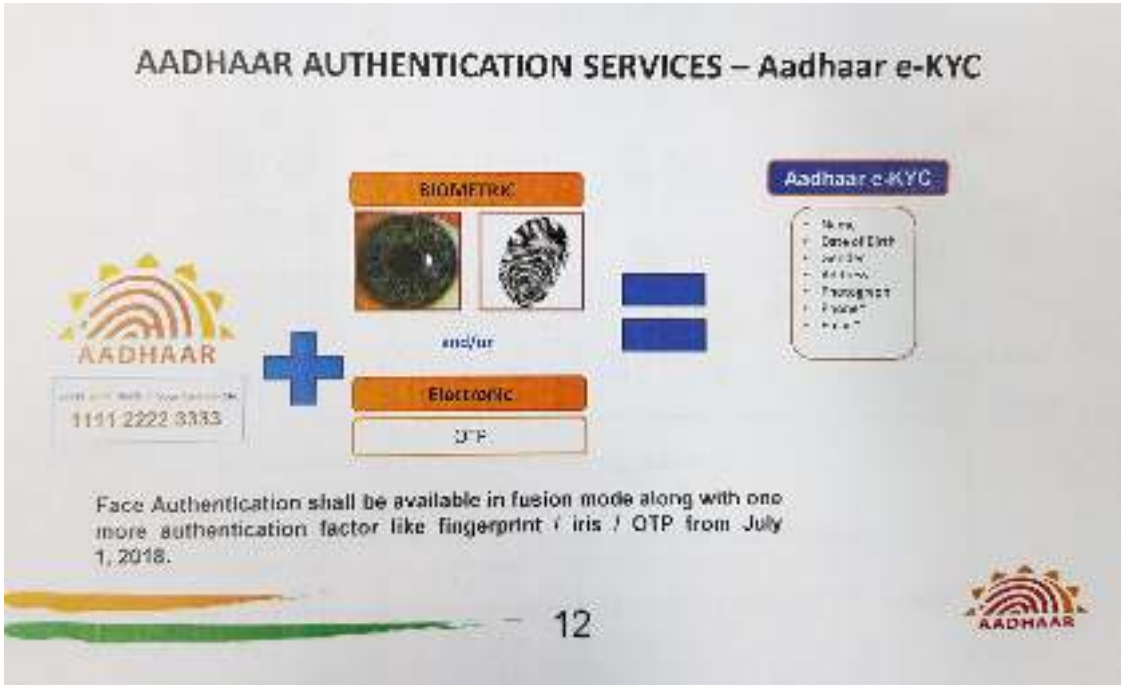
any level.

46) The respondents, on the other hand, have attempted to shake the very foundation of the aforesaid structure of the petitioners' case. They argue that in the first instance, minimal biometric information of the applicant, who intends to have Aadhaar number, is obtained which is also stored in CIDR for the purpose of authentication. Secondly, no other information is stored. It is emphasised that there is no data collection in respect of religion, caste, tribe, language records of entitlement, income or medical history of the applicant at the time of Aadhaar enrolment. Thirdly, the Authority also claimed that the entire Aadhaar enrolment eco-system is foolproof inasmuch as within few seconds of the biometrics having been collected by the enrolling agency, the said information gets transmitted the Authorities/CIDR, that too in an encrypted form, and goes out of the reach of the enrolling agency. Same is the situation at the time of authentication as biometric information does not remain with the requesting agency. Fourthly, while undertaking the authentication process, the Authority simply matches the biometrics and no other information is received or stored in respect of purpose, location or nature or transaction etc. Therefore, the question of profiling does

not arise at all. A powerpoint presentation was given by Dr. Ajay Bhushan Pandey, CEO of the Authority, in the Court, while explaining various nuances of the whole process. In this presentation, the enrolment process has been projected in the following manner:



47) Insofar as Aadhaar authentication service is concerned, it was explained that the same is e-KYC wherein following process is involved:



48) It was asserted with all vehemence that while doing the aforesaid authentication, no other information is collected or stored by the Authority/CIDR, specifically pointing that:

(a) The Authority does not collect purpose, location or details of transaction. Thus, it is purpose blind.

(b) The information collected as aforesaid remains in silos.

(c) Merging of silos is prohibited.

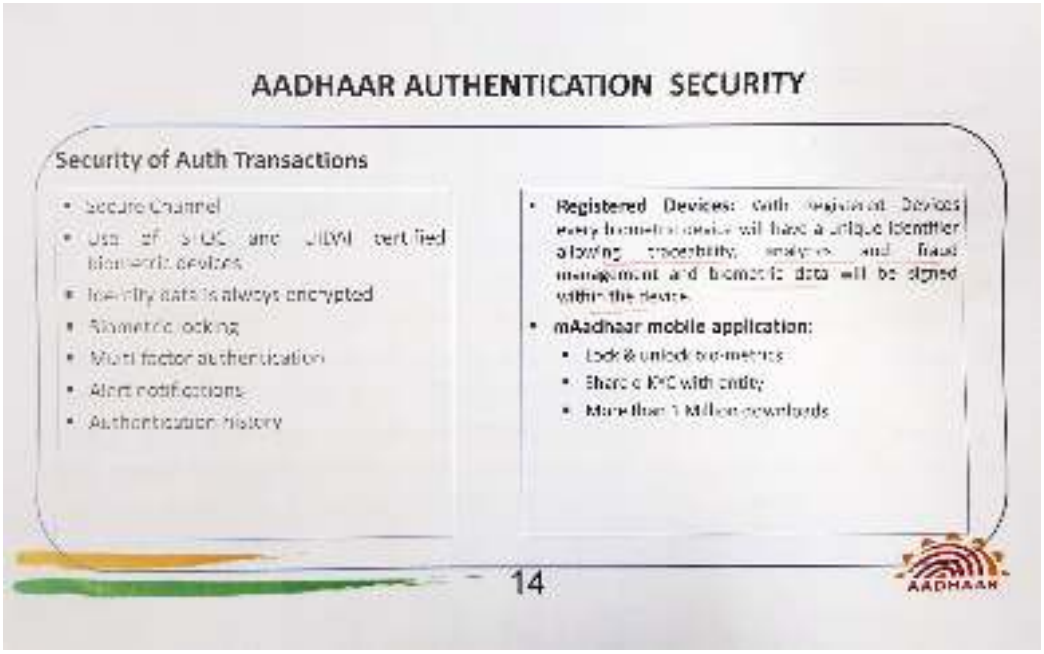
(d) The RE is provided answer only in Yes or No about the authentication of the person concerned.

(e) The authentication process is not exposed to the internet world.

(f) Security measures as per the provisions of Section 29(3) read with Section 38(g) as well as Regulation 17(1)(d) of the

Authentication Regulations are strictly followed and adhere to.

The Aadhaar Authentication Security has been described in the following manner:



49) In this hue, the Authority has projected that the Aadhaar design takes full care of privacy and security of the persons. It is sought to be demonstrated by pointing out the following features:

(i) Privacy is ensured by the very design of Aadhaar which was conceived by the Authority from very inception and is now even incarnated in the Aadhaar Act because : (a) it is backed by minimal data, federated databases, optimal ignorance; and (b) there is no transaction/pooling data coupled with the fact that resident authorised access to identity data is available.

(ii) Aadhaar is designed for inclusion inasmuch as : (a) there is flexibility of demographic data, multi-modal biometrics, and

flexible processes; (b) DDSVP Committee by Dr. V.N. Vittal, former CVC; and (c) Biometric design and Standards Committee by Dr. Gairola, Former DG, NIC.

(iii) All security numbers are followed which can be seen from: (a) PKI-2048 encryption from the time of capture, (b) adoption of best-in-class security standards and practices, and (c) strong audit and traceability as well as fraud detection.

50) It was explained that the security and data privacy is ensured in the following way:

(i) The data sent to ABIS is completely anonymised. The ABIS systems do not have access to resident's demographic information as they are only sent biometric information of a resident with a reference number and asked to de-duplicate. The de-duplication result with the reference number is mapped back to the correct enrolment number by the Authorities own enrolment server.

(ii) The ABIS providers only provide their software and services. The data is stored in UIDAI storage and it never leaves the secure premises.

(iii) The ABIS providers do not store the biometric images (source). They only store template for the purpose of de-

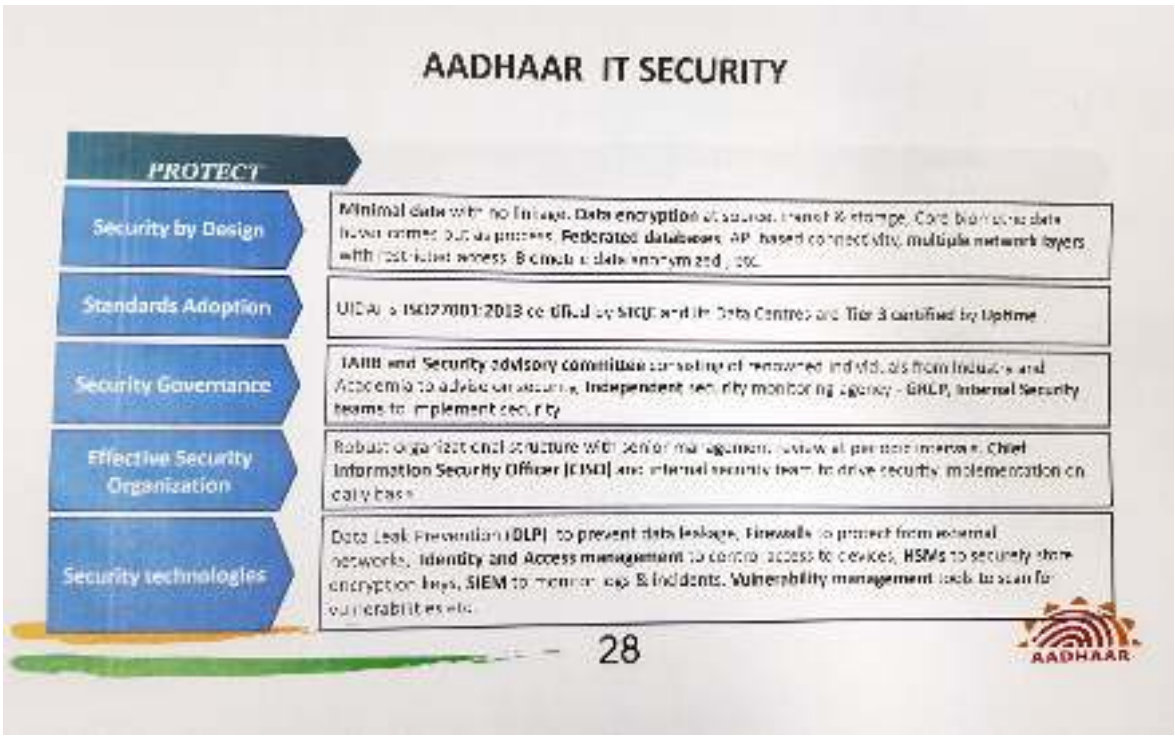
duplication (with reference number).

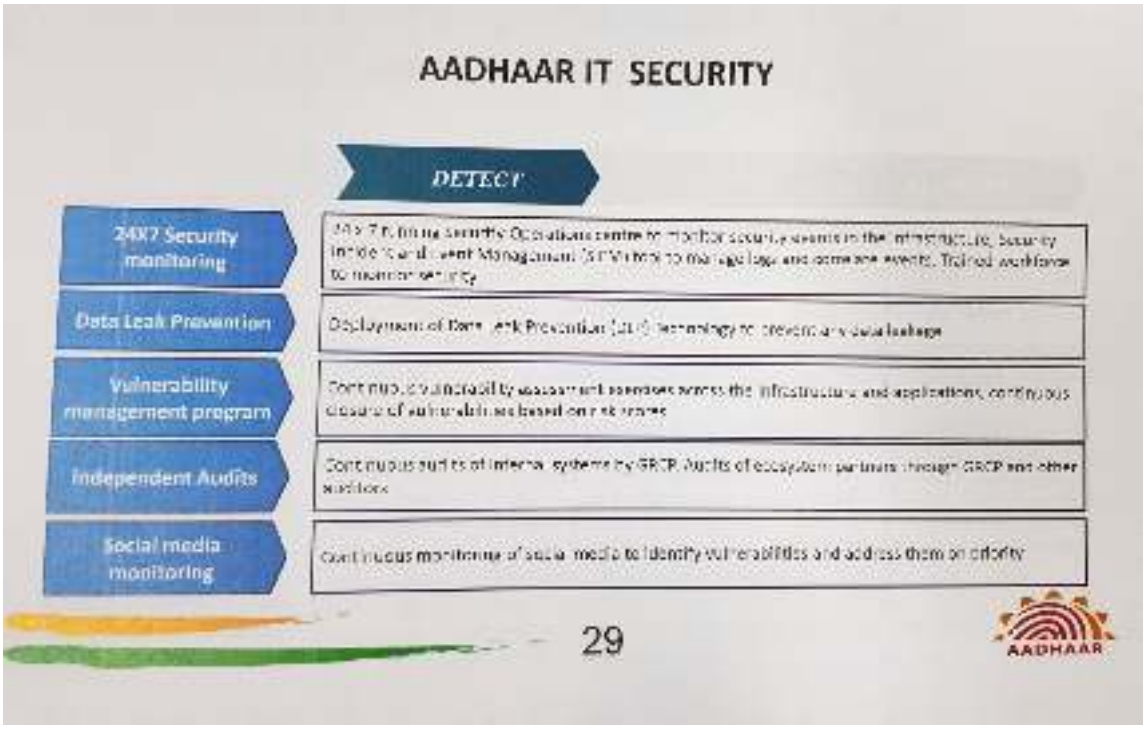
(iv) The encrypted enrolment packet sent by the enrolment client software to the CIDR is decrypted by the enrolment server but the decrypted packet is never stored.

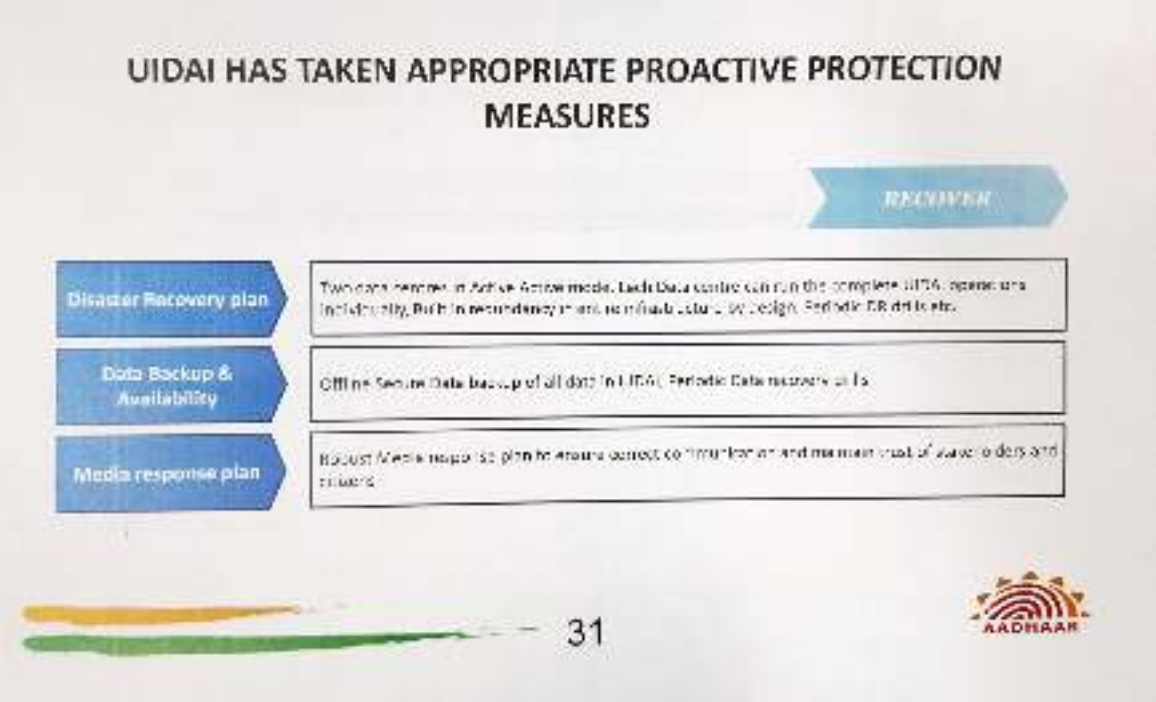
(v) The original biometric images of fingerprints, iris and face are archived and stored offline. Hence, they cannot be accessed through an online network.

(vi) The biometric system provides high accuracy of over 99.86%. The mixed biometric have been adopted only t enhance the accuracy and to reduce the errors which may arise on account of some residents either not having biometrics or not having some particular biometric.

51) Above all, there is an oversight by Technology and Architecture Review Board (TARB) and Security Review Committee. This Board and Committee consists of very high profiled officers. The aforesaid security measures are shown by the Authority in the following manner:


AADHAAR IT SECURITY
PROTECT
Security by Design
Standards Adoption
Security Governance
Effective Security Organization
Security technologies
28
AADHAAR


AADHAAR IT SECURITY
DETECT
24X7 Security monitoring
Data Leak Prevention
Vulnerability management program
Independent Audits
Social media monitoring
29
AADHAAR



52) We may point out at this stage that to the powerpoint presentation by Dr. Pandey on the aforesaid lines, certain questions were put to him by Mr. Shyam Divan as well as Mr. Vishwanathan, senior advocates, and the answers thereto were given by Dr. Pandey. In order to have the complete picture, we will be well advised to reproduce these questions and their answers as well, which are as follows:

53) <u>Questions and Answers to the queries raised by the petitioners in W.P. (C) No. 1056 of 2017 entitled *'Nachiket Udupa & Anr.* v. *Union of India*</u>

(1) What are the figures for authentication failures, both at the national and state level? Please provide a breakup, between fingerprints and iris.

Ans.: UIDAI cannot provide authentication failure rates at the state level since it does not track the location of the authentication transactions. Authentication failure rate at national level is as below:

Modality	Unique UID Participated	Failed Unique ID	Failed Percentage
IRIS	1,08,50,391	9,27,132	8.54%
FINGER	61,63,63,346	3,69,62,619	6.00%

It must be stated that authentication failures do not mean exclusion or denial from subsidies, benefits or services since the requesting entities are obliged under the law to provide for exception handling mechanisms.

(2) In case a person who is claiming a biometric exception (e.g. a person suffering from leprosy) does not have a mobile phone number, or has not given it in the enrolment form, or if the phone number changes – how will her Aadhaar enrolment and subsequent authentication occur and under which provision of law?

Ans.: Aadhaar enrolment is done for all residents, even of residents with leprosy. Biometric exception process is defined in the UIDAI resident enrolment process. In the case of a leprosy patient, who may not be able to do fingerprint authentication, iris

authentication can be used for update (and add the mobile number). This was the reason for multi-modal enrolment and authentication being selected for use in Aadhaar.

Only in an unlikely scenario where both iris and fingerprint cannot be used for authentication, the mobile number is one of the methods for authentication. In cases where authentication through mobile number is not possible or feasible, the requesting entities have to provide their own exception and backup mechanism to ensure services to Aadhaar holders. As part of the exception handling mechanism, UIDAI has already implemented a digitally signed QR code into e-Aadhaar which allows agencies to verify the Aadhaar card in an off-line manner and trust the data (based on digital signature validation) without accessing e-KYC API service of UIDAI. This is a simple off-line mechanism to quickly verify the legitimacy of the Aadhaar card. But, it does not ensure that the person holding the card is the owner of that Aadhaar number. It needs either manual check of photo against the face of the individual (like the way ID is verified at the entry of airports) or some form of electronic authentication using Aadhaar authentication API or agency specific authentication scheme. QR code based verification allows Aadhaar number holders to use their ID on a day-to-day purpose without using online e-KYC

authentication. The verification through offline QR code can be used for those purposes or cases where proof of presence or proof of ownership of card is not required.

The Aadhaar Act and Aadhaar (Enrolment and Update) Regulations, 2016 define special provision for enrolment of residents with biometric exception. Further, as per Regulation 14(i) of the Authentication Regulations, RE shall implement exception-handling mechanisms and backup identity authentication mechanisms to ensure seamless provision of authentication services to Aadhaar number holders. Accordingly, DBT Mission Cabinet Secretariat has issued a detailed circular dated December 19, 2017 regarding exception handling during use of Aadhaar in the benefit schemes of the Government.

(3) Are there any surprise checks, field studies done to check the authenticity of the exemption registers?

Ans.: As per Regulation 14(i) of the Authentication Regulations, this exception handling mechanism is to be implemented and monitored by the requesting entities and in case of the Government, their respective Ministries. Further, the DBT Mission Cabinet Secretariat had issued Circular dated December 19, 2017 on exception handling and audit of exceptions.

(4) Between the ages of 5-15 years, can a school, as an 'introducer', enrol a child without parental consent?

Ans.: School officials, if permitted to act as 'introducer', can enrol only when there is a parental consent to enrol. The disclosure requirement as per Section 3(2) of the Aadhaar Act and the Aadhaar (Enrolment and Update) Regulations, 2016 (Schedule-I) is implemented through the enrolment form which is signed by the resident making it informed disclosure. In case of children, the consent form will be signed by the parent/guardian.

(5) Once a child attains the age of 18 years, is there any way for them to opt out or revoke consent?

Ans.: It is not permissible under the Aadhaar Act. However, residents have the option of permanently locking their biometrics and only temporarily unlock it when needed for biometric authentication as per Regulation 11 of the Authentication Regulations.

(6) What is the status of the enrolments done by the 49,000 blacklisted enrolment operators? Please provide the number of enrolments done by them?

Ans.: UIDAI has a policy to enforce the process guidelines and

data quality check during the enrolment process. 100% of the enrolment done by operators undergoes a quality assurance check, wherein every enrolment passes through a human eye. Any Aadhaar enrolment found to be contrary to the UIDAI process, the enrolment itself gets rejected and Aadhaar is not generated. The resident is advised to re-enroll. Once an operator is blacklisted or suspended, further enrolments cannot be carried out by him during the time the order of blacklisting/suspension is valid.

(7) What are the total number of biometric De-duplication rejections that have taken place till date? In case an enrolment is rejected either for: (a) duplicate enrolment and (b) other technical reason under Regulation 14 of the Aadhaar Enrolment Regulations, what happens to the data packet that contains the stored biometric and demographic information?

Ans.: The total number of biometric de-duplication rejections that have taken place are 6.91 crores as on March 21, 2018. These figures do not pertain to the number of unique individuals who have been denied Aadhaar enrolment resulting in no Aadhaar issued to them. This figure merely pertains to the number of applications which have been identified by the Aadhaar de-

duplication system as having matching biometrics to an existing Aadhaar number holder. The biometric de-duplication system is designed to identify as duplicate those cases where any one of the biometrics (ten fingers and two irises) match. However, very often it is found that all the biometrics match. It is highly improbable for the biometrics to match unless the same person has applied again. There are a number of reasons why the same person might apply more than once. For instance, many individuals innocently apply for enrolment multiple times because of the delay in getting their Aadhaar cards due to postal delays, loss or destruction of their cards or confusion about how the system works. Each time one applies for Aadhaar, the system identifies her as a new enrolment but when it recognises that the individual's biometrics match with already those in the database, thereafter further checks, including manual check through experienced personnels, are done. After that exercise, if it is found that the person is already registered, it rejects the enrolment application. One of their main reasons for rejection is that multiple people would put their biometric details like fingerprints for Aadhaar generation either as a fraudulent exercise or by mistake, which also would get rejected. There were many fakes and frauds in the earlier systems and several reports have

found that almost 50% of the subsidies were getting pilfered away by fakes and duplicates in the system. Then, there would also be several such people who may have tried to defraud the Aadhaar enrolment system as well but failed get multiple Aadhaar numbers due to the stringent Aadhaar de-duplication process. Thus, the mere fact that 6.23 crore enrolments have been rejected as biometric duplicates does not mean that 6.23 crore people have been denied an Aadhaar number as has been alleged by the petitioners. Any genuine person who does not have an Aadhaar number and whose enrolment has been rejected can always apply again for enrolment. It is worth noting that none of the de-duplication rejects have come forward to lodge complaints either with the Authority or with the Government about denial of Aadhaar number. None of them have even approached any Court of law. Evidently, the genuine residents have got themselves re-enrolled and the rest are those who were trying to reach the Aadhaar system by fraudulent means. That explains why no one has approached a court of law complaining denial of Aadhaar number. All the enrolment packets received by UIDAI (accepted/rejected) are archived in the CIDR irrespective of its status.

(8) If the figure of rejection of enrolment packets was 8 crore,

as on 2015, what is the total rejection figure for enrolment packets as on date? How many field studies/physical verification have been done to ensure that these persons (who have been rejected) are indeed “False or duplicate” enrolments?

Ans.: The total rejection figure for enrolment packets is 18.0 cr. as on March 26, 2018. These rejections are due to various technical reasons like: (i) data quality reject such as address incomplete, name incomplete, use of expletives in names, address etc. photo is of object, photo of photo, age photo mismatch etc.; and (ii) OSI validation reject such as operator / supervisor / introducer validation failed, operator / supervisor / introducer / Head of Family biometric validation failed etc.

Those whose enrolments have been rejected for any reason and who do not have Aadhaar can re-enrol and obtain Aadhaar. Rejection of enrolments do not mean that the person will never be able to get Aadhaar.

(9) What does “any other appropriate response” under Section 8(4) of the Aadhaar Act include?

Ans.: “Any other appropriate responses” includes e-KYC or limited e-KYC data. As per Regulation 3 of Authentication Regulations, UIDAI provides two types of authentication facilities,

namely -

(i) Yes/No authentication facility; and

(ii) e-KYC authentication facility.

In Yes/No authentication, UIDAI provides the response as Yes or No along with relevant error codes, if any.

In e-KYC authentication, UIDAI provides the demographic data along with photograph and in case of mismatch/error, the relevant error codes.

54) Questions and Answers to the queries raised by the petitioners in W.P. (C) No. 829 of 2013 entitled *'S.G. Vombatkere & Anr.* v. *Union of India*

(1) Please confirm that no UIDAI official verifies the correctness of documents offered at the stage of enrolment/updating.

Ans.: As per UIDAI process, the verification of the documents is entrusted to the Registrar. For Verification based on Documents, the verifier present at the Enrolment Centre will verify the documents. Registrars/Enrolment agency must appoint personnel for the verification of documents.

(2) Please confirm that UIDAI does not know whether the documents shown at the time of enrolment/updating are genuine or false.

Ans.: The answer is same as in (1) above.

(3) Please confirm:

(a) UIDAI does not identify the persons it only matches the biometric information received at the time of authentication with its records and provides a Yes/No response;

Ans.: Biometric authentication of an Aadhaar number holder is always performed as 1:1 biometric match against his/her Aadhaar number (identity) in CIDR. Based on the match, UIDAI provides Yes or No response. A “Yes” response means a positive identification of the Aadhaar number holder.

Each enrolment is biometrically de-duplicated against all (1.2 billion) residents to issue the Aadhaar number (or Unique Identity).

(b) UIDAI takes no responsibility with respect to the correctness of the name, date of birth or address of the person enrolled.

Ans.: The Name/Address/DOB are derived from the Proof of Identity (POI)/Proof of Address (POA) documents submitted during enrolments.

The enrolment/update packet (encrypted) retains a scanned copy of the POI/POA documents used for the enrolment which can be reviewed in case of dispute.

UIDAI maintains the update history of each Aadhaar

number related to changes in name, address, date of birth etc.

(4) Please confirm:

(a) UIDAI takes no responsibility with respect to the correct identification of a person.

Ans.: Please refer to Answer (1) above. Additionally, it may be stated that enrolment of Aadhaar is done through a resident enrolment process and verification of the POI/POA document is done against the acceptable documents, as per the UIDAI valid list of documents as provided in Schedule II and III Aadhaar (Enrolment and Update) Regulations, 2016 read with Regulation 10.

UIDAI takes responsibility in creating and implementing standards, ensuring matching systems installed in CIDR work as they are designed to do, and providing options to Aadhaar holders in terms of controlling their identity (such as updating their data, locking their biometrics, etc.) and accessing their own authentication records. One of the key goals of Aadhaar is to issue a unique identity for the residents of India. Hence, each enrolment is biometrically de-duplicated against all (1.2 billion) residents to issue the Aadhaar number (or Unique Identity).

Section 4 of Aadhaar lays down the properties of an

Aadhaar number. Sub-section (3) of Section 4 reads as under:

> "(3) An Aadhaar number, in physical or electronic form subject to authentication and other conditions, as may be specified by regulations, may be accepted as proof of identity of the Aadhaar number holder for any purpose."

The requesting entities are at liberty to use any or multiple of authentication mode available under Regulation 4 of Aadhaar (Authentication) Regulation, 2016 as per their requirements and needs of security etc.

(b) The biometric authentication is based on a probabilistic match of the biometric captured during authentication and the record stored with CIDR.

Ans.: Biometric authentication is based on 1:1 matching and, therefore, in that sense it is not probabilistic. If biometrics are captured it will lead to successful authentication. If biometrics are not well captured during authentication or an impostor tries authentication, it will lead to authentication failure. Aadhaar Proof of Concept studies show that a vast majority of residents (>98%) can successfully authenticate using biometric modalities such fingerprints and/or iris.

However, the Aadhaar Act and Regulations provides that an Aadhaar number holder cannot be denied service due to the failure of Aadhaar authentication. Hence, all Aadhaar

applications must implement exception processes. Possible methods to implement the exception process include:

(i) Family Based Authentication: Family based applications such as PDS or Health applications may allow authentication by family members to allow resident to avail services.

(ii) Alternate Modalities: Some applications may use different modalities for exception handling. Alternate modalities include:

(a) Iris Authentication

(b) OTP Authentication (if allowed by policy)

(iii) Biometric Fusion: UIDAI is introducing face authentication as secondary authentication factor to reduce the rate of authentication failures, especially for senior citizens. At this time, face authentication will be used only conjunction with another authentication factor such as finger/iris/OTP.

(a) Face + Finger Fusion

(b) Face + Iris Fusion

(c) Face + OTP Fusion

(iv) Non Aadhaar Based Exception process: Applications may implement non-Aadhaar based exception process to ensure that no resident is denied service. Applications need to monitor the use of exceptions in their applications to prevent misuse of the exception process.

(v) Accordingly, DBT Mission Cabinet Secretariat had issued a detailed circular dated December 19, 2017 regarding use of Aadhaar in benefit schemes of Government – exception handling.

(5) Please confirm that with respect to individuals under 15 years and over 60 years of age, biometric authentication is likely to fail due to changes in/fading of biometrics such as fingerprints.

Ans.: Though there is no conclusive evidence to say that biometric authentication success is dependent upon age, slightly higher authentication failure rates have been observed only for fingerprints for senior citizens above the age of 70. A number of exception processes are provided in answer to Question 4(b) above to prevent denial of service for failure of authentication. Further, in case of any issue in biometric authentication, an Aadhaar number holder may update his/her biometric at any of the Aadhaar enrolment centres, which is also provided for in the Aadhaar Act.

(6) Please confirm that the reasons why over 49000 enrolment operators were blacklisted include: (i) failure to verify documents presented; (ii) failure to maintain records of documents submitted; (iii) misuse of information submitted; and (iv) aiding or abetting false enrolments?

Ans.: UIDAI has a policy to enforce the process guidelines and data quality check during the enrolment process. 100% of the enrolments done by operators undergoes a quality assurance check. If any Aadhaar enrolment is found to be not as per the UIDAI process, the enrolment itself gets rejected and Aadhaar is not generated. If such mistake by an operator crosses a threshold defined in the policy, the operator is blacklisted/ removed from the UIDAI ecosystem. As such, of the 49,000 operators who have been blacklisted/removed from the UIDAI eco-system, all the enrolments which were in violation of the process were rejected in the QA stage. Enrolment operators may be blacklisted for the following reasons:

- illegally charging the resident for Aadhaar enrolment
- poor demographic data quality
- invalid biometric exceptions
- other process malpractice

(7) Please confirm:

(a) At the stage of enrolment, there is no verification as to whether a person is an illegal immigrant.

(b) At the stage of enrolment, there is no verification about a person being resident in India for 182 days or more in the past 12

months.

(c) Foreign nationals may enrol and are issued Aadhaar numbers.

(d) Persons retain their Aadhaar number even after they cease to be resident. This is true of foreign nationals as well.

Ans.:

(a) At the time of enrolment, verification is done based upon documents provided by the resident. In case any violation of prescribed guidelines comes to light, the concerned Aadhaar is omitted/deactivated.

(b) This has been included through the enrolment form where resident undertakes and signs the disclosure:

> "Disclosure under Section 3(2) of the Aadhaar (Targeted Delivery of Financial And Other Subsidies, Benefits and Services) Act, 2016
>
> I confirm that I have been residing in India for at least 182 days in the preceding 12 months & information (including biometrics) provided by me to the UIDAI is my own and is true, correct and accurate. I am aware that my information (including biometrics) will be used for generation of Aadhaar and authentication. I understand that my identity information (except core biometric) may be provided to an agency only with my consent during authentication or as per the provisions of the Aadhaar Act. I have a right to access my identity information (except core biometrics) following the procedure laid down by UIDAI."

(c) Aadhaar is issued to the resident of India and the word 'resident' is defined in Section 2(v) of the Aadhaar Act. Aadhaar numbers may be issued to foreign nationals who are resident in

India. Section 2(v) reads as under:

> " 'resident' means an individual who has resided in India for a period or periods amounting in all to one hundred and eighty-two days or more in the twelve months immediately preceding the date of application for enrolment;"

A foreign national fulfilling the above criteria is eligible for Aadhaar, provided he submits the acceptable POI/POA document as per the UIDAI valid list of documents.

(d) As per the Aadhaar Act, an Aadhaar number is issued to a resident who has been residing in India for at least 182 days in the preceding 12 months. An Aadhaar number is issued to an individual for life and may be omitted/deactivated in case of violation of prescribed guidelines only. Ineligibility of a person to retain an Aadhaar number owing to become non-resident may be treated as a ground for deactivation of Aadhaar number and Regulation 28(l)(f) of the Aadhaar Enrolment Regulations. This is in keeping with Section 31(1) and (3) of the Aadhaar Act wherein it is an obligation on an Aadhaar number holder to inform the UIDAI of changes in demographic information and for the Authority to make the necessary alteration.

(8) Please confirm the Points Of Service (POS) biometric readers are capable of storing biometric information.

Ans.: UIDAI has mandated use of Registered Devices (RD) for

all authentication requests. With RDs, biometric data is signed within the device/RD service using the provider key to ensure it is indeed captured live. The device provider RD service encrypts the PID block before returning to the host application. This RD service encapsulates the biometric capture, signing and encryption of biometrics all within it. Therefore, introduction of RD in Aadhaar authentication system rules out any possibility of use of stored biometric and replay of biometrics captured from other source. Requesting entities are not legally allowed to store biometrics captured for Aadhaar authentication under Regulation 17(1)(a) of the Authentication Regulations.

(9) Referring to slide/page 13, please confirm that the architecture under the Aadhaar Act includes: (i) authentication user agencies (e.g. Kerala Dairy Farmers Welfare Fund Board); (ii) authentication service agencies (e.g. Airtel); and (iii) CIDR.

Ans.: UIDAI appoints Requesting Entities (AUA/KUA) and Authentication Service Agency (ASA) as per Regulation 12 of Authentication Regulations. List of Requesting Entitles (AUA/KUA) and Authentication Service Agency appointed by UIDAI is available on UIDAI's website. An AUA/KUA can do authentication on behalf of other entities under Regulation 15 and

Regulation 16.

(10) Please confirm that one or more entitles in the Aadhaar architecture described in the previous paragraph record the date and time of the authentication, the client IP, the device ID and purpose of authentication.

Ans.: UIDAI does not ask requesting entities to maintain any logs related to IP address of the device, GPS coordinates of the device and purpose of authentication. However, AUAs like banks, telecom etc., in order to ensure that their systems are secure, frauds are managed, they may store additional information as per their requirement under their respective laws to secure their system. Section 32(3) of the Aadhaar Act specifically prevents the UIDAI from either by itself or through any entity under its control to keep or maintain any information about the purpose of authentication.

Requesting entities are mandated to maintain following logs as per Regulation 18 of the Authentication Regulations. These are:

(i) the Aadhaar number against which authentication is sought;

(ii) specified parameters of authentication request

submitted;

(iii) specified parameters received as authentication response;

(iv) the record of disclosure of information to the Aadhaar number holder at the time of authentication; and

(v) record of consent of the Aadhaar number holder for authentication, but shall not, in any event, retain the PID information.

Further, even if a requesting entity captures any other data as per their own requirement, UIDAI will only audit the authentication logs maintained by the requesting entity as per Regulation 18(1) of the Authentication Regulations.

ASAs are not permitted to maintain any logs related to IP address of the device, GPS coordinates of the device etc. ASAs are mandated to maintain logs as per Regulation 20 of the Authentication Regulations:

(i) identity of the requesting entity;

(ii) parameters of authentication request submitted; and

(iii) parameters received as authentication response.

Provided that no Aadhaar number, PID information, device identity related data and e-KYC response data, where applicable, shall be retained.

(11) Referring to slide/page 7 and 14, please confirm that 'traceability' features enable UIDAI to track the specific device and its location from where each and every authentication takes place.

Ans.: UIDAI gets the AUA code, ASA code, unique device code, registered device code used for authentication. UIDAI does not get any information related to the IP address or the GPS location from where authentication is performed as these parameters are not part of authentication (v2.0) and e-KYC (v2.1) API UIDAI would only know from which device the authentication has happened, through which AUA/ASA etc. This is what the slides meant by traceability. UIDAI does not receive any information about at what location the authentication device is deployed, its IP address and its operator and the purpose of authentication. Further, the UIDAI or any entity under its control is statutorily barred from collecting, keeping or maintaining any information about the purpose of authentication under Section 32(3) of the Aadhaar Act.

Summing up the Scheme:

55) The whole architecture of Aadhaar is devised to give unique identity to the citizens of this country. No doubt, a person can

have various documents on the basis of which that individual can establish her identify. It may be in the form of a passport, Permanent Account Number (PAN) card, ration card and so on. For the purpose of enrolment itself number of documents are prescribed which an individual can produce on the basis of which Aadhaar card can be issued. Thus, such documents, in a way, are also proof of identity. However, there is a fundamental difference between the Aadhaar card as a mean of identity and other documents through which identity can be established. Enrolment for Aadhaar card also requires giving of demographic information as well as biometric information which is in the form of iris and fingerprints. This process eliminates any chance of duplication. It is emphasised that an individual can manipulate the system by having more than one or even number of PAN cards, passports, ration cards etc. When it comes to obtaining Aadhaar card, there is no possibility of obtaining duplicate card. Once the biometric information is stored and on that basis Aadhaar card is issued, it remains in the system with the Authority. Wherever there would be a second attempt for enrolling for Aadhaar and for this purpose same person gives his biometric information, it would immediately get matched with the same biometric information already in the system and the second

request would stand rejected. It is for this reason the Aadhaar card is known as Unique Identification (UID). Such an identity is unparalleled.

56) There is, then, another purpose for having such a system of issuing unique identification cards in the form of Aadhaar card. A glimpse thereof is captured under the heading 'Introduction' above while mentioning how and under what circumstances the whole project was conceptualised. To put it tersely, in addition to enabling any resident to obtain such unique identification proof, it is also to empower marginalised section of the society, particularly those who are illiterate and living in abject poverty or without any shelter etc. It gives identity to such persons also. Moreover, with the aid of Aadhaar card, they can claim various privileges and benefits etc. which are actually meant for these people.

Identity of a person has a significance for every individual in his/her life. In a civilised society every individual, on taking birth, is given a name. Her place of birth and parentage also becomes important as she is known in the society and these demographic particulars also become important attribute of her personality. Throughout their lives, individuals are supposed to provide such information: be it admission in a school or college or at the time of

taking job or engaging in any profession or business activity, etc. When all this information is available in one place, in the form of Aadhaar card, it not only becomes unique, it would also qualify as a document of empowerment. Added with this feature, when an individual knows that no other person can clone her, it assumes greater significance.

57) Thus, the scheme by itself can be treated as laudable when it comes to enabling an individual to seek Aadhaar number, more so, when it is voluntary in nature. Howsoever benevolent the scheme may be, it has to pass the muster of constitutionality. According to the petitioners, the very architecture of Aadhaar is unconstitutional on various grounds, glimpse whereof can be provided at this stage:

Gist of the challenge to the Aadhaar Scheme as well as the Act:

58) The petitioners accept that the case at hand is unique, simply because of the reason that the programme challenged here is itself without precedent. According to them, no democratic society has adopted a programme that is similar in its command and sweep. The case is about a new technology that the Government seeks to deploy and a new architecture of governance that it seeks to build on this technology. The

petitioners are discrediting the Government's claim that biometric technology employed and the Aadhaar Act is greatly beneficial. As per the petitioners, this is an inroad into the rights and liberties of the citizens which the Constitution of India guarantees. It is intrusive in nature. At its core, Aadhaar alters the relationship between the citizen and the State. It diminishes the status of the citizens. Rights freely exercised, liberties freely enjoyed, entitlements granted by the Constitution and laws are all made conditional, on a compulsory barter. The barter compels the citizens to give up their biometrics 'voluntarily', allow their biometrics and demographic information to be stored by the State and private operators and then used for a process termed 'authentication'. According to them, by the very scheme of the Act and the way it operates, it has propensity to cause 'civil death' of an individual by simply switching of Aadhaar of that person. It is the submission of the petitioners that the Constitution balances rights of individuals against State interest. The Aadhaar completely upsets this balance and skews the relationship between the citizen and the State enabling the State to totally dominate the individual.

59) The challenge is directed at the constitutional validity of the

following facets of Aadhaar:

(i) The Aadhaar programme that operated between January 28, 2009 until the bringing into force of the Aadhaar Act on July 12, 2016.

(ii) The Aadhaar Act (and alternatively certain provisions of that Act).

(iii) Elements of the Aadhaar project or programme that continues to operate, though not within the cover of the Aadhaar Act.

(iv) Specific Regulations framed under the Aadhaar Act, illustratively the Aadhaar (Authentication) Regulations, 2016.

(v) A set of subordinate legislation in the form of statutory rules/regulations including the Money Laundering (Amendment) Rules, 2017.

(vi) All notifications (nearly 139) issued under Section 7 of the Aadhaar Act (assuming the Act is upheld) insofar as they make Aadhaar mandatory for availing certain benefits/services/subsidies, including PDS, MGNREGA and social security pension.

(vii) Actions on the part of the authorities to make Aadhaar mandatory even where not covered by Section 7, *inter*

alia: Actions by CBSE, NEET, JEE and UGC requirements for scholarship.

(viii) Specifically, actions on part of the Government mandating linking of mobile phones and Aadhaar vide DoT circular dated March 23, 2017.

(ix) Section 139AA of the Income Tax Act, 1961 insofar as it violates Article 21 by mandating linking Aadhaar to PAN and requiring Aadhaar linkage for filing returns.

60) Apart from the declaratory reliefs regarding *ultra vires* and *certiorari* to quash the provisions/actions enumerated above, there are certain other reliefs that are also sought, including:

(i) Suitable declarations regarding the physical autonomy of a person over her own body *qua* the Indian State.

(ii) Mandatory directions requiring the respondents to give an option to persons who are enrolled with the Aadhaar programme to opt out and to delete the data with suitable certification for compliance.

(iii) Mandatory directions to all concerned authorities that should the Aadhaar Act, etc. be upheld, nevertheless, every person must be entitled to avail services, benefits etc. through alternative means of identification. Negatively, nothing can be withheld from a citizen merely

because he/she does not have an Aadhaar Card or does not wish to use their Aadhaar Card.

(iv) Mandatory directions consistent with the fundamental right to privacy and the right of a citizen to be let alone that no electronic trial or record of his/her authentication be maintained.

61) On the aforesaid premise, the petitioners point out following heads of challenge:

Surveillance:

62) The project creates the architecture for pervasive surveillance and unless the project is stopped, it will lead to an Orwellian State where every move of the citizen is constantly tracked and recorded by the State. The architecture of the project comprises a Central Identities Data Repository (CIDR) which stores and maintains authentication transaction data. The authentication record comprises the time of authentication and the identity of the requesting entity. Based on this architecture it is possible for the State to track down the location of the person seeking authentication. Since the requesting entity is also identified, the activity that the citizen is engaging in is also known.

Violation of Fundamental Right to Privacy:

63) The fundamental right to privacy is breached by the Aadhaar project and the Aadhaar Act in numerous ways. Following are the illustrations given by the petitioners:

(a) Between 2009-10 and July 2016 the project violated the right to privacy with respect to personal demographic as well as biometric information collected, stored and shared as there was no law authorising these actions.

(b) During both the pre-Act and post-Act periods, the project continues to violate the right to privacy by requiring individuals to part with demographic as well as biometric information to private enrolling agencies.

(c) By enabling private entities to use the Aadhaar authentication platform, the citizen's right to informational privacy is violated inasmuch as the citizen is compelled to 'report' his/her actions to the State.

(d) Even where a person is availing of a subsidy, benefit or service from the State, mandatory authentication through the Aadhaar platform (without an option to the citizen to use an alternative mode of identification) violates the right to informational privacy.

(e) With Aadhaar being made compulsory for holding a bank account, operating a cell phone, having a valid PAN, holding

mutual funds, securing admission to school, taking a board examination, etc. the citizen has no option but to obtain Aadhaar. Compelling the citizen to part with biometric information violates individual autonomy and dignity.

(f) In a digital society an individual has the right to protect himself by controlling the dissemination of personal information, including biometric information. Compelling an individual to establish his identity by planting her biometric at multiple points of service violates privacy involving the person.

(g) The seeding of Aadhaar in distinct databases enables the content of information about an individual that is stored in different silos to be aggregated. This enables the State to build complete profiles of individuals violating privacy through the convergence of data.

Limited Government:

64) A fundamental feature of the Constitution is the sovereignty of the people with limited Government authority. The Constitution limits governmental authority in various ways, amongst them Fundamental Rights, the distribution of powers amongst organs of the State and the ultimate check by way of judicial review. The Aadhaar project is destructive of the limited Government. The

Constitution is not about the power of the State, but about the limits on the power of the State. Post Aadhaar, the State will completely dominate the citizen and alter the relationship between citizen and the State. The features of a totalitarian state is seen from:

(a) A person cannot conduct routine activities such as operating a bank account, holding an investment in mutual funds, receiving government pension, receiving scholarship, receiving food rations, operating a mobile phone without the State knowing about these activities.

(b) The State can build a profile of the individual based on the trial of authentication from which the nature of the citizen's activity can be determined.

(c) By disabling Aadhaar the State can cause civil death of the person.

(d) By making Aadhaar compulsory for other activities such as air travel, rail travel, directorship in companies, services and benefits extended by the State Governments and Municipal Corporations, etc. there will be virtually no zone of activity left where the citizen is not under the gaze of the State. This will have a chilling effect on the citizen.

(e) In such a society, there is little or no personal autonomy.

The State is pervasive, and dignity of the individual stands extinguished.

(f) This is an inversion of the accountability in the Right to Information age: instead of the State being transparent to the citizen, it is the citizen who is rendered transparent to the State.

Impugned Act illegally passed as a 'Money Bill':

65) The Bill No. 47 of 2016 introduced in the Lok Sabha and which upon passage became the impugned Act was not a Money Bill in terms of Article 110 of the Constitution of India. Even though the object and purpose of the impugned legislation states that it is to be used for the delivery of subsidies, benefits and services, expenditure for which is incurred from the Consolidated Fund of India, the scope of the impugned Act is far beyond what is envisaged under Article 110. Inasmuch as the impugned Act has not followed the constitutional procedure mandated for the passage of a law by disguising the statute as a 'Money Bill', there is no valid legislative process that has been followed in this case. The legislative process being colourable and since judicial review extends wherever Part III rights are violated, the Aadhaar Act is liable to be struck down.

Procedure followed violates Articles 14 and 21 of the Constitution:

66) The procedure adopted by the respondents, both pre-Act and post-Act, is arbitrary and in violation of Articles 14 and 21 of the Constitution because:

(a) There is no informed consent at the time of enrolment. Individuals are not told about crucial aspects such as potential misuse of the information, the commercial value of the information, the storage of information in a centralised database, that the information supplied could be used against the individual in criminal proceedings pursuant to a court order, there is no opt-out option, the entire enrolment process is conducted by private entities without any governmental supervision, etc.

(b) UIDAI has no direct relationship with the enrolling agency which collects sensitive personal information (biometric and demographic).

(c) The data collected and uploaded in to the CIDR is not verified by any Government official designated by the UIDAI. The data collected and stored lacks integrity.

(d) The procedure at the stage of enrolment and authentication enables the enrolling agency as well as the 'requesting entity' to capture, store and misuse/use the biometric as well as demographic information without the UIDAI having any control

over such misuse/use.

Unreliability of Biometrics and Exclusion:

67) The foundation of the project, i.e. biometrics, is an unreliable and untested technology. Moreover, biometric exceptions severely erode reliability. The biometric authentication system works on a probabilistic model. Consequently, entitlements are reduced from certainty to a chance delivery where the biometrics match. Across the country several persons are losing out on their entitlements, for say food rations, because of a biometric mismatch resulting in them being excluded from various welfare schemes. The project is not an 'identity' project but an 'identification' exercise. Unless the biometrics work, a person in flesh and blood, does not exist for the State.

Illegal Object:

68) It is submitted before us that the objective of creating a single pervasive identification over time is itself illegal. There are several facets to the illegality and amongst them is the very negation of an individual citizen's freedom to identify through different means. The coercive foundation of the impugned Act is in substance an illegal objective that renders the statute *ultra vires* Article 14 of the Constitution of India.

Democracy, Identity and Choice:

69) A citizen or resident in a democratic society has a choice to identify himself/herself through different modes in the course of his/her interactions generally in society as well as his/her interactions with the State. Mandating identification by only one highly intrusive mode is excessive, disproportionate and violates Articles 14, 19 and 21.

Children:

70) As per the petitioners, there is no justification to include children in the Aadhaar programme for various reasons.

71) It may also be recorded at this juncture itself that insofar as the Aadhaar Act is concerned, following provisions thereof are specifically attacked as unconstitutional:

(i) Section 2(c) and 2(d) - authentication and authentication record, read with Section 32

(ii) Section 2(h) read with Section 10 of CIDR

(iii) Section 2(l) read with Regulation 23 of the Aadhaar (Enrolment and Updates) Regulation - 'enrolling agency'

(iv) Section 2(v) - 'resident'

(v) Section 3 – Aadhaar Number

(vi) Section 5 – Special treatment to children

(vii) Section 6 – Update of information

(viii) Section 7

(ix) Section 8

(x) Section 9

(xi) Chapter IV – Sections 11 to 23

(xii) Sections 23 and 54 – excessive delegation

(xiii) Section 23(2)(g) read with Chapter VI & VII – Regulations 27 to 32 of the Aadhaar (Enrolment and Update) Regulations, 2016

(xiv) Section 29

(xv) Section 33

(xvi) Section 47

(xvii) Section 48 – Power of Central Government to supersede UIDAI

(xviii) Section 57

(xix) Section 59

Some Introductory Remarks:

72) Before proceeding further, it would be necessary to state here the approach which we have adopted in dealing with various issues that are raised in these petitions. That may help in understanding the manner in which the matter is dealt with. This necessitates

some introductory remarks:

(i) We may remark at this stage itself that many of the heads of challenge which are taken note of above are overlapping and, therefore, discussion on one aspect may provide substantial answers to the arguments advanced under the other head of challenge as well. Our endeavour, therefore, would be to eschew the repetitive discussion. However, our anxiety to bring clarity and also in order to have continuity of thought while discussing a particular head, may have led to some repetitions at different places. In any case, we would be dealing with the various heads of challenge, one by one, so as to cover the entire spectrum.

(ii) In order to have a smooth flow of discussion, we are going to formulate the questions which arise in all these petitions and then decide those issues. Since, number of advocates[7] appeared on both sides, many of the arguments addressed by them were overlapping and repetitive. In this scenario, we deem it proper to collate the arguments of all the counsel and present the same while undertaking the discussion on each of the issues. Thus, in the process, we would not be referring to each counsel and her arguments. We may, however, intend to place on record that all

7 S/Shri Kapil Sibal, Gopal Subramaniam, P. Chidambaram, Shyam Divan, K.V. Viswanathan, Neeraj Kishan Kaul, C.U. Singh, Anand Grover, Sanjay R. Hegde, Arvind P. Datar, V. Giri, Rakesh Dwivedi, Jayant Bhushan, Sajan Poovayya, P.V. Surendra Nath, Senior Advocates, K.K. Venugopal, Attorney General for India, Tushar Mehta, Additional Solicitor General of India, Gopal Sankaranarayanan and Zoheb Hossain, Advocates.

the counsel on both sides had taken the advocacy to its highest level by presenting all possible nuances of the complex issues involved. In the process, plethora of literature on such issues, including the law prevailing across the Globe was cited. We, therefore, place on record our appreciation of the sublime nature of lawyering in this case.

(iii) As pointed out above, many number of foreign judgments were cited during arguments. The history of this Court reflects that this Court has liberally accepted the good practices, rules of interpretation and norms of constitutional courts of other jurisdictions. In fact, in drafting Indian Constitution itself, the framing fathers had studied various foreign models and adopted provisions from different Constitutions after deep reflection. Constitutional influences of system prevailing in some of the countries on Indian Constitution can be summarised as under:

From UK	- Parliamentary Type of Government - Cabinet System of Ministers - Bicameral Parliament - Lower House more powerful - Council of Minsters responsible to Lower House
From US	- Written Constitution - Executive head of State known as President and his being the Supreme Commander of the Armed Forces - Vice-President as the *ex-officio* Chairman of Rajya Sabha - Bill of Rights

	- Supreme Court - Provision of States - Independence of Judiciary and judicial review - Preamble - Removal of Supreme Court and High Court Judges
From USSR	- Fundamental Duties - Five Year Plan
From Australia	- Concurrent List - Language of the preamble - Provision regarding trade, commerce and intercourse
From Japan	- Law on which the Supreme Court function
From Weimar Constitution of Germany	- Suspension of Fundamental Rights during the emergency
From Canada	- Scheme of federation with a strong centre - Distribution of powers between the centre and the states and placing residuary powers with the centre
From Ireland	- Concept of Directive Principles of States Policy - Method of election of President - Nomination of members in the Rajya Sabha by the President

It was, therefore, but natural to find out the manner in which particular provisions have been interpreted by the constitutional courts of the aforesaid countries. Case law of this Court would reflect this for interpreting the provisions relating to 'Inter-State Trade, Commerce & Intercourse'. The case law of the Australian High Court is liberally referred as this Chapter is influenced by the provisions contained in the Australian Constitution. Likewise, for interpreting provisions of Part IX of the Constitution on 'Relations

between the Union and the States' where Canadian model is followed, the judgments of Canadian Supreme Court have been cited by this Court from time to time. Influence of U.S. Constitutionalism, tempered by the wish to preserve India's own characteristics, while interpreting chapter relating to fundamental rights as well as power of judicial review is also discernible. A critical analysis of the various judgments of this Court, where foreign precedents are cited[8], formulates four typologies of use, namely:

(a) Where the court relies on foreign precedents for guidance on general constitutional principles and when necessary to;

(b) Where the court frames the issue posed for adjudication and/or to formulate evaluative test and frameworks;

(c) To distinguish the country's context from the foreign one[9];

(d) To 'read' in the Constitution implied or unenumerated rights[10].

It can be said that though this Court has been liberally relying upon the judgments of the constitutional courts of other countries, particularly when it comes to human rights discourse, at the same time, in certain situations, note of caution is also

8 Thiruvengadam, The Use of Foreign Law in Constitutional Cases in India and Singapore (2010)
9 Basheshar Nath v. Commissioner of Income Tax, Delhi and Rajasthan & Anr., 1959 Supp (1) SCR 528
10 Romesh Thappar v. State of Madras, 1950 SCR 594

added to give a message that the judgment of other jurisdiction cannot be relied blindly and it would depend as to whether a particular judgment will fit in Indian context or not. As a matter of fact, in *Basheshar Nath*, the Court discussed the doctrine of waiver in force in the United States and rejected it firmly stating that:

> :...the doctrine of waiver enunciated by some American Judges in construing the American Constitution cannot be introduced in our Constitution...We are not for the moment convinced that this theory has any relevancy in construing the fundamental rights conferred by Part III of the Constitution."

On the contrary, in *Romesh Thappar*, the Court completely based its decision to strike down a law restricting the free circulation of newspapers on two US precedents, *Ex parte Jackson*[11] and *Lovell* v. *City of Griffin*[12], and affirmed that the protection of freedom of expression in India follows the maxim of Madison that the Court transposed from its quotation in *Near* v. *Minnesota*[13], according to which 'it is better to leave a few of its noxious branches to their luxuriant growth, than, by pruning them away, to injure the vigour of those yielding the proper fruits'. Likewise, the role of foreign precedents in a majority opinion is confirmed in the decision of *His Holiness Kesavananda Bharati*

11 Ex Parte Jackson, 96 US 727 (1878).
12 Lovell v. City of Griffin, 303 US 444 (1938).
13 Near v. Minnesota, 282 US 607 (1931) 717-18.

Sripadagalvaru which clarifies Parliament's power to amend the Constitution. At the same time, looking to the use of foreign precedents in this judgment, Justice S.M. Sikri (as His Lordship then was), dealing with the interpretation of Article 368 of the Constitution, first of all, highlighted that:

> "No other Constitution in the world is like ours. No other Constitution combines under its wings such diverse peoples, numbering now more than 550 millions [sic], with different languages and religions and in different stages of economic development, into one nation, and no other nation is faced with such vast socio-economic problems.

After this premise, however, His Lordship accepts, in order to define what an 'amendment' is according to the Indian Constitution, the reasoning of Lord Greene in *Bidie* v. *General Accident, Fire and Life Assurance Corporation*[14] and that of Justice Holmes in *Towne* v. *Eisner*[15], which affirm that to understand a word it is necessary to understand the context in which it is inserted. To strengthen this, *James* v. *Commonwealth of Australia*[16] is also referred to.

We have stated the trend in brief with a purpose. Number of judgments of U.K. Courts, German Supreme Court, European Commission of Human Rights (ECHR), U.S. Supreme Court etc. were cited. However, there is no similarity in approach by these

14 Bidie v. General Accident, Fire and Life Assurance Corporation (1948) 2 All ER 995, 998.
15 Towne v. Eisner, 245 US 418.
16 James v. Commonwealth of Australia, (1936) AC 578.

Courts in deciding a particular issue by applying different principles, particularly when it comes to the issues of data protection and privacy. In this backdrop, it becomes necessary, while referring to these judgments, to keep in mind the ethos, cultural background and vast socio-economic problems of this country and on that basis to accept a particular norm, or for that matter, to formulate a constitutional norm which is relevant in our context. That is the endeavour which is made by us.

(iv) Many arguments of the petitioners relate to the working of the system. The petitioners had argued that the architecture of Aadhaar, by its very nature, is probabilistic and, therefore, it may result in exclusion, in many cases. Therefore, rather than extending subsidies, benefits and services to the section of society for which these are meant, it may have the tendency to exclude them from receiving such subsidies, benefits and services. The respondents, on the other hand, have stated on affidavit that the attempt of the respondents would be to ensure that no individual who is eligible for such benefits etc. is deprived form receiving those benefits, even when in a particular case, it is found that on authentication, his fingerprints or iris are not matching and is resulting into failure. It was clarified that since

Aadhaar project is an ongoing project, there may be some glitches in its working and there is a continuous attempt to make improvements in order to ensure that it becomes foolproof over a period of time. We have eschewed detailed discussion in respect of those arguments, which may not have much relevance when judging the constitutional validity of the Act and the scheme. However, such arguments of exclusion etc. leading to violation of Articles 14 and 21 are dealt with at an appropriate stage. But the argument based on alleged inaccurate claims of savings by the Authority/Union of India in respect of certain programmes, like saving of USD 11 billion per annum due to the Aadhaar project, as well as savings in the implementation of the MGNREGA scheme, LPG subsidy, PDS savings need not detain us for long. Such rebuttals raised by the petitioners may have relevance insofar as working of the Act is concerned. That by itself cannot be a ground to invalidate the statute.

(v) As mentioned above, notwithstanding the passions and emotions evoked on both sides in equal measure, this Court has adopted a lambent approach while dealing with the issues raised, having a posture of calmness coupled with objective examination of the issues on the touchstone of the constitutional provisions.

We are in the age of constitutional democracy, that too substantive and liberal democracy. Such a democracy is not based solely on the rule of people through their representatives which is known as “formal democracy”. It also has other precepts like rule of law, human rights, independence of judiciary, separation of powers, etc. The framers of Indian Constitution duly recognized the aforesaid precepts of liberal and substantive democracy with rule of law as an important and fundamental pillar. At the same time, in the scheme of the Constitution, it is the judiciary which is assigned the role of upholding rule of law and protecting the Constitution and democracy.

The essence of rule of law is to preclude arbitrary action. Dicey, who propounded the rule of law, gave distinct meaning to this concept and explained that it was based on three kindered features, which are as follows:

(i) absence of arbitrary powers on the part of authorities;

(ii) equality before law; and

(iii) the Constitution is part of the ordinary law of the land.

There are three aspects of the rule of law, which are as follows:

(a) A formal aspect which means making the law rule.

(b) A jurisprudential or doctrinal aspect which is concerned with the minimal condition for the existence of law in society.

(c) A substantive aspect as per which the rule of law is concerned with properly balancing between the individual and society.

When we talk of jurisprudential rule of law, it includes certain minimum requirements without which a legal system cannot exist and which distinguished a legal system from an automatic system where the leader imposes his will on everyone else. Professor Lon Fuller has described these requirements collectively as the *'inner morality of law'*. In addition to jurisprudential concept, which is important and an essential condition for the rule of law, the substantive concept of the rule of law is equally important and inseparable norm of the rule of law in real sense. It encompasses the 'right conception' of the rule of law propounded by Dworkin. It means guaranteeing fundamental values of morality, justice, and human rights, with a proper balance between these and the other needs of the society. Justice Aharon Barak, former Chief Justice of Israel, has lucidly explained this facet of rule of law in the following manner:

> "The rule of law is not merely public order, the rule of law is social justice based on public order. The law exists to ensure proper social life. Social life, however, is not a goal in itself but a means to allow the individual to live in dignity

> and develop himself. The human being and human rights underlie this substantive perception of the rule of law, with a proper balance among the different rights and between human rights and the proper needs of society. The substantive rule of law "is the rule of proper law, which balances the needs of society and the individual". This is the rule of law that strikes a balance between society's need for political independence, social equality, economic development, and internal order, on the one hand, and the needs of the individual, his personal liberty, and his human dignity on the other. The Judge must protect this rich concept of the rule of law."

The 'rule of law', which is a fine sonorous phrase, is dynamic and ever expanding and can be put alongside the brotherhood of man, human rights and human dignity. About the modern rule of law, Professor Garner observed:

> "The concept in its modern dress meets a need that has been felt throughout the history of civilization, law is not sufficient in itself and it must serve some purpose. Man is a social animal, but to live in society he has had to fashion for himself and in his own interest the law and other instruments of government, and as a consequence those must to some extent limit his personal liberties. The problem is how to control those instruments of government in accordance with the Rule of Law and in the interest of the governed."

Likewise, the basic spirit of our Constitution is to provide each and every person of the nation equal opportunity to grow as a human being, irrespective of race, caste, religion, community and social status. Granville Austin while analyzing the functioning of Indian Constitution in first 50 years has described three distinguished strands of Indian Constitution: (i) protecting national

unity and integrity, (ii) establishing the institution and spirit of democracy; and (iii) fostering social reforms. The strands are mutually dependent and inextricably intertwined in what he elegantly describes as a 'seamless web'. And there cannot be social reforms till it is ensured that each and every citizen of this country is able to exploit his/her potentials to the maximum. The Constitution, although drafted by the Constituent Assembly, was meant for the people of India and that is why it is given by the people to themselves as expressed in the opening words “We the People...”. What is the most important gift to the common person given by this Constitution is “fundamental rights” which may be called human rights as well.

Speaking for the vision of our founding fathers, in *State of Karnataka & Anr.* v. *Shri Ranganatha Reddy & Anr.*[17], this Court speaking through Justice Krishna Iyer observed:

> “The social philosophy of the Constitution shapes creative judicial vision and orientation. Our nation has, as its dynamic doctrine, economic democracy *sans* which political democracy is chimerical. We say so because our Constitution, in Parts III and IV and elsewhere, ensouls such a value system, and the debate in this case puts precisely this soul in peril….Our thesis is that the dialectics of social justice should not be missed if the synthesis of Parts III and Part IV is to influence State action and court pronouncements. Constitutional problems cannot be studied in a socio-economic vacuum, since socio-cultural changes are the source of the new values, and sloughing off old legal thought is part of the process the new equity-

17 (1977) 4 SCC 471

> loaded legality. A judge is a social scientist in his role as constitutional invigilator and fails functionally if he forgets this dimension in his complex duties."

In *Dattatraya Govind Mahajan* v. *State of Maharashtra*[18] the spirit of our Constitution was explained thus:

> "Our Constitution is a tryst with destiny, preamble with lucent solemnity in the words 'Justice – social, economic and political.' The three great branches of Government, as creatures of the Constitution, must remember this promise in their fundamental role and forget it at their peril, for to do so will be a betrayal of chose high values and goals which this nation set for itself in its objective Resolution and whose elaborate summation appears in Part IV of the Paramount Parchment. The history of our country's struggle for independence was the story of a battle between the forces of socio-economic exploitation and the masses of deprived people of varying degrees and the Constitution sets the new sights of the nation…..Once we grasp the dharma of the Constitution, the new orientation of the karma of adjudication becomes clear. Our founding fathers, aware of our social realities, forged our fighting faith and integrating justice in its social, economic and political aspects. While contemplating the meaning of the Articles of the Organic Law, the Supreme Court shall not disown Social Justice."

In *National Human Rights Commission* v. *State of Arunachal Pradesh*[19], the Supreme Court explained it again, as under:

> "We are a country governed by the Rule of Law. Our Constitution confers certain rights on every human being and certain other rights on citizens. Every person is entitled to equality before the law and equal protection of the laws."

Looking the matter from this angle, when the judiciary is assigned the role of upholding the rule of law, the first function of

18 (1977) 2 SCC 548
19 (1996) 1 SCC 742

the judiciary is to protect the democracy as well as the Constitution. At the same time, second role of the Court, which is equally important, is to bridge the gap between the law and the society. In the process of undertaking this role, a third role, which is of equal significance also springs up. Judiciary is also to ensure that social and economic justice is meted out to the deserving lot by affirmative action of the State. Our attempt has been to strive the balancing of competing Constitutional norms. The complex issues are dealt with keeping in view this role of the Supreme Court as assigned by the Constitution; *albeit* within the constitutional norms.

Scope of Judicial Review:

73) The aforesaid discussion leads us to pick up and discuss another strand viz. the scope of judicial review in such matters.

74) Judicial review means the Supremacy of law. It is the power of the court to review the actions of the Legislature, the Executive and the Judiciary itself and to scrutinize the validity of any law or action. It has emerged as one of the most effective instruments of protecting and preserving the cherished freedoms in a constitutional democracy and upholding principles such as separation of powers and rule of law. The Judiciary, through

judicial review, prevents the decisions of other branches from impinging on the constitutional values. The fundamental nature of the Constitution is that of a limiting document, it curtails the powers of majoritarianism from hijacking the State. The power of review is the shield which is placed in the hands of the most judiciaries of constitutional democracies to enable the protection of the supreme document.

75) In *Binoy Viswam* v. *Union of India & Ors.*[20], scope of judicial review of legislative Act was described in the following manner:

> "**76.** Under the Constitution, Supreme Court as well as High Courts are vested with the power of judicial review of not only administrative acts of the executive but legislative enactments passed by the legislature as well. This power is given to the High Courts under Article 226 of the Constitution and to the Supreme Court under Article 32 as well as Article 136 of the Constitution. At the same time, the parameters on which the power of judicial review of administrative act is to be undertaken are different from the parameters on which validity of legislative enactment is to be examined. No doubt, in exercises of its power of judicial review of legislative action, the Supreme Court, or for that matter, the High Courts can declare law passed by Parliament or the State Legislature as invalid. However, the power to strike down primary legislation enacted by the Union or the State Legislatures is on limited grounds. Courts can strike down legislation either on the basis that it falls foul of federal distribution of powers or that it contravenes fundamental rights or other constitutional rights/provisions of the Constitution of India. No doubt, since the Supreme Court and the High Courts are treated as the ultimate arbiter in all matters involving interpretation of the Constitution, it is the courts which have the final say on questions relating to rights and whether such a right is violated or not. The basis of the aforesaid statement lies in

20 (2017) 7 SCC 59

Article 13(2) of the Constitution which proscribes the State from making "any law which takes away or abridges the right conferred by Part III", enshrining fundamental rights. It categorically states that any law made in contravention thereof, to the extent of the contravention, be void.

77. We can also take note of Article 372 of the Constitution at this stage which applies to pre-constitutional laws. Article 372(1) reads as under:

> "**372. *Continuance in force of existing laws and their adaptation***.—(1) Notwithstanding the repeal by this Constitution of the enactments referred to in Article 395 but subject to the other provisions of this Constitution, all the laws in force in the territory of India immediately before the commencement of this Constitution shall continue in force therein until altered or repealed or amended by a competent legislature or other competent authority."

In the context of judicial review of legislation, this provision gives an indication that all laws enforced prior to the commencement of the Constitution can be tested for compliance with the provisions of the Constitution by courts. Such a power is recognised by this Court in *Union of India* v. *SICOM Ltd.* In that judgment, it was also held that since the term "laws", as per Article 372, includes common law the power of judicial review of legislation, which is a part of common law applicable in India before the Constitution came into force, would continue to vest in the Indian courts.

78. …These contours of the judicial review are spelled out in the clear terms in *Rakesh Kohli*, and particularly in the following paragraphs: (SCC pp. 321-22 & 325-27, paras 16-17, 26-28 & 30)

> "*16*. The statute enacted by Parliament or a State Legislature cannot be declared unconstitutional lightly. The court must be able to hold beyond any iota of doubt that the violation of the constitutional provisions was so glaring that the legislative provision under challenge cannot stand. Sans flagrant violation of the constitutional provisions, the law made by Parliament or a State Legislature is not declared bad.

17. This Court has repeatedly stated that legislative enactment can be struck down by court only on two grounds, namely (*i*) that the appropriate legislature does not have the competence to make the law, and (*ii*) that it does not (sic) take away or abridge any of the fundamental rights enumerated in Part III of the Constitution or any other constitutional provisions. In *McDowell and Co.* while dealing with the challenge to an enactment based on Article 14, this Court stated in para 43 of the Report as follows: (SCC pp. 737-38)

'43. … A law made by Parliament or the legislature can be struck down by courts on two grounds and two grounds alone viz. (*1*) lack of legislative competence, and (*2*) violation of any of the fundamental rights guaranteed in Part III of the Constitution or of any other constitutional provision. There is no third ground. … if an enactment is challenged as violative of Article 14, it can be struck down only if it is found that it is violative of the equality clause/equal protection clause enshrined therein. Similarly, if an enactment is challenged as violative of any of the fundamental rights guaranteed by sub-clauses (*a*) to (*g*) of Article 19(1), it can be struck down only if it is found not saved by any of the clauses (2) to (6) of Article 19 and so on. *No enactment can be struck down by just saying that it is arbitrary or unreasonable*. Some or the other constitutional infirmity has to be found before invalidating an Act. An enactment cannot be struck down on the ground that court thinks it unjustified. Parliament and the legislatures, composed as they are of the representatives of the people, are supposed to know and be aware of the needs of the people and what is good and bad for them. The court cannot sit in judgment over their wisdom.'

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26. In *Mohd. Hanif Quareshi*, the Constitution Bench further observed that there was always a presumption in favour of constitutionality of an enactment and the burden is upon him, who attacks it, to show that there has been a clear violation of the constitutional principles. It stated in para 15 of the Report as under: (AIR pp. 740-41)

'*15*. … The courts, it is accepted, must presume that the legislature understands and correctly appreciates the needs of its own people, that its laws are directed to problems made manifest by experience and that its discriminations are based on adequate grounds. It must be borne in mind that the legislature is free to recognise degrees of harm and may confine its restrictions to those cases where the need is deemed to be the clearest and finally that in order to sustain the presumption of constitutionality the court may take into consideration matters of common knowledge, matters of common report, the history of the times and may assume every state of facts which can be conceived existing at the time of legislation.'

27. The above legal position has been reiterated by a Constitution Bench of this Court in *Mahant Moti Das* v. *S.P. Sahi*.

28. In *Hamdard Dawakhana* v. *Union of India*, inter alia, while referring to the earlier two decisions, namely, *Bengal Immunity Co. Ltd.* and *Mahant Moti Das*, it was observed in para 8 of the Report as follows: (*Hamdard Dawakhana case*, AIR p. 559)

'*8*. Therefore, when the constitutionality of an enactment is challenged on the ground of violation of any of the articles in Part III of the Constitution, the ascertainment of its true nature and character becomes necessary i.e. its subject-matter, the area in which it is intended to operate, its purport and intent have to be determined. In order to do so it is legitimate to take into consideration all the factors such as history of the legislation, the purpose thereof, the surrounding circumstances and conditions, the mischief which it intended to suppress, the remedy for the disease which the legislature resolved to cure and the true reason for the remedy….'

In *Hamdard Dawakhana*, the Court also followed the statement of law in *Mahant Moti Das* and the two earlier decisions, namely, *Charanjit Lal Chowdhury* v. *Union of India* and *State of Bombay* v. *F.N. Balsara* and reiterated the principle that presumption was always in favour of constitutionality of an enactment.

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30. A well-known principle that in the field of taxation, the legislature enjoys a greater latitude for classification, has been noted by this Court in a long line of cases. Some of these decisions are *Steelworth Ltd.* v. *State of Assam* [*Steelworth Ltd.* v. *State of Assam*, 1962 Supp (2) SCR 589], *Gopal Narain* v. *State of U.P.* [*Gopal Narain* v. *State of U.P.*, AIR 1964 SC 370], *Ganga Sugar Corpn. Ltd.* v. *State of U.P.* [*Ganga Sugar Corpn. Ltd.* v. *State of U.P.*, (1980) 1 SCC 223 : 1980 SCC (Tax) 90], *R.K. Garg* v. *Union of India* [*R.K. Garg* v. *Union of India*, (1981) 4 SCC 675 : 1982 SCC (Tax) 30] and *State of W.B.* v. *E.I.T.A. India Ltd.* [*State of W.B.* v. *E.I.T.A. India Ltd.*, (2003) 5 SCC 239]"

(emphasis in original)

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83. It is, thus, clear that in exercise of power of judicial review, the Indian courts are invested with powers to strike down primary legislation enacted by Parliament or the State Legislatures. However, while undertaking this exercise of judicial review, the same is to be done at three levels. In the first stage, the Court would examine as to whether impugned provision in a legislation is compatible with the fundamental rights or the constitutional provisions (substantive judicial review) or it falls foul of the federal distribution of powers (procedural judicial review). If it is not found to be so, no further exercise is needed as challenge would fail. On the other hand, if it is found that legislature lacks competence as the subject legislated was not within the powers assigned in the List in Schedule VII, no further enquiry is needed and such a law is to be declared as ultra vires the Constitution. However, while undertaking substantive judicial review, if it is found that the impugned provision appears to be violative of fundamental rights or other constitutional rights, the Court reaches the second stage of review. At this second phase of enquiry, the Court is supposed to undertake the exercise as to whether the impugned provision can still be saved by reading it down so as to bring it in conformity with the constitutional provisions. If that is not achievable then the enquiry enters the third stage. If the offending portion of the statute is severable, it is severed and the Court strikes down the

impugned provision declaring the same as unconstitutional."

76) In support of the aforesaid proposition that an Act of the Parliament can be invalidated only on the aforesaid two grounds, passages from various judgments were extracted[21]. The Court also noted the observations from *State of A.P. & Ors.* v. *MCDOWELL & Co. & Ors.*[22] wherein it was held that apart from the aforesaid two grounds, no third ground is available to validate any piece of legislation. In the process, it was further noted that in *Rajbala & Ors.* v. *State of Haryana & Ors.*[23] (which followed *MCDOWELL & Co.* case), the Court held that a legislation cannot be declared unconstitutional on the ground that it is 'arbitrary' inasmuch as examining as to whether a particular Act is arbitrary or not implies a value judgment and courts do not examine the wisdom of legislative choices, and, therefore, cannot undertake this exercise.

77) The issue whether law can be declared unconstitutional on the ground of arbitrariness has received the attention of this Court in a Constitution Bench judgment in the case of *Shayara Bano* v. *Union of India & Ors.*[24]. R.F. Nariman and U.U. Lalit, JJ.

21 *State of M.P.* v. *Rakesh Kohli*, (2012) 6 SCC 312; *Ashoka Kumar Thakur* v. *Union of India*, (2008) 6 SCC 1
22 (1996) 3 SCC 709
23 (2016) 2 SCC 445
24 (2017) 9 SCC 1

discredited the ratio of the aforesaid judgments wherein the Court had held that a law cannot be declared unconstitutional on the ground that it is arbitrary. The Judges pointed out the larger Bench judgment in the case of *Dr. K.R. Lakshmanan* v. *State of T.N. & Anr.*[25] and *Maneka Gandhi* v. *Union of India & Anr.*[26] where 'manifest arbitrariness' is recognised as the third ground on which the legislative Act can be invalidated. Following discussion in this behalf is worthy of note:

> "**87.** The thread of reasonableness runs through the entire fundamental rights chapter. What is manifestly arbitrary is obviously unreasonable and being contrary to the rule of law, would violate Article 14. Further, there is an apparent contradiction in the three-Judge Bench decision in *McDowell* [*State of A.P.* v. *McDowell and Co.*, (1996) 3 SCC 709] when it is said that a constitutional challenge can succeed on the ground that a law is "disproportionate, excessive or unreasonable", yet such challenge would fail on the very ground of the law being "unreasonable, unnecessary or unwarranted". The arbitrariness doctrine when applied to legislation obviously would not involve the latter challenge but would only involve a law being disproportionate, excessive or otherwise being manifestly unreasonable. All the aforesaid grounds, therefore, do not seek to differentiate between State action in its various forms, all of which are interdicted if they fall foul of the fundamental rights guaranteed to persons and citizens in Part III of the Constitution.
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> **88.** We only need to point out that even after *McDowell* [*State of A.P.* v. *McDowell and Co.*, (1996) 3 SCC 709] , this Court has in fact negated statutory law on the ground of it being arbitrary and therefore violative of Article 14 of the Constitution of India. In *Malpe Vishwanath Acharya* v. *State of Maharashtra* [*Malpe Vishwanath Acharya* v. *State of Maharashtra*, (1998) 2 SCC 1] , this Court held that after passage of time, a law can become arbitrary, and,

25 (1996) 2 SCC 226
26 (1978) 1 SCC 248

> therefore, the freezing of rents at a 1940 market value under the Bombay Rent Act would be arbitrary and violative of Article 14 of the Constitution of India (*see* paras 8 to 15 and 31).
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> **99.** However, in *State of Bihar* v. *Bihar Distillery Ltd.* [*State of Bihar* v. *Bihar Distillery Ltd.*, (1997) 2 SCC 453] , SCC at para 22, in *State of M.P.* v. *Rakesh Kohli* [*State of M.P.* v. *Rakesh Kohli*, (2012) 6 SCC 312 : (2012) 3 SCC (Civ) 481], SCC at paras 17 to 19, in *Rajbala* v. *State of Haryana* [*Rajbala* v. *State of Haryana*, (2016) 2 SCC 445], SCC at paras 53 to 65 and in *Binoy Viswam* v. *Union of India* [*Binoy Viswam* v. *Union of India*, (2017) 7 SCC 59], SCC at paras 80 to 82, *McDowell* [*State of A.P.* v. *McDowell and Co.*, (1996) 3 SCC 709] was read as being an absolute bar to the use of "arbitrariness" as a tool to strike down legislation under Article 14. As has been noted by us earlier in this judgment, *McDowell* [*State of A.P.* v. *McDowell and Co.*, (1996) 3 SCC 709] itself is per incuriam, not having noticed several judgments of Benches of equal or higher strength, its reasoning even otherwise being flawed. The judgments, following *McDowell* [*State of A.P.* v. *McDowell and Co.*, (1996) 3 SCC 709] are, therefore, no longer good law."

78) The historical development of the doctrine of arbitrariness has been noticed by the said Judges in *Shayara Bano* in detail. It would be suffice to reproduce paragraphs 67 to 69 of the said judgment as the discussion in these paras provide a sufficient guide as to how a doctrine of arbitrariness is to be applied while adjudging the constitutional validity of a legislation.

> "**67.** We now come to the development of the doctrine of arbitrariness and its application to State action as a distinct doctrine on which State action may be struck down as being violative of the rule of law contained in Article 14. In a significant passage, Bhagwati, J., in *E.P. Royappa* v. *State of T.N.* stated: (SCC p. 38, para 85)

"*85*. The last two grounds of challenge may be taken up together for consideration. Though we have formulated the third ground of challenge as a distinct and separate ground, it is really in substance and effect merely an aspect of the second ground based on violation of Articles 14 and 16. Article 16 embodies the fundamental guarantee that there shall be equality of opportunity for all citizens in matters relating to employment or appointment to any office under the State. Though enacted as a distinct and independent fundamental right because of its great importance as a principle ensuring equality of opportunity in public employment which is so vital to the building up of the new classless egalitarian society envisaged in the Constitution, Article 16 is only an instance of the application of the concept of equality enshrined in Article 14. In other words, Article 14 is the genus while Article 16 is a species. Article 16 gives effect to the doctrine of equality in all matters relating to public employment. The basic principle which, therefore, informs both Articles 14 and 16 is equality and inhibition against discrimination. Now, what is the content and reach of this great equalising principle? It is a founding faith, to use the words of Bose, J., "a way of life", and it must not be subjected to a narrow pedantic or lexicographic approach. We cannot countenance any attempt to truncate its all-embracing scope and meaning, for to do so would be to violate its activist magnitude. Equality is a dynamic concept with many aspects and dimensions and it cannot be "cribbed, cabined and confined" within traditional and doctrinaire limits. *From a positivistic point of view, equality is antithetic to arbitrariness. In fact equality and arbitrariness are sworn enemies; one belongs to the rule of law in a republic while the other, to the whim and caprice of an absolute monarch. Where an act is arbitrary, it is implicit in it that it is unequal both according to political logic and constitutional law and is therefore violative of Article 14*, and if it effects any matter relating to public employment, it is also violative of Article 16. Articles 14 and 16 strike at arbitrariness in State action and ensure fairness and equality of treatment. They require that State action must be based on valid relevant principles applicable alike to all similarly situate and it must not be guided by any extraneous

or irrelevant considerations because that would be denial of equality. Where the operative reason for State action, as distinguished from motive inducing from the antechamber of the mind, is not legitimate and relevant but is extraneous and outside the area of permissible considerations, it would amount to mala fide exercise of power and that is hit by Articles 14 and 16. Mala fide exercise of power and arbitrariness are different lethal radiations emanating from the same vice: in fact the latter comprehends the former. Both are inhibited by Articles 14 and 16."

(emphasis supplied)

68. This was further fleshed out in *Maneka Gandhi* v. *Union of India*, where, after stating that various fundamental rights must be read together and must overlap and fertilise each other, Bhagwati, J., further amplified this doctrine as follows: (SCC pp. 283-84, para 7)

"*The nature and requirement of the procedure under Article 21*

7. Now, the question immediately arises as to what is the requirement of Article 14: what is the content and reach of the great equalising principle enunciated in this article? There can be no doubt that it is a founding faith of the Constitution. It is indeed the pillar on which rests securely the foundation of our democratic republic. And, therefore, it must not be subjected to a narrow, pedantic or lexicographic approach. No attempt should be made to truncate its all-embracing scope and meaning, for to do so would be to violate its activist magnitude. Equality is a dynamic concept with many aspects and dimensions and it cannot be imprisoned within traditional and doctrinaire limits. We must reiterate here what was pointed out by the majority in *E.P. Royappa* v. *State of T.N.* , namely, that: (SCC p. 38, para 85)

'*85*. … From a positivistic point of view, equality is antithetic to arbitrariness. In fact equality and arbitrariness are sworn enemies; one belongs to the rule of law in a republic, while the other, to the whim and caprice of an absolute monarch. Where an act is arbitrary, it is implicit in it that it is unequal both according to political logic and constitutional law and is therefore violative of Article 14….'

> Article 14 strikes at arbitrariness in State action and ensures fairness and equality of treatment. *The principle of reasonableness, which legally as well as philosophically, is an essential element of equality or non-arbitrariness pervades Article 14 like a brooding omnipresence and the procedure contemplated by Article 21 must answer the test of reasonableness in order to be in conformity with Article 14*. It must be "right and just and fair" and not arbitrary, fanciful or oppressive; otherwise, it would be no procedure at all and the requirement of Article 21 would not be satisfied."
>
> (emphasis supplied)

69. This was further clarified in *A.L. Kalra* v. *Project and Equipment Corpn.*, following *Royappa* and holding that arbitrariness is a doctrine distinct from discrimination. It was held: (*A.L. Kalra case*, SCC p. 328, para 19)

> "*19*. … It thus appears well settled that Article 14 strikes at arbitrariness in executive/administrative action because any action that is arbitrary must necessarily involve the negation of equality. One need not confine the denial of equality to a comparative evaluation between two persons to arrive at a conclusion of discriminatory treatment. An action per se arbitrary itself denies equal of (sic) protection by law. The Constitution Bench pertinently observed in *Ajay Hasia case* and put the matter beyond controversy when it said: (SCC p. 741, para 16)
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> '*16*. … Wherever therefore, there is arbitrariness in State action whether it be of the legislature or of the executive or of an "authority" under Article 12, Article 14 immediately springs into action and strikes down such State action.'

This view was further elaborated and affirmed in *D.S. Nakara* v. *Union of India* . In *Maneka Gandhi* v. *Union of India* it was observed that Article 14 strikes at arbitrariness in State action and ensures fairness and equality of treatment. It is thus too late in the day to contend that an executive action shown to be arbitrary is not either judicially reviewable or within the reach of Article 14."

> The same view was reiterated in *Babita Prasad* v. *State of Bihar* , SCC at p. 285, para 31."

This doctrine is, thus, treated as a facet of both Articles 14 and 21 of the Constitution.

79) We would like to record that we have proceeded on the premise that manifest arbitrariness also furnishes a ground on the basis on which a legislative enactment can be judicially reviewed. In the process, even the constitutional validity of Section 139AA of the Income Tax Act, 1961 is given a fresh look on the touchstone of this norm.

Explaining the doctrine/principles on which the cases are to be decided:

80) Our discussion up to this stage, which gives a glimpse of the attack to the Aadhaar scheme and the Aadhaar Act, spearheaded by the petitioners, would reveal that in the forefront is the right to privacy and that forms the main pillar on which the edifice of arguments is substantially constructed[27]. Inbuilt in this right to privacy is the right to live with dignity, which is a postulate of right to privacy. In the process, discussion leads to the issue of proportionality, viz. whether measures taken under the Aadhaar Act satisfy the doctrine of proportionality. We would, therefore,

27 There are few other incidental and ancillary issues raised by the petitioners as well, which we propose to discuss and deal with after answering these fundamental submissions.

be well advised to explain these concepts, so that their application to the fact situation is undertaken with clear and stable norms in mind.

Contours of Right to Privacy:

81) It stands established, with conclusive determination of the nine Judge Bench judgment of this Court in *K.S. Puttaswamy* that right to privacy is a fundamental right. The majority judgment authored by Dr. D.Y. Chandrachud, J. (on behalf of three other Judges) and five concurring judgments of other five Judges have declared, in no uncertain terms and most authoritatively, right to privacy to be a fundamental right. This judgment also discusses in detail the scope and ambit of right to privacy. The relevant passages in this behalf have been reproduced above while taking note of the submissions of the learned counsel for the petitioners as well as respondents. One interesting phenomenon that is discerned from the respective submissions on either side is that both sides have placed strong reliance on different passages from this very judgment to support their respective stances. A close reading of this judgment brings about the following features:

(i) *Privacy has always been a natural right:* The correct position in this behalf has been established by a number of

judgments starting from *Gobind* v. *State of M.P.*[28] Various opinions conclude that:

(a) privacy is a concomitant of the right of the individual to exercise control over his or her personality.

(b) Privacy is the necessary condition precedent to the enjoyment of any of the guarantees in Part III.

(c) The fundamental right to privacy would cover at least three aspects – (i) intrusion with an individual's physical body, (ii) informational privacy, and (iii) privacy of choice.

(d) One aspect of privacy is the right to control the dissemination of personal information. And that every individual should have a right to be able to control exercise over his/her own life and image as portrayed in the world and to control commercial use of his/her identity.

Following passages from different opinions reflect the aforesaid proposition:

> **Dr. D.Y. Chandrachud, J.**:
>
> 42. Privacy is a concomitant of the right of the individual to exercise control over his or her personality. It finds an origin in the notion that there are certain rights which are natural to or inherent in a human being. Natural rights are inalienable because they are inseparable from the human personality. The human element in life is impossible to conceive without the existence of natural rights. In 1690, *John Locke*had in his *Second Treatise of Government* observed that the lives, liberties and estates of individuals

28 (1975) 2 SCC 148

are as a matter of fundamental natural law, a private preserve. The idea of a private preserve was to create barriers from outside interference. In 1765, *William Blackstone* in his *Commentaries on the Laws of England* spoke of a "natural liberty". There were, in his view, absolute rights which were vested in the individual by the immutable laws of nature. These absolute rights were divided into rights of personal security, personal liberty and property. The right of personal security involved a legal and uninterrupted enjoyment of life, limbs, body, health and reputation by an individual.

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46. Natural rights are not bestowed by the State. They inhere in human beings because they are human. They exist equally in the individual irrespective of class or strata, gender or orientation.

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318. Life and personal liberty are inalienable rights. These are rights which are inseparable from a dignified human existence. The dignity of the individual, equality between human beings and the quest for liberty are the foundational pillars of the Indian Constitution.

S.A. Bobde, J. :

415. Therefore, privacy is the necessary condition precedent to the enjoyment of any of the guarantees in Part III. As a result, when it is claimed by rights bearers before constitutional courts, a right to privacy may be situated not only in Article 21, but also simultaneously in any of the other guarantees in Part III. In the current state of things, Articles 19(1), 20(3), 25, 28 and 29 are all rights helped up and made meaningful by the exercise of privacy. This is not an exhaustive list. Future developments in technology and social ordering may well reveal that there are yet more constitutional sites in which a privacy right inheres that are not at present evident to us.

R.F. Nariman, J. :

521. In the Indian context, a fundamental right to privacy would cover at least the following three aspects:

- Privacy that involves the person i.e. when there is some invasion by the State of a person's rights relatable to his physical body, such as the right to move freely;
- Informational privacy which does not deal with a person's body but deals with a person's mind, and therefore recognises that an individual may have control over the dissemination of material that is personal to him. Unauthorised use of such information may, therefore lead to infringement of this right; and
- The privacy of choice, which protects an individual's autonomy over fundamental personal choices.

For instance, we can ground physical privacy or privacy relating to the body in Articles 19(1)(*d*) and (*e*) read with Article 21; ground personal information privacy under Article 21; and the privacy of choice in Articles 19(1)(*a*) to (*c*), 20(3), 21 and 25. The argument based on "privacy" being a vague and nebulous concept need not, therefore, detain us.

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532. The learned counsel for the petitioners also referred to another important aspect of the right to privacy. According to the learned counsel for the petitioner this right is a natural law right which is inalienable. Indeed, the reference order itself, in para 12, refers to this aspect of the fundamental right contained. It was, therefore, argued before us that given the international conventions referred to hereinabove and the fact that this right inheres in every individual by virtue of his being a human being, such right is not conferred by the Constitution but is only recognised and given the status of being fundamental. There is no doubt that the petitioners are correct in this submission. However, one important roadblock in the way needs to be got over.

533. In *ADM, Jabalpur* v. *Shivakant Shukla*, a Constitution Bench of this Court arrived at the conclusion (by majority) that Article 21 is the sole repository of all rights to life and personal liberty, and, when suspended, takes away those

rights altogether. A remarkable dissent was that of Khanna, J. [Khanna, J. was in line to be Chief Justice of India but was superseded because of this dissenting judgment. Nani Palkhivala in an article written on this great Judge's supersession ended with a poignant sentence, “To the stature of such a man, the Chief Justiceship of India can add nothing.” Seervai, in his monumental treatise *Constitutional Law of India* had this to say:“53. If in this Appendix the dissenting judgment of Khanna, J. has not been considered in detail, it is not for lack of admiration for the judgment, or the courage which he showed in delivering it regardless of the cost and consequences to himself. It cost him the Chief Justiceship of India, but it gained for him universal esteem not only for his courage but also for his inflexible judicial independence. If his judgment is not considered in detail it is because under the theory of precedents which we have adopted, a dissenting judgment, however valuable, does not lay down the law and the object of a critical examination of the majority judgments in this Appendix was to show that those judgments are untenable in law, productive of grave public mischief and ought to be overruled at the earliest opportunity. The conclusion which Justice Khanna has reached on the effect of the suspension of Article 21 is correct. His reminder that the rule of law did not merely mean giving effect to an enacted law was timely, and was reinforced by his reference to the mass murders of millions of Jews in Nazi concentration camps under an enacted law. However, the legal analysis in this Chapter confirms his conclusion though on different grounds from those which he has given.” (at Appendix p. 2229).] The learned Judge held: (SCC pp. 747 & 751, paras 525 & 531)

> “*525*. The effect of the suspension of the right to move any court for the enforcement of the right conferred by Article 21, in my opinion, is that when a petition is filed in a court, the court would have to proceed upon the basis that no reliance can be placed upon that article for obtaining relief from the court during the period of emergency. Question then arises as to whether the rule that no one shall be deprived of his life or personal liberty without the authority of law still survives during the period of emergency despite the Presidential Order suspending the right to move any court for the enforcement of the right contained in Article 21. The answer to this question is linked with the answer to the question as

to whether Article 21 is the sole repository of the right to life and personal liberty. After giving the matter my earnest consideration, I am of the opinion that Article 21 cannot be considered to be the sole repository of the right to life and personal liberty. The right to life and personal liberty is the most precious right of human beings in civilised societies governed by the rule of law. Many modern Constitutions incorporate certain fundamental rights, including the one relating to personal freedom. According to Blackstone, the absolute rights of Englishmen were the rights of personal security, personal liberty and private property. The American Declaration of Independence (1776) states that all men are created equal, and among their inalienable rights are life, liberty, and the pursuit of happiness. The Second Amendment to the US Constitution refers inter alia to security of person, while the Fifth Amendment prohibits inter alia deprivation of life and liberty without due process, of law. The different Declarations of Human Rights and fundamental freedoms have all laid stress upon the sanctity of life and liberty. They have also given expression in varying words to the principle that no one shall be derived of his life or liberty without the authority of law. The International Commission of Jurists, which is affiliated to UNESCO, has been attempting with, considerable success to give material content to "the rule of law", an expression used in the Universal Declaration of Human Rights. One of its most notable achievements *was the Declaration of Delhi, 1959*. This resulted from a Congress held in New Delhi attended by jurists from more than 50 countries, and was based on a questionnaire circulated to 75,000 lawyers. "Respect for the supreme value of human personality" was stated to be the basis of all law (see p. 21 of the *Constitutional and Administrative Law* by O. Hood Phillips, 3rd Edn.).

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531. I am unable to subscribe to the view that when right to enforce the right under Article 21 is suspended, the result would be that there would be no remedy against deprivation of a person's life or liberty by the State even though such deprivation is without the authority of law or even in flagrant

violation of the provisions of law. The right not to be deprived of one's life or liberty without the authority of law was not the creation of the Constitution. Such right existed before the Constitution came into force. The fact that the Framers of the Constitution made an aspect of such right a part of the fundamental rights did not have the effect of exterminating the independent identity of such right and of making Article 21 to be the sole repository of that right. Its real effect was to ensure that a law under which a person can be deprived of his life or personal liberty should prescribe a procedure for such deprivation or, according to the dictum laid down by Mukherjea, J. in *Gopalan case* [*A.K. Gopalan* v. *State of Madras*, AIR 1950 SC 27 : 1950 SCR 88] , such law should be a valid law not violative of fundamental rights guaranteed by Part III of the Constitution. Recognition as fundamental right of one aspect of the pre-constitutional right cannot have the effect of making things less favourable so far as the sanctity of life and personal liberty is concerned compared to the position if an aspect of such right had not been recognised as fundamental right because of the vulnerability of fundamental rights accruing from Article 359. I am also unable to agree that in view of the Presidential Order in the matter of sanctity of life and liberty, things would be worse off compared to the state of law as it existed before the coming into force of the Constitution."

(emphasis in original)

S.K. Kaul, J.:

574. I have had the benefit of reading the exhaustive and erudite opinions of Rohinton F. Nariman and Dr D.Y. Chandrachud, JJ. The conclusion is the same, answering the reference that privacy is not just a common law right, but a fundamental right falling in Part III of the Constitution of India. I agree with this conclusion as privacy is a primal, natural right which is inherent to an individual. However, I am tempted to set out my perspective on the issue of privacy as a right, which to my mind, is an important core of any individual existence.

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620. I had earlier adverted to an aspect of privacy — the right to control dissemination of personal information. The boundaries that people establish from others in society are not only physical but also informational. There are different kinds of boundaries in respect to different relations. Privacy assists in preventing awkward social situations and reducing social frictions. Most of the information about individuals can fall under the phrase “none of your business”. On information being shared voluntarily, the same may be said to be in confidence and any breach of confidentiality is a breach of the trust. This is more so in the professional relationships such as with doctors and lawyers which requires an element of candour in disclosure of information. An individual has the right to control one's life while submitting personal data for various facilities and services. It is but essential that the individual knows as to what the data is being used for with the ability to correct and amend it. The hallmark of freedom in a democracy is having the autonomy and control over our lives which becomes impossible, if important decisions are made in secret without our awareness or participation. [Daniel Solove, “10 Reasons Why Privacy Matters” published on 20-1-2014 <https://www.teachprivacy.com/10-reasons-privacy-matters/>.]

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625. Every individual should have a right to be able to exercise control over his/her own life and image as portrayed to the world and to control commercial use of his/her identity. This also means that an individual may be permitted to prevent others from using his image, name and other aspects of his/her personal life and identity for commercial purposes without his/her consent. [The Second Circuit's decision in *Haelan Laboratories Inc.* v. *Topps Chewing Gum Inc.*, 202 F 2d 866 (2d Cir 1953) penned by Jerome Frank, J. defined the right to publicity as “the right to grant the exclusive privilege of publishing his picture”.]”

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646. If the individual permits someone to enter the house it does not mean that others can enter the house. The only check and balance is that it should not harm the other individual or affect his or her rights. This applies both to the physical form and to technology. In an era where there are

> wide, varied, social and cultural norms and more so in a country like ours which prides itself on its diversity, privacy is one of the most important rights to be protected both against State and non-State actors and be recognised as a fundamental right. How it thereafter works out in its inter-play with other fundamental rights and when such restrictions would become necessary would depend on the factual matrix of each case. That it may give rise to more litigation can hardly be the reason not to recognise this important, natural, primordial right as a fundamental right."

(ii) *The sanctity of privacy lies in its functional relationship with dignity*: Privacy ensures that a human being can lead a life of dignity by securing the inner recesses of the human personality from unwanted intrusions. While the legitimate expectation of privacy may vary from intimate zone to the private zone and from the private to the public arena, it is important to underscore that privacy is not lost or surrendered merely because the individual is in a public place. Further, privacy is a postulate of dignity itself. Also, privacy concerns arise when the State seeks to intrude into the body and the mind of the citizen. This aspect is discussed in the following manner:

> **Dr. D.Y. Chandrachud, J.** :
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> 127. The submission that recognising the right to privacy is an exercise which would require a constitutional amendment and cannot be a matter of judicial interpretation is not an acceptable doctrinal position. The argument assumes that the right to privacy is independent of the liberties guaranteed by Part III of the Constitution. There lies the error. The right to privacy is an element of human dignity. The sanctity of privacy lies in its functional relationship with dignity. Privacy ensures that a human

being can lead a life of dignity by securing the inner recesses of the human personality from unwanted intrusion. Privacy recognises the autonomy of the individual and the right of every person to make essential choices which affect the course of life. In doing so privacy recognises that living a life of dignity is essential for a human being to fulfill the liberties and freedoms which are the cornerstone of the Constitution. To recognise the value of privacy as a constitutional entitlement and interest is not to fashion a new fundamental right by a process of amendment through judicial fiat. Neither are the Judges nor is the process of judicial review entrusted with the constitutional responsibility to amend the Constitution. But judicial review certainly has the task before it of determining the nature and extent of the freedoms available to each person under the fabric of those constitutional guarantees which are protected. Courts have traditionally discharged that function and in the context of Article 21 itself, as we have already noted, a panoply of protections governing different facets of a dignified existence has been held to fall within the protection of Article 21.

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297. What, then, does privacy postulate? Privacy postulates the reservation of a private space for the individual, described as the right to be let alone. The concept is founded on the autonomy of the individual. The ability of an individual to make choices lies at the core of the human personality. The notion of privacy enables the individual to assert and control the human element which is inseparable from the personality of the individual. The inviolable nature of the human personality is manifested in the ability to make decisions on matters intimate to human life. The autonomy of the individual is associated over matters which can be kept private. These are concerns over which there is a legitimate expectation of privacy. The body and the mind are inseparable elements of the human personality. The integrity of the body and the sanctity of the mind can exist on the foundation that each individual possesses an inalienable ability and right to preserve a private space in which the human personality can develop. Without the ability to make choices, the inviolability of the personality would be in doubt. Recognising a zone of privacy is but an acknowledgment that each individual must be entitled to chart and pursue the course of development

of personality. Hence privacy is a postulate of human dignity itself. Thoughts and behavioural patterns which are intimate to an individual are entitled to a zone of privacy where one is free of social expectations. In that zone of privacy, an individual is not judged by others. Privacy enables each individual to take crucial decisions which find expression in the human personality. It enables individuals to preserve their beliefs, thoughts, expressions, ideas, ideologies, preferences and choices against societal demands of homogeneity. Privacy is an intrinsic recognition of heterogeneity, of the right of the individual to be different and to stand against the tide of conformity in creating a zone of solitude. Privacy protects the individual from the searching glare of publicity in matters which are personal to his or her life. Privacy attaches to the person and not to the place where it is associated. Privacy constitutes the foundation of all liberty because it is in privacy that the individual can decide how liberty is best exercised. Individual dignity and privacy are inextricably linked in a pattern woven out of a thread of diversity into the fabric of a plural culture.

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322. Privacy is the constitutional core of human dignity. Privacy has both a normative and descriptive function. At a normative level privacy subserves those eternal values upon which the guarantees of life, liberty and freedom are founded. At a descriptive level, privacy postulates a bundle of entitlements and interests which lie at the foundation of ordered liberty.

323. Privacy includes at its core the preservation of personal intimacies, the sanctity of family life, marriage, procreation, the home and sexual orientation. Privacy also connotes a right to be left alone. Privacy safeguards individual autonomy and recognises the ability of the individual to control vital aspects of his or her life. Personal choices governing a way of life are intrinsic to privacy. Privacy protects heterogeneity and recognises the plurality and diversity of our culture. While the legitimate expectation of privacy may vary from the intimate zone to the private zone and from the private to the public arenas, it is important to underscore that privacy is not lost or surrendered merely because the individual is in a public place. Privacy attaches to the person since it is an essential facet of the dignity of the human being.

S.A. Bobde, J. :

407. Undoubtedly, privacy exists, as the foregoing demonstrates, as a verifiable fact in all civilised societies. But privacy does not stop at being merely a descriptive claim. It also embodies a normative one. The normative case for privacy is intuitively simple. Nature has clothed man, amongst other things, with dignity and liberty so that he may be free to do what he will consistent with the freedom of another and to develop his faculties to the fullest measure necessary to live in happiness and peace. The Constitution, through its Part III, enumerates many of these freedoms and their corresponding rights as fundamental rights. Privacy is an essential condition for the exercise of most of these freedoms. Ex facie, every right which is integral to the constitutional rights to dignity, life, personal liberty and freedom, as indeed the right to privacy is, must itself be regarded as a fundamental right.

408. Though he did not use the name of "privacy", it is clear that it is what J.S. Mill took to be indispensable to the existence of the general reservoir of liberty that democracies are expected to reserve to their citizens. In the introduction to his seminal *On Liberty* (1859), he characterised freedom in the following way:

> "*This, then, is the appropriate region of human liberty. It comprises, first, the inward domain of consciousness; demanding liberty of conscience, in the most comprehensive sense; liberty of thought and feeling; absolute freedom of opinion and sentiment on all subjects, practical or speculative, scientific, moral, or theological*. The liberty of expressing and publishing opinions may seem to fall under a different principle, since it belongs to that part of the conduct of an individual which concerns other people; but, being almost of as much importance as the liberty of thought itself, and resting in great part on the same reasons, is practically inseparable from it. *Secondly, the principle requires liberty of tastes and pursuits; of framing the plan of our life to suit our own character*; of doing as we like, subject to such consequences as may follow: without impediment from our fellow creatures, so long as what we do does not harm them, even though they should think our conduct foolish, perverse, or wrong. Thirdly, from this liberty of

each individual, follows the liberty, within the same limits, of combination among individuals; freedom to unite, for any purpose not involving harm to others: the persons combining being supposed to be of full age, and not forced or deceived.

No society in which these liberties are not, on the whole, respected, is free, whatever may be its form of Government; and none is completely free in which they do not exist absolute and unqualified. The only freedom which deserves the name, is that of pursuing our own good in our own way, so long as we do not attempt to deprive others of theirs, or impede their efforts to obtain it. Each is the proper guardian of his own health, whether bodily, or mental and spiritual. Mankind are greater gainers by suffering each other to live as seems good to themselves, than by compelling each to live as seems good to the rest.

Though this doctrine is anything but new, and, to some persons, may have the air of a truism, there is no doctrine which stands more directly opposed to the general tendency of existing opinion and practice. Society has expended fully as much effort in the attempt (according to its lights) to compel people to conform to its notions of personal, as of social excellence." [John Stuart Mill, *On Liberty and Other Essays* (Stefan Collini Edition, 1989) (1859)]

(emphasis supplied)

409. The first and natural home for a right to privacy is in Article 21 at the very heart of "personal liberty" and life itself. Liberty and privacy are integrally connected in a way that privacy is often the basic condition necessary for exercise of the right of personal liberty. There are innumerable activities which are virtually incapable of being performed at all and in many cases with dignity unless an individual is left alone or is otherwise empowered to ensure his or her privacy. Birth and death are events when privacy is required for ensuring dignity amongst all civilised people. Privacy is thus one of those rights "instrumentally required if one is to enjoy" [Laurence H. Tribe and Michael C. Dorf, "Levels of Generality in the Definition of Rights", 57 U CHI L REV 1057 (1990) at p. 1068.] rights specified and enumerated in the constitutional text.

410. This Court has endorsed the view that “life” must mean “something more than mere animal existence” [*Munn* v. *Illinois*, 1876 SCC OnLine US SC 4 : 24 L Ed 77 : 94 US 113 (1877) (Per Field, J.) as cited in *Kharak Singh*, (1964) 1 SCR 332 at pp. 347-48] on a number of occasions, beginning with the Constitution Bench in *Sunil Batra (1)* v. *Delhi Admn.* [*Sunil Batra* v. *Delhi Admn.*, (1978) 4 SCC 494 : 1979 SCC (Cri) 155] *Sunil Batra* [*Sunil Batra* v. *Delhi Admn.*, (1978) 4 SCC 494 : 1979 SCC (Cri) 155] connected this view of Article 21 to the constitutional value of dignity. In numerous cases, including *Francis Coralie Mullin* v. *UT of Delhi* [*Francis Coralie Mullin* v. *UT of Delhi*, (1981) 1 SCC 608 : 1981 SCC (Cri) 212] , this Court has viewed liberty as closely linked to dignity. Their relationship to the effect of taking into the protection of “life” the protection of “faculties of thinking and feeling”, and of temporary and permanent impairments to those faculties. In *Francis Coralie Mullin*[*Francis Coralie Mullin* v. *UT of Delhi*, (1981) 1 SCC 608 : 1981 SCC (Cri) 212] , Bhagwati, J. opined as follows: (SCC p. 618, para 7)

> “*7*. Now obviously, the right to life enshrined in Article 21 cannot be restricted to mere animal existence. It means something much more than just physical survival. In *Kharak Singh* v. *State of U.P.* [*Kharak Singh* v. *State of U.P.*, AIR 1963 SC 1295 : (1963) 2 Cri LJ 329 : (1964) 1 SCR 332], Subba Rao, J. quoted with approval the following passage from the judgment of Field, J. in *Munn* v. *Illinois* [*Munn* v. *Illinois*, 1876 SCC OnLine US SC 4 : 24 L Ed 77 : 94 US 113 (1877)] to emphasise the quality of life covered by Article 21: (*Kharak Singh case* [*Kharak Singh* v. *State of U.P.*, AIR 1963 SC 1295 : (1963) 2 Cri LJ 329 : (1964) 1 SCR 332] , AIR p. 1301, para 15)
>
> *15*. … “By the term “life” as here used something more is meant than mere animal existence. The inhibition against its deprivation extends to all those limbs and faculties by which life is enjoyed. The provision equally prohibits the mutilation of the body or amputation of an arm or leg or the putting out of an eye or the destruction of any other organ of the body through which the soul communicates with the outer world.” ’

> and this passage was again accepted as laying down the correct law by the Constitution Bench of this Court in the first *Sunil Batra case* [*Sunil Batra* v. *Delhi Admn.*, (1978) 4 SCC 494 : 1979 SCC (Cri) 155]. *Every limb or faculty through which life is enjoyed is thus protected by Article 21 and a fortiori, this would include the faculties of thinking and feeling*. Now deprivation which is inhibited by Article 21 may be total or partial, neither any limb or faculty can be totally destroyed nor can it be partially damaged. Moreover it is every kind of deprivation that is hit by Article 21, whether such deprivation be permanent or temporary and, furthermore, deprivation is not an act which is complete once and for all: it is a continuing act and so long as it lasts, it must be in accordance with procedure established by law. It is therefore clear that *any act which damages or injures or interferes with the use of, any limb or faculty of a person, either permanently or even temporarily, would be within the inhibition of Article 21*."
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> (emphasis supplied)

Privacy is, therefore, necessary in both its mental and physical aspects as an enabler of guaranteed freedoms.

411. It is difficult to see how dignity—whose constitutional significance is acknowledged both by the Preamble and by this Court in its exposition of Article 21, among other rights—can be assured to the individual without privacy. Both dignity and privacy are intimately intertwined and are natural conditions for the birth and death of individuals, and for many significant events in life between these events. Necessarily, then, the right to privacy is an integral part of both "life" and "personal liberty" under Article 21, and is intended to enable the rights bearer to develop her potential to the fullest extent made possible only in consonance with the constitutional values expressed in the Preamble as well as across Part III.

R.F. Nariman, J:

525. But most important of all is the cardinal value of fraternity which assures the dignity of the individual. [In 1834, Jacques-Charles Dupont de l'Eure associated the three terms liberty, equality and fraternity together in the Revue Républicaine, which he edited, as follows:"Any man aspires to liberty, to equality, but he cannot achieve it

without the assistance of other men, without fraternity."Many of our decisions recognise human dignity as being an essential part of the fundamental rights chapter. For example, see *Prem Shankar Shukla* v. *Delhi Admn.*, (1980) 3 SCC 526 at para 21, *Francis Coralie Mullin* v. *UT of Delhi*, (1981) 1 SCC 608 at paras 6, 7 and 8, *Bandhua Mukti Morcha* v. *Union of India*, (1984) 3 SCC 161 at para 10, *Maharashtra University of Health Sciences* v. *Satchikitsa Prasarak Mandal*, (2010) 3 SCC 786 at para 37, *Shabnam* v. *Union of India*, (2015) 6 SCC 702 at paras 12.4 and 14 and *Jeeja Ghosh* v. *Union of India*, (2016) 7 SCC 761 at para 37.] The dignity of the individual encompasses the right of the individual to develop to the full extent of his potential. And this development can only be if an individual has autonomy over fundamental personal choices and control over dissemination of personal information which may be infringed through an unauthorised use of such information. It is clear that Article 21, more than any of the other articles in the fundamental rights chapter, reflects each of these constitutional values in full, and is to be read in consonance with these values and with the international covenants that we have referred to. In the ultimate analysis, the fundamental right to privacy, which has so many developing facets, can only be developed on a case-to-case basis. Depending upon the particular facet that is relied upon, either Article 21 by itself or in conjunction with other fundamental rights would get attracted.

S.K. Kaul, J. :

618. Rohinton F. Nariman, and Dr D.Y. Chandrachud, JJ., have emphasised the importance of the protection of privacy to ensure protection of liberty and dignity. I agree with them and seek to refer to some legal observations in this regard:

618.1. In *Robertson and Nicol on Media Law* [Geoffrey Robertson, QC and Andrew Nicol, QC, *Media Law*, 5th Edn., p. 265.] it was observed:

> "Individuals have a psychological need to preserve an intrusion-free zone for their personality and family and suffer anguish and stress when that zone is violated. Democratic societies must protect privacy as part of their facilitation of individual freedom, and offer some legal support for the individual choice as to what

aspects of intimate personal life the citizen is prepared to share with others. This freedom in other words springs from the same source as freedom of expression: a liberty that enhances individual life in a democratic community."

618.2. Lord Nicholls and Lord Hoffmann in their opinion in *Naomi Campbell case*[*Campbell* v. *MGN Ltd.*, (2004) 2 AC 457 : (2004) 2 WLR 1232 : (2004) UKHL 22 (HL)] recognised the importance of the protection of privacy. Lord Hoffman opined as under: (AC p. 472 H & 473 A-D, paras 50-51)

"*50*. What human rights law has done is to identify private information as something worth protecting as an aspect of human autonomy and dignity. And this recognition has raised inescapably the question of why it should be worth protecting against the state but not against a private person. There may of course be justifications for the publication of private information by private persons which would not be available to the state — I have particularly in mind the position of the media, to which I shall return in a moment — but I can see no logical ground for saying that a person should have less protection against a private individual than he would have against the state for the publication of personal information for which there is no justification. Nor, it appears, have any of the other Judges who have considered the matter.

51. The result of these developments has been a shift in the centre of gravity of the action for breach of confidence when it is used as a remedy for the unjustified publication of personal information. … Instead of the cause of action being based upon the duty of good faith applicable to confidential personal information and trade secrets alike, it focuses upon the protection of human autonomy and dignity — the right to control the dissemination of information about one's private life and the right to the esteem and respect of other people."

618.3. Lord Nicholls opined as under: (*Naomi Campbell case* [*Campbell* v. *MGN Ltd.*, (2004) 2 AC 457 : (2004) 2 WLR 1232 : (2004) UKHL 22 (HL)] , AC p. 464 D-F, para 12)

> "*12*. The present case concerns one aspect of invasion of privacy: wrongful disclosure of private information. The case involves the familiar competition between freedom of expression and respect for an individual's privacy. Both are vitally important rights. Neither has precedence over the other. The importance of freedom of expression has been stressed often and eloquently, the importance of privacy less so. But it, too, lies at the heart of liberty in a modern state. A proper degree of privacy is essential for the well-being and development of an individual. And restraints imposed on government to pry into the lives of the citizen go to the essence of a democratic state: see La Forest J. in *R.* v. *Dyment* [*R.* v. *Dyment*, 1988 SCC OnLine Can SC 86 : (1988) 2 SCR 417] , SCC OnLine Can SC para 17 : SCR p. 426."

619. Privacy is also the key to freedom of thought. A person has a right to think. The thoughts are sometimes translated into speech but confined to the person to whom it is made. For example, one may want to criticise someone but not share the criticism with the world.

Chelameswar, J.:

372. History abounds with examples of attempts by Governments to shape the minds of subjects. In other words, conditioning the thought process by prescribing what to read or not to read; what forms of art alone are required to be appreciated leading to the conditioning of beliefs; interfering with the choice of people regarding the kind of literature, music or art which an individual would prefer to enjoy. [*Stanley*v. *Georgia*, 1969 SCC OnLine US SC 78 : 22 L Ed 2d 542 : 394 US 557 (1969)"*3*. … that the mere private possession of obscene matter cannot constitutionally be made a crime.***9*. … State has no business telling a man, sitting alone in his own house, what books he may read or what films he may watch. Our whole constitutional heritage rebels at the thought of giving Government the power to control men's minds." (SCC OnLine US SC paras 3 & 9)] Such conditioning is sought to be achieved by screening the source of information or prescribing penalties for making choices which Governments do not approve. [*Bijoe Emmanuel* v. *State of Kerala*, (1986) 3 SCC 615] Insofar as religious beliefs are concerned, a good deal of the misery our species suffer

owes its existence to and centres around competing claims of the right to propagate religion. Constitution of India protects the liberty of all subjects guaranteeing ["**25. *Freedom of conscience and free profession, practice and propagation of religion***.—(1) Subject to public order, morality and health and to the other provisions of this Part, all persons are equally entitled to freedom of conscience and the right freely to profess, practice and propagate religion.(2) Nothing in this article shall affect the operation of any existing law or prevent the State from making any law—(*a*) regulating or restricting any economic, financial, political or other secular activity which may be associated with religious practice;(*b*) providing for social welfare and reform or the throwing open of Hindu religious institutions of a public character to all classes and sections of Hindus.*Explanation I*.—The wearing and carrying of kirpans shall be deemed to be included in the profession of the Sikh religion. Explanation *II*.—In sub-clause (*b*) of clause (2), the reference to Hindus shall be construed as including a reference to persons professing the Sikh, Jaina or Buddhist religion, and the reference to Hindu religious institutions shall be construed accordingly."] the freedom of conscience and right to freely profess, practice and propagate religion. While the right to freely "profess, practice and propagate religion" may be a facet of free speech guaranteed under Article 19(1)(*a*), the freedom of the belief or faith in any religion is a matter of conscience falling within the zone of purely private thought process and is an aspect of liberty. There are areas other than religious beliefs which form part of the individual's freedom of conscience such as political belief, etc. which form part of the liberty under Article 21.

373. Concerns of privacy arise when the State seeks to intrude into the body of subjects. [*Skinner* v. *Oklahoma*, 1942 SCC OnLine US SC 125 : 86 L Ed 1655 : 316 US 535 (1942)"*20*. There are limits to the extent to which a legislatively represented majority may conduct biological experiments at the expense of the dignity and personality and natural powers of a minority—even those who have been guilty of what the majority defines as crimes." (SCC OnLine US SC para 20)—Jackson, J.] Corporeal punishments were not unknown to India, their abolition is of a recent vintage. Forced feeding of certain persons by the State raises concerns of privacy. An individual's rights to refuse life prolonging medical treatment or terminate his life is another freedom which falls within the zone of the right to

privacy. I am conscious of the fact that the issue is pending before this Court. But in various other jurisdictions, there is a huge debate on those issues though it is still a grey area. [For the legal debate in this area in US, See Chapter 15.11 of *American Constitutional Law* by Laurence H. Tribe, 2nd Edn.] A woman's freedom of choice whether to bear a child or abort her pregnancy are areas which fall in the realm of privacy. Similarly, the freedom to choose either to work or not and the freedom to choose the nature of the work are areas of private decision-making process. The right to travel freely within the country or go abroad is an area falling within the right to privacy. The text of our Constitution recognised the freedom to travel throughout the country under Article 19(1)(*d*). This Court has already recognised that such a right takes within its sweep the right to travel abroad. [*Maneka Gandhi* v. *Union of India*, (1978) 1 SCC 248] A person's freedom to choose the place of his residence once again is a part of his right to privacy [*Williams* v. *Fears*, 1900 SCC OnLine US SC 211 : 45 L Ed 186 : 179 US 270 (1900)—"*8*. Undoubtedly the right of locomotion, the right to remove from one place to another according to inclination, is an attribute of personal liberty…." (SCC OnLine US SC para 8)] recognised by the Constitution of India under Article 19(1)(*e*) though the predominant purpose of enumerating the abovementioned two freedoms in Article 19(1) is to disable both the federal and State Governments from creating barriers which are incompatible with the federal nature of our country and its Constitution. The choice of appearance and apparel are also aspects of the right to privacy. The freedom of certain groups of subjects to determine their appearance and apparel (such as keeping long hair and wearing a turban) are protected not as a part of the right to privacy but as a part of their religious belief. Such a freedom need not necessarily be based on religious beliefs falling under Article 25. Informational traces are also an area which is the subject-matter of huge debate in various jurisdictions falling within the realm of the right to privacy, such data is as personal as that of the choice of appearance and apparel. Telephone tappings and internet hacking by State, of personal data is another area which falls within the realm of privacy. The instant reference arises out of such an attempt by the Union of India to collect biometric data regarding all the residents of this country. The abovementioned are some of the areas where some interest of privacy exists. The examples given above

indicate to some extent the nature and scope of the right to privacy.

374. I do not think that anybody in this country would like to have the officers of the State intruding into their homes or private property at will or soldiers quartered in their houses without their consent. I do not think that anybody would like to be told by the State as to what they should eat or how they should dress or whom they should be associated with either in their personal, social or political life. Freedom of social and political association is guaranteed to citizens under Article 19(1)(*c*). Personal association is still a doubtful area. [The High Court of A.P. held that Article 19(1)(*c*) would take within its sweep the matrimonial association in *T. Sareetha* v. *T. Venkata Subbaiah*, 1983 SCC OnLine AP 90 : AIR 1983 AP 356. However, this case was later overruled by this Court in *Saroj Rani* v. *Sudarshan Kumar Chadha*, (1984) 4 SCC 90 : AIR 1984 SC 1562.] The decision-making process regarding the freedom of association, freedoms of travel and residence are purely private and fall within the realm of the right to privacy. It is one of the most intimate decisions.

375. All liberal democracies believe that the State should not have unqualified authority to intrude into certain aspects of human life and that the authority should be limited by parameters constitutionally fixed. Fundamental rights are the only constitutional firewall to prevent State's interference with those core freedoms constituting liberty of a human being. The right to privacy is certainly one of the core freedoms which is to be defended. It is part of liberty within the meaning of that expression in Article 21.

376. I am in complete agreement with the conclusions recorded by my learned Brothers in this regard."

(iii) *Privacy is intrinsic to freedom, liberty and dignity:* The right to privacy is inherent to the liberties guaranteed by Part-III of the Constitution and privacy is an element of human dignity. The fundamental right to privacy derives from Part-III of the Constitution and recognition of this right does not require a

constitutional amendment. Privacy is more than merely a derivative constitutional right. It is the necessary basis of rights guaranteed in the text of the Constitution. Discussion in this behalf is captured in the following passages:

> **Dr. D.Y. Chandrachud, J.** :
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> 127. The submission that recognising the right to privacy is an exercise which would require a constitutional amendment and cannot be a matter of judicial interpretation is not an acceptable doctrinal position. The argument assumes that the right to privacy is independent of the liberties guaranteed by Part III of the Constitution. There lies the error. The right to privacy is an element of human dignity. The sanctity of privacy lies in its functional relationship with dignity. Privacy ensures that a human being can lead a life of dignity by securing the inner recesses of the human personality from unwanted intrusion. Privacy recognises the autonomy of the individual and the right of every person to make essential choices which affect the course of life. In doing so privacy recognises that living a life of dignity is essential for a human being to fulfill the liberties and freedoms which are the cornerstone of the Constitution. To recognise the value of privacy as a constitutional entitlement and interest is not to fashion a new fundamental right by a process of amendment through judicial fiat. Neither are the Judges nor is the process of judicial review entrusted with the constitutional responsibility to amend the Constitution. But judicial review certainly has the task before it of determining the nature and extent of the freedoms available to each person under the fabric of those constitutional guarantees which are protected. Courts have traditionally discharged that function and in the context of Article 21 itself, as we have already noted, a panoply of protections governing different facets of a dignified existence has been held to fall within the protection of Article 21.
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> **S.A. Bobde, J.** :
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> 416. There is nothing unusual in the judicial enumeration of one right on the basis of another under the Constitution. In

the case of Article 21's guarantee of “personal liberty”, this practice is only natural if Salmond's formulation of liberty as “incipient rights” [P.J. Fitzgerald, *Salmond on Jurisprudence* at p. 228.] is correct. By the process of enumeration, constitutional courts merely give a name and specify the core of guarantees already present in the residue of constitutional liberty. Over time, the Supreme Court has been able to imply by its interpretative process that several fundamental rights including the right to privacy emerge out of expressly stated fundamental rights. In *Unni Krishnan, J.P.* v. *State of A.P.* [*Unni Krishnan, J.P.* v. *State of A.P.*, (1993) 1 SCC 645] , a Constitution Bench of this Court held that “several unenumerated rights fall within Article 21 since personal liberty is of widest amplitude” [*Unni Krishnan, J.P.* v. *State of A.P.*, (1993) 1 SCC 645 at p. 669, para 29] on the way to affirming the existence of a right to education. It went on to supply the following indicative list of such rights, which included the right to privacy: (SCC pp. 669-70, para 30)

> “*30*. The following rights are held to be covered under Article 21:
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> 1. The right to go abroad. *Satwant Singh* v. *D. Ramarathnam* [*Satwant Singh Sawhney* v. *D. Ramarathnam*, (1967) 3 SCR 525 : AIR 1967 SC 1836] .
>
> 2. The right to privacy. *Gobind* v. *State of M.P.* [*Gobind* v. *State of M.P.*, (1975) 2 SCC 148 : 1975 SCC (Cri) 468] In this case reliance was placed on the American decision in *Griswold* v. *Connecticut* [*Griswold* v. *Connecticut*, 1965 SCC OnLine US SC 124 : 14 L Ed 2d 510 : 85 S Ct 1678 : 381 US 479 (1965)] , US at p. 510.
>
> 3. The right against solitary confinement. *Sunil Batra (1)* v. *Delhi Admn.* [*Sunil Batra* v. *Delhi Admn.*, (1978) 4 SCC 494 : 1979 SCC (Cri) 155] , SCC at p. 545.
>
> 4. The right against bar fetters. *Charles Sobhraj* v. *Supt., Central Jail* [*Charles Sobraj* v. *Supt., Central Jail*, (1978) 4 SCC 104 : 1978 SCC (Cri) 542].
>
> 5. The right to legal aid. *M.H. Hoskot* v. *State of Maharashtra* [*M.H. Hoskot* v. *State of Maharashtra*, (1978) 3 SCC 544 : 1978 SCC (Cri) 468].

6. The right to speedy trial. *Hussainara Khatoon (1)* v. *State of Bihar*[*Hussainara Khatoon (1)* v. *State of Bihar*, (1980) 1 SCC 81 : 1980 SCC (Cri) 23] .

7. The right against handcuffing. *Prem Shankar* v. *Delhi Admn.* [*Prem Shankar Shukla* v. *Delhi Admn.*, (1980) 3 SCC 526 : 1980 SCC (Cri) 815]

8. The right against delayed execution. *T.V. Vatheeswaran* v. *State of T.N.* [*T.V. Vatheeswaran* v. *State of T.N.*, (1983) 2 SCC 68 : 1983 SCC (Cri) 342]

9. The right against custodial violence. *Sheela Barse* v. *State of Maharashtra* [*Sheela Barse* v. *State of Maharashtra*, (1983) 2 SCC 96 : 1983 SCC (Cri) 353].

10. The right against public hanging. *Attorney General of India* v. *Lachma Devi* [*Attorney General of India* v. *Lachma Devi*, 1989 Supp (1) SCC 264 : 1989 SCC (Cri) 413].

11. Doctor's assistance. *Paramananda Katara* v. *Union of India* [*Parmanand Katara* v. *Union of India*, (1989) 4 SCC 286 : 1989 SCC (Cri) 721].

12. Shelter. *Santistar Builders* v. *Narayan Khimalal Totame* [*Shantistar Builders* v. *Narayan Khimalal Totame*, (1990) 1 SCC 520] ."

In the case of privacy, the case for judicial enumeration is especially strong. It is no doubt a fair implication from Article 21, but also more. Privacy is a right or condition, "logically presupposed" [Laurence H. Tribe And Michael C. Dorf, "Levels Of Generality in the Definition of Rights", 57 U CHI L REV 1057 (1990) at p. 1068.] by rights expressly recorded in the constitutional text, if they are to make sense. As a result, privacy is more than merely a derivative constitutional right. It is the necessary and unavoidable logical entailment of rights guaranteed in the text of the Constitution.

R.F. Nariman, J:

482. Shri Sundaram has argued that rights have to be traced directly to those expressly stated in the fundamental rights chapter of the Constitution for such rights to receive

> protection, and privacy is not one of them. It will be noticed that the dignity of the individual is a cardinal value, which is expressed in the Preamble to the Constitution. Such dignity is not expressly stated as a right in the fundamental rights chapter, but has been read into the right to life and personal liberty. The right to live with dignity is expressly read into Article 21 by the judgment in *Jolly George Varghese*v. *Bank of Cochin* [*Jolly George Varghese* v. *Bank of Cochin*, (1980) 2 SCC 360] , at para 10. Similarly, the right against bar fetters and handcuffing being integral to an individual's dignity was read into Article 21 by the judgment in *Sunil Batra* v. *Delhi Admn.* [*Sunil Batra* v. *Delhi Admn.*, (1978) 4 SCC 494 : 1979 SCC (Cri) 155] , at paras 192, 197-B, 234 and 241 and *Prem Shankar Shukla* v. *Delhi Admn.* [*Prem Shankar Shukla* v. *Delhi Admn.*, (1980) 3 SCC 526 : 1980 SCC (Cri) 815] , at paras 21 and 22. It is too late in the day to canvas that a fundamental right must be traceable to express language in Part III of the Constitution. As will be pointed out later in this judgment, a Constitution has to be read in such a way that words deliver up principles that are to be followed and if this is kept in mind, it is clear that the concept of privacy is contained not merely in personal liberty, but also in the dignity of the individual."

(iv) *Privacy has both positive and negative content*: The negative content restrains the State from committing an intrusion upon the life and personal liberty of a citizen. Its positive content imposes an obligation on the State to take all necessary measures to protect the privacy of the individual.

> **Dr. D.Y. Chandrachud, J.**:
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> 326. Privacy has both positive and negative content. The negative content restrains the State from committing an intrusion upon the life and personal liberty of a citizen. Its positive content imposes an obligation on the State to take all necessary measures to protect the privacy of the individual."

(v) *Informational Privacy is a facet of right to privacy*: The old adage that 'knowledge is power' has stark implications for the position of individual where data is ubiquitous, an all-encompassing presence. Every transaction of an individual user leaves electronic tracks without her knowledge. Individually these information silos may seem inconsequential. In aggregation, information provides a picture of the beings. The challenges which big data poses to privacy emanate from both State and non-State entities. This proposition is described in the following manner:

> **Dr. D.Y. Chandrachud, J.**:
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> 300. Ours is an age of information. Information is knowledge. The old adage that "knowledge is power" has stark implications for the position of the individual where data is ubiquitous, an all-encompassing presence. Technology has made life fundamentally interconnected. The internet has become all-pervasive as individuals spend more and more time online each day of their lives. Individuals connect with others and use the internet as a means of communication. The internet is used to carry on business and to buy goods and services. Individuals browse the web in search of information, to send e-mails, use instant messaging services and to download movies. Online purchases have become an efficient substitute for the daily visit to the neighbouring store. Online banking has redefined relationships between bankers and customers. Online trading has created a new platform for the market in securities. Online music has refashioned the radio. Online books have opened up a new universe for the bibliophile. The old-fashioned travel agent has been rendered redundant by web portals which provide everything from restaurants to rest houses, airline tickets to art galleries, museum tickets to music shows. These are but a few of the reasons people access the internet each day of their lives.

Yet every transaction of an individual user and every site that she visits, leaves electronic tracks generally without her knowledge. These electronic tracks contain powerful means of information which provide knowledge of the sort of person that the user is and her interests [*See* Francois Nawrot, Katarzyna Syska and Przemyslaw Switalski, "Horizontal Application of Fundamental Rights — Right to Privacy on the Internet", 9th Annual European Constitutionalism Seminar (May 2010), University of Warsaw, available at <http://en.zpc.wpia.uw.edu.pl/wp-content/uploads/2010/04/9_Horizontal_Application_of_Fundamental_Rights.pdf>.] . Individually, these information silos may seem inconsequential. In aggregation, they disclose the nature of the personality: food habits, language, health, hobbies, sexual preferences, friendships, ways of dress and political affiliation. In aggregation, information provides a picture of the being: of things which matter and those that do not, of things to be disclosed and those best hidden.

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304. Data mining processes together with knowledge discovery can be combined to create facts about individuals. Metadata and the internet of things have the ability to redefine human existence in ways which are yet fully to be perceived. This, as *Christina Moniodis* states in her illuminating article, results in the creation of new knowledge about individuals; something which even she or he did not possess. This poses serious issues for the Court. In an age of rapidly evolving technology it is impossible for a Judge to conceive of all the possible uses of information or its consequences:

> "… The creation of new knowledge complicates data privacy law as it involves information the individual did not possess and could not disclose, knowingly or otherwise. In addition, as our State becomes an "information State" through increasing reliance on information—such that information is described as the "lifeblood that sustains political, social, and business decisions. It becomes impossible to conceptualize all of the possible uses of information and resulting harms. Such a situation poses a challenge for courts who are effectively asked to anticipate and remedy invisible, evolving harms." [Christina P. Moniodis, "Moving from Nixon to NASA: Privacy's Second

> Strand — A Right to Informational Privacy", *Yale Journal of Law and Technology* (2012), Vol. 15 (1), at p. 154.]

The contemporary age has been aptly regarded as "an era of ubiquitous dataveillance, or the systematic monitoring of citizen's communications or actions through the use of information technology" [Yvonne McDermott, "Conceptualizing the Right to Data Protection in an Era of Big Data", *Big Data and Society* (2017), at p. 1.] . It is also an age of "big data" or the collection of data sets. These data sets are capable of being searched; they have linkages with other data sets; and are marked by their exhaustive scope and the permanency of collection. [*Id*, at pp. 1 and 4.] The challenges which big data poses to privacy interests emanate from State and non-State entities. Users of wearable devices and social media networks may not conceive of themselves as having volunteered data but their activities of use and engagement result in the generation of vast amounts of data about individual lifestyles, choices and preferences. Yvonne McDermott speaks about the quantified self in eloquent terms:

> "… The rise in the so-called 'quantified self', or the self-tracking of biological, environmental, physical, or behavioural information through tracking devices, Internet-of-things devices, social network data and other means (?Swan.2013) may result in information being gathered not just about the individual user, but about people around them as well. Thus, a solely consent-based model does not entirely ensure the protection of one's data, especially when data collected for one purpose can be repurposed for another." [*Id*, at p. 4.]

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328. Informational privacy is a facet of the right to privacy. The dangers to privacy in an age of information can originate not only from the State but from non-State actors as well. We commend to the Union Government the need to examine and put into place a robust regime for data protection. The creation of such a regime requires a careful and sensitive balance between individual interests and legitimate concerns of the State. The legitimate aims of the State would include for instance protecting national

security, preventing and investigating crime, encouraging innovation and the spread of knowledge, and preventing the dissipation of social welfare benefits. These are matters of policy to be considered by the Union Government while designing a carefully structured regime for the protection of the data. Since the Union Government has informed the Court that it has constituted a Committee chaired by Hon'ble Shri Justice B.N. Srikrishna, former Judge of this Court, for that purpose, the matter shall be dealt with appropriately by the Union Government having due regard to what has been set out in this judgment.

S.K. Kaul, J.:

585. The growth and development of technology has created new instruments for the possible invasion of privacy by the State, including through surveillance, profiling and data collection and processing. Surveillance is not new, but technology has permitted surveillance in ways that are unimaginable. Edward Snowden shocked the world with his disclosures about global surveillance. States are utilising technology in the most imaginative ways particularly in view of increasing global terrorist attacks and heightened public safety concerns. One such technique being adopted by the States is “profiling”. The European Union Regulation of 2016 [Regulation No. (EU) 2016/679 of the European Parliament and of the Council of 27-4-2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive No. 95/46/EC (General Data Protection Regulation).] on data privacy defines “profiling” as any form of automated processing of personal data consisting of the use of personal data to evaluate certain personal aspects relating to a natural person, in particular to analyse or predict aspects concerning that natural person's performance at work, economic situation, health, personal preferences, interests, reliability, behaviour, location or movements [Regulation No. (EU) 2016/679 of the European Parliament and of the Council of 27-4-2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive No. 95/46/EC (General Data Protection Regulation).] . Such profiling can result in discrimination based on religion, ethnicity and caste. However, “profiling” can also be used to further public interest and for the benefit of national security.

586. The security environment, not only in our country, but throughout the world makes the safety of persons and the State a matter to be balanced against this right to privacy.

587. The capacity of non-State actors to invade the home and privacy has also been enhanced. Technological development has facilitated journalism that is more intrusive than ever before.

588. Further, in this digital age, individuals are constantly generating valuable data which can be used by non-State actors to track their moves, choices and preferences. Data is generated not just by active sharing of information, but also passively, with every click on the “world wide web”. We are stated to be creating an equal amount of information every other day, as humanity created from the beginning of recorded history to the year 2003 — enabled by the “world wide web”. [Michael L. Rustad, SannaKulevska, “Reconceptualizing the right to be forgotten to enable transatlantic data flow”, (2015) 28 Harv JL & Tech 349.]

589. Recently, it was pointed out that “ “Uber”, the world's largest taxi company, owns no vehicles. “Facebook”, the world's most popular media owner, creates no content. “Alibaba”, the most valuable retailer, has no inventory. And “Airbnb”, the world's largest accommodation provider, owns no real estate. Something interesting is happening.” [Tom Goodwin “The Battle is for Customer Interface”, <https://techcrunch.com/2015/03/03/in-the-age-of-disintermediation-the-battle-is-all-for-the-customer-interface/>.] “Uber” knows our whereabouts and the places we frequent. “Facebook” at the least, knows who we are friends with. “Alibaba” knows our shopping habits. “Airbnb” knows where we are travelling to. Social network providers, search engines, e-mail service providers, messaging applications are all further examples of non-State actors that have extensive knowledge of our movements, financial transactions, conversations — both personal and professional, health, mental state, interest, travel locations, fares and shopping habits. As we move towards becoming a digital economy and increase our reliance on internet-based services, we are creating deeper and deeper digital footprints — passively and actively.

590. These digital footprints and extensive data can be analysed computationally to reveal patterns, trends, and associations, especially relating to human behaviour and interactions and hence, is valuable information. This is the age of “big data”. The advancement in technology has created not just new forms of data, but also new methods of analysing the data and has led to the discovery of new uses for data. The algorithms are more effective and the computational power has magnified exponentially. A large number of people would like to keep such search history private, but it rarely remains private, and is collected, sold and analysed for purposes such as targeted advertising. Of course, “big data” can also be used to further public interest. There may be cases where collection and processing of big data is legitimate and proportionate, despite being invasive of privacy otherwise.

591. Knowledge about a person gives a power over that person. The personal data collected is capable of effecting representations, influencing decision-making processes and shaping behaviour. It can be used as a tool to exercise control over us like the “big brother” State exercised. This can have a stultifying effect on the expression of dissent and difference of opinion, which no democracy can afford.

592. Thus, there is an unprecedented need for regulation regarding the extent to which such information can be stored, processed and used by non-State actors. There is also a need for protection of such information from the State. Our Government was successful in compelling Blackberry to give to it the ability to intercept data sent over Blackberry devices. While such interception may be desirable and permissible in order to ensure national security, it cannot be unregulated. [Kadhim Shubber, “Blackberry gives Indian Government ability to intercept messages” published by Wired on 11-7-2013 <http://www.wired.co.uk/article/blackberry-india>.]

593. The concept of “invasion of privacy” is not the early conventional thought process of “poking ones nose in another person's affairs”. It is not so simplistic. In today's world, privacy is a limit on the Government's power as well as the power of private sector entities. [Daniel Solove, “10 Reasons Why Privacy Matters” published on 20-1-2014 <https://www.teachprivacy.com/10-reasons-privacy-matters/>.]

594. George Orwell created a fictional State in *Nineteen Eighty-Four*. Today, it can be a reality. The technological development today can enable not only the State, but also big corporations and private entities to be the “big brother”.

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629. The right of an individual to exercise control over his personal data and to be able to control his/her own life would also encompass his right to control his existence on the internet. Needless to say that this would not be an absolute right. The existence of such a right does not imply that a criminal can obliterate his past, but that there are variant degrees of mistakes, small and big, and it cannot be said that a person should be profiled to the *nth* extent for all and sundry to know.

630. A high school teacher was fired after posting on her Facebook page that she was “so not looking forward to another [school] year” since the school district's residents were “arrogant and snobby”. A flight attendant was fired for posting suggestive photos of herself in the company's uniform. [Patricia Sánchez Abril, “Blurred Boundaries: Social Media Privacy and the Twenty-First-Century Employee”, 49 Am Bus LJ 63 at p. 69 (2012).] In the pre-digital era, such incidents would have never occurred. People could then make mistakes and embarrass themselves, with the comfort that the information will be typically forgotten over time.

631. The impact of the digital age results in information on the internet being permanent. Humans forget, but the internet does not forget and does not let humans forget. Any endeavour to remove information from the internet does not result in its absolute obliteration. The footprints remain. It is thus, said that in the digital world preservation is the norm and forgetting a struggle [Ravi Antani, “THE RESISTANCE OF MEMORY : COULD THE EUROPEAN UNION'S RIGHT TO BE FORGOTTEN EXIST IN THE UNITED STATES?”, 30 Berkeley Tech LJ 1173 (2015).] .

632. The technology results almost in a sort of a permanent storage in some way or the other making it difficult to begin life again giving up past mistakes. People are not static, they change and grow through their lives. They evolve. They make mistakes. But they are entitled to re-invent themselves and reform and correct their

mistakes. It is privacy which nurtures this ability and removes the shackles of unadvisable things which may have been done in the past.

633. Children around the world create perpetual digital footprints on social network websites on a 24/7 basis as they learn their "ABCs": Apple, Bluetooth and chat followed by download, e-mail, Facebook, Google, Hotmail and Instagram. [Michael L. Rustad, SannaKulevska, "Reconceptualizing the right to be forgotten to enable transatlantic data flow", (2015) 28 Harv JL & Tech 349.] They should not be subjected to the consequences of their childish mistakes and naivety, their entire life. Privacy of children will require special protection not just in the context of the virtual world, but also the real world.

634. People change and an individual should be able to determine the path of his life and not be stuck only on a path of which he/she treaded initially. An individual should have the capacity to change his/her beliefs and evolve as a person. Individuals should not live in fear that the views they expressed will forever be associated with them and thus refrain from expressing themselves.

635. Whereas this right to control dissemination of personal information in the physical and virtual space should not amount to a right of total eraser of history, this right, as a part of the larger right to privacy, has to be balanced against other fundamental rights like the freedom of expression, or freedom of media, fundamental to a democratic society.

636. Thus, the European Union Regulation of 2016 [Regulation No. (EU) 2016/679 of the European Parliament and of the Council of 27-4-2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive No. 95/46/EC (General Data Protection Regulation).] has recognised what has been termed as "the right to be forgotten". This does not mean that all aspects of earlier existence are to be obliterated, as some may have a social ramification. If we were to recognise a similar right, it would only mean that an individual who is no longer desirous of his personal data to be processed or stored, should be able to remove it from the system where the personal data/information is no longer necessary, relevant, or is incorrect and serves no legitimate interest. Such a right

cannot be exercised where the information/data is necessary, for exercising the right of freedom of expression and information, for compliance with legal obligations, for the performance of a task carried out in public interest, on the grounds of public interest in the area of public health, for archiving purposes in the public interest, scientific or historical research purposes or statistical purposes, or for the establishment, exercise or defence of legal claims. Such justifications would be valid in all cases of breach of privacy, including breaches of data privacy."

(vi) *Right to privacy cannot be impinged without a just, fair and reasonable law*: It has to fulfill the test of proportionality i.e. (i) existence of a law; (ii) must serve a legitimate State aim; and (iii) proportionality.

"**Dr. D.Y. Chandrachud, J.** :

310. While it intervenes to protect legitimate State interests, the State must nevertheless put into place a robust regime that ensures the fulfilment of a threefold requirement. These three requirements apply to all restraints on privacy (not just informational privacy). They emanate from the procedural and content-based mandate of Article 21. The first requirement that there must be a law in existence to justify an encroachment on privacy is an express requirement of Article 21. For, no person can be deprived of his life or personal liberty except in accordance with the procedure established by law. The existence of law is an essential requirement. Second, the requirement of a need, in terms of a legitimate State aim, ensures that the nature and content of the law which imposes the restriction falls within the zone of reasonableness mandated by Article 14, which is a guarantee against arbitrary State action. The pursuit of a legitimate State aim ensures that the law does not suffer from manifest arbitrariness. Legitimacy, as a postulate, involves a value judgment. Judicial review does not reappreciate or second guess the value judgment of the legislature but is for deciding whether the aim which is sought to be pursued suffers from palpable or manifest arbitrariness. The third requirement ensures that the means which are adopted by the legislature are

proportional to the object and needs sought to be fulfilled by the law. Proportionality is an essential facet of the guarantee against arbitrary State action because it ensures that the nature and quality of the encroachment on the right is not disproportionate to the purpose of the law. Hence, the threefold requirement for a valid law arises out of the mutual interdependence between the fundamental guarantees against arbitrariness on the one hand and the protection of life and personal liberty, on the other. The right to privacy, which is an intrinsic part of the right to life and liberty, and the freedoms embodied in Part III is subject to the same restraints which apply to those freedoms.

311. Apart from national security, the State may have justifiable reasons for the collection and storage of data. In a social welfare State, the Government embarks upon programmes which provide benefits to impoverished and marginalised sections of society. There is a vital State interest in ensuring that scarce public resources are not dissipated by the diversion of resources to persons who do not qualify as recipients. Allocation of resources for human development is coupled with a legitimate concern that the utilisation of resources should not be siphoned away for extraneous purposes. Data mining with the object of ensuring that resources are properly deployed to legitimate beneficiaries is a valid ground for the State to insist on the collection of authentic data. But, the data which the State has collected has to be utilised for legitimate purposes of the State and ought not to be utilised unauthorisedly for extraneous purposes. This will ensure that the legitimate concerns of the State are duly safeguarded while, at the same time, protecting privacy concerns. Prevention and investigation of crime and protection of the revenue are among the legitimate aims of the State. Digital platforms are a vital tool of ensuring good governance in a social welfare State. Information technology—legitimately deployed is a powerful enabler in the spread of innovation and knowledge.

312. A distinction has been made in contemporary literature between anonymity on one hand and privacy on the other. [*See* in this connection, Jeffrey M. Skopek, “Reasonable Expectations of Anonymity”, *Virginia Law Review* (2015), Vol. 101, at pp. 691-762.] Both anonymity and privacy prevent others from gaining access to pieces of personal information yet they do so in opposite ways. Privacy involves hiding information whereas anonymity

involves hiding what makes it personal. An unauthorised parting of the medical records of an individual which have been furnished to a hospital will amount to an invasion of privacy. On the other hand, the State may assert a legitimate interest in analysing data borne from hospital records to understand and deal with a public health epidemic such as malaria or dengue to obviate a serious impact on the population. If the State preserves the anonymity of the individual it could legitimately assert a valid State interest in the preservation of public health to design appropriate policy interventions on the basis of the data available to it.

313. Privacy has been held to be an intrinsic element of the right to life and personal liberty under Article 21 and as a constitutional value which is embodied in the fundamental freedoms embedded in Part III of the Constitution. Like the right to life and liberty, privacy is not absolute. The limitations which operate on the right to life and personal liberty would operate on the right to privacy. Any curtailment or deprivation of that right would have to take place under a regime of law. The procedure established by law must be fair, just and reasonable. The law which provides for the curtailment of the right must also be subject to constitutional safeguards.

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325. Like other rights which form part of the fundamental freedoms protected by Part III, including the right to life and personal liberty under Article 21, privacy is not an absolute right. A law which encroaches upon privacy will have to withstand the touchstone of permissible restrictions on fundamental rights. In the context of Article 21 an invasion of privacy must be justified on the basis of a law which stipulates a procedure which is fair, just and reasonable. The law must also be valid with reference to the encroachment on life and personal liberty under Article 21. An invasion of life or personal liberty must meet the threefold requirement of (*i*) legality, which postulates the existence of law; (*ii*) need, defined in terms of a legitimate State aim; and (*iii*) proportionality which ensures a rational nexus between the objects and the means adopted to achieve them.

S.A. Bobde, J. :

426. There is no doubt that privacy is integral to the several fundamental rights recognised by Part III of the Constitution and must be regarded as a fundamental right itself. The relationship between the right to privacy and the particular fundamental right (or rights) involved would depend on the action interdicted by a particular law. At a minimum, since privacy is always integrated with personal liberty, the constitutionality of the law which is alleged to have invaded into a rights bearer's privacy must be tested by the same standards by which a law which invades personal liberty under Article 21 is liable to be tested. Under Article 21, the standard test at present is the rationality review expressed in *Maneka Gandhi case* [*Maneka Gandhi* v. *Union of India*, (1978) 1 SCC 248] . This requires that any procedure by which the State interferes with an Article 21 right to be “fair, just and reasonable, not fanciful, oppressive or arbitrary” [*Maneka Gandhi* v. *Union of India*, (1978) 1 SCC 248 at p. 323, para 48].

R.F. Nariman, J. :

526. But this is not to say that such a right is absolute. This right is subject to reasonable regulations made by the State to protect legitimate State interests or public interest. However, when it comes to restrictions on this right, the drill of various articles to which the right relates must be scrupulously followed. For example, if the restraint on privacy is over fundamental personal choices that an individual is to make, State action can be restrained under Article 21 read with Article 14 if it is arbitrary and unreasonable; and under Article 21 read with Article 19(1)(*a*) only if it relates to the subjects mentioned in Article 19(2) and the tests laid down by this Court for such legislation or subordinate legislation to pass muster under the said article. Each of the tests evolved by this Court, qua legislation or executive action, under Article 21 read with Article 14; or Article 21 read with Article 19(1)(*a*) in the aforesaid examples must be met in order that State action pass muster. In the ultimate analysis, the balancing act that is to be carried out between individual, societal and State interests must be left to the training and expertise of the judicial mind.

S.K. Kaul, J. :

638. The concerns expressed on behalf of the petitioners arising from the possibility of the State infringing the right to

privacy can be met by the test suggested for limiting the discretion of the State:

"(*i*) The action must be sanctioned by law;

(*ii*) The proposed action must be necessary in a democratic society for a legitimate aim;

(*iii*) The extent of such interference must be proportionate to the need for such interference;

(*iv*) There must be procedural guarantees against abuse of such interference."

Chelameswar, J.:

377. It goes without saying that no legal right can be absolute. Every right has limitations. This aspect of the matter is conceded at the Bar. Therefore, even a fundamental right to privacy has limitations. The limitations are to be identified on case-to-case basis depending upon the nature of the privacy interest claimed. There are different standards of review to test infractions of fundamental rights. While the concept of reasonableness overarches Part III, it operates differently across Articles (even if only slightly differently across some of them). Having emphatically interpreted the Constitution's liberty guarantee to contain a fundamental right to privacy, it is necessary for me to outline the manner in which such a right to privacy can be limited. I only do this to indicate the direction of the debate as the nature of limitation is not at issue here.

378. To begin with, the options canvassed for limiting the right to privacy include an Article 14 type reasonableness enquiry [A challenge under Article 14 can be made if there is an unreasonable classification and/or if the impugned measure is arbitrary. The classification is unreasonable if there is no intelligible differentia justifying the classification and if the classification has no rational nexus with the objective sought to be achieved. Arbitrariness, which was first explained at para 85 of *E.P. Royappa* v. *State of T.N.*, (1974) 4 SCC 3 : 1974 SCC (L&S) 165 : AIR 1974 SC 555, is very simply the lack of any reasoning.] ; limitation as per the express provisions of Article 19; a just, fair and reasonable basis (that is, substantive due process) for limitation per Article 21; and finally, a just, fair and

reasonable standard per Article 21 plus the amorphous standard of "compelling State interest". The last of these four options is the highest standard of scrutiny [A tiered level of scrutiny was indicated in what came to be known as the most famous footnote in constitutional law, that is, fn 4 in *United States* v. *Carolene Products Co.*, 1938 SCC OnLine US SC 93 : 82 L Ed 1234 : 304 US 144 (1938). Depending on the graveness of the right at stake, the court adopts a correspondingly rigorous standard of scrutiny.] that a court can adopt. It is from this menu that a standard of review for limiting the right to privacy needs to be chosen.

379. At the very outset, if a privacy claim specifically flows only from one of the expressly enumerated provisions under Article 19, then the standard of review would be as expressly provided under Article 19. However, the possibility of a privacy claim being entirely traceable to rights other than Article 21 is bleak. Without discounting that possibility, it needs to be noted that Article 21 is the bedrock of the privacy guarantee. If the spirit of liberty permeates every claim of privacy, it is difficult, if not impossible, to imagine that any standard of limitation other than the one under Article 21 applies. It is for this reason that I will restrict the available options to the latter two from the above described four.

380. The just, fair and reasonable standard of review under Article 21 needs no elaboration. It has also most commonly been used in cases dealing with a privacy claim hitherto. [*District Registrar and Collector* v. *Canara Bank*, (2005) 1 SCC 496 : AIR 2005 SC 186] , [*State of Maharashtra* v. *Bharat Shanti Lal Shah*, (2008) 13 SCC 5] *Gobind* [*Gobind* v. *State of M.P.*, (1975) 2 SCC 148 : 1975 SCC (Cri) 468] resorted to the compelling State interest standard in addition to the Article 21 reasonableness enquiry. From the United States, where the terminology of "compelling State interest" originated, a strict standard of scrutiny comprises two things—a "compelling State interest" and a requirement of "narrow tailoring" (narrow tailoring means that the law must be narrowly framed to achieve the objective). As a term, "compelling State interest" does not have definite contours in the US. Hence, it is critical that this standard be adopted with some *clarity as to when and in what types of privacy claims*it is to be used. Only in privacy claims which deserve the strictest scrutiny is the standard of compelling State interest to be used. As for

> others, the just, fair and reasonable standard under Article 21 will apply. When the compelling State interest standard is to be employed, must depend upon the context of concrete cases. However, this discussion sets the ground rules within which a limitation for the right to privacy is to be found."

82) In view of the aforesaid detailed discussion in all the opinions penned by six Hon'ble Judges, it stands established, without any pale of doubt, that privacy has now been treated as part of fundamental rights. The Court has held, in no uncertain terms, that privacy has always been a natural right which gives an individual freedom to exercise control over his or her personality. The judgment further affirms three aspects of the fundamental right to privacy, namely:

(i) intrusion with an individual's physical body;

(ii) informational privacy; and

(iii) privacy of choice.

83) As succinctly put by Nariman, J. first aspect involves the person himself/herself and guards a person's rights relatable to his/her physical body thereby controlling the uncalled invasion by the State. Insofar as the second aspect, namely, informational privacy is concerned, it does not deal with a person's body but deals with a person's mind. In this manner, it protects a person by giving her control over the dissemination of material that is

personal to her and disallowing unauthorised use of such information by the State. Third aspect of privacy relates to individual's autonomy by protecting her fundamental personal choices. These aspects have functional connection and relationship with dignity. In this sense, privacy is a postulate of human dignity itself. Human dignity has a constitutional value and its significance is acknowledged by the Preamble. Further, by catena of judgments, human dignity is treated as a fundamental right and as a facet not only of Article 21 but that of right to equality (Article 14) and also part of bouquet of freedoms stipulated in Article 19. Therefore, privacy as a right is intrinsic of freedom, liberty and dignity. Viewed in this manner, one can trace positive and negative contents of privacy. The negative content restricts the State from committing an intrusion upon the life and personal liberty of a citizen. Its positive content imposes an obligation on the State to take all necessary measures to protect the privacy of the individual.

84) A brief summation of the judgment on privacy would indicate that privacy is treated as fundamental right. It is predicated on the basis that privacy is a postulate of dignity and the concept of dignity can be traced to the preamble of the Constitution as well as Article 21 thereof. Further, privacy is considered as a subset

of personal liberty thereby accepting the minority opinion in *Kharak Singh* v. *State of U.P. & Ors.*[29] Another significant jurisprudential development of this judgment is that right to privacy as a fundamental right is not limited to Article 21. On the contrary, privacy resonates through the entirety of Part III of the Constitution which pertains to fundamental rights and, in particular, Articles 14, 19 and 21. Privacy is also recognised as a natural right which inheres in individuals and is, thus, inalienable. In developing the aforesaid concepts, the Court has been receptive to the principles in international law and international instruments. It is a recognition of the fact that certain human rights cannot be confined within the bounds of geographical location of a nation but have universal application. In the process, the Court accepts the concept of universalisation of human rights, including the right to privacy as a human right and the good practices in developing and understanding such rights in other countries have been welcomed. In this hue, it can also be remarked that comparative law has played a very significant role in shaping the aforesaid judgment on privacy in Indian context, notwithstanding the fact that such comparative law has only a persuasive value.

29 AIR 1963 SC 1295

85) The whole process of reasoning contained in different opinions of the Hon'ble Judges would, thus, reflect that the argument that it is difficult to precisely define the common denominator of privacy, was rejected. While doing so, the Court referred to various approaches in formulating privacy[30]. An astute and sagacious analysis of the judgment by the Centre for Internet and Society brings about the following approaches which contributed to formulating the following right to privacy:

(a) Classifying privacy on the basis of 'harms', thereby adopting the approach conceptualised by Daniel Solove. In his book, *Understanding Privacy*[31], Daniel Solove makes a case for privacy being a family resemblance concept.

(b) Classifying privacy on the basis of 'interests': Gary Bostwick's taxonomy of privacy is among the most prominent amongst the scholarship that sub-areas within the right to privacy protect different 'interests' or 'justifications'. This taxonomy is adopted in Chelameswar, J.'s definition of 'privacy' and includes the three interests of privacy of repose, privacy of sanctuary and privacy of intimate decision. Repose is the 'right to be let alone', sanctuary is the interest which prevents others from knowing,

30 See the analysis of this judgment by the Centre for Internet and Society, https://cis-india.org/internet-governance/blog/the-fundamental-right-to-privacy-an-analysis

31 Daniel Solove, *Understanding Privacy*, Cambridge, Massachusetts: Harvard University Press, 2008.

seeing and hearing thus keeping information within the private zone, and finally, privacy of intimate decision protects the freedom to act autonomously.

(c) Classifying privacy as an 'aggregation of rights': This approach in classifying privacy as a right, as highlighted above, is not limited to one particular provision in the Chapter of Fundamental Rights under the Constitution but is associated with amalgam of different but connected rights. In formulating this principle, the Court has referred to scholars like Roger Clarke, Anita Allen etc. It has led to the recognition of private spaces or zones as protected under the right to privacy (thereby extending the ambit and scope of spatial privacy), informational privacy and decisional autonomy.

86) The important question that arises, which is directly involved in these cases, is:

What is the scope of the right to privacy and in what circumstances such a right can be limited?

87) Concededly, fundamental rights are not absolute. The Constitution itself permits State to impose reasonable restrictions on these rights under certain circumstances. Thus, extent and scope of the right to privacy and how and when it can be limited

by the State actions is also to be discerned. As noted above, Nariman, J. has led the path by observing that "when it comes to restrictions on this right, the drill of various Articles to which the right relates must be scrupulously followed". Therefore, examination has to be from the point of view of Articles 14, 19 and 21 for the reason that right to privacy is treated as having intimate connection to various rights in Part III and is not merely related to Article 21. Looked from this angle, the action of the State will have to be tested on the touchstone of Article 14. This judgment clarifies that the 'classification' test adopted earlier has to be expanded and instead the law/action is to be tested on the ground of 'manifest arbitrariness'. This aspect has already been discussed in detail under the caption 'Scope of Judicial Review' above. When it comes to examining the 'restrictions' as per the provisions of Article 19 of the Constitution, the judgment proceeds to clarify that a law which impacts dignity and liberty under Article 21, as well as having chilling effects on free speech which is protected by Article 19(1)(a), must satisfy the standards of judicial review under both provisions. Therefore, such restriction must satisfy the test of judicial review under: (i) one of the eight grounds mentioned under Article 19(2); and (ii) the restriction should be reasonable. This Court has applied multiple standards

to determine reasonableness, including proximity, arbitrariness, and proportionality. Further, the reasonable restrictions must be in the interests of: (i) the sovereignty and integrity of India, (ii) the security of the State, (iii) friendly relations with foreign States, (iv) public order, (v) decency or morality or (vi) in relation to contempt of court, (vii) defamation or (viii) incitement to an offence.

88) The judgment further lays down that in the context of Article 21, the test to be applied while examining a particular provision is the 'just, fair and reasonable test' thereby bringing notion of proportionality.

89) The petitioners have sought to build their case on the aforesaid parameters of privacy and have submitted that this right of privacy, which is now recognised as a fundamental right, stands violated by the very fabric contained in the scheme of Aadhaar. It is sought to be highlighted that the data which is collected by the State, particularly with the authentication of each transaction entered into by an individual, can be assimilated to construct a profile of such an individual and it particularly violates informational privacy. No doubt, there can be reasonable restrictions on this right, which is conceded by the petitioners. It is, however, argued that right to privacy cannot be impinged

without a just, fair and reasonable law. Therefore, in the first instance, any intrusion into the privacy of a person has to be backed by a law. Further, such a law, to be valid, has to pass the test of legitimate aim which it should serve and also proportionality i.e. proportionate to the need for such interference. Not only this, the law in question must also provide procedural guarantees against abuse of such interference.

90) At the same time, it can also be deduced from the reading of the aforesaid judgment that the reasonable expectation of privacy may vary from the intimate zone to the private zone and from the private zone to the public arena. Further, privacy is not lost or surrendered merely because the individual is in a public place. For example, if a person was to post on Facebook vital information about himself, the same being in public domain, he would not be entitled to claim privacy right. This aspect is highlighted by some of the Hon'ble Judges as under:

> **Dr. D.Y. Chandrachud, J.:**
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> "297. What, then, does privacy postulate? Privacy postulates the reservation of a private space for the individual, described as the right to be let alone. The concept is founded on the autonomy of the individual. The ability of an individual to make choices lies at the core of the human personality. The notion of privacy enables the individual to assert and control the human element which is inseparable from the personality of the individual. The inviolable nature of the human personality is manifested in

the ability to make decisions on matters intimate to human life. The autonomy of the individual is associated over matters which can be kept private. These are concerns over which there is a legitimate expectation of privacy. The body and the mind are inseparable elements of the human personality. The integrity of the body and the sanctity of the mind can exist on the foundation that each individual possesses an inalienable ability and right to preserve a private space in which the human personality can develop. Without the ability to make choices, the inviolability of the personality would be in doubt. Recognising a zone of privacy is but an acknowledgment that each individual must be entitled to chart and pursue the course of development of personality. Hence privacy is a postulate of human dignity itself. Thoughts and behavioural patterns which are intimate to an individual are entitled to a zone of privacy where one is free of social expectations. In that zone of privacy, an individual is not judged by others. Privacy enables each individual to take crucial decisions which find expression in the human personality. It enables individuals to preserve their beliefs, thoughts, expressions, ideas, ideologies, preferences and choices against societal demands of homogeneity. Privacy is an intrinsic recognition of heterogeneity, of the right of the individual to be different and to stand against the tide of conformity in creating a zone of solitude. Privacy protects the individual from the searching glare of publicity in matters which are personal to his or her life. Privacy attaches to the person and not to the place where it is associated. Privacy constitutes the foundation of all liberty because it is in privacy that the individual can decide how liberty is best exercised. Individual dignity and privacy are inextricably linked in a pattern woven out of a thread of diversity into the fabric of a plural culture.

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299. Privacy represents the core of the human personality and recognises the ability of each individual to make choices and to take decisions governing matters intimate and personal. Yet, it is necessary to acknowledge that individuals live in communities and work in communities. Their personalities affect and, in turn are shaped by their social environment. The individual is not a hermit. The lives of individuals are as much a social phenomenon. In their interactions with others, individuals are constantly engaged in behavioural patterns and in relationships impacting on

the rest of society. Equally, the life of the individual is being consistently shaped by cultural and social values imbibed from living in the community. This state of flux which represents a constant evolution of individual personhood in the relationship with the rest of society provides the rationale for reserving to the individual a zone of repose. The lives which individuals lead as members of society engender a reasonable expectation of privacy. The notion of a reasonable expectation of privacy has elements both of a subjective and objective nature. Privacy at a subjective level is a reflection of those areas where an individual desires to be left alone. On an objective plane, privacy is defined by those constitutional values which shape the content of the protected zone where the individual ought to be left alone. The notion that there must exist a reasonable expectation of privacy ensures that while on the one hand, the individual has a protected zone of privacy, yet on the other, the exercise of individual choices is subject to the rights of others to lead orderly lives. For instance, an individual who possesses a plot of land may decide to build upon it subject to zoning regulations. If the building bye-laws define the area upon which construction can be raised or the height of the boundary wall around the property, the right to privacy of the individual is conditioned by regulations designed to protect the interests of the community in planned spaces. Hence while the individual is entitled to a zone of privacy, its extent is based not only on the subjective expectation of the individual but on an objective principle which defines a reasonable expectation.

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307. The sphere of privacy stretches at one end to those intimate matters to which a reasonable expectation of privacy may attach. It expresses a right to be left alone. A broader connotation which has emerged in academic literature of a comparatively recent origin is related to the protection of one's identity. Data protection relates closely with the latter sphere. Data such as medical information would be a category to which a reasonable expectation of privacy attaches. There may be other data which falls outside the reasonable expectation paradigm. Apart from safeguarding privacy, data protection regimes seek to protect the autonomy of the individual. This is evident from the emphasis in the European data protection regime on the centrality of consent. Related to the issue of consent is the requirement of transparency which requires a

disclosure by the data recipient of information pertaining to data transfer and use."

S.A. Bobde, J:

"421. Shri Rakesh Dwivedi, appearing for the State of Gujarat, while referring to several judgments of the Supreme Court of the United States, submitted that only those privacy claims which involve a "reasonable expectation of privacy" be recognised as protected by the fundamental right. It is not necessary for the purpose of this case to deal with the particular instances of privacy claims which are to be recognised as implicating a fundamental right. Indeed, it would be premature to do so. The scope and ambit of a constitutional protection of privacy can only be revealed to us on a case-by-case basis."

91) Though Nariman, J. did not subscribe to the aforesaid view in totality, however, His Lordship has also given an example that if a person has to post on Facebook vital information, the same being in public domain, she would not be entitled to the claim of privacy right.

92) We would also like to reproduce following discussion, in the opinion authored by Nariman, J., giving the guidance as to how a law has to be tested when it is challenged on the ground that it violates the fundamental right to privacy:

"...Statutory provisions that deal with aspects of privacy would continue to be tested on the ground that they would violate the fundamental right to privacy, and would not be struck down, if it is found on a balancing test that the social or public interest and the reasonableness of the restrictions would outweigh the particular aspect of privacy claimed. If this is so, then statutes which would enable the State to contractually obtain information about persons would pass muster in given circumstances, provided they safeguard the individual right to privacy as well. A

> simple example would suffice. If a person was to paste on Facebook vital information about himself/herself, such information, being in the public domain, could not possibly be claimed as a privacy right after such disclosure. But, in pursuance of a statutory requirement, if certain details need to be given for the statutory purpose concerned, then such details would certainly affect the right to privacy, but would on a balance, pass muster as the State action concerned has sufficient inbuilt safeguards to protect this right—viz. the fact that such information cannot be disseminated to anyone else, save on compelling grounds of public interest."

93) One important comment which needs to be made at this stage relates to the standard of judicial review while examining the validity of a particular law that allegedly infringes right to privacy. The question is as to whether the Court is to apply 'strict scrutiny' standard or the 'just, fair and reasonableness' standard. In the privacy judgment, different observations are made by different Hon'ble Judges and the aforesaid aspect is not determined authoritatively, may be for the reason that the Bench was deciding the reference on the issue as to whether right to privacy is a fundamental right or not and, in the process, it was called upon to decide the specific questions referred to it. We have dealt with this aspect at the appropriate stage.

Principles of Human Dignity:

94) While undertaking the analysis of the judgment in *K.S. Puttaswamy*, we have mentioned that one of the attributes laid down therein is that the sanctity of privacy lies in its functional

relationship with dignity. Privacy is the constitutional core of human dignity. In the context of Aadhaar scheme how the concept of human dignity is to be applied assumes significance.

95) In *Common Cause* v. *Union of India*[32], the concept of human dignity has been explained in much detail[33]. The concept of human dignity developed in the said judgment was general in nature which is based on right to autonomy and right of choice and it has become a constitutional value. In the last 40 years or so, this Court has given many landmark judgments wherein concept of human dignity is recognised as an attribute of fundamental rights. In the earlier years, though the meaning and scope of human dignity by itself was not expanded, this exercise has been undertaken in last few years. Earlier judgments have mentioned that human dignity is the intrinsic value of every human being and, in the process, a person's autonomy as an attribute of dignity stands recognised. The judgments rendered in the last few years have attempted to provide jurisprudential basis to the concept of human dignity itself.

96) In *National Legal Services Authority* v. *Union of India & Ors.*[34] while recognising the right of transgenders of self determination

32 (2018) 5 SCC 1
33 See paras 72-79 of the judgment
34 (2014) 5 SCC 438

of their sex, the Court explained the contours of human dignity in the following words:

> "106. The basic principle of the dignity and freedom of the individual is common to all nations, particularly those having democratic set up. Democracy requires us to respect and develop the free spirit of human being which is responsible for all progress in human history. Democracy is also a method by which we attempt to raise the living standard of the people and to give opportunities to every person to develop his/her personality. It is founded on peaceful co-existence and cooperative living. If democracy is based on the recognition of the individuality and dignity of man, as a fortiori we have to recognize the right of a human being to choose his sex/gender identity which is integral to his/her personality and is one of the most basic aspect of self-determination, dignity and freedom. In fact, there is a growing recognition that the true measure of development of a nation is not economic growth; it is human dignity.
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> 107. More than 225 years ago, Immanuel Kant propounded the doctrine of free will, namely, the free willing individual as a natural law ideal. Without going into the detailed analysis of his aforesaid theory of justice (as we are not concerned with the analysis of his jurisprudence) what we want to point out is his emphasis on the "freedom" of human volition. The concepts of volition and freedom are "pure", that is not drawn from experience. They are independent of any particular body of moral or legal rules. They are presuppositions of all such rules, valid and necessary for all of them.
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> 108. Over a period of time, two divergent interpretations of the Kantian criterion of justice came to be discussed. One trend was an increasing stress on the maximum of individual freedom of action as the end of law. This may not be accepted and was criticised by the protagonist of "hedonist utilitarianism", notably Bentham. This school of thought laid emphasis on the welfare of the society rather than an individual by propounding the principle of maximum of happiness to most of the people. Fortunately, in the instant case, there is no such dichotomy between the individual freedom/liberty we are discussing, as against public good. On the contrary, granting the right to choose gender leads to public good. The second tendency of the

> **Kantian criterion of justice was found in reinterpreting "freedom" in terms not merely of absence of restraint but in terms of attainment of individual perfection**. It is this latter trend with which we are concerned in the present case and this holds good even today. As pointed out above, after the Second World War, in the form of the UN Charter and thereafter there is more emphasis on the attainment of individual perfection. In that united sense at least there is a revival of the natural law theory of justice. Blackstone, in the opening pages in his "Vattelian Fashion" said that the principal aim of society "is to protect individuals in the enjoyment of those absolute rights which were vested in them by the immutable laws of nature…."

97) Thus, right of choice and right of self determination were accepted as facets of human dignity. It was also emphasised that in certain cases, like the case at hand (that of transgenders), recognition of this aspect of human dignity would yield happiness to the individuals and, at the same time, also be in public good.

98) Advancement in conceptualising the doctrine of human dignity took place in the case of *Shabnam* v. *Union of India & Ors.*[35] wherein this Court has gone to the extent of protecting certain rights of death convicts by holding that they cannot be executed till they exhaust all available constitutional and statutory remedies. In the process, the Court held as under:

> ""15. This right to human dignity has many elements. First and foremost, human dignity is the dignity of each human being *'as a human being'*. Another element, which needs to be highlighted, in the context of the present case, is that human dignity is infringed if a person's life, physical or mental welfare is harmed. It is in this sense torture,

35 (2015) 6 SCC 702

humiliation, forced labour, etc. all infringe on human dignity. It is in this context many rights of the accused derive from his dignity as a human being. These may include the presumption that every person is innocent until proven guilty; the right of the accused to a fair trial as well as speedy trial; right of legal aid, all part of human dignity. Even after conviction, when a person is spending prison life, allowing humane conditions in jail is part of human dignity. Prisons reforms or Jail reforms measures to make convicts a reformed person so that they are able to lead normal life and assimilate in the society, after serving the jail term, are motivated by human dignity jurisprudence.

16. In fact, this principle of human dignity has been used frequently by Courts in the context of considering the death penalty itself. Way back in the year 1972, the United States Supreme Court kept in mind this aspect in the case of *Furman* v. *Georgia* 408 US 238 (1972). The Court, speaking through Brennan, J., while considering the application of Eighth Amendment's prohibition on cruel and unusual punishments, summed up the previous jurisprudence on the Amendment as 'prohibit(ing) the infliction of uncivilized and inhuman punishments. The State, even as it punishes, must treat its members with respect for their intrinsic worth as human beings. A punishment is *'cruel and unusual'*, therefore, if it does not comport with human dignity'. In *Gregg* v. *Georgia* 428 US 153 (1976), that very Court, again through Brennan, J., considered that 'the fatal constitutional infirmity in the punishment of death is that it treats *"members of the human race as non-humans, as objects to be toyed with an discarded. (It is), thus, inconsistent with the fundamental premise of the clause that even the vilest criminal remains a human being possessed of common human dignity'.* The Canadian Supreme Court, the Hungarian Constitutional Court and the South African Supreme Court have gone to the extent of holding that capital punishment constitutes a serious impairment of human dignity and imposes a limitation on the essential content of the fundamental rights to life and human dignity and on that touchstone declaring that dignity as unconstitutional."

99) Next judgment in this line of cases would be that of *Jeeja Ghosh*

& Another v. *Union of India & Ors.*[36] wherein the Court, while expanding the jurisprudential basis, outlined three models of dignity which have been discussed by us above. These were referred to while explaining the normative role of human dignity, alongside, in the following manner:

> "37. The rights that are guaranteed to differently-abled persons under the 1995 Act, are founded on the sound principle of human dignity which is the core value of human right and is treated as a significant facet of right to life and liberty. Such a right, now treated as human right of the persons who are disabled, has it roots in Article 21 of the Constitution. Jurisprudentially, three types of models for determining the content of the constitutional value of human dignity are recognised. These are: (i) Theological Models, (ii) Philosophical Models, and (iii) Constitutional Models. Legal scholars were called upon to determine the theological basis of human dignity as a constitutional value and as a constitutional right. Philosophers also came out with their views justifying human dignity as core human value. Legal understanding is influenced by theological and philosophical views, though these two are not identical. Aquinas and Kant discussed the jurisprudential aspects of human dignity based on the aforesaid philosophies. Over a period of time, human dignity has found its way through constitutionalism, whether written or unwritten. Even right to equality is interpreted based on the value of human dignity. Insofar as India is concerned, we are not even required to take shelter under theological or philosophical theories. We have a written Constitution which guarantees human rights that are contained in Part III with the caption "Fundamental Rights". One such right enshrined in Article 21 is right to life and liberty. Right to life is given a purposeful meaning by this Court to include right to live with dignity. It is the purposive interpretation which has been adopted by this Court to give a content of the right to human dignity as the fulfilment of the constitutional value enshrined in Article 21. Thus, human dignity is a constitutional value and a constitutional goal. What are the dimensions of constitutional value of human dignity? It is

36 (2016) 7 SCC 761

beautifully illustrated by Aharon Barak (former Chief Justice of the Supreme Court of Israel) in the following manner:

> "The constitutional value of human dignity has a central normative role. Human dignity as a constitutional value is the factor that unites the human rights into one whole. It ensures the normative unity of human rights. This normative unity is expressed in the three ways: first, the value of human dignity serves as a normative basis for constitutional rights set out in the Constitution; second, it serves as an interpretative principle for determining the scope of constitutional rights, including the right to human dignity; third, the value of human dignity has an important role in determining the proportionality of a statute limiting a constitutional right."

38. All the three goals of human dignity as a constitutional value are expanded by the author in a scholarly manner. Some of the excerpts thereof, are reproduced below which give a glimpse of these goals:

> "The first role of human dignity as a constitutional value is expressed in the approach that it comprises the foundation for all of the constitutional rights. Human dignity is the central argument for the existence of human rights. It is the rationale for them all. It is the justification for the existence of rights. According to Christoph Enders, it is the constitutional value that determines that every person has the right to have rights…
>
> The second role of human dignity as a constitutional value is to provide meaning to the norms of the legal system. According to purposive interpretation, all of the provisions of the Constitution, and particularly all of the rights in the constitutional bill of rights, are interpreted in light of human dignity…
>
> Lastly, human dignity as a constitutional value influences the development of the common law. Indeed, where common law is recognised, Judges have the duty to develop it, and if necessary, modify it, so that it expresses constitutional values, including the constitutional value of human dignity. To the extent that common law determines rights and duties between individuals, it might limit the human dignity of

> one individual and protect the human dignity of the other."

100) The concept was developed and expanded further in *K.S. Puttaswamy*. The Court held that privacy postulates the reservation of a private space for an individual, described as the right to be let alone, as a concept founded on autonomy of the individual. In this way, right to privacy has been treated as a postulate of human dignity itself. While defining so, the Court also remarked as under:

> "298. Privacy of the individual is an essential aspect of dignity. Dignity has both an intrinsic and instrumental value. As an intrinsic value, human dignity is an entitlement or a constitutionally protected interest in itself. In its instrumental facet, dignity and freedom are inseparably intertwined, each being a facilitative tool to achieve the other. The ability of the individual to protect a zone of privacy enables the realisation of the full value of life and liberty... The family, marriage, procreation and sexual orientation are all integral to the dignity of the individual. Above all, the privacy of the individual recognises an inviolable right to determine how freedom shall be exercised..."

101) This concept of dignity took a leap forwarded in the case of *Common Cause* v. *Union of India*[37] pertaining to passive euthanasia. Though this right was earlier recognised in *Aruna Ramachandra Shanbaug* v. *Union of India & Ors.*[38], a totally new dimension was given to this right, based on freedom of choice

37 (2018) 5 SCC 1
38 (2011) 4 SCC 454

which is to be given to an individual accepting his dignity. There were four concurring opinions. In one of the opinions[39], the aspects of dignity are succinctly brought out in the following manner:

> "154. Dignity of an individual has been internationally recognised as an important facet of human rights in the year 1948 itself with the enactment of the Universal Declaration of Human Rights. Human dignity not only finds place in the Preamble of this important document but also in Article 1 of the same. It is well known that the principles set out in UDHR are of paramount importance and are given utmost weightage while interpreting human rights all over the world. The first and foremost responsibility fixed upon the State is the protection of human dignity without which any other right would fall apart. Justice Brennan in his book *The Constitution of the United States: Contemporary Ratification* has referred to the Constitution as "a sparkling vision of the supremacy of the human dignity of every individual".
>
> 155. In fact, in *Christine Goodwin* v. *United Kingdom* the European Court of Human Rights, speaking in the context of the Convention for the Protection of Human Rights and Fundamental Freedoms, has gone to the extent of stating that "the very essence of the Convention is respect for human dignity and human freedom". In the South African case of *S.* v. *Makwanyane,* O'Regan, J. stated in the Constitutional Court that "without dignity, human life is substantially diminished".
>
> xx xx xx
>
> 157. The concept and value of dignity requires further elaboration since we are treating it as an inextricable facet of right to life that respects all human rights that a person enjoys. Life is basically self-assertion. In the life of a person, conflict and dilemma are expected to be normal phenomena. Oliver Wendell Holmes, in one of his addresses, quoted a line from a Latin poet who had uttered the message, "Death plucks my ear and says, Live—I am coming". That is the significance of living. But when a

39 Rendered by Dipak Misra, CJI

patient really does not know if he/she is living till death visits him/her and there is constant suffering without any hope of living, should one be allowed to wait? Should she/he be cursed to die as life gradually ebbs out from her/his being? Should she/he live because of innovative medical technology or, for that matter, should he/she continue to live with the support system as people around him/her think that science in its progressive invention may bring about an innovative method of cure? To put it differently, should he/she be "Guinea pig" for some kind of experiment? The answer has to be an emphatic "No" because such futile waiting mars the pristine concept of life, corrodes the essence of dignity and erodes the fact of eventual choice which is pivotal to privacy.

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159. In *Mehmood Nayyar Azam* v. *State of Chhattisgarh*, a two-Judge Bench held thus: (SCC p. 6, para 1)

> "1. … Albert Schweitzer, highlighting on Glory of Life, pronounced with conviction and humility, "the reverence of life offers me my fundamental principle on morality". The aforesaid expression may appear to be an individualistic expression of a great personality, but, when it is understood in the complete sense, it really denotes, in its conceptual essentiality, and connotes, in its macrocosm, the fundamental perception of a thinker about the respect that life commands. The reverence of life is insegregably associated with the dignity of a human being who is basically divine, not servile. A human personality is endowed with potential infinity and it blossoms when dignity is sustained. The sustenance of such dignity has to be the superlative concern of every sensitive soul. The essence of dignity can never be treated as a momentary spark of light or, for that matter, "a brief candle", or "a hollow bubble". The spark of life gets more resplendent when man is treated with dignity sans humiliation, for every man is expected to lead an honourable life which is a splendid gift of "creative intelligence"."

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166. The purpose of saying so is only to highlight that the law must take cognizance of the changing society and

march in consonance with the developing concepts. The need of the present has to be served with the interpretative process of law. However, it is to be seen how much strength and sanction can be drawn from the Constitution to consummate the changing ideology and convert it into a reality. The immediate needs are required to be addressed through the process of interpretation by the Court unless the same totally falls outside the constitutional framework or the constitutional interpretation fails to recognise such dynamism. The Constitution Bench in *Gian Kaur* [*Gian Kaur* v. *State of Punjab*, (1996) 2 SCC 648 : 1996 SCC (Cri) 374] , as stated earlier, distinguishes attempt to suicide and abetment of suicide from acceleration of the process of natural death which has commenced. The authorities, we have noted from other jurisdictions, have observed the distinctions between the administration of lethal injection or certain medicines to cause painless death and non-administration of certain treatment which can prolong the life in cases where the process of dying that has commenced is not reversible or withdrawal of the treatment that has been given to the patient because of the absolute absence of possibility of saving the life. To explicate, the first part relates to an overt act whereas the second one would come within the sphere of informed consent and authorised omission. The omission of such a nature will not invite any criminal liability if such action is guided by certain safeguards. The concept is based on non-prolongation of life where there is no cure for the state the patient is in and he, under no circumstances, would have liked to have such a degrading state. The words “no cure” have to be understood to convey that the patient remains in the same state of pain and suffering or the dying process is delayed by means of taking recourse to modern medical technology. It is a state where the treating physicians and the family members know fully well that the treatment is administered only to procrastinate the continuum of breath of the individual and the patient is not even aware that he is breathing. Life is measured by artificial heartbeats and the patient has to go through this undignified state which is imposed on him. The dignity of life is denied to him as there is no other choice but to suffer an avoidable protracted treatment thereby thus indubitably casting a cloud and creating a dent in his right to live with dignity and face death with dignity, which is a preserved concept of bodily autonomy and right to privacy. In such a stage, he has no old memories or any future hopes but he is in a state of misery which nobody ever desires to have.

> Some may also silently think that death, the inevitable factum of life, cannot be invited. To meet such situations, the Court has a duty to interpret Article 21 in a further dynamic manner and it has to be stated without any trace of doubt that the right to life with dignity has to include the smoothening of the process of dying when the person is in a vegetative state or is living exclusively by the administration of artificial aid that prolongs the life by arresting the dignified and inevitable process of dying. Here, the issue of choice also comes in. Thus analysed, we are disposed to think that such a right would come within the ambit of Article 21 of the Constitution."

102) In the other opinion[40], four facets of euthanasia were discussed, namely: (i) philosophy of euthanasia, (ii) morality of euthanasia, (iii) dignity in euthanasia, and (iv) economics of euthanasia. While discussing dignity in euthanasia, the three models of dignity, namely, theological, philosophical and constitutional model, were highlighted. Thereafter, postulates of dignity have been explained in the following manner:

> "292. Aharon Barak, former Chief Justice of the Supreme Court of Israel, attributes two roles to the concept of human dignity as a constitutional value, which are:
>
> 292.1. Human dignity lays a foundation for all the human rights as it is the central argument for the existence of human rights.
>
> 292.2. Human dignity as a constitutional value provides meaning to the norms of the legal system. In the process, one can discern that the principle of purposive interpretation exhorts us to interpret all the rights given by the Constitution, in the light of the human dignity. In this sense, human dignity influences the purposive interpretation of the Constitution. Not only this, it also influences the interpretation of every sub-constitutional norm in the legal system. Moreover, human dignity as a

40 Rendered by A.K. Sikri, J.

constitutional value also influences the development of the common law.

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295. Dworkin, being a philosopher-jurist, was aware of the idea of a Constitution and of a constitutional right to human dignity. In his book, *Taking Rights Seriously*, he noted that everyone who takes rights seriously must give an answer to the question why human rights vis-à-vis the State exist. According to him, in order to give such an answer one must accept, as a minimum, the idea of human dignity. As he writes:

> "Human dignity … associated with Kant, but defended by philosophers of different schools, supposes that there are ways of treating a man that are inconsistent with recognising him as a full member of the human community, and holds that such treatment is profoundly unjust."[41]

296. In his Book, *Is Democracy Possible Here?*[42] **Dworkin develops two principles about the concept of human dignity. First** principle regards the intrinsic value of every person viz. every person has a special objective value which value is not only important to that person alone but success or failure of the lives of every person is important to all of us. **The second** principle, according to Dworkin, is that of personal responsibility. According to this principle, every person has the responsibility for success in his own life and, therefore, he must use his discretion regarding the way of life that will be successful from his point of view. Thus, Dworkin's jurisprudence of human dignity is founded on the aforesaid two principles which, together, not only define the basis but the conditions for human dignity. Dworkin went on to develop and expand these principles in his book, *Justice for Hedgehogs* (2011)[43].

297. When speaking of rights, it is impossible to envisage it without dignity. In his pioneering and all-inclusive *Justice for Hedgehogs*, he proffered an approach where respect for **human dignity, entails two requirements**; **first**, **self-respect** i.e. taking the objective importance of one's own

41 Ronald Dworkin, *Taking Rights Seriously* (A&C Black, 2013) 239.
42 Ronald Dworkin, *Is Democracy Possible Here? Principles for a New Political Debate* (Princeton University Press, 2006)
43 Harvard University Press, 2011.

> life seriously; this represents the free will of the person, his capacity to think for himself and to control his own life and **second**, **authenticity** i.e. accepting a "special, personal responsibility for identifying what counts as success" in one's own life and for creating that life "through a coherent narrative" that one has chosen[44]. According to Dworkin, these principles form the fundamental criteria supervising what we should do in order to live well.[45] They further explicate the rights that individuals have against their political community,[46] and they provide a rationale for the moral duties we owe to others. This notion of dignity, which Dworkin gives utmost importance to, is indispensable to any civilised society. It is what is constitutionally recognised in our country and for good reason. Living well is a moral responsibility of individuals; it is a continuing process that is not a static condition of character but a mode that an individual constantly endeavours to imbibe. A life lived without dignity, is not a life lived at all for living well implies a conception of human dignity which Dworkin interprets includes ideals of self-respect and authenticity."

103) In summation, it can be said that the concept of human dignity dates back to thousands of years. Historically, human dignity, as a concept, found its origin in different religions which is held to be an important component of their theological approach. Jurists have given this approach as 'theological model' of dignity. It is primarily based on the premise that human beings are the creation of God and cannot be treated as mere material beings. Human identity is more ethical than spiritual because man is creation of God; harm to a human being is harm to God. God, thus, wishes to grant human being recognition, dignity and

44 Kenneth W. Simons, "Dworkin's Two Principle of Dignity: An Unsatisfactory Non-Consequentialist Account of Interpersonal Moral Duties", 90 Boston Law Rev. 715 (2010)]
45 Footnote 33 above.
46 Footnote 32 above.

authority. It is also religious belief that God is rational and determines his goals for himself. Likewise, human being created by God too is rational and determines his own goal. Therefore, man has freedom of will. A couple of centuries ago, philosophical approach was given to the conception of human dignity. This sphere was headed by German Philosopher Immanuel Kant whose moral theory is divided into two parts: ethics and right. According to Kant, a person acts ethically when he acts by force of a duty that a rational agent self-legislates onto his own will. Thus, he talked of free will of the human being. For Kant, ethics include duties of oneself (for example - to develop one's talents) and to others (for example - to contribute to their happiness). This ability is the human dignity of man. Philosophical approach, thus, is metaethical one, which is a journey from 'human being' and 'remaining human'. This is explained by Professor Upendra Baxi as the relationship between 'self', 'others' and 'society'. In this philosophical sense, dignity is 'respect' for an individual person based on the principle of freedom and capacity of making choices and a good or just social order is one which respects dignity *via* assuring 'contexts' and 'conditions' as the 'source of free and informed choice'. To put it philosophically, each individual has a right to live her life the way she wants, without

any subjugation. One can rule others, but then it is never noble. It is immoral because the other is not a means to you, the other is an end to herself. Kant also maintains that to use the other as a means is the basic immoral act. Everything else that is immoral is immoral because of this, so this should be the criterion: Are you using the other as a means? Someone has put this remarkably in the following words:

> "Alexander the Great is not noble, only Gautam the Buddha is noble, for the simple reason that Buddha has no rule over others but he is a matter of himself.
>
> There is no part of his being which is not in tune with him. He has come to attain absolute harmony. There is no conflict in him, there is a reign of absolute peace. And his consciousness is supreme, nothing is above it – no instinct, no intellect, nothing is higher than his consciousness."

104) Historically, a transition has taken place into the idea of dignity by transforming the amalgam of theological approach (man as creation of God deserving dignity) and philosophical approach based on morality, by elevating human dignity as a constitutional norm attaching constitutional value to it. It is a transition from 'respect' to 'right' by making respect as enforceable right. The manner in which it has happened in India has been traced above.

105) From the aforesaid discussion, it follows that dignity as a jurisprudential concept has now been well defined by this Court.

Its essential ingredients can be summarised as under:

The basic principle of dignity and freedom of the individual is an attribute of natural law which becomes the right of all individuals in a constitutional democracy. Dignity has a central normative role as well as constitutional value. This normative role is performed in three ways:

First, it becomes basis for *constitutional rights*;

Second, it serves as an *interpretative principle* for determining the scope of constitutional rights; and,

Third, it determines the *proportionality of a statute* limiting a constitutional right. Thus, if an enactment puts limitation on a constitutional right and such limitation is disproportionate, such a statute can be held to be unconstitutional by applying the doctrine of proportionality.

106) As per Dworkin, there are two principles about the concept of human dignity. First principle regards an 'intrinsic value' of every person, namely, every person has a special objective value, which value is not only important to that person alone but success or failure of the lives of every person is important to all of us. It can also be described as self respect which represents the free will of the person, her capacity to think for herself and to control her own life. The second principle is that of 'personal

responsibility', which means every person has the responsibility for success in her own life and, therefore, she must use her discretion regarding the way of life that will be successful from her point of view.

107) Sum total of this exposition is well defined by Professor Baxi by explaining that as per the aforesaid view, dignity is to be treated as 'empowerment' which makes a triple demand in the name of 'respect' for human dignity, namely:

(i) respect for one's capacity as an agent to make one's own free choices;

(ii) respect for the choices so made; and

(iii) respect for one's need to have a context and conditions in which one can operate as a source of free and informed choice.

108) In this entire formulation, 'respect' for an individual is the fulcrum, which is based on the principle of freedom and capacity to make choices and a good or just social order is one which respects dignity via assuring 'contexts' and 'conditions' as the 'source of free and informed choice'.

109) The aforesaid discourse on the concept of human dignity is from an individual point of view. That is the emphasis of the petitioners as well. That would be one side of the coin. A very important

feature which the present case has brought into focus is another dimension of human dignity, namely, in the form of 'common good' or 'public good'. Thus, our endeavour here is to give richer and more nuanced understanding to the concept of human dignity. Here, dignity is not limited to an individual and is to be seen in an individualistic way. A reflection on this facet of human dignity was stated in *National Legal Services Authority* (Transgenders' case), which can be discerned from the following discussion:

> "103. A corollary of this development is that while so long the negative language of Article 21 and use of the word "deprived" was supposed to impose upon the State the negative duty not to interfere with the life or liberty of an individual without the sanction of law, the width and amplitude of this provision has now imposed a positive obligation (*Vincent Panikurlangara* v. *Union of India*) upon the State to take steps for ensuring to the individual a better enjoyment of his life and dignity e.g.:
>
> (*i*) Maintenance and improvement of public health (*Vincent Panikurlangara* v. *Union of India*).
>
> (*ii*) Elimination of water and air pollution (*M.C. Mehta* v. *Union of India*).
>
> (*iii*) Improvement of means of communication (*State of H.P.* v. *Umed Ram Sharma*).
>
> (*iv*) Rehabilitation of bonded labourers (*Bandhua Mukti Morcha* v. *Union of India*).
>
> (*v*) Providing human conditions in prisons (*Sher Singh* v. *State of Punjab*) and protective homes (*Sheela Barse* v. *Union of India*).

(*vi*) Providing hygienic condition in a slaughterhouse (*Buffalo Traders Welfare Assn.* v. *Maneka Gandhi*).

104. The common golden thread which passes through all these pronouncements is that Article 21 guarantees enjoyment of life by all citizens of this country with dignity, viewing this human right in terms of human development.

105. The concepts of justice social, economic and political, equality of status and of opportunity and of assuring dignity of the individual incorporated in the Preamble, clearly recognise the right of one and all amongst the citizens of these basic essentials designed to flower the citizen's personality to its fullest. The concept of equality helps the citizens in reaching their highest potential. Thus, the emphasis is on the development of an individual in all respects."

110) Christopher McCrudden, an Oxford Academic, in his article '*Human Dignity and Judicial Interpretation of Human Rights'*[47] published in the European Journal of International Law on September 01, 2008 traces the evolution of concept of human dignity. In substance, his analysis is that in the early stages of social evolution, human dignity was understood as a concept associated with 'status'. Only those individuals were considered worthy of respect who enjoyed a certain status within the social construct. Though one finds statements about dignity of humans as human beings on account of the human being the highest creation of God and his possession of mind and the power of reason in the Oration of Marcus Tullius Cicero, a Roman Politician and Philosopher (63 BC), and in the works of Pico della

47 Published in the European Journal of International Law on September 01, 2008

Mirandola, a Reformation Humanist (1486) '*On the dignity of man'*, yet there existed human beings who were not considered as human beings. There were slaves who were treated at par with animals.

111) Kant expounded the theory that humans should be treated as an end in themselves and not merely as a means to an end with ability to choose their destiny. Emphasis was laid on the intrinsic worth of the human being. Based on this philosophy emerged the initial declaration of rights. Kant wrote thus:

> "Humanity itself is a dignity; for a human being cannot be used merely as a means by any human being (...) but must always be used at the same time as an end. It is just in this that his dignity (personality) consists, by which he raises himself above all other beings in the world that are not human beings and yet can be used, and so overall things."

112) Charles Bernard Renouvier, a French Philosopher, said:

> "Republic is a State which best reconciles dignity of individual with dignity of everyone."

113) Dignity extended to all citizens involves the idea of communitarism. A little earlier in 1798, Friedrich Schiller, a German poet of freedom and philosophy, brought out the connection between dignity and social condition in his work "*Wurde des Menschen"*. He said "(g)ive him food and shelter;

when you have covered his nakedness, dignity will follow by itself." It was during the period that abolition of slavery became an important political agenda. Slavery was considered as an affront to human dignity.

114) The Universal Declaration of Human Rights (UDHR) recorded in the Preamble recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family as the foundation of freedom, justice and peace. It included freedom from fear and want as amongst the highest aspirations of the common people. This is of course subject to resources of each State. But the realisation is contemplated through national effort and international cooperation. Evidently, the UDHR adopts a substantive or communitarian concept of human dignity. The realisation of intrinsic worth of every human being, as a member of society through national efforts as an indispensable condition has been recognised as an important human right. Truly speaking, this is directed towards the deprived, downtrodden and have nots.

115) We, therefore, have to keep in mind humanistic concept of human dignity which is to be accorded to a particular segment of the society and, in fact, a large segment. Their human dignity is

based on the socio-economic rights that are read in to the fundamental rights, as already discussed above.

116) When we read socio-economic rights into human dignity, the community approach also assumes importance along with individualistic approach to human dignity. It has now been well recognised that at its core, human dignity contains three elements, namely, intrinsic value, autonomy and community value. These are known as core values of human dignity. These three elements can assist in structuring legal reasoning and justifying judicial choices in 'hard cases'. It has to be borne in mind that human dignity is a constitutional principle, rather than free standing fundamental rights. Insofar as intrinsic value is concerned, here human dignity is linked to the nature of being. We may give brief description of these three contents of the idea of human dignity as below:

(I) Intrinsic Value:

The uniqueness of human kind is the product of a combination of inherent traits and features – including intelligence, sensibility, and the ability to communicate – that give humans a special status in the world, distinct from other species.[48] The intrinsic value of all individuals results in two

48 See George Kateb, Human Dignity 5 (2011) ("[W]e can distinguish between the dignity of every

basic postulates: anti-utilitarian and anti-authoritarian. The former consists of the formulation of Kant's categorical imperative that every individual is an end in him or herself, not a means for collective goals or the purposes of others. The latter is synthesized in the idea that the State exists for the individual, not the other way around. As for its legal implications, intrinsic value is the origin of a set of fundamental rights. The first of these rights is the right to life, a basic precondition for the enjoyment of any other right. A second right directly related to the intrinsic value of each and every individual is equality before and under the law. All individuals are of equal value and, therefore, deserve equal respect and concern. This means not being discriminated against due to race, colour, ethnic or national origin, sex, age or mental capacity (the right to non-discrimination), as well as respect for cultural, religious, or linguistic diversity (the right to recognition). Human dignity fulfills only part of the content of the idea of equality, and in many situations it may be acceptable to differentiate among people. In the contemporary world, this is particularly at issue in cases involving affirmative action and the rights of religious minorities. Intrinsic value also leads to the right to integrity, both physical and mental. The right to physical

human individual and the dignity of the human species as a whole.").

integrity includes the prohibition of torture, slave labour, and degrading treatment or punishment. Discussions on life imprisonment, interrogation techniques, and prison conditions take place within the scope of this right. The right to mental integrity comprises the right to personal honour and image and includes the right to privacy.

(II) Autonomy:

Autonomy is the ethical element of human dignity. It is the foundation of the free will of individuals, which entitles them to pursue the ideals of living well and having a good life in their own ways. The central notion is that of self-determination: An autonomous person establishes the rules that will govern his or her life. Kantian conception of autonomy is the will governed by the moral law (moral autonomy). Here, we are concerned with personal autonomy, which is value neutral and means the free exercise of the will according to one's own values, interests, and desires. Autonomy requires the fulfillment of certain conditions, such as reason (the mental capacity to make informed decisions), independence (the absence of coercion, manipulation and severe want), and choice (the actual existence of alternatives). Autonomy, thus, is the ability to make personal decisions and choices in life based on one's conception of the good, without

undue external influences. As for its legal implications, autonomy underlies a set of fundamental rights associated with democratic constitutionalism, including basic freedoms (private autonomy) and the right of political participation (public autonomy).

It would be pertinent to emphasise here that with the rise of the welfare state, many countries in the world (and that includes India) also consider a fundamental right to minimum living conditions (the existential minimum) in the balancing that results into effective autonomy. Thus, there are three facets of autonomy, namely: private autonomy, public autonomy and the existential minimum. Insofar as the last component is concerned, it is also referred to as social minimum or the basic right to the provision of adequate living conditions has its roots in right to equality as well. In fact, equality, in a substantive sense, and especially autonomy (both private and public), are dependent on the fact that individuals are “free from want,” meaning that their essential needs are satisfied. To be free, equal, and capable of exercising responsible citizenship, individuals must pass minimum thresholds of well-being, without which autonomy is a mere fiction. This requires access to some essential utilities, such as basic education and health care services, as well as some elementary necessities, such as food, water, clothing, and

shelter. The existential minimum, therefore, is the core content of social and economic rights. This concept of minimum social right is protected by the Court, time and again.

(III) Community Value:

This element of human dignity as community value relates to the social dimension of dignity. The contours of human dignity are shaped by the relationship of the individual with others, as well as with the world around him. English poet John Donne expresses the same sentiments when he says 'no man is an island, entire of itself'[49]. The individual, thus, lives within himself, within a community, and within a state. His personal autonomy is constrained by the values, rights, and morals of people who are just as free and equal as him, as well as by coercive regulation. Robert Post identified three distinct forms of social order: community (a "shared world of common faith and fate"), management (the instrumental organization of social life through law to achieve specific objectives), and democracy (an arrangement that embodies the purpose of individual and collective self-determination. These three forms of social order presuppose and depend on each other, but are also in constant tension.

49 See John Donne, XVII. Mediation, in Devotions upon Emergent Occasions 107, 108-09 (Uyniv. Of Mich. Press 1959) (1624)

Dignity as a community value, therefore, emphasises the role of the state and community in establishing collective goals and restrictions on individual freedoms and rights on behalf of a certain idea of the good life. The relevant question here is in what circumstances and to what degree should these actions be regarded as legitimate in a constitutional democracy? The liberal predicament that the state must be neutral with regard to different conceptions of the good in a plural society is not incompatible, of course, with limitation resulting from the necessary coexistence of different views and potentially conflicting rights. Such interferences, however, must be justified on grounds of a legitimate idea of justice, an "overlapping consensus"[50] that can be shared by most individuals and groups. Whenever such tension arises, the task of balancing is to be achieved by the Courts.

We would like to highlight one more significant feature which the issues involved in the present case bring about. It is the balancing of two facets of dignity of the same individual. Whereas, on the one hand, right of personal autonomy is a part of dignity (and right to privacy), another part of dignity of the same individual is to lead a dignified life as well (which is again a

50 "Overlapping consensus" is a term coined by John Rawls that identifies basic ideas of justice that can be shared by supporters of different religious, political, and moral comprehensive doctrines.

facet of Article 21 of the Constitution). Therefore, in a scenario where the State is coming out with welfare schemes, which strive at giving dignified life in harmony with human dignity and in the process some aspect of autonomy is sacrificed, the balancing of the two becomes an important task which is to be achieved by the Courts. For, there cannot be undue intrusion into the autonomy on the pretext of conferment of economic benefits. Precisely, this very exercise of balancing is undertaken by the Court in resolving the complex issues raised in the petitions.

Doctrine of Proportionality:

117) As noted above, whenever challenge is laid to an action of the State on the ground that it violates the right to privacy, the action of the State is to be tested on the following parameters:

(a) the action must be sanctioned by law;

(b) the proposed action must be necessary in a democratic society for a legitimate aim; and

(c) the extent of such interference must be proportionate to the need for such interference.

118) Doctrine of proportionality was explained by the Constitution Bench judgment of this Court in *Modern Dental College and Research Centre & Ors.* v. *State of Madhya Pradesh & Ors.*[51]. In

51 (2016) 7 SCC 353

the first instance, therefore, it would be apt to reproduce the said discussion:

> "60. ...Thus, while examining as to whether the impugned provisions of the statute and rules amount to reasonable restrictions and are brought out in the interest of the general public, the exercise that is required to be undertaken is the balancing of fundamental right to carry on occupation on the one hand and the restrictions imposed on the other hand. This is what is known as "*doctrine of proportionality*". Jurisprudentially, "*proportionality*" can be defined as the set of rules determining the necessary and sufficient conditions for limitation of a constitutionally protected right by a law to be constitutionally permissible. According to Aharon Barak (former Chief Justice, Supreme Court of Israel), there are four sub-components of proportionality which need to be satisfied [Aharon Barak, *Proportionality: Constitutional Rights and Their Limitation* (Cambridge University Press 2012)], a limitation of a constitutional right will be constitutionally permissible if:
>
> (i) it is designated for a proper purpose;
>
> (ii) the measures undertaken to effectuate such a limitation are rationally connected to the fulfilment of that purpose;
>
> (iii) the measures undertaken are necessary in that there are no alternative measures that may similarly achieve that same purpose with a lesser degree of limitation; and finally
>
> (iv) there needs to be a proper relation ("*proportionality stricto sensu*" or "*balancing*") between the importance of achieving the proper purpose and the social importance of preventing the limitation on the constitutional right.
>
> 61. Modern theory of constitutional rights draws a fundamental distinction between the scope of the constitutional rights, and the extent of its protection. Insofar as the scope of constitutional rights is concerned, it marks the outer boundaries of the said rights and defines its contents. The extent of its protection prescribes the limitations on the exercises of the rights within its scope. In

that sense, it defines the justification for limitations that can be imposed on such a right.

62. It is now almost accepted that there are no absolute constitutional rights [Though, debate on this vexed issue still continues and some constitutional experts claim that there are certain rights, albeit very few, which can still be treated as "absolute". Examples given are:(*a*) Right to human dignity which is inviolable,(*b*) Right not to be subjected to torture or to inhuman or degrading treatment or punishment. Even in respect of such rights, there is a thinking that in larger public interest, the extent of their protection can be diminished. However, so far such attempts of the States have been thwarted by the judiciary.] and all such rights are related. As per the analysis of Aharon Barak [Aharon Barak, *Proportionality: Constitutional Rights and Their Limitation* (Cambridge University Press 2012).] , two key elements in developing the modern constitutional theory of recognising positive constitutional rights along with its limitations are the notions of democracy and the rule of law. Thus, the requirement of proportional limitations of constitutional rights by a sub-constitutional law i.e. the statute, is derived from an interpretation of the notion of democracy itself. Insofar as the Indian Constitution is concerned, democracy is treated as the basic feature of the Constitution and is specifically accorded a constitutional status that is recognised in the Preamble of the Constitution itself. It is also unerringly accepted that this notion of democracy includes human rights which is the cornerstone of Indian democracy. Once we accept the aforesaid theory (and there cannot be any denial thereof), as a fortiori, it has also to be accepted that democracy is based on a balance between constitutional rights and the public interests. In fact, such a provision in Article 19 itself on the one hand guarantees some certain freedoms in clause (1) of Article 19 and at the same time empowers the State to impose reasonable restrictions on those freedoms in public interest. This notion accepts the modern constitutional theory that the constitutional rights are related. This relativity means that a constitutional licence to limit those rights is granted where such a limitation will be justified to protect public interest or the rights of others. This phenomenon—of both the right and its limitation in the Constitution—exemplifies the inherent tension between democracy's two fundamental elements. On the one hand is the right's element, which constitutes a fundamental component of substantive democracy; on the

other hand is the people element, limiting those very rights through their representatives. These two constitute a fundamental component of the notion of democracy, though this time in its formal aspect. How can this tension be resolved? The answer is that this tension is not resolved by eliminating the "*losing*" facet from the Constitution. Rather, the tension is resolved by way of a proper balancing of the competing principles. This is one of the expressions of the multi-faceted nature of democracy. Indeed, the inherent tension between democracy's different facets is a "*constructive tension*". It enables each facet to develop while harmoniously coexisting with the others. The best way to achieve this peaceful coexistence is through balancing between the competing interests. Such balancing enables each facet to develop alongside the other facets, not in their place. This tension between the two fundamental aspects—rights on the one hand and its limitation on the other hand—is to be resolved by balancing the two so that they harmoniously coexist with each other. This balancing is to be done keeping in mind the relative social values of each competitive aspects when considered in proper context.

63. In this direction, the next question that arises is as to what criteria is to be adopted for a proper balance between the two facets viz. the rights and limitations imposed upon it by a statute. Here comes the concept of "*proportionality*", which is a proper criterion. To put it pithily, when a law limits a constitutional right, such a limitation is constitutional if it is proportional. The law imposing restrictions will be treated as proportional if it is meant to achieve a proper purpose, and if the measures taken to achieve such a purpose are rationally connected to the purpose, and such measures are necessary. This essence of doctrine of proportionality is beautifully captured by Dickson, C.J. of Canada in *R.* v. *Oakes* [*R.* v. *Oakes*, (1986) 1 SCR 103 (Can SC)] , in the following words (at p. 138):

> 'To establish that a limit is reasonable and demonstrably justified in a free and democratic society, two central criteria must be satisfied. First, the objective, which the measures, responsible for a limit on a Charter right or freedom are designed to serve, must be "of" sufficient importance to warrant overriding a constitutional protected right or freedom … Second … the party invoking Section 1 must show that the means chosen are reasonable and

> demonstrably justified. This involves "a form of proportionality test…" Although the nature of the proportionality test will vary depending on the circumstances, in each case courts will be required to balance the interests of society with those of individuals and groups. There are, in my view, three important components of a proportionality test. First, the measures adopted must be … rationally connected to the objective. Second, the means … should impair "as little as possible" the right or freedom in question … Third, there must be a proportionality between the effects of the measures which are responsible for limiting the Charter right or freedom, and the objective which has been identified as of "sufficient importance". The more severe the deleterious effects of a measure, the more important the objective must be if the measure is to be reasonable and demonstrably justified in a free and democratic society.'

64. The exercise which, therefore, is to be taken is to find out as to whether the limitation of constitutional rights is for a purpose that is reasonable and necessary in a democratic society and such an exercise involves the weighing up of competitive values, and ultimately an assessment based on proportionality i.e. balancing of different interests.

65. We may unhesitatingly remark that this doctrine of proportionality, explained hereinabove in brief, is enshrined in Article 19 itself when we read clause (1) along with clause (6) thereof. While defining as to what constitutes a reasonable restriction, this Court in a plethora of judgments has held that the expression "*reasonable restriction*" seeks to strike a balance between the freedom guaranteed by any of the sub-clauses of clause (1) of Article 19 and the social control permitted by any of the clauses (2) to (6). It is held that the expression "*reasonable*" connotes that the limitation imposed on a person in the enjoyment of the right should not be arbitrary or of an excessive nature beyond what is required in the interests of public. Further, in order to be reasonable, the restriction must have a reasonable relation to the object which the legislation seeks to achieve, and must not go in excess of that object (see *P.P. Enterprises* v. *Union of India*). At the same time, reasonableness of a restriction has to be determined in an objective manner and from the standpoint of the interests

> of the general public and not from the point of view of the persons upon whom the restrictions are imposed or upon abstract considerations (see *Mohd. Hanif Quareshi* v. *State of Bihar*). In *M.R.F. Ltd.* v. *State of Kerala*, this Court held that in examining the reasonableness of a statutory provision one has to keep in mind the following factors:
>
> (1) The directive principles of State policy.
>
> (2) Restrictions must not be arbitrary or of an excessive nature so as to go beyond the requirement of the interest of the general public.
>
> (3) In order to judge the reasonableness of the restrictions, no abstract or general pattern or a fixed principle can be laid down so as to be of universal application and the same will vary from case to case as also with regard to changing conditions, values of human life, social philosophy of the Constitution, prevailing conditions and the surrounding circumstances.
>
> (4) A just balance has to be struck between the restrictions imposed and the social control envisaged by Article 19(6).
>
> (5) Prevailing social values as also social needs which are intended to be satisfied by the restrictions.
>
> (6) There must be a direct and proximate nexus or reasonable connection between the restrictions imposed and the object sought to be achieved. If there is a direct nexus between the restrictions, and the object of the Act, then a strong presumption in favour of the constitutionality of the Act will naturally arise."
>
> (emphasis in original)

119) We may note at this stage that there is a growing awareness of the practical importance of the principle of proportionality for rights adjudication and it has sparked a wave of academic scholarship as well. The first integrates the doctrine of proportionality into a broader theoretical framework. It is

propounded by Robert Alexy, premised on the theory of rights as principles and optimisation requirements[52]. For Alexy, all norms are either rules or principles. Constitutional rights are principles, which means that they must be realised to the greatest extent factually and legally possible. For Alexy, the principle of proportionality follows logically from the nature of constitutional rights as principles. On the other hand, Mattias Kumm presented his theory of rights adjudication as Socratic contestation, with proportionality principle at its centre. As per Kumm, proportionality is the doctrinal tool which allows Judges to assess the reasonableness or plausibility, of a policy and thus to determine whether it survives Socratic contestation[53]. Recently, Kai Moller has proposed another theory, which is an autonomy-based theory of what he calls 'the global model of constitutional rights', at the core of which lies the obligation of the State to take the autonomy interests of every person adequately into account[54]. In this process, his understanding of autonomy leads to one consequence, viz., there will often be conflicts of autonomy interests, which have to be resolved in line with each agent's

52 Robert Alexy, A Theory of Constitutional Rights, (Oxford, Oxford University Press, 2002)

53 M Kumm, 'The Idea of Socratic Contestation and the Right to Justification: The Point and Purpose of Rights-Based Proportionality Review' (2010) 4 Law & Ethics of Human Rights 141; M Kumm, 'Institutionalising Socratic Contestation: The Rationalist Human Rights Paradigm, Legitimate Authority and the point of Judicial Review' (2007) 1 European Journal of Legal Studies.

54 K Moller, The Global Model of Constitutional Rights (Oxford, Oxford University Press, 2012).

status as an equal. Here, the proportionality principle becomes the doctrinal tool which guides Judges through the process of resolving those conflicts.

One thing is clear from the above, i.e. jurisprudential explanations of proportionality principle. There may be some differences about the approach on the application of proportionality doctrine, it is certain that proportionality has become the *lingua franca* of judicial systems across borders, concerning the circumstances under which it is appropriate to limit fundamental rights.

120) The proportionality test which is stated in the aforesaid judgment, accepting Justice Barak's conceptualisation, essentially takes the version which is used by the German Federal Constitutional Court and is also accepted by most theorists of proportionality. According to this test, a measure restricting a right must, first, serve a legitimate goal (legitimate goal stage); it must, secondly, be a suitable means of furthering this goal (suitability or rational connection stage); thirdly, there must not be any less restrictive but equally effective alternative (necessity stage); and fourthly, the measure must not have a disproportionate impact on the right-holder (balancing stage).

121) Many issues arise while undertaking the exercise of proportionality inquiry. At legitimate goal stage, question arises as to what does it mean to speak of the goal of a policy, and what does it mean to require a goal to be legitimate?[55] With regard to the suitability and necessity stages, some of the open issues are how to deal with empirical uncertainty: should this lead to wide-ranging deference to the elected branches?[56] At the balancing stage, we have to ask the question of what it means to say that a right is 'balanced' against a competing right or public interest. One remarkable feature of the German test is that it tends to push most of the important issues into the last stage, viz., the balancing stage. At the legitimate goal stage, any goal that is legitimate will be accepted. At the suitability stage, even a marginal contribution to the achievement of the goal will suffice. At the necessity stage, it is very rare for a policy to fail because less restrictive alternatives normally come with some disadvantage and cannot, therefore, be considered equally effective. Thus, the balancing stage dominates the legal analysis and is usually determinative of the outcome.

55 On this issue there is a detailed discussion in M Kumm, 'Political Liberalism and the Structure of Rights: On the Place and Limits of the Proportionality Requirement' in Pavlakos (ed), Law, Rights and Discourse: The Legal Philosophy of Robert Alexy (Oxford, Hart Publishing, 2007) 131; Moller, the Global Model of Constitutional Rights (Oxford, Oxford University Press, 2012) ch 7.

56 As a proposal of how to deal with uncertainty, see Alexy's 'Second Law of Balancing', which he proposes in the Postscript to A Theory of Constitutional Rights (Oxford, Oxford University Press, 2002).

122) In contrast, Canadian Supreme Court has chartered different course while using proportionality test. *R.* v. *Oakes*[57] (popularly known as Oakes test), has held that the objective must be 'of sufficient importance to warrant overriding a constitutionally protected right or freedom'; there must be a rational connection between measure and objective; the means must 'impair "as little as possible" the right or freedom in question'; and finally, 'there must be a proportionality between the effects of the measures which are responsible for limiting the Charter right or freedom, and the objective which has been identified as of "sufficient importance"'. Under this test, arguably more issues are addressed at the earlier stages. Instead of accepting any legitimate goal, *Oakes* requires a goal 'of sufficient importance to warrant overriding a constitutionally protected right or freedom'. And the minimal impairment test is different from the German necessity test both in the way in which it is formulated (there is no requirement that the less restrictive measure be equally effective) and in the way it is applied in practice: the Canadian Supreme Court tends to resolve cases at that stage and not, as the German Federal Constitutional Court, at the balancing stage.

123) There is a great debate as to which out of the aforesaid two

57 (1986) 1 SCR 103

approaches is a better approach. Some jurists are of the view that the proper application of the German test leads to a practice of constitutional review with two connected problems: first, as pointed about above, usually almost all the moral work is done at the balancing stage, arguably rendering the earlier stages largely useless and throwing doubt on the truth of the popular argument that proportionality is a valuable doctrine partly because it structures the analysis of rights issues in a meaningful way. Secondly, the balancing act at the final stage is often carried out in an impressionistic fashion which seems to be largely unguided by principle and thus opens the door for subjective, arbitrary and unpredictable judgments encroaching on what ought to be the proper domain of the democratic legislature. These concerns can, however, be addressed. According to Bilchitz[58], first concern can be addressed by focusing on the necessity stage of the test. He takes issue with both the German test – according to which almost all policies are necessary because any alternative policy will usually have some disadvantage which means that it cannot be considered equally effective – and the Canadian minimal impairment test – which, taken seriously, narrows down the range of constitutionally acceptable policies far too much: 'minimal

58 'Necessity and Proportionality: Towards A Balanced Approach?', Hart Publishing, Oxford and Portland, Oregon, 2016.

impairment' can be read as insisting that only one measure could pass constitutional scrutiny, namely the measure which impairs the right least.[59] So the alternatives seem to be either to construct the necessity (minimal impairment) test as filtering out almost nothing or to allow only one policy, thus rendering the elected branches partly superfluous. In order to preserve a meaningful but not unduly strict role for the necessity stage, Bilchitz proposes the following inquiry. First, a range of possible alternatives to the measure employed by the Government must be identified. Secondly, the effectiveness of these measures must be determined individually; the test here is not whether each respective measure realises the governmental objective to the same extent, but rather whether it realises it in a 'real and substantial manner'. Thirdly, the impact of the respective measures on the right at stake must be determined. Finally, an overall judgment must be made as to whether in light of the findings of the previous steps, there exists an alternative which is preferable; and this judgment will go beyond the strict means-ends assessment favoured by Grimm and the German version of the proportionality test; it will also require a form of balancing to

59 On the various problems which the Canadian Supreme Court created for itself because of its early unfortunate statements on proportionality see S Choudhry, 'So What Is the Real Legacy of Oakes? Two Decades of Proportionality Analysis under the Canadian Charter's Section 1' (2006) 34 Supreme Court Law Review 501.

be carried out at the necessity stage.

124) Insofar as second problem in German test is concerned, it can be taken care of by avoiding 'ad-hoc balancing' and instead proceeding on some 'bright-line rules' i.e. by doing the act of balancing on the basis of some established rule or by creating a sound rule. We may point out that whereas Chandrachud, J. has formulated the test of 'legitimate state interest', other two of the Judges, namely, Chelameswar and Sapre, JJ. have used the test of 'compelling state interest' and not 'legitimate state interest'. On the other hand, S.K. Kaul, J. has held that the test to be applied is whether the law satisfies 'public interest'. Nariman, J., on the other hand, pointed out that the Right to Information Act, 2005 has provided for personal information being disclosed to third parties subject to 'larger public interest' being satisfied. If this test is applied, the result is that one would be entitled to invoke 'large public interest' in lieu of 'legitimate state aim' or 'legitimate state interest', as a permissible restriction on a claim to privacy of an individual – a more lenient test. However, since judgment of Chandrachud, J. is on behalf of himself and three other Judges and S.K. Kaul, J. has also virtually adopted the same test, we can safely adopt the test of 'legitimate state interest' as the majority opinion, instead of applying the test of

'compelling state interest'.

125) In *Modern Dental College & Research Centre*, four sub components or proportionality which need to be satisfied were taken note of. These are:

(a) A measure restricting a right must have a legitimate goal (legitimate goal stage).

(b) It must be a suitable means of furthering this goal (suitability or rationale connection stage).

(c) There must not be any less restrictive but equally effective alternative (necessity stage).

(d) The measure must not have a disproportionate impact on the right holder (balancing stage).

126) This has been approved in *K.S. Puttaswamy* as well. Therefore, the aforesaid stages of proportionality can be looked into and discussed. Of course, while undertaking this exercise it has also to be seen that the legitimate goal must be of sufficient importance to warrant overriding a constitutionally protected right or freedom and also that such a right impairs freedom as little as possible. This Court, in its earlier judgments, applied German approach while applying proportionality test to the case at hand. We would like to proceed on that very basis which, however, is

tempered with more nuanced approach as suggested by Bilchitz. This, in fact, is the amalgam of German and Canadian approach. We feel that the stages, as mentioned in *Modern Dental College & Research Centre* and recapitulated above, would be the safe method in undertaking this exercise, with focus on the parameters as suggested by Bilchitz, as this projects an ideal approach that need to be adopted.

Issues:

127) After setting the tone of the case, it is now time to specify the precise issues which are involved that need to be decided in these matters:

(1) Whether the Aadhaar Project creates or has tendency to create surveillance state and is, thus, unconstitutional on this ground?

(a) What is the magnitude of protection that needs to be accorded to collection, storage and usage of biometric data?

(b) Whether the Aadhaar Act and Rules provide such protection, including in respect of data minimisation, purpose limitation, time period for data retention and data protection and security?

(2) Whether the Aadhaar Act violates right to privacy and is unconstitutional on this ground?
{This issue is considered in the context of Sections 7 and 8 of the Aadhaar Act. Incidental issue of 'Exclusion' is also considered here}

(3) Whether children can be brought within the sweep of Sections 7 and 8 of the Aadhaar Act?

(4) Whether the following provisions of the Aadhaar Act and Regulations suffer from the vice of unconstitutionality:

(i) Sections 2(c) and 2(d) read with Section 32
(ii) Section 2(h) read with Section 10 of CIDR
(iii) Section 2(l) read with Regulation 23
(iv) Section 2(v)
(v) Section 3
(vi) Section 5
(vii) Section 6
(viii) Section 8
(ix) Section 9
(x) Sections 11 to 23
(xi) Sections 23 and 54
(xii) Section 23(2)(g) read with Chapter VI & VII – Regulations 27 to 32
(xiii) Section 29
(xiv) Section 33
(xv) Section 47
(xvi) Section 48
(xvii) Section 57
(xviii) Section 59

(5) Whether the Aadhaar Act defies the concept of Limited Government, Good Governance and Constitutional Trust?

(6) Whether the Aadhaar Act could be passed as 'Money Bill' within the meaning of Article 110 of the Constitution?

(7) Whether Section 139AA of the Income Tax Act, 1961 is violative of right to privacy and is, therefore, unconstitutional?

(8) Whether Rule 9(a)(17) of the Prevention of Money Laundering (Maintenance of Records) Rules, 2005 and the notifications issued thereunder, which mandate linking of Aadhaar with bank accounts, are unconstitutional?

(9) Whether Circular dated March 23, 2017 issued by the Department of Telecommunications mandating linking of mobile number with Aadhaar is illegal and unconstitutional?

(10) Whether certain actions of the respondents are in contravention of the interim orders passed by the Court, if so, the effect thereof?

128) We now proceed to discuss the arguments on these grounds, as advanced by the petitioners, reply thereto and our conclusions thereupon.

Surveillance:

Whether the Aadhaar Project creates or has tendency to create surveillance state and is, thus, unconstitutional on this ground?

Education took us from thumb impression to signature
Technology has taken us from signature to thumb impression, again

129) It may be remarked at the outset that the argument of surveillance draws sustenance, to a larger extent, from privacy rights as well. Therefore, the arguments which were addressed under this caption have traces of privacy also. However, these are discussed in the context of surveillance state argument.

130) It was submitted that Aadhaar project creates the architecture of a 'cradle to grave' surveillance state and society. This means that it enables the State to profile citizens, track their movements, assess their habits and silently influence their behaviour throughout their lives. Over time, the profiling enables the State to stifle dissent and influence political decision making. The

architecture of the project comprises a Central Identities Data Repository which stores and maintains authentication transaction data. The authentication record comprises the time of authentication and the identity of the requesting entity. The UIDAI and the Authentication Service Agency (ASA) is permitted to store this authentication record for 2 + 5 years (as per Regulations 20 and 26/27 of the Authentication Regulations). Based on this architecture it is possible for the State to track down the location of the person seeking authentication. Since the requesting entity is also identified, the activity that the citizen is engaging in is also known. (Sections 2(d), 2(h), 8, 10, 32 of the Act read with Regulations 18, 20, 26 of the Aadhaar (Authentication) Regulation, 2016).

131) According to the petitioners, the Authority has the following information (according to the document on technical specification of Aadhaar registered devices published by the Authority in February 2017) – Aadhaar number, name of Aadhaar holder, whether authentication failed or was successful, reason for such failure, requesting entities' Internet Protocol (IP) address, date and time of authentication, device ID and its unique ID of authentication device which can be used to locate the individual.

132) Authentication of Aadhaar number enables tracking, tagging and profiling of individuals as the IP Address of the authentication device gives an idea of its geographical location (determinable within the range of 2 kilometres), country, city, region, pin code/zip code). Mr. Divan submits that an individual is on an electronic leash, tethered to a central data repository that has the architecture to track all activities of an individual. The Aadhaar Act creates a database of all Indian residents and citizens with their core biometric information, demographic information and meta data. In light of the enormous potential of information, concentration of information in a single entity, i.e., the Authority, enabling easier access to aggregated information puts the State in a position to wield enormous power. Given that with advancements in technology, such information can affect every aspect of an individual's personal, professional, religious and social life, such power is a threat to individual freedoms guaranteed under Articles 19(1)(a) to 19(1)(g) of the Constitution and other fundamental rights guaranteed under Article 21 (Right to informational privacy) and Article 25 of the Constitution. It was submitted that the Aadhaar Act treats the entire populace of the country as potential criminals ignoring the necessity to balance the State's mandate of protection against crime with the right to

personal bodily integrity which is envisaged under Article 21 read with Article 20(3) of the Constitution. It does not require the collection of data to have a nexus with a crime. Mr. Sibal submits that in the decision in *Selvi & Ors.* v. *State of Karnataka*[60], this Court has held:

> "The theory of interrelationship of rights mandates that the right against self-incrimination should also be read as a component of "personal liberty" under Article 21. Hence, our understanding of the "right to privacy" should account for its intersection with Article 20(3)"

133) It is argued that the Aadhaar Act, therefore, violates the right to protection from self-incrimination, and the right to privacy and personal dignity/bodily integrity under Article 20(3) and Article 21.

134) It was argued that the Constitution of India repudiates mass surveillance as enabled by Aadhaar and the project ought to be struck down on this ground alone. There is no question of balancing or justification in case of a surveillance architecture.

135) Passages from various judgments were quoted in an attempt to establish that surveillance causes interference with right to privacy, life and liberty. From *Kharak Singh v. State of U.P.*[61], dissenting opinion of Subba Rao, J. (which has been upheld in *K.S. Puttaswamy*) was relied upon. With respect to how

60 (2010) 7 SCC 263
61 (1964) 1 SCR 332

surveillance constricts right to life and liberty, His Lordship held that:

> “Now let us consider the scope of Article 21. The expression "life" used in that Article cannot be confined only to the taking away of life, i.e., causing death. In Munn v. Illinois (1), Field, J., defined "life" in the following words:
>
> > “Something more than mere animal existence. The inhibition against its deprivation extends to all those limbs and faculties by which life is enjoyed. The provision equally prohibits the mutilation of the body by the amputation of an arm or leg, or the putting out of an eye, or the destruction of any other organ of the body through which the soul communicates with the outer world. The expression '"liberty" is given a very wide meaning in America. It takes in all the freedoms. In Bolling v. Sharpe (2), the Supreme Court of America observed that the said expression was not confined to mere freedom from bodily restraint and that liberty under law extended to the full range of conduct which the individual was free to pursue. But this absolute right to liberty was regulated to protect other social interests by the State exercising its powers such as police power, the power of eminent domain, the power of taxation etc. The proper exercise of the power which is called the due process of law is controlled by the Supreme Court of America. In India the word "liberty" has been qualified by the word "Personal", indicating thereby that it is confined only to the liberty of the person. The other aspects of the liberty have been provided for in other Articles of the Constitution
> >
> > xx xx xx
> >
> > It is true our Constitution does not expressly declare a right to privacy as a fundamental right, but the said right is an essential ingredient of personal liberty. Every democratic country sanctifies domestic life; it is expected to give him rest, physical happiness, peace of mind and security. In the last resort, a person's house, where he lives with his family, is his “castle”; it is his rampart against encroachment on his personal liberty. The pregnant words of that famous Judge,

> Frankfurter J., in Wolf v. Colorado [[1949] 238 US 25] pointing out the importance of the security of one's privacy against arbitrary intrusion by the police, could have no less application to an Indian home as to an American one. If physical restraints on a person's movements affect his personal liberty, physical encroachments on his private life would affect it in a larger degree. Indeed, nothing is more deleterious to a man's physical happiness and health than a calculated interference with his privacy. We would, therefore, define the right of personal liberty in Article 21 as a right of an individual to be free from restrictions or encroachments on his person, whether those restrictions or encroachments are directly imposed or indirectly brought about by calculated measures.
>
> xx xx xx
>
> The freedom of movement in clause (d) of Article 19 therefore must be a movement in a free country i.e. in a country where he can do whatever he likes, speak to whomsoever he wants, meet people of his own choice without any apprehension, subject of course to the law of social control. The petitioner under the shadow of surveillance is certainly deprived of this freedom. He can move physically, but he cannot do so freely, for all his activities are watched and noted. The shroud of surveillance cast upon him perforce engender inhibitions in him and he cannot act freely as he would like to do. ”

136) In the case of *District Registrar and Collector, Hyderabad and Anr.* v. *Canara Bank and Ors.*[62]*,* this Court struck down provisions of a legislation on grounds that it was too intrusive of citizens' right to privacy. The case involved an evaluation of the Andhra Pradesh Stamp Act which authorized the collector to delegate “any person” to enter any premises in order to search for and

62 (2005) 1 SCC 496

impound any document that was found to be improperly stamped. After an exhaustive analysis of privacy laws across the world, and in India, the Court held that in the absence of any safeguards as to probable or reasonable cause or reasonable basis, this provision was violative of the constitutionally guaranteed right to privacy "both of the house and of the person". The Court held:

> "The A.P. amendment permits inspection being carried out by the Collector by having access to the documents which are in private custody i.e. custody other than that of a public officer. It is clear that this provision empowers invasion of the home of the person in whose possession the documents 'tending' to or leading to the various facts stated in sec. 73 are in existence and sec. 73 being one without any safeguards as to probable or reasonable cause or reasonable basis or materials violates the right to privacy both of the house and of the person. We have already referred to R. Rajagopal's case wherein the learned judges have held that the right to personal liberty also means the life free from encroachments unsustainable in law and such right flowing from Article 21 of the Constitution."

137) Reference was made to the U.S Supreme Court case of *U.S.* v. *Jones*[63] where the court held that installing a Global Positioning System (GPS) tracking device on a vehicle and using the device to monitor the vehicle's movements constitutes an unlawful search under the Fourth Amendment. Sotomayor, J. in her concurring judgment observed that Fourth Amendment search and seizure is not only concerned with physical trespassory intrusions on property but also non-physical violation of privacy

63 132 S.Ct. 945 (2012)

that society recognizes as reasonable. She notes that GPS data can reveal an entire profile of a person simply by knowing the places she visits and that the Government can mine this data in the future:

> "With increasing regularity, the Government will be capable of duplicating the monitoring undertaken in this case by enlisting factory or owner-installed vehicle tracking devises or GPS enabled smart-phones … In cases of electronic or other novel modes of surveillance that do not depend upon a physical invasion on property, the trespassory test may provide little guidance.
>
> xx xx xx
>
> GPS monitoring generates a precise, comprehensive record of a person's public movements that reflects a wealth of detail about her familial, political, professional, religious, and sexual associations … disclosed GPS data will be trips to the psychiatrist, plastic surgeon, abortion clinic, AIDS treatment centre, strip club, criminal defence attorney …
>
> Government can store such records and efficiently mine them for information years into the future… awareness that the government may be watching chills associational and expressive freedom … it may alter the relationship between citizen and government in a way that is inimical to democratic society.
>
> xx xx xx
>
> I would not assume that all information voluntarily disclosed to some member of the public for a limited purpose is, for that reason alone, disentitled to Fourth Amendment protection … ("Privacy is not a discrete commodity, possessed absolutely or not at all. Those who disclose certain facts to a bank or phone company for a limited business purpose need not assume that this information will be released to other persons for other purposes") ... ("[W]hat [a person] seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected")."

138) The judgment of the ECtHR in *Zakharov* v. *Russia*[64] was also referred to where the ECtHR examined an application claiming violation of Article 8 of the Convention (right to respect for private and family life) alleging that the mobile operators had permitted unrestricted interception of all telephone communications by the security services without prior judicial authorisation, under the prevailing national law. The Court observed that:

> "Mr Zakharov was entitled to claim to be a victim of a violation of the European Convention, even though he was unable to allege that he had been the subject of a concrete measure of surveillance. Given the secret nature of the surveillance measures provided for by the legislation, their broad scope (affecting all users of mobile telephone communications) and the lack of effective means to challenge them at national level… Russian law did not meet the "quality of law" requirement and was incapable of keeping the interception of communications to what was "necessary in a democratic society". There had accordingly been a violation of Article 8 of the Convention… existence of arbitrary and abusive surveillance practices, which appear to be due to inadequate safeguards provided by law".

139) The Court held that any interference with the right to privacy under Article 8 can only be justified under Article 8(2) if it is in accordance with law, pursues one or more legitimate aims and is necessary in a democratic society to achieve such aim. "In accordance with the law" requires the impugned measure both to have some basis in domestic law and to be compatible with the

64 (2015) Application No. 47143/2006

rule of law, which is expressly mentioned in the Preamble to the Convention and inherent in the object and purpose of Article 8. The law must, thus, meet quality requirements: it must be accessible to the person concerned and foreseeable as to its effects. With respect to foreseeability of surveillance, the court held:

> "Foreseeability in the special context of secret measures of surveillance, such as the interception of communications, cannot mean that an individual should be able to foresee when the authorities are likely to intercept his communications so that he can adapt his conduct accordingly. However, especially where a power vested in the executive is exercised in secret, the risks of arbitrariness are evident. It is therefore essential to have clear, detailed rules on interception of telephone conversations, especially as the technology available for use is continually becoming more sophisticated. The domestic law must be sufficiently clear to give citizens an adequate indication as to the circumstances in which and the conditions on which public authorities are empowered to resort to any such measures.
>
> xx xx xx
>
> Since the implementation in practice of measures of secret surveillance of communications is not open to scrutiny by the individuals concerned or the public at large, it would be contrary to the rule of law for the discretion granted to the executive or to a judge to be expressed in terms of an unfettered power. Consequently, the law must indicate the scope of any such discretion conferred on the competent authorities and the manner of its exercise with sufficient clarity to give the individual adequate protection against arbitrary interference."

140) The Court observed that the following minimum safeguards that should be set out in law in order to avoid abuses of power for

surveillance are: the nature of offences which may give rise to an interception order; a definition of the categories of people liable to have their telephones tapped; a limit on the duration of telephone tapping; the procedure to be followed for examining, using and storing the data obtained; the precautions to be taken when communicating the data to other parties; and the circumstances in which recordings may or must be erased or destroyed.

141) For establishing if the measures were "necessary in a democratic society" in pursuit of a legitimate aim, the Court observed:

> "When balancing the interest of the respondent State in protecting its national security through secret surveillance measures against the seriousness of the interference with an applicant's right to respect for his or her private life, the national authorities enjoy a certain margin of appreciation in choosing the means for achieving the legitimate aim of protecting national security. However, this margin is subject to European supervision embracing both legislation and decisions applying it. In view of the risk that a system of secret surveillance set up to protect national security may undermine or even destroy democracy under the cloak of defending it, the Court must be satisfied that there are adequate and effective guarantees against abuse. The assessment depends on all the circumstances of the case, such as the nature, scope and duration of the possible measures, the grounds required for ordering them, the authorities competent to authorise, carry out and supervise them, and the kind of remedy provided by the national law. The Court has to determine whether the procedures for supervising the ordering and implementation of the restrictive measures are such as to keep the "interference" to what is "necessary in a democratic society"."

142) Two other cases of violation of Article of the European

Convention of Human Rights were cited, namely *Digital Rights Ireland Ltd.* v. *Minister for Communication, Marine and Natural Resources*[65] and *S and Marper v. United Kingdom*[66]. In *Digital Ireland*, the European Parliament and the Council of the European Union adopted Directive 2006/24/EC (Directive), which regulated Internet Service Providers' storage of telecommunications data. It could be used to retain data generated or processed in connection with the provision of publicly available electronic communications services or of public communications network for the purpose of fighting serious crime in the European Union (EU). The data included data necessary to trace and identify the source of communication and its destination, to identify the date, time duration, type of communication, IP address, telephone number and other fields. The European Court of Justice (ECJ) evaluated the compatibility of the Directive with Articles 7 and 8 of the Charter of Fundamental Rights of the European Union and declared the Directive to be invalid. According to the ECJ, the Directive interfered with the right to respect for private life under Article 7 and with the right to the protection of personal data under Article 8. It allowed very precise conclusion to be drawn concerning the

65 [2014] All ER (D) 66 (Apr)
66 (2008) ECHR 1581

private lives of the persons whose data had been retained, such as habits of everyday life, permanent or temporary places of residence, daily and other movements, activities carried out, social relationships and so on. The invasion of right was not proportionate to the legitimate aim pursued.

143) In *S and Marper*, the storing of DNA profiles and cellular samples of any person arrested in the United Kingdom was challenged before the ECtHR. Even if the individual was never charged, if criminal proceedings were discontinued, or if the person was later acquitted of any crime, their DNA profile could nevertheless be kept permanently on record. It held that there had been a violation of Article 8 of the ECHR. Fingerprints, DNA profiles and cellular samples, constituted personal data and their retention was capable of affecting private life of an individual. Retention of such data without consent, thus, constitutes violation of Article 8 as they relate to identified and identifiable individuals. The Court held that invasion of privacy was not "necessary in a democratic society as it did not fulfill any pressing social need. The blanket and indiscriminate nature of retention of data was excessive and did not strike a balance between private and public interest.

144) The respondents, on the other hand, rebutted the arguments of

the petitioners that the architecture of the Aadhaar Act enables State surveillance. It was submitted that bare minimal information was obtained from the individual who enrolled for Aadhaar. Insofar as demographic information is concerned, it included name, date of birth, address, gender, mobile number and email address. The latter two are optional and meant for transmitting relevant information to the AMH and for One Time Password (OTP) based authentication. This information was in respect of an individual and is always in public domain. Section 2(k) of the Aadhaar Act specifically provides that regulations cannot include race, religion, caste, tribe, ethnicity, language, records of entitlement, income or medical history. Therefore, sensitive information specifically stands excluded. This specific exclusion, in the context, ensures that the scope of including additional demographic information is very narrow and limited. It was also argued that even the biometric information was limited to the fingerprints and iris scan, which is considered to be the core biometric information. Such information is, again, frequently utilised globally to ascertain the identity of a person. The argument was, thus, that the information gathered was non-invasive and non-intrusive identity information.

145) It was also argued that the very scheme of the Aadhaar and the manner in which it operates excludes every possibility of data profiling and, therefore, the question of State surveillance would not arise. The powerpoint presentation which was given by Dr. Pandey, as has been stated above, was referred to, on the basis of which it was argued that the Aadhaar design takes full care of security of persons.

146) It was also argued by the respondents that identity information data resides in the CIDR which is not in the control of the Government or the police force. The Authority is a body constituted as a body corporate having perpetual succession and a common seal. It is regulated by substantive and procedural checks to protect the identity information and authentication record. This information cannot be published, displayed or posted publicly. It does not have the authority to carry out surveillance. The State Governments and the police forces cannot obtain the information contained in the CIDR or the authentication records except in two situations contemplated by Section 33 – (i) When the District Judge orders so after giving an opportunity of hearing to the authority (even in this situation core biometric information will not be shared; and (ii) in the interest of National Security

where a Joint Secretary or a superior officer of the Government of India specially authorizes in this behalf, and in this case every direction is reviewed by an oversight committee chaired by the Cabinet Secretary. Further, this direction is limited for three months and extendable by a further period of 3 months.

147) It was submitted that surveillance, if at all, can only be carried out by unauthorised use of CIDR information, despite its statutory prohibition and punitive injunctions or by other means such as physical surveillance. That is, however, an illegal surveillance. The architecture of the Act does not allow surveillance. It was submitted that the petitioners have not made out a case of surveillance by the Authority but points out a mere possibility of surveillance.

148) We may reiterate that the argument of surveillance also has the reflections of privacy and in fact the argument is structured on the basis that the vital information which would be available with the Government can be utilised to create the profiling of individuals and retention of such information in the hands of the respondents is a risky affair which may enable the State to do the surveillance of any individual it wants.

149) Insofar as the aspect of privacy of individual is concerned, that

would be dealt with in detail while addressing that issue. To segregate issue of surveillance from privacy, we are focusing the discussion to the aspect whether there is sufficient data available with the respondents which may facilitate the profiling and misuse thereof or whether there are sufficient safeguards to ward off the same. In the process, we would be discussing the issues pertaining to data protection as well. At the same time, there would be some overlapping of discussion inasmuch as it will have to be seen as to the collection, storage and use of biometric data satisfies the proportionality principle.

150) It is clear that the argument of the petitioners is that on the basis of the data available with the Authority, there can be a profiling of an individual which may make the surveillance state. And such a mass surveillance is not permitted by the Constitution of India. The entire foofaraw about the Aadhaar architecture is the so-called enormous information that would be available to the Government on using Aadhaar card by residents. Two issues arise from the respective arguments of the parties:

(a) whether the architecture of the Aadhaar project enables the Sate to create a regime of surveillance?; and

(b) whether there are adequate provisions for data protection?

151) Insofar as issue (a) above is concerned, after going through the various aspects of the Aadhaar project, the provisions of the Aadhaar Act and the manner in which it operates, it is difficult to accept the argument of the petitioners. The respondents have explained that the enrolment and authentication processes are strongly regulated so that data is secure. The enrolment agency, which collects the biometric and demographic of the individuals during enrolment, is appointed either by UIDAI or by a Registrar [Section 2(s)]. The Registrars are appointed through MoUs or agreements for enrolment and are to abide by a code of conduct and processes, policies and guidelines issued by the Authority. They are responsible for the process of enrolment. Categories of persons eligible for appointment are limited by the Regulations. The agency employs a certified supervisor, an operator and a verifier under Enrolment and Update Regulations. Registrars and the enrolling agencies are obliged to use the software provided or authorized by UIDAI for enrolment purpose. The standard software has security features as specified by the Authority. All equipment used is as per the specification issued by the Authority. The Registrars are prohibited from using the information collected for any purpose other than uploading the information to CIDR. Sub-contracting of enrolment function is not

allowed. The Code of Conduct contains specific directions for following the confidentiality, privacy and security protocols and submission of periodic reports of enrolment. Not only there are directions prohibiting manipulation and fraudulent practices but the Act contains penal provisions for such violations in Chapter VII of the Regulations. The enrolment agencies are empanelled by the Authority. They are given an enrolling agency code using which the Registrar can onboard such agency to the CIDR. The enrolment data is uploaded to the Central Identities Data Repository (CIDR) certified equipment and software with a digital signature of the Registrar/enrolling agency. The data is encrypted immediately upon capture. The decryption key is with the UIDAI solely. Section 2(ze) of the Information Technology Act, 2000 (hereinafter referred to as the 'IT Act') which defines 'secure systems' and Section 2(w) of the Act, which defines 'intermediaries' apply to the process. Authentication only becomes available through the Authentication Service Agency (ASA). They are regulated by the Aadhaar (Authentication) Regulations, 2016. Their role and responsibilities are provided by Regulation 19 of the Authentication Regulations. They are to use certified devices. The equipment or software has to be duly registered with or approved or certified by the Authority/agency.

The systems and operations are audited by information system auditor. The requesting entities pass the encrypted data to the CIDR through the ASA and the response (Yes/No authentication or e-KYC information) also takes the same route back. The server of the ASA has to perform basic compliance and completeness checks on the authentication data packet before forwarding it to the CIDR. The Act prohibits sharing and disclosure of core biometric data under Section 8 and 29. Other identity information is shared with requesting entity (AUAs and KUAs) only for the limited purpose of authentication. The data is transferred from the requesting entity to the ASA to the CIDR in an encrypted manner through a leased line circuitry using secure Protocols (Regulation 9 of the Authentication Regulations). The storage of data templates is in safely located servers with no public internet inlet/outlet, and offline storage of original encrypted data (PID blocks). There are safety and security provisions such as audit by Information Systems Auditor. Requesting entities are appointed through agreement. They can enter into agreement with sub-AUA or sub-KUA with permission of the UIDAI. Whatever identity information is obtained by the requesting entity is based on a specific consent of the Aadhaar number holder. The e-KYC data shared with the requesting entity

can only be after prior consent of the Aadhaar holder. Such data cannot be shared and has to be stored in encrypted form. The biometric information used is not permitted to be stored. Only the logs of authentication transactions are maintained for a short period. Full identity information is never transmitted back to the requesting entity. There is a statutory bar from sharing biometric information (Section 29(1)(a)/Section 29(4)). Data centres of ASA, requesting entities and CIDR should be within the territory of India. There are various other provisions for monitoring, auditing, inspection, limits on data sharing, data protection, punishments etc., grievance redressal mechanism, suspension and termination of services, etc. so that all actions the entities involved in the process are regulated. Regulation 3(i) & (j) of Aadhaar (Data Security) Regulation, 2016 enables partitioning of CIDR network into zones based on risk and trust and other security measures. CIDR being a computer resource is notified to be a “Protected System” under Section 70 of the IT Act by the Central Government on December 11, 2015. Anyone trying to unlawfully gain access into this system is liable to be punished with 10 years imprisonment and fine. The storage involves end to end encryption, logical partitioning, firewalling and anonymisation of decrypted biometric data. Breaches of penalty are made

punitive by Chapter VII of the Act. Biometric information is deemed to be an “electronic record”, and “Sensitive personal data or information” under the IT Act. There are further guards under the Aadhaar (Data Security) Regulations, 2016.

152) That apart, we have recorded in detail the powerpoint presentation that was given by Dr. Ajay Bhushan Pandey, CEO of the Authority, which brings out the following salient features:

(a) During the enrolment process, minimal biometric data in the form of iris and fingerprints is collected. The Authority does not collect purpose, location or details of transaction. Thus, it is purpose blind. The information collected, as aforesaid, remains in silos. Merging of silos is prohibited. The requesting agency is provided answer only in ‘*Yes’* or ‘*No’* about the authentication of the person concerned. The authentication process is not exposed to the Internet world. Security measures, as per the provisions of Section 29(3) read with Section 38(g) as well as Regulation 17(1)(d) of the Authentication Regulations are strictly followed and adhered to.

(b) There are sufficient authentication security measures taken as well, as demonstrated in Slides 14, 28 and 29 of the presentation.

(c) The Authority has sufficient defence mechanism, as

explained in Slide 30. It has even taken appropriate protection measures as demonstrated in Slide 31.

(d) There is an oversight by Technology and Architecture Review Board (TARB) and Security Review Committee.

(e) During authentication no information about the nature of transaction etc. is obtained.

(f) The Authority has mandated use of Registered Devices (RD) for all authentication requests. With these, biometric data is signed within the device/RD service using the provider key to ensure it is indeed captured live. The device provider RD service encrypts the PID block before returning to the host application. This RD service encapsulates the biometric capture, signing and encryption of biometrics all within it. Therefore, introduction of RD in Aadhaar authentication system rules out any possibility of use of stored biometric and replay of biometrics captured from other source. Requesting entities are not legally allowed to store biometrics captured for Aadhaar authentication under Regulation 17(1)(a) of the Authentication Regulations.

(g) The Authority gets the AUA code, ASA code, unique device code, registered device code used for authentication. It does not get any information related to the IP address or the GPS location from where authentication is performed as these parameters are

not part of authentication (v2.0) and e-KYC (v2.1) API. The Authority would only know from which device the authentication has happened, through which AUA/ASA etc. It does not receive any information about at what location the authentication device is deployed, its IP address and its operator and the purpose of authentication. Further, the authority or any entity under its control is statutorily barred from collecting, keeping or maintaining any information about the purpose of authentication under Section 32(3) of the Aadhaar Act.

153) After going through the Aadhaar structure, as demonstrated by the respondents in the powerpoint presentation from the provisions of the Aadhaar Act and the machinery which the Authority has created for data protection, we are of the view that it is very difficult to create profile of a person simply on the basis of biometric and demographic information stored in CIDR. Insofar as authentication is concerned, the respondents rightly pointed out that there are sufficient safeguard mechanisms. To recapitulate, it was specifically submitted that there were security technologies in place (slide 28 of Dr. Pandey's presentation), 24/7 security monitoring, data leak prevention, vulnerability management programme and independent audits (slide 29) as

well as the Authority's defence mechanism (slide 30). It was further pointed out that the Authority has taken appropriate pro-active protection measures, which included disaster recovery plan, data backup and availability and media response plan (slide 31). The respondents also pointed out that all security principles are followed inasmuch as: (a) there is PKI-2048 encryption from the time of capture, meaning thereby, as soon as data is given at the time of enrolment, there is an end to end encryption thereof and it is transmitted to the Authority in encrypted form. The said encryption is almost foolproof and it is virtually impossible to decipher the same; (b) adoption of best-in-class security standards and practices; and (c) strong audit and traceability as well as fraud detection. Above all, there is an oversight of Technology and Architecture Review Board (TARB) and Security Review Committee. This Board and Committee consist of very high profiled officers. Therefore, the Act has endeavoured to provide safeguards[67].

67 We may also take on record responsible statements of the learned Attorney General and Mr. Dwivedi who appeared for UIDAI that no State would be interested in any mass surveillance of 1.2 Billion people of the country or even the overwhelming majority of officers and employees or professionals. The very idea of mass surveillance by State which pursues what an ANH does all the time and based on Aadhaar is an absurdity and an impossibility. According to them, the petitioners submission is based on too many imaginary possibilities, viz.:
(i) Aadhaar makes it possible for the State to obtain identity information of all ANH. It is possible that UIDAI would share identity information/authentication records in CIDR notwithstanding statutory prohibition and punitive injunctions in the Act. It is possible that the State would unleash its investigators to surveil a sizeable section of the ANH, if not all based on the authentication records. It is submitted that given the architecture of the Aadhaar Act, there are no such possibilities and in any event, submission based on imaginary possibility do not provide any basis for questioning the validity of Aadhaar Act. (ii) None of the writ petitions set forth specific facts and even allegations that any Aadhaar number holder is being subjected to

154) Issue (b) relates to data protection. According to the petitioners there is no data protection and there is a likelihood of misuse of data/personal information of the individuals.

155) The question to be determined is whether the safeguards provided for the protection of personal biometric data in the Aadhaar Act and Rules are sufficient. The crucial tasks that the Court needs to undertake are – (i) to discuss the significance of data in the world of technology and its impact; (ii) to determine the magnitude of protection that should be accorded to collection, storage and use of sensitive biometric data, so that they can qualify as proportionate; and (iii) to determine whether the Aadhaar Act and Rules provide such data protection, thereby obviating any possibility of surveillance.

(i) Significance of Data:

156) Alvin Toffler in his illuminating article titled *'What will our future be like?'* has presented mind boggling ideas. Toffler traces the transition – from agriculture society to industry society to knowledge based society. If we go back to the beginnings of time,

surveillance by UIDAI or the Union/States. The emphasis during the argument was only on the possibility of surveillance based on electronic track trails and authentication records. It was asserted that there are tools in the market for track back. The entire case was speculative and conjectural. In *Clapper, Director of National Intelligence* v. *Amnesty International USA*, the majority judgment did not approve the submissions in the context of Foreign Intelligence Surveillance Act and one of the reason was that the allegations were conjectural and speculative. There were no facts pleaded on the basis of which the asserted threat could be fairly traced to. However, we have not deliberated on this argument.

agriculture was the prime source and the entire mankind was based on agriculture. 350 years later with the invention of steam engines came the industrialized age and now what we are living through is the third gigantic wave, which is way more powerful than industrialized age. An age that is based on knowledge. Toffler emphasises that in today's society the only thing that leads to creation of wealth is knowledge. Unlike the past wherein economics was described as the science of the allocation of scarce resources, today we are primarily dependent on knowledge and that is not a scarce resource. Times are changing, we can no longer trust the straight line projection. His view is that we are going from a society which is more and more uniform to a highly de-massified society. Knowledge is power. We are in the era of information. Probably what Toffler is hinting is that access to this vast reservoir of information is available in digital world. Information is available online, at the touch of a button. With this, however, we usher into the regime of data.

157) In a recent speech by Mr. Benjamin Netanyahu, Prime Minister of Israel, while talking about innovation and entrepreneurship, he brought out an interesting phenomena in the world of free market principles, i.e. in the era of globalisation, in the following words:

> "Look at the ten leading companies in 2006, five energy companies, one IT company Microsoft and a mere ten years later, in 2016, a blink of an eye, in historical terms, its completely reversed, five IT companies one energy company left. The true wealth is in innovation - you know these companies - Apple, Google, Microsoft, Amazon, Facebook."

158) He adds by making a significant statement as the reason behind this change:

> "...there is a reason something is going on, it's a great change - you want to hear a jargan – it's a one sentence, this is a terrible sentence, but I have no other way to say, it's a confluence of big data, connectivity and artificial intelligence. Ok, you get that? You know what that does – it revolutionises old industries and it creates entirely new industries, so here is an old industry that Israel was always great in – Agriculture. We are always good in agriculture but now we have precision agriculture. You know what that is? See that drone in the sky is connected to a big database and there is sensor at the field and in the field there is drip irrigation and drip fertilization and now we can target with this technology the water that we give, the fertilizer that we give down to the individual plant that needs it. That's precision agriculture, that's Israel. Unbelievable."

159) This brings us to the world of data – big data. It has its own advantages of tremendous nature. It is making life of people easier. People can connect with each other even when they are located at places far away from each other. Not only they can converse with each other but can even see each other while talking. There is a wealth of information available on different networks to which they can easily access and satisfy their quest for knowledge within seconds by getting an answer. People can

move from one place to the other with the aid of Global Positioning System (GPS). They can hear music and watch movies on their handy gadgets, including smart cellphones. We are in the age of digital economy which has enabled multiple avenues for a common man. Internet access is becoming cheaper by the day, which can be accessed not only through the medium of desktop computers or laptops and even other handy gadgets like smart phones. Electronic transactions like online shopping, bill payments, movie/train/air ticket bookings, funds transfer, e-wallet payments, online banking and online insurance etc. are happening with extreme ease at the touch of a finger. Such tasks can be undertaken sitting in drawing rooms. Even while travelling from one place to the other in their car, they can indulge in all the aforesaid activities. In that sense, technology has made their life so easy.

160) However, there is another side to do as well, like any coin which has two sides. The use of such technologies is at the cost of giving away personal information, which is in the realm of privacy. In order to connect with such technologies and avail their benefits, the users are parting with their biometric information like fingerprints and iris as well as demographic information like their

names, parentage, family members, their age, even personal information like their sex, blood group or even the ailments they are suffering from. Not only this, use of aforesaid facilities on net or any portal like Apple, Google, Facebook etc. involves tracking their movements, including the nature of activities, like the kind of shopping, the places from where shopping is done, the actual money spent thereon, the nature of movies watched etc. All this data is there with the companies in respect of its users which may even turn into metadata. In fact, cases after cases are reported where such data of users is parted with various purposes. Interestingly, for using such facilities, people knowingly and willingly, are ready to part with their vital personal information. Every transaction on a digital platform is linked with some form of sensitive personal information. It can be an individual's user name, password, account number, PAN number, biometric details, e-mail ID, debit/credit card number, CVV number and transaction OTP etc.

161) These have raised concerns about the privacy and protection of data, which has become a matter of great concern. Problem is not limited to data localisation but has become extra-territorial. There are issues of cross-border transfers of personal data,

regulation whereof is again a big challenge with which various opinions are grappling. There are even talks of convergence of regulatory regime in this behalf so that uniform approach is adopted in providing a legal ecosystem to regulate cross-border data transfer. Asian Business Law Institute (ABLI), in collaboration with Singapore Academy of Law (SAL) has, after undertaking in-depth study, compiled 14 country reports in their respective jurisdictions on the regulation of cross-border data transfer and data localisation in Asia.

162) In the aforesaid scenario, interesting issue is posed by the respondents, viz., when so much personal information about people is already available in public domain, how can there be an expectancy of data privacy. That aspect is dealt with while discussing the issue of privacy. Here, we are concerned with data protection under Aadhaar that is available with the State. As pointed out above, even in respect of private players, the data protection has become a matter of serious concern. When it comes to the State or the instrumentality of the State, the matter has to be taken with all seriousness, on the touchstone of constitutionalism and the concept of limited Government.

(ii) Law on Data Protection:

163) In order to determine this aspect, i.e. the nature and magnitude of data protection that is required to enable legal collection and use of biometric data, reliance can be placed on – (a) various existing legislations – both in India and across the world; and (b) case law including the judgment in *K.S. Puttaswamy.*

(a) Legislation in India:

(i) *Information Technology Act, 2000*

The only existing legislation covering data protection related to biometric information are Section 43A and Section 72A of the IT Act and the Information Technology (Reasonable Security Practices and Procedures and Sensitive Personal Data or Information) Rules, 2011 (hereinafter "Sensitive Personal Data Rules"). Although the IT Act and Rules do not determine the constitutionality of use of biometric data and information by the Aadhaar Act and Rules, they are instructive in determining the safeguards that must be taken to collect biometric information[68].

164) Following are the provisions which cover biometric information under the IT Act:

Section 43A of the IT Act attaches liability to a body corporate, which is possessing, handling and dealing with any

68 A challenge to the Aadhaar project for violation of IT Act and Rules has been filed in the Delhi High Court in the matter of *Shamnad Basheer* v *UIDAI and Ors*. Therefore, we are not dealing with this aspect, nor does it arise for consideration in these proceedings.

‘sensitive personal information or data’ and is negligent in implementing and maintaining reasonable security practices resulting in wrongful loss or wrongful gain to any person. ‘Sensitive personal information or data’ is defined under Rule 3 of the Sensitive Personal Data Rules to include information relating to biometric data. Section 43A reads as follows:

> “**43A. Compensation for failure to protect data.** -Where a body corporate, possessing, dealing or handling any sensitive personal data or information in a computer resource which it owns, controls or operates, is negligent in implementing and maintaining reasonable security practices and procedures and thereby causes wrongful loss or wrongful gain to any person, such body corporate shall be liable to pay damages by way of compensation to the person so affected.
> Explanation. -For the purposes of this section,-
>
> (i) "body corporate" means any company and includes a firm, sole proprietorship or other association of individuals engaged in commercial or professional activities;
>
> (ii) "reasonable security practices and procedures" means security practices and procedures designed to protect such information from unauthorised access, damage, use, modification, disclosure or impairment, as may be specified in an agreement between the parties or as may be specified in any law for the time being in force and in the absence of such agreement or any law, such reasonable security practices and procedures, as may be prescribed by the Central Government in consultation with such professional bodies or associations as it may deem fit;
>
> (iii) "sensitive personal data or information" means such personal information as may be prescribed by the Central Government in consultation with such professional bodies or associations as it may deem fit.]”

165) Similarly, Section 72A of the IT Act makes intentional disclosure of ‘personal information’ obtained under a contract, without consent of the parties concerned and in breach of a lawful contract, punishable with imprisonment and fine. Rule 2(i) of the Sensitive Personal Data Rules define "personal information" to mean any information that relates to a natural person, which, either directly or indirectly, in combination with other information available or likely to be available with a body corporate, is capable of identifying such person. Thus, biometrics will form a part of “personal information”. The Section reads as under-

> “**72A. Punishment for disclosure of information in breach of lawful contract** - Save as otherwise provided in this Act or any other law for the time being in force, any person including an intermediary who, while providing services under the terms of lawful contract, has secured access to any material containing personal information about another person, with the intent to cause or knowing that he is likely to cause wrongful loss or wrongful gain discloses, without the consent of the person concerned, or in breach of a lawful contract, such material to any other person, shall be punished with imprisonment for a term which may extend to three years, or with fine which may extend to five lakh rupees, or with both.”

166) The Sensitive Personal Data Rules provide for additional requirements on commercial and business entities (body corporates as defined under Section 43A of the IT Act) relating to the collection and disclosure of sensitive personal data (including biometric information). The crucial requirements, which are

indicative of the principles for data protection that India adheres to, *inter alia* include:

(i) The body corporate or any person who on behalf of body corporate collects, receives, possesses, stores, deals or handle information of provider of information, shall provide a privacy policy for handling of or dealing in personal information including sensitive personal data or information and ensure that the same are available for view.

(ii) Body corporate or any person on its behalf shall obtain consent in writing from the provider of the sensitive personal data or information regarding purpose of usage before collection of such information.

(iii) Body corporate or any person on its behalf shall not collect sensitive personal data or information unless — (a) the information is collected for a lawful purpose connected with a function or activity of the body corporate or any person on its behalf; and (b) the collection of the sensitive personal data or information is considered necessary for that purpose

(iv) The person concerned has the knowledge of — (a) the fact that the information is being collected; (b) the purpose for which the information is being collected; (c) the intended recipients of the information; and (d) name and address of the agency

collecting and retaining the information.

(v) Body corporate or any person on its behalf holding sensitive personal data or information shall not retain that information for longer than is required for the purposes for which the information may lawfully be used or is otherwise required under any other law for the time being in force.

(vi) Information collected shall be used for the purpose for which it has been collected.

(vii) Body corporate or any person on its behalf shall, prior to the collection of information, including sensitive personal data or information, provide an option to the provider of the information to not to provide the data or information sought to be collected.

(viii) Body corporate shall address any discrepancies and grievances of their provider of the information with respect to processing of information in a time bound manner.

(ix) Disclosure of sensitive personal data or information by body corporate to any third party shall require prior permission from the provider of such information, who has provided such information under lawful contract or otherwise, unless such disclosure has been agreed to in the contract between the body corporate and provider of information, or where the disclosure is necessary for compliance of a legal obligation.

(x) A body corporate or a person on its behalf shall comply with reasonable security practices and procedure i.e. implement such security practices and standards and have a comprehensive documented information security programme and information security policies that contain managerial, technical, operational and physical security control measures that are commensurate with the information assets being protected with the nature of business. In the event of an information security breach, the body corporate or a person on its behalf shall be required to demonstrate, as and when called upon to do so by the agency mandated under the law, that they have implemented security control measures as per their documented information security programme and information security policies.

The above substantive and procedural safeguards are required for legal collection, storage and use of biometric information under the IT Act. They indicate the rigour with which such processes need to be carried out.

Position in other countries:

(a) *EUGDPR (European Union General Data Protection Regulation)*[69]

69 Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation)

EUGDPR which was enacted by the EU in 2016 came into force on May 25, 2018 replacing the Data Protection Directive of 1995. It is an exhaustive and comprehensive legal framework that is aimed at protection of natural persons from the processing of personal data and their right to informational privacy. It deals with all kinds of processing of personal data while delineating rights of data subjects and obligations of data processors in detail. The following fundamental principles of data collection, processing, storage and use reflect the proportionality principle underpinning the EUGDPR -

(i) the personal data shall be processed lawfully, fairly, and in a transparent manner in relation to the data subject *(principle of lawfulness, fairness, and transparency);*

(ii) the personal data must be collected for specified, explicit, and legitimate purposes *(principle of purpose limitation);*

(iii) processing must also be adequate, relevant, and limited to what is necessary *(principle of data minimization)* as well as accurate and, where necessary, kept up to date *(principle of accuracy);*

(iv) data is to be kept in a form that permits identification of data subjects for no longer than is necessary for the purposes for

which the personal data are processed *(principle of storage limitation);*

(v) data processing must be secure *(principle of integrity and confidentiality*); and

(vi) data controller is to be held responsible *(principle of accountability).*

167) The EUGDPR under Article 9 prohibits the collection of biometric data unless except in few circumstances which include (but are not limited to) -

(a) there is an explicit consent by the party whose data is being collected. The consent should be freely given, which is clearly distinguishable in an intelligible and easily accessible form, using clear and plain language. This consent can be withdrawn at any time without affecting the actions prior to the withdrawal;

(b) processing is necessary for the purposes of carrying out the obligations and exercising specific rights of the controller or of the data subject in the field of employment and social security and social protection law;

(c) processing relates to personal data which is manifestly made public by the data subject; and

(d) processing is necessary for reasons of substantial public

interest, and it shall be proportionate to the aim pursued, respect the essence of the right to data protection and provide for suitable and specific measures to safeguard the fundamental rights and the interests of the data subject.

168) The Regulation also institutes rights of the data subject (the person whose data is collected), subject to exceptions, which include the data subject's right of access to information about the purpose of collection of data, details of data controller and subsequent use and transfer of data, the data subject's right to rectification of data, right to erasure or right to be forgotten, the data subject's right to restriction of processing, the right to be informed, the right to data portability and the data subject's right to object to illegitimate use of data.

(b) Biometric Privacy Act in the United States of America

169) Some States in the United States of America have laws regulating collection and use of biometric information. Illinois has passed Biometric Information Privacy Act (740 ILCS 14/1 or BIPA) in 2008. Texas has also codified the law for capture of use of biometric identifier (Tex. Bus. & Com. Code Ann. §503.001) in 2009. The Governor of the Washington State signed into law House Bill 1493 ("H.B. 1493") on May 16, 2017, which sets forth

requirements for businesses who collect and use biometric identifiers for commercial purposes. BIPA, Illinois, for example makes it unlawful for private entities to collect, store, or use biometric information, such as retina/iris scans, voice scans, face scans, or fingerprints, without first obtaining individual consent for such activities. BIPA also requires that covered entities take specific precautions to secure the information.

(b) Case Laws:

170) In *K.S. Puttaswamy's* judgment*, a*ll the Judges highlighted the importance of informational privacy in the age of easy access, transfer, storage and mining of data. The means of aggregation and analysis of data of individuals through various tools are explained. Chandrachud, J. observed that with the increasing ubiquity of electronic devices, information can be accessed, stored and disseminated without notice to the individual. Metadata and data mining make the individual's personal information subject to private companies and the state. In this background, His Lordship discusses the necessity of a data protection regime for safeguarding privacy and protecting the autonomy of the individual. The following observations in the conclusion of the judgment are worth quoting:

> "328. Informational privacy is a facet of the right to privacy. The dangers to privacy in an age of information can originate not only from the state but from non-state actors as well. We commend to the Union Government the need to examine and put into place a robust regime for data protection. The creation of such a regime requires a careful and sensitive balance between individual interests and legitimate concerns of the state. The legitimate aims of the state would include for instance protecting national security, preventing and investigating crime, encouraging innovation and the spread of knowledge, and preventing the dissipation of social welfare benefits. These are matters of policy to be considered by the Union government while designing a carefully structured regime for the protection of the data. Since the Union government has informed the Court that it has constituted a Committee chaired by Hon'ble Shri Justice B N Srikrishna, former Judge of this Court, for that purpose, the matter shall be dealt with appropriately by the Union government having due regard to what has been set out in this judgment."

171) S.K. Kaul, J. cited the *European Union General Data Protection Regulations*[70] to highlight the importance of data protection and the circumstances in which restrictions on the right to privacy may be justifiable subject to the principle of proportionality. These include balance against other fundamental rights, legitimate national security interest, public interest including scientific or historical research purposes or statistical purposes, criminal offences, tax purposes, etc.

172) There are numerous case laws – both American and European – presented by the petitioners and the respondents with respect to

70 Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation)

the collection, storage and use of biometric data which have been taken note of above. They are illustrative of the method and safeguards required to satisfy the proportionality principle while dealing with biometric data. The first set of cases cited by the petitioners are cases from European Human Rights Courts.

173) The European Human Rights legislations have both explicitly and through case laws recognized the right to informational privacy and data protection. The EU Charter of Fundamental Rights states in Article 7 that 'everyone has the right to respect for his or her private and family life, home and communications' and in Article 8 it grants a fundamental right to protection of personal data. The first article of the EU Charter affirms the right to respect and protection of human dignity. The ECHR also recognises the right to respect for private and family life, home and his correspondence which have been read to include protection of right to control over personal biometric information.

174) As pointed out above as well, a prominent case which addresses the question of storage of biometric data, i.e. whether storage and retention of DNA samples and fingerprints violates Article 8 of the ECHR, is *S and Marper*[71]. In this case, the storing of DNA

71 *S and Marper v. United Kingdom [2008] ECHR 1581*

profiles and cellular samples of any person arrested in the United Kingdom was challenged before the ECtHR. Even if the individual was never charged or if criminal proceedings were discontinued or if the person was later acquitted of any crime, their DNA profile could nevertheless be kept permanently on record without their consent.

175) In a unanimous verdict, the seventeen-judge bench held that there had been a violation of Article 8 of the ECHR. Fingerprints, DNA profiles and cellular samples, constituted personal data and their retention was capable of affecting private life of an individual. The retention of such data without consent, thus, constitutes violation of Article 8 as they relate to identified and identifiable individuals. It held that:

> "84. …fingerprints objectively contain unique information about the individual concerned allowing his or her identification with precision in a wide range of circumstances. They are thus capable of affecting his or her private life and retention of this information without the consent of the individual concerned cannot be regarded as neutral or insignificant."

176) It articulated the proportionality principle in the following words:

> "101. An interference will be considered "necessary in a democratic society" for a legitimate aim if it answers a "pressing social need" and, in particular, if it is proportionate to the legitimate aim pursued and if the reasons adduced by the national authorities to justify it are "relevant and sufficient

xx xx xx

> The protection of personal data is of fundamental importance to a person's enjoyment of his or her right to respect for private and family life, as guaranteed by Article 8 of the Convention. The domestic law must afford appropriate safeguards to prevent any such use of personal data as may be inconsistent with the guarantees of this Article. The need for such safeguards is all the greater where the protection of personal data undergoing automatic processing is concerned, not least when such data are used for police purposes. The domestic law should notably ensure that such data are relevant and not excessive in relation to the purposes for which they are stored; and preserved in a form which permits identification of the data subjects for no longer than is required for the purpose for which those data are stored … The domestic law must also afford adequate guarantees that retained personal data was efficiently protected from misuse and abuse."

177) The issue in the case according to the Court was whether the retention of the fingerprints and DNA data of the applicants, as persons who had been suspected but not convicted of certain criminal offences, was justified under Article 8 of the Convention.

178) The Court held that such invasion of privacy was not proportionate as it was not "necessary in a democratic society" as it did not fulfill any pressing social need. The blanket and indiscriminate nature of retention of data was excessive and did not strike a balance between private and public interest. It held:

> "125. the blanket and indiscriminate nature of the powers of retention of the fingerprints, cellular samples and DNA profiles of persons suspected but not convicted of offences, as applied in the case of the present applicants, fails to strike a fair balance between the competing public and

> private interests and that the respondent State has overstepped any acceptable margin of appreciation in this regard. Accordingly, the retention at issue constitutes a disproportionate interference with the applicants' right to respect for private life and cannot be regarded as necessary in a democratic society. This conclusion obviates the need for the Court to consider the applicants' criticism regarding the adequacy of certain particular safeguards, such as too broad an access to the personal data concerned and insufficient protection against the misuse or abuse of such data."

179) The two crucial aspects of the case that need to be kept in mind are – First, in that case, the fingerprints were collected for criminal purposes and without the consent of the individual to whom the fingerprints belonged. Second, the fingerprints were to be stored indefinitely without the consent of the individual and that the individual did not have an option to seek deletion. These aspects were vital for the Court to decide that the retention violated the citizen's right to privacy.

180) Similarly, in the *Digital Ireland* case[72], the European Parliament and the Council of the European Union adopted Directive 2006/24/EC (Directive), which regulated Internet Service Providers' storage of telecommunications data. It could be used to retain data which was generated or processed in connection with the provision of publicly available electronic communications services or of public communications network, for the purpose of

72 *Digital Rights Ireland Ltd v Minister for Communication, Marine and Natural Resources* [2014] All ER (D) 66 (Apr)

fighting serious crime in the European Union. The data included data necessary to trace and identify the source of communication and its destination, to identify the date, time duration, type of communication, IP address, telephone number and other fields. The Court of Justice of European Court (CJEU) evaluated the compatibility of the Directive with Articles 7 and 8 of the Charter and declared the Directive to be invalid.

181) According to the CJEU, the Directive interfered with the right to respect for private life under Article 7 and with the right to the protection of personal data under Article 8 of the Charter of Fundamental Rights of the European Union. It allowed very precise conclusion to be drawn concerning the private lives of the persons whose data had been retained, such as habits of everyday life, permanent or temporary places of residence, daily and other movements, activities carried out, social relationships and so on. The invasion of right was not proportionate to the legitimate aim pursued for the following reasons:

(i) Absence of limitation of data retention pertaining to a particular time period and/or a particular geographical zone and/or to a circle of particular persons likely to be involved.

(ii) Absence of objective criterion, substantive and procedural

conditions to determine the limits of access of the competent national authorities to the data and their subsequent use for the purposes of prevention, detection or criminal prosecutions. There was no prior review carried out by a court or by an independent administrative body whose decision sought to limit access to the data and their use to what is strictly necessary for attaining the objective pursued.

(iii) Absence of distinction being made between the categories of data collected based on their possible usefulness.

(iv) Period of retention i.e. 6 months was very long being not based on an objective criterion.

(v) Absence of rules to protect data retained against the risk of abuse and against any unlawful access and use of that data.

(vi) Directive does not require the data in question to be retained within the European Union.

182) In *Tele2 Sverige AB* vs. *Post-och telestyrelsen*[73], the CJEU was seized with the issue as to whether in light of *Digital Rights Ireland*, a national law which required a provider of electronic communications services to retain meta-data (name, address, telephone number and IP address) regarding users/subscribers for the purpose of fighting crime was contrary to Article 7, 8 and

73 Tele2 Sverige AB v. Post-och telestyrelsen and Secretary of State for the Home Department v. Tom Watson, Peter Brice, Geoffrey Lewis, Joined Cases C-203/15 and C-698/15, 2016

11 of the EU Charter. The CJEU struck down the provision allowing collection of such meta data on grounds of lack of purpose limitation, data differentiation, data protection, prior review by a court or administrative authority and consent, amongst other grounds. It held:

> "103. While the effectiveness of the fight against serious crime, in particular organised crime and terrorism (…) cannot in itself justify that national legislation providing for the general and indiscriminate retention of all traffic and location data should be considered to be necessary for the purposes of that fight.
>
> xx xx xx
>
> 105. Second, national legislation (…) provides for no differentiation, limitation or exception according to the objective pursued. It is comprehensive in that it affects all persons using electronic communication services, even though those persons are not, even indirectly, in a situation that is liable to give rise to criminal proceedings. It therefore applies even to persons for whom there is no evidence capable of suggesting that their conduct might have a link, even an indirect or remote one, with serious criminal offences. Further, it does not provide for any exception, and consequently it applies even to persons whose communications are subject, according to rules of national law, to the obligation of professional secrecy.
>
> xx xx xx
>
> if it is to be ensured that data retention is limited to what is strictly necessary, it must be observed that, while those conditions may vary according to the nature of the measures taken for the purposes of prevention, investigation, detection and prosecution of serious crime, the retention of data must continue nonetheless to meet objective criteria, that establish a connection between the data to be retained and the objective pursued. In particular, such conditions must be shown to be such as actually to circumscribe, in practice, the extent of that measure and, thus, the public affected."

183) With respect to measures for data security and data protection the court held :

> "122. Those provisions require those providers to take appropriate technical and organisational measures to ensure the effective protection of retained data against risks of misuse and against any unlawful access to that data. Given the quantity of retained data, the sensitivity of that data and the risk of unlawful access to it, the providers of electronic communications services must, in order to ensure the full integrity and confidentiality of that data, guarantee a particularly high level of protection and security by means of appropriate technical and organisational measures. In particular, the national legislation must make provision for the data to be retained within the European Union and for the irreversible destruction of the data at the end of the data retention period."

184) In *BVerfG*[74], the German Constitutional Court rendered on March 02, 2010 a decision by which provisions of the data retention legislation adopted for, *inter alia*, the prevention of crime were rendered void because of lack of criteria for rendering the data retention proportional.

185) In *Maximillian Schrems* v. *Data Protection Commissioner*[75], the CJEU struck down the transatlantic US-EU Safe Harbor agreement that enabled companies to transfer data from Europe to the United States on the ground that there was not an adequate level of safeguard to protect the data. It held that the

74 2.03. 2010, 1 BvR 256 / 08 , 1 BvR 263 / 08 , 1 BvR 586 / 08
75 [2016] 2 W.L.R. 873

U.S. authorities could access the data beyond what was strictly necessary and proportionate to the protection of national security. The subject had no administrative or judicial means of accessing, rectifying or erasing their data.

186) In *Szabo and Vissy* v. *Hungary*[76], the ECtHR held unanimously that there had been a violation of Article 8 (right to respect for private and family life, the home and correspondence) of the European Convention on Human Rights. The case concerned Hungarian legislation on secret anti-terrorist surveillance introduced in 2011. The court held that the legislation in question did not have sufficient safeguards to avoid abuse. Notably, the scope of the measures could include virtually anyone in Hungary, with new technologies enabling the Government to intercept masses of data easily concerning even persons outside the original range of operation. Furthermore, the ordering of such measures was taking place entirely within the realm of the executive and without an assessment of whether interception of communications was strictly necessary. There were no effective remedial measures in place, let alone judicial ones. The court held:

> "77. … Rule of law implies, inter alia, that an interference by the executive authorities with an individual right should

76 Eur. Ct. H.R. 2016

be subject to an effective control which should normally be assured by the judiciary, at least in the last resort…"

187) Thus, it is evident from various case laws cited above, that data collection, usage and storage (including biometric data) in Europe requires adherence to the principles of consent, purpose and storage limitation, data differentiation, data exception, data minimization, substantive and procedural fairness and safeguards, transparency, data protection and security. Only by such strict observance of the above principles can the State successfully discharge the burden of proportionality while affecting the privacy rights of its citizens.

188) The jurisprudence with respect to collection, use and retention of biometric information in the United States differs from the EU. In the US context, there is no comprehensive data protection regime. This is because of the federal system of American government, there are multiple levels of law enforcement—federal, state, and local. Different states have differing standards for informational privacy. Moreover, the U.S. has a sectoral approach to privacy, i.e. laws and regulations related to data differ in different sectors such as health sector or student sector. In most cases, however, the Fourth Amendment which prohibits "unreasonable searches and seizures" by the

government has been read by courts to envisage various levels data protection.

189) At this juncture, we are not entering the debate as to whether the jurisprudence developed in United States is to be preferred or E.U. approach would be more suitable. Fact remains that importance to data protection in processing the data of the citizens is an accepted norm.

190) Observance of this fundamental principle is necessary to prevent a disproportionate infringement of the Fundamental Right of Privacy of a citizen. The question which now needs to be addressed is whether the Aadhaar Act and Rules incorporate these principles of data protection. We have already taken note of the provisions in the Act, which relate to data protection. However, a detailed analysis of the provisions of the Act needs to be undertaken for this purpose having regard to the principles that have emerged from case law in other jurisdiction and noted in paragraph 187 above.

Data Minimisation:

191) The petitioners have argued that the Act enables data collection indiscriminately regarding all aspects of a person (biometrics,

demographic details, authentication records, meta-data related to transaction) even though such data has no nexus to the purported object of subsidies, thus violating the principle of *data minimization.* The data collected is sufficient to indicate religion, class, social status, income, education and intimate personal details. Under Section 32 of the Act, authentication records are stored in the central database in the manner prescribed under the Regulations. Regulation 26 of the Authentication Regulations requires UIDAI to store "authentication transaction data" consisting of: (a) authentication request data received including PID block; (b) authentication response data sent; (c) meta data related to the transaction; and (d) any authentication server side configurations as necessary. The authentication record affords access to information that can be used and analyzed to systematically track or profile an individual and her activities.

192) As per the respondents, Aadhaar involves minimal identity information for effective authentication. Four types of information collected for providing Aadhaar:

(i) Mandatory demographic information comprising name, date of birth, address and gender [Section 2(k) read with Regulation 4(1) of the Aadhaar (Enrolment and Update) Regulations, 2016];

(ii) Optional demographic information [Section 2(k) read with

Regulation 4(2) of the Aadhaar (Enrolment and Update) Regulations, 2016];

(iii) Non-core biometric information comprising photograph;

(iv) Core biometric information comprising finger print and iris scan.

193) Demographic information, both mandatory and optional, and photographs does not raise a reasonable expectation of privacy under Article 21 unless under special circumstances such as juveniles in conflict of law or a rape victim's identity. Today, all global ID cards contain photographs for identification alongwith address, date of birth, gender etc. The demographic information is readily provided by individuals globally for disclosing identity while relating with others and while seeking benefits whether provided by government or by private entities, be it registration for citizenship, elections, passports, marriage or enrolment in educational institutions. Email ids and phone numbers are also available in public domain, For example in telephone directories. Aadhaar Act only uses demographic information which are not sensitive and where no reasonable expectation of privacy exists - name, date of birth, address, gender, mobile number and e mail address. Section 2(k) specifically provides that Regulations

cannot include race, religion, caste, tribe, ethnicity, language, records of entitlement, income or medical history. Thus, sensitive information specifically stand excluded.

194) We find that Section 32 (3) of the Aadhaar Act specifically prohibits the authority from collecting, storing or maintaining, either directly or indirectly any information about the purpose of authentication. The proviso to Regulation 26 of Authentication Regulations is also to the same effect.

195) Thus, the principle of data minimization is largely followed.

196) With this, we advert to some other provisions, challenge whereof is based on threat to security of the data. These are Section 2(c), Section 2(g) and Section 2(h) read with Section 10 of the Aadhaar Act. Section 2(c) pertains to authentication. It is a process by which Aadhaar number along with demographic information or biometric information of an individual is submitted to the CIDR for its verification. On submission thereof, the CIDR verifies the correctness or lack of it. CIDR is defined in Section 2(h). Section 10 lays down that the Authority may engage one or more entities to establish or maintain the CIDR and to perform any other functions as may be specified by regulations.

197) Insofar as authentication process is concerned, that has already been taken note of above. The manner in which it is explained by the respondent authority, that may not pose much of a problem. As noted earlier, while seeking authentication, neither the location of the person whoso identity is to be verified nor the purpose for which authentication of such identity is needed, comes to the knowledge of the Authority and, therefore, such data collected by the Authority. Therefore, the threat to real time surveillance and profiling may be far-fetched. The respondents have explained that Section 2(d) defines "authentication record" to mean the record of the time of authentication, identity of the RE and the response provided by the authority", Regulation 26 (a) to (d) does not go beyond the scope of Section 2(d). None of the four clauses of Regulation 26 entitle the authority to store data about the purpose for which authentication is being done. The device can therefore only tell the authority the identity of the RE, the PID, the time and nature of response, the code of the device and the authentication server side configurations. Identity of the RE does not include details of the organization which is seeking authentication as an RE provides authentication service to large number of government organizations who have agreements with it. Such a mechanism preventing the authority from tracking the

nature of activity for which the authentication was required. To illustrate nic.in is an RE which provides authentication service to large number of Government organisations who have agreements with it. The authentication record would only contain information about the identity about the RE. It will give information only about the RE (nic.in) and not about the organisation which is requiring authentication through the RE. In most cases the authentication is one time. Mr. Dwivedi has also explained that yet again, there may be organisations, which have branches in different part of India. Assuming Apollo Hospital (although in fact it is not an RE) has five branches in India. If Apollo Hospital seeks authentication as an RE, the authentication record will merely tell the identity of Apollo Hospital and its device code, but it will not indicate which branch of Apollo was seeking authentication and from which part of the country. Further, assuming that the Indira Gandhi International Airport is an RE and there is requirement of authentication at the point of entry and/or exit. All that the record will show that the ANH has entered the airport at a particular time but it will not show by which plane he is flying and to what destination. At the time of exit, it will only show that the person has exited the airport at a particular time. It will not show from which flight he has arrived and from which

destination and at what time he has arrived or with whom he travelled.

198) However, other apprehension of the petitioners is that storing of data for a period of seven years as per Regulations 20 and 26/27 of the Aadhaar (Authentication) Regulations, 2016 is too long a period. We may reproduce Regulations 26 and 27 of the Aadhaar (Authentication) Regulations, 2016 hereunder:

> "26. Storage and Maintenance of Authentication Transaction Data – (1) The Authority shall store and maintain authentication transaction data, which shall contain the following information:-
>
> (a) authentication request data received including PID block;
>
> (b) authentication response data sent;
>
> (c) meta data related to the transaction;
>
> (d) any authentication server side configurations as necessary:
>
> Provided that the Authority shall not, in any case, store the purpose of authentication.
> 27. Duration of storage – (1) Authentication transaction data shall be retained by the Authority for a period of 6 months, and thereafter archived for a period of five years.
>
> (2) Upon expiry of the period of five years specified in sub-regulation (1), the authentication transaction data shall be deleted except when such authentication transaction data are required to be maintained by a court or in connection with any pending dispute."

199) It is also submitted that Section 10 which authorises the Authority to engage one or more entities, which may be private entities, to

establish and maintain CIDR is a serious threat to privacy and it even amounts to compromise on national sovereignty and security. Insofar as first argument is concerned, there appears to be some force in that. If authentication is the only purpose, we fail to understand why this authentication record is needed to be kept for a period of 2+5 years. No satisfactory explanation in this behalf was given.

200) Insofar as information regarding metadata is concerned, we may note that the respondents distinguished between three types of meta-data :technical, business and process metadata. Process metadata describes the results of various operations such as logs key data, start time, end time, CPU seconds used, disk reads, disk writes, and rows processed. This data is valuable for purposes of authenticating transaction, troubleshooting , security, compliance and monitoring and improving performance. They submit that the metadata contemplated under this Regulation is Process metadata.

201) However, metadata is not defined in the Aadhaar Act. In common parlance, it is understood as information about data, example whereof was given by Mr. Sibal that the text of a message exchanged between two persons would be the data itself.

However, surrounding circumstances like when the message was sent; from whom and to whom the message was sent; and location from which the message was sent would include meta data. As noted above, Mr. Dwivedi had tried to explain it away by stating that there are three types of meta data, namely, technical, business and process meta data. According to him, meta data under the Aadhaar Act refers to only process meta data. In support, he had referred to Section 2(d) of the Aadhaar Act which defines 'authentication record' to mean the record of the time of authentication, identity of requesting entity and the response provided by the Authority. He, thus, submitted that Regulation 26 would not go beyond Section 2(d). However, aforesaid explanation that meta data refers to process data only does not find specific mention. There is, thus, need to amend Regulation 26 to restrict it to process meta data, and to exclude other type of meta data specifically.

Purpose Limitation:

202) As per the petitioners, there is no *purpose limitation*. Identity information collected for one purpose under the Act can be used for any other (new) purpose. Definition of "benefit" (Section 2(f)) and "service" (Section 2(w)) and "subsidy" (Section

2(x)), to which the personal data collected is supposed to be applied is not identifiable. It is open to the executive to notify that any advantage, gift, reward, relief, payment, provision, facility, utility or any other assistance aid, support, grant subvention, or appropriation may be made conditional on Aadhaar Authentication. Moreover, under Section 57, the State, a body corporate or any person can avail authentication facility and access information under CIDR. This creates an open ended and unspecified set of laws and contracts for which Aadhaar can be used and defeats the principle of informed consent at the time of enrolment and purpose limitation.

203) Respondents controvert the aforesaid submission by arguing that there is purpose limitation under the Aadhaar Act as purpose of use of biometric data in the CIDR is limited to authentication for identification. The Aadhaar holder is made aware of such use of the Aadhaar card at the time of enrolment. The enrolling agency is obliged under the Enrolment Regulations to inform the individual about the manner in which the information shall be used, the nature of recipients with whom the information is to be shared during authentication; and the existence of a right to access information, the procedure for making request for such

access and details of the person/ department to whom request can be made. This information to individual is the basis for his consent for enrolment.

204) As per the respondents, Section 57 is not an enabling provision which allows Aadhaar to be used for purposes other than Section 7, but is a limiting provision. It limits its use by State, Body Corporate or a person by requiring it to be sanctioned by any law in force or any contract and making the use subject to the proviso to Section 57. The proviso requires the use of Aadhaar under this Section to be subject to procedure and obligations under Section 8 and Chapter VI of penalties. Section 8(2)(a) requires Requesting Entities (RE) (parties authorized to carry out authentication under Section 57) to obtain the consent of an individual before collecting her identity information for the purposes of authentication in such manner as may be specified by regulations. Section 8(3) enables this consent to be informed consent by requiring that an individual submitting her identity information for authentication shall be informed of the nature and the use of the information that may be shared upon authentication and the alternatives to submission of identity information to the requesting entity. This aspect is discussed in

detail at a later stage, as it touches upon privacy aspects as well. Suffice it is to mention here that we have found some portion of Section 57 as offending and declared that unconstitutional.

Insofar as Sections 2(f), (w) and (x) are concerned, these provisions are discussed at a later stage[77]. We would like to mention here that we have read down these provisions. The aforesaid measure would subserve the purpose limitation as well.

Time Period for Data Retention:

205) We have touched upon this aspect hereinabove. According to petitioners, the data is allowed to be retained for an *unreasonable long period of time*. Regulation 27 of the Authentication Regulations requires the UIDAI to retain the "authentication transaction data" (which includes the meta data) for a period of 6 months and to archive the same for a period of 5 years thereafter. Regulation 18(3) and 20(3) allow Requesting entities (RE) and Authentication Service Agencies to retain the authentication logs for a period of 2 years and then archive them for 5 years. It is required to be deleted only after 7 years unless retained by a court. The right of the citizen to erasure of data or right to be forgotten is severely affected by such regulation. There is no provision to delete the biometric information in any

77 See paragraphs 320 to 322

eventuality once a person is enrolled.

We do not find any reason for archiving the authentication transaction data for a period of five years. Retention of this data for a period of six months is more than sufficient after which it needs to be deleted except when such authentication transaction data are required to be maintained by a Court or in connection with any pending dispute. Regulations 26 and 27 shall, therefore, be amended accordingly.

Data Protection and Security:

206) Petitioners argued that there are not enough safeguards for *data protection and security* in the Act. Section 28 of the Act which addresses security and confidentiality of information is vague and fails to lay down any standard of data security or prescribe any cogent measures which are to be taken to prevent data breaches. Section 54 empowers UIDAI to make regulations related to various data management processes, security protocol and other technology safeguards. The Aadhaar (Data Security) Regulations, 2016 passed by UIDAI under Section 54, vest in the authority a discretion to specify "an information security policy" (Regulation 3). This leads to excessive delegation. Alternatively, it has not been subject to parliamentary oversight which

Regulations under Section 54 require. Further, the CIDR central database, unlike the ASAs and REs (under Authentication Regulation 22(1)), are not required to be located in data centres. The personal data is accessible by private entities such as AUAs and KUAs and other private entities such as banks, insurance companies and telecom service providers. There have been numerous data breaches in the Aadhaar system. These establish its vulnerability. There are not enough safeguards from data hack and data leak. The data is being used by private parties to build comprehensive databases containing information and profiles of individuals. Thus the project also lacks *transparency* of data and its use.

207) The Respondents contend that strong measures for data protection and security, taken at all stages of data collection, transfer, storage and use.

After deliberating over respective contentions, we are of the opinion that the following explanation furnished by the respondents on various facets ensures data protection and security to a considerable extent:

(a) CIDR

208) Regulation 3(i) & (j) of Aadhaar (Data Security) Regulation 2016

enables partitioning of CIDR network into zones based on risk and trust and other security measures. CIDR being a computer resource is notified to be a “Protected System” under Section 70 of the IT Act, 2000 by the Central Government on 11.12.2015. Anyone trying to unlawfully gain access into this system is liable to be punished with 10 years imprisonment and fine. The storage involves end to end encryption, logical partitioning, firewalling and anonymisation of decrypted biometric data. Breaches of penalty are made punitive by Chapter VII of the Act. Biometric information is deemed to be an “electronic record”, and “Sensitive personal data or information” under the IT Act, 2000. There are further guards under The Aadhaar (Data Security)Regulation, 2016.

(b) Requesting Entities (AUA and KUA)

209) Other identity information is shared with Requesting Entity (AUAs and KUAs) only for the limited purpose of authentication. The data is transferred from the RE to the ASA (Authentication Service Agency) to the CIDR in an encrypted manner through a leased line circuitry using secure Protocols (Regulation 9 of the Authentication Regulations). The storage of data templates is in safely located servers with no public internet inlet/outlet, and offline storage of original encrypted data (PID blocks). There are

safety and security provisions such as audit by Information Systems Auditor. REs are appointed through agreement. REs can enter into agreement with sub-AUA or sub-KUA with permission of the of UIDAI. Whatever identity information is obtained by the requesting entity is based on a specific consent of the Aadhaar number holder. The e-KYC data shared with the RE can only be after prior consent of the Aadhaar holder. Such data cannot be shared and has to be stored in encrypted form. The biometric information used is not permitted to be stored only the logs of authentication transactions are maintained for a short period. Full identity information is never transmitted back to RE. There is a statutory bar from sharing Biometric information [Section 29(1)(a)/ Section 29(4)]. The Data centres of ASA, REs and CIDR should be within the territory of India.

(c) Enrolment Agencies and Registrars

210) The enrolment and Authentication processes are strongly regulated so that data is secure. The Enrolment agency, which collects the biometric and demographic of the individuals during enrolment, is appointed either by UIDAI or by a Registrar [Section 2(s)]. The registrar are appointed through MoUs or agreements for enrolment and are to abide by a code of conduct and

processes, policies and guidelines issued by the authority. They are responsible for the process of enrolment. Categories of persons eligible for appointment are limited by the Regulations. The agency employees a certified supervisor, an operator and a verifier under Enrolment and Update Regulations. Registrars, enrolling agencies are obliged to use the software provided or authorized by UIDAI for enrolment purpose. The standard software has security features as specified by Authority. All equipment used are as per the specification issued by the authority. The Registrars are prohibited from using the information collected for any purpose other than uploading the information to CIDR. Sub-contracting of enrolment function is not allowed. The Code of Conduct contains specific directions for following the confidentiality, privacy and security protocols and submission of periodic reports of enrolment. Not only there are directions prohibiting manipulation and fraudulent practices but the Act contains penal provisions for such violations in Chapter VII of the Regulations. The enrolment agencies are empanelled by the authority. They are given an enrolling agency code using which the Registrar can onboard such agency to the CIDR. The enrolment data is uploaded to the Central Identities Data Repository (CIDR) certified equipment and software with a digital

signature of the registrar/enrolling agency. The data is encrypted immediately upon capture. The decryption key is with the UIDAI solely. Section 2(ze) of the IT Act, which defines ‘secure systems’ and Section 2(w) of the Act, which defines ‘intermediaries’ apply to the process.

(d) Authentication Service Agency

211) Authentication only becomes available through the Authentication Service Agency (ASA). They are regulated by the Aadhaar (Authentication) Regulations, 2016. Their role and responsibilities are provided by Authentication Regulation 19. They are to use certified devices, equipment, or software are duly registered with or approved or certified by the Authority/agency. The systems and operations are audited by information system auditor. The REs pass the encrypted data to the CIDR through the ASA and the response (Yes/No authentication or e-KYC information) also takes the same route back. The server of the ASA has to perform basic compliance and completeness checks on the authentication data packet before forwarding it to the CIDR.

(e) Hacking

212) As far as hacking is concerned, the respondents submit that the authority has involved adequate firewalling and other safety

features. The biometric data stored in the CIDR is stored offline. Only templates are online. So far there has been no incidence of hacking. However, the authority is conscious of the hackers and it constantly updates itself to safe guard the data.

It may, however, be mentioned that of late certain reports have appeared in newspapers to the effect that some people could hack the website of CIDR, though it is emphatically denied by the UIDAI. Since there are only newspapers reports to this effect which appeared after the conclusion of hearing in these cases and, therefore, parties could not be heard on this aspect, we leave this aspect of the matter at that with a hope that CIDR would find out the ways and means to curb any such tendency.

(f) Biometric Solution Providers

213) With respect to foreign companies owning software, Respondents submit that UIDAI has entered into licensing agreements with foreign biometric solution providers (BSP) for software. Even thought the source code of the software are retained by the BSP as it constitutes their Intellectual property, the data in the server rooms is secure as the software operates automatically and the biometric data is stored offline. There is no opportunity available to BSP to extract data as they have no access to it.

Substantive, Procedural or Judicial Safeguards:

214) Another grievance of the petitioners is that the Act lacks any *substantive, procedural or judicial safeguards* against misuse of individual data. Section 23(2)(k) which allows sharing information of Aadhaar holders, in such manner as may be specified by regulations. This means individual's identity information can be shared with the government. This may include demographic and core biometric information, include aspects such as DNA profiles, handwriting, voice-print etc., (in the future). Subsequent linkage with various state and non-state actors that interact with such individual may enable UIDAI to share greater information. The police can easily gain access to all biometric information, bank accounts of the individual, all mobile phones, and meta data associated with any associated linkages, information relating to all mutual funds, policies etc., information relating to travel by air or by rail by such person and so on.

215) In other cases of collection of information of this kind under other laws, there are exhaustive legal procedures. For example, Section 73 of the Indian Evidence Act, 1872 which allows the taking of handwriting samples only if necessary "for the purposes of any (specific) investigation", or in order to compare writing or

signature that appears in relation to the facts of a particular case. Section 53 of the CrPC allows medical examination of a person arrested on a charge of committing an offence if reasonable grounds exist for believing that an examination of his person will afford evidence as to the commission of the offence. Similarly provisions in various other statutes such as of the Foreign Exchange Regulation Act, 1973 (Sections 34-48); the Prevention of Money-Laundering Act, 2002 (Sections 17-19); the Narcotic Drugs and Psychotropic Substances Act, 1985 (Sections 41-42) and the Customs Act, 1962 (Chapter 13) which allow for search, seizure or even arrest, and thereby provide access to personal information also bear a nexus with a particular crime under investigation.

216) As per the petitioners, the Investigating Agency can presently access fingerprints, only limited to cases of citizens who were arrested on the reasonable basis of having committed a crime, or were convicted of a crime, as per provisions of the Identification of Prisoners Act. In all such circumstances, not only are there adequate safeguards- such as permission from the Magistrate that collection is necessary for the purpose of investigation, but persons accused of an offence presently can claim protection

under Article 20(3), thereby making it incumbent upon the investigating agency to obtain such information in accordance with law, as described above. Further, unlike the Aadhaar Act, present day criminal statutes contain provisions for destruction of some kinds of core biometric data obtained [Section 7 of the Identification of Prisoners Act, 1920]. No such safeguards exist under the Aadhaar Act.

217) It is also argued that Section 33(2), which permits disclosure of identity information and authentication records under direction of an officer not below the rank of Jt. Secretary to Central Government in the interest of national security, has no provision for judicial review. The Oversight Committee does not have a judicial member.

218) Respondents submitted that Section 29 of the Aadhaar Act provides protection against disclosure of core biometric information. The biometric information cannot shared with anyone for any reason whatsoever; or used for any purpose other than generation of Aadhaar numbers and authentication under this Act. Section 8 ensure that the during authentication, biometric information of an individual is only used for submission to the Central Identities Data Repository.

219) We are of the view that most of the apprehensions of the petitioners stand assuaged with the treatment which is given by us to some of the provisions. Some of these are already discussed above and some provisions are debated in the next issue. Summary thereof, however, can be given hereunder:

(a) Authentication records are not to be kept beyond a period of six months, as stipulated in Regulation 27(1) of the Authentication Regulations. This provision which permits records to be archived for a period of five years is held to be bad in law.

(b) Metabase relating to transaction, as provided in Regulation 26 of the aforesaid Regulations in the present form, is held to be impermissible, which needs suitable amendment.

(c) Section 33 of the Aadhaar Act is read down by clarifying that an individual, whose information is sought to be released, shall be afforded an opportunity of hearing.

(d) Insofar as Section 33(2) of the Act in the present form is concerned, the same is struck down.

(e) That portion of Section 57 of the Aadhaar Act which enables body corporate and individual to seek authentication is held to be unconstitutional.

(f) We have also impressed upon the respondents, as the discussion hereinafter would reveal, to bring out a robust data protection regime in the form of an enactment on the basis of Justice B.N. Srikrishna (Retd.) Committee Report with necessary modifications thereto as may be deemed appropriate.

220) With the removal of the aforesaid provisions from the statute and the Rules, coupled with the statement of the Authority on affidavit that there is no record of any transactions carried out by the individuals which is even known (and, therefore, no question of the same being retained by the Authority), most of the apprehensions of the petitioners are taken care of. At the same time, we may remind ourselves of the judgment in *G. Sundarrajan* v. *Union of India & Ors.*[78]. In that case, the Court noted the safety and security risk in the setting up of the nuclear power plant in the backdrop of Fukushima disaster and Bhopal Gas tragedy. Yet, keeping in view the importance of generation of nuclear energy, the Court observed that a balance should be struck between production of nuclear energy which was of extreme importance for the economic growth, alleviation of poverty, generation of employment, and the smaller violation to

78 (2013) 6 SCC 620

right to life under Article 21. It took note of the opinion of experts committee and observed that 'adequate safety measure' have been taken. It noted huge expenditure of money running into crores and observed 'apprehension however legitimate it may be, cannot override the justification of the project. Nobody on this earth can predict what would happen in future and to a larger extent we have to leave it to the destiny. But once the justification test is satisfied, the apprehension test is bound to fail. Apprehension is something we anticipate with anxiety or fear, a fearful anticipation, which may vary from person to person'. The Court also held that 'nuclear power plant is being established not to negate right to life but to protect the right to life guaranteed under Article 21 of the Constitution. No doubt, the Court took a view that this interest of people needed to be respected for their human dignity which was divinity. However, it was also stressed that generation of nuclear energy was a nuclear necessity and the project was for larger public benefit and consequently, individual interest or smaller public interest must yield. In such a situation, necessity for 'adequate care, caution, and monitoring at every stage' and 'constant vigil' was emphasised. Safety and security was read into Article 21. Acknowledging that proportionality of risk may not be 'zero', regard being had to the

nature's unpredictability, the Court ruled that all efforts must be made to avoid disaster by observing the highest degree of constant alertness. In the directions of the Court, it was observed that 'maintaining safety is an ongoing process not only at the design level but also during the operation'. In the present case as well, we have come to the conclusion that Aadhaar Act is a beneficial legislation which is aimed at empowering millions of people in this country. The justification of this project has been taken note of in detail, which the subsequent discussion shall also demonstrate. In such a scenario only on apprehension, the project cannot be shelved. At the same time, data protection and data safety is also to be ensured to avoid even the remote possibility of data profiling or data leakage.

221) Notwithstanding the statutory provision discussed above, we are of the view that there is a need for a proper legislative mechanism for data protection. The Government is not unmindful of this essential requirement. During the arguments it was stated by Mr. K.K. Venugopal, learned Attorney General, that an expert committee heading by Justice B.N. Srikrishna (Retd.) was constituted which was looking into the matter. The said Committee has since given its report.

222) In this behalf, it may be worthwhile to mention that one of the first comprehensive reports on data protection and informational privacy was prepared by the Group of Experts[79] constituted by the Planning Commission of India under the Chairmanship of Retd. Justice A.P. Shah, which submitted a report on 16 October, 2012. The five salient features of this report were expected to serve as a conceptual foundation for legislation protecting privacy. The framework suggested by the expert group was based on five salient features: (i) Technological neutrality and interoperability with international standards; (ii) Multi-Dimensional privacy; (iii) Horizontal applicability to state and non-state entities; (iv) Conformity with privacy principles; and (v) A co-regulatory enforcement regime.

223) The Union Government, on 31 July 2017, had constituted a committee chaired by Retd.Justice B N Srikrishna, former Judge of the Supreme Court of India to review data protection norms in the country and to make recommendations. The Committee recently released its report and the first draft of the *Personal Data Protection Bill, 2018* which comprehensively addresses the processing of personal data where such data has been collected,

79 "Report of the Group of Experts on Privacy" (16 October, 2012), Government of India, available at http://planningcommission.nic.in/reports/genrep/rep_privacy.pdf

disclosed, shared or otherwise processed within the territory of India. The bill has incorporated provisions and principles from the Europe's General Data Protection Regulation (EUGDPR).

224) The Draft Bill replaces the traditional concepts of data controller i.e. the entity which processes data and data subject i.e. the natural person whose data is being collected, with data 'fiduciary' and data 'principal'. It aims to create a trust-based relationship between the two.

225) The Bill largely incorporates data protection principles from the EUGDPR and EU data protection jurisprudence, including fair and reasonable processing of data, purpose limitation, collection limitation, lawful processing, storage limitation, data quality and accountability. The Draft bill and the report cull out rights and obligations of the data fiduciary and data controller respectively. These rights include the right to access and correction, the right to data portability and right to be forgotten – a right to prevent or restrict disclosure of personal data by a fiduciary. Most importantly, consent has been given a crucial status in the draft data protection law. Thus, a primary basis for processing of personal data must be individual consent. This consent is required to be free, informed, specific, clear and, in an important

addition, capable of being withdrawn. The Authority under the Bill is obligated and empowered to ensure protection of data from misuse and compromise.

226) Processing of biometric data, classified as 'Sensitive Personal Data' (SPD), by the data fiduciary mandates additional safeguards (mentioned under Chapter IV of the Bill). For example, the data fiduciary is required to undertake Data Protection Impact Assessment under the provisions of the Bill. The Draft Bill allows processing of biometric data for the exercise of any function of the State authorised by law for the provision of any service or benefit to the data principal. Special provisions to protect sensitive and personal data of children also exist. For example, Data fiduciaries shall be barred from profiling, tracking, or behavioural monitoring of, or targeted advertising directed at, children and undertaking any other processing of personal data that can cause significant harm to the child.

227) For security of data and protection of breach, the Draft Bill has separate provisions which require use of methods such as de-identification and encryption and other steps necessary to protect the integrity of personal data and to prevent misuse, unauthorised access to, modification, disclosure or destruction of personal

data. The data fiduciary is required to immediately notify the Authority of any personal data breach relating to any personal data processed by the data fiduciary where such breach is likely to cause harm to any data principal. It also incorporates a provision for Grievance Redressal.

228) The Draft Bill creates several exceptions and exemptions for processing data by the State. These are situations where rights and obligations of data principals and data fiduciaries may not apply in totality. Such situations include national security, prevention of crime, allocation of resources for human development, protection of revenue, etc. The committee asserts that such exceptions have been envisaged in the Puttaswamy judgement as legitimate interests of the state and satisfy the proportionality test.

229) The Srikrishna Committee Report and the Draft Data Protection Bill are the first articulation of a data protection law in our country. They have incorporated many of the progressive data protection principles inspired by the EUGDPR. There may be indeed be scope for further fine tuning of this law through a consultative process, however, we are not far away from a comprehensive data protection regime which entrenches informational and data

privacy within our laws and legal system. We hope that there would be a robust statutory regime in place in near future.

230) The aforesaid discussion leads us to hold that the protection that there is going to be a surveillance state created by the Aadhaar project is not well founded, and in any case, taken care of by the diffluence exercise carried out with the striking down certain offending provisions in their present form.

Privacy:

Whether Aadhaar Act violates right to privacy and is unconstitutional on this ground?

(This issue is considered in the context of Section 7 and Section 8 of the Act.)

231) The petitioners submit that right to privacy and dignity and individual autonomy have been established by various cases. In *Gobind* v. *State of M.P.*[80], this Court held:

> "the significance of man's spiritual nature, of his feelings and of his intellect and that only a part of the pain, pleasure, satisfaction of life can be found in material things and therefore they must be deemed to have conferred upon the individual as against the Government, a sphere where he should be let alone.
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> 24. Any right to privacy must encompass and protect the personal intimacies of the home, the family, marriage, motherhood, procreation and child rearing. This catalogue approach to the question is obviously not as instructive as it does not give analytical picture of the distinctive characteristics of the right of privacy. Perhaps, the only

80 (1975) 2 SCC 148

> suggestion that can be offered as unifying principle underlying the concept has been the assertion that a claimed right must be a fundamental right implicit in the concept of ordered liberty.
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> 25. Rights and freedoms of citizens are set forth in the Constitution in order to guarantee that the individual, his personality, and those things stamped with his personality shall be free from official interference except where a reasonable basis for intrusion exists. "Liberty against Government" a phrase coined by Professor Corwin expresses this idea forcefully. In this sense, many of the fundamental rights of citizens can be described as contributing to the right to privacy.
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> 26. As Ely says:
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> "There is nothing to prevent one from using the word 'privacy' to mean the freedom to live one's life without governmental interference. But the Court obviously does not so use the term. Nor could it, for such a right is at stake in every case."

232) To recapitulate briefly, the judgment of *K.S. Puttaswamy* has affirmed the following –

(i) privacy has always been a natural right, and the correct position has been established by a number of judgments starting from *Gobind*. Privacy is a concomitant of the right of the individual to exercise control over his or her personality. Equally, privacy is the necessary condition precedent to the enjoyment of any of the guarantees in Part III. The fundamental right to privacy would cover at least three aspects—(i) intrusion with an individual's physical body, (ii) informational privacy and (iii) privacy of choice. Further, one aspect of privacy is the right to

control the dissemination of personal information. Every individual should have a right to be able to control exercise over his/her own life and image as portrayed in the world and to control commercial use of his/her identity.

(ii) The sanctity of privacy lies in its functional relationship with dignity. Privacy ensures that a human being can lead a life of dignity by securing the inner recesses of the human personality from unwanted intrusions. While the legitimate expectation of privacy may vary from intimate zone to the private zone and from the private to the public arena, it is important to underscore that privacy is not lost or surrendered merely because the individual is in a public place. Privacy is a postulate of dignity itself. Privacy concerns arise when the State seeks to intrude into the body and the mind of the citizen.

(iii) Privacy as intrinsic to freedom, liberty and dignity. The right to privacy is inherent to the liberties guaranteed by Part-III of the Constitution and privacy is an element of human dignity. The fundamental right to privacy derives from Part-III of the Constitution and recognition of this right does not require a constitutional amendment. Privacy is more than merely a derivative constitutional right. It is the necessary basis of rights guaranteed in the text of the Constitution.

(iv) Privacy has both positive and negative content. The negative content restrains the State from committing an intrusion upon the life and personal liberty of a citizen. Its positive content imposes an obligation on the State to take all necessary measures to protect the privacy of the individual.

(v) Informational Privacy is a facet of right to privacy. The old adage that 'knowledge is power' has stark implications for the position of individual where data is ubiquitous, an all-encompassing presence. Every transaction of an individual user leaves electronic tracks, without her knowledge. Individually these information silos may seem inconsequential. In aggregation, information provides a picture of the beings. The challenges which big data poses to privacy emanate from both State and non-State entities.

(vi) Right to privacy cannot be impinged without a just, fair and reasonable law. It has to fulfil the test of proportionality i.e. (i) existence of a law (ii) must serve a legitimate State aim and (iii) proportionate.

233) We have also remarked, in paragraph 85 above, the taxonomy of privacy, namely, on the basis of 'harms', 'interest' and 'aggregation of rights'. We have also discussed the scope of right to privacy with reference to the cases at hand and the

circumstances in which such a right can be limited. In the process, we have also taken note of the passage from the judgment rendered by Nariman, J. in *K.S. Puttaswamy* stating the manner in which law has to be tested when it is challenged on the ground that it violates the fundamental right to privacy. Keeping in mind all these considerations and parameters, we proceed to deal with the argument on right to privacy.

234) It is argued that the Aadhaar project, during the pre-Act period (2009/10 – July, 2016), violated the Right to Privacy with respect to personal demographic as well as biometric information collected, stored and shared as there was no law authorizing these actions. In a digital society an individual has the right to protect herself by controlling the dissemination of such personal information. Compelling an individual to establish her identity by planting her biometric at multiple points of service violates privacy involving the person. The seeding of Aadhaar in distinct data bases enables the content of information about an individual that is stored in different silos to be aggregated. This enables the State to build complete profiles of individuals violating privacy through the convergence of data.

235) It is also contended that the citizen's right to informational privacy

is violated by authentication under the Aadhaar Act inasmuch as the citizen is compelled to 'report' her actions to the State. Even where a person is availing of a subsidy, benefit or service from the State under Section 7 of the Act, mandatory authentication through the Aadhaar platform (without an option to the citizen to use an alternative mode of identification) violates the right to informational privacy. An individual's rights and entitlements cannot be made dependent upon an invasion of his or her bodily integrity and his or her private information which the individual may not be willing to share with the State. The bargain underlying section 7 is an unconscionable, unconstitutional bargain. Section 7 is against the constitutional morality contained in both Part III as well the Part IV of the Constitution of India.

236) It was also highlighted that today the fastest growing businesses are network orchestrators, the likes of Facebook and Uber, which recreate a network of peers in which participants interact and share value in creation. The most important assets for these network orchestrators is information. Although, individuals share information with these entities, such information is scattered, not concentrated in a single authority or aggregated. If information, collected in different silos is aggregated and centralized, it can afford easy access to a person's complete profile, including her

social groups, proclivities, habits, inclinations, tastes etc. The entity that holds the key to such information would then be in an extremely powerful position, especially if such entity is the State. Since informational privacy is a part of Right to Privacy, it had to be saved. The peittioners pointed out that the significance of information being aggregated was noted by Hon'ble Court in *K.S. Puttaswamy* as follows:

> "300 ...Yet every transaction of an individual user and every site that she visits, leaves electronic tracks generally without her knowledge. These electronic tracks contain powerful means of information which provide knowledge of the sort of person that the user is and her interests. Individually, these information silos may seem inconsequential. In aggregation, they disclose the nature of the personality: food habits, language, health, hobbies, sexual preferences, friendships, ways of dress and political affiliation. In aggregation, information provides a picture of the being: of things which matter and those that don't, of things to be disclosed and those best hidden…
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> 305. Daniel J Solove deals with the problem of "aggregation". Businesses and governments often aggregate a variety of information fragments, including pieces of information which may not be viewed as private in isolation to create a detailed portrait of personalities and behaviour of individuals. Yet, it is now a universally accepted fact that information and data flow are "increasingly central to social and economic ordering". Individuals are identified with reference to tax records, voting eligibility, and government-provided entitlements. There is what is now described as "'veillant panoptic assemblage', where data gathered through the ordinary citizen's veillance practices finds its way to state surveillance mechanisms, through the corporations that hold that data."

237) It was further argued that test of proportionality was not satisfied as the extent of information collected is not proportionate to the 'compelling interest of the State'. Various judgments were citied where the principle of proportionality has been established by this court. In *Chairman, All India Railway Recruitment Board* v. *K Shyam Kumar and others*[81], this Court held as follows:

> "37. ...Proportionality requires the court to judge whether action taken was really needed as well as whether it was within the range of courses of action which could reasonably be followed. Proportionality is more concerned with the aims and intention of the decision-maker and whether the decision-maker has achieved more or less the correct balance or equilibrium. The court entrusted with the task of judicial review has examine whether decision taken by the authority is proportionate i.e. well balanced and harmonious, to this extent the court may indulge in a merit review and if the court finds that the decision is proportionate, it seldom interferes with the decision taken and if it finds that the decision is disproportionate i.e. if the court feels that it is not well balanced or harmonious and does not stand to reason it may tend to interfere."

238) Attention was also drawn to the judgment in *Modern Dental College & Research Centre*, wherein this Court established the four-limb test of proportionality. It was argued that Aadhaar failed to meet the test laid down therein.

239) According to the petitioners, there is no compelling state interest for State to know the details of the location and time of using Aadhaar authentication. Likewise, there are various other

81 (2010) 6 SCC 614

methods available for identification. Submission was that one of the objects of the Aadhaar project is to ensure targeted delivery in the disbursement of government subsidies benefits and services in India. Identification for this purpose can be carried out by various other identity documents issued by the government of India, such as passport, voting card, ration card, driving license, job card issued by NREGA duly signed by an officer of the State government, employment certificate by a public authority, birth certificate, school leaving certificate, PAN card, overseas Indian citizen card/PIO/OCI of Indian origin card. There is no justification to impose Aadhaar under as the exclusive means of identification under Section 7, without which a person would be unable to secure her entitlements. Such mandate would not only infringe upon the privacy of a person and violate a person's fundamental rights, but would also unreasonably deprive a person of her entitlements on a ground that has little connection with her right to receive such entitlements.

240) Judgment in the case of *Jordan & Ors* v. *State*[82] was also cited wherein Sachs & O'Regan JJ. concurringly held that continuum of privacy rights start with the inviolable inner self, move to the home, and end with the public realm; and that

82 (2002) ZACC 22

commitment to dignity invests great value in the inviolability and worth of the body. Decisional privacy allows individuals to make decisions about their own body, and is an aspect of right to self determination. It is underscored by personal autonomy, which prevents the State from using citizens as puppets and controlling their body and decisions. Informational privacy deals with a person's mind and comprises of (i) anonymity, (ii) secrecy, and (iii) freedom. It is premised on the assumption that all information about a person is in a fundamental way her own, for her to communicate or retain for herself as she sees fit.

241) It was submitted that privacy rights against both the State and non-State actors. There is a qualitative difference between right to privacy against the State and against Non-state actors. Subba Rao. J's dissent in *Kharak Singh,* was relied upon wherein it was stated that the existence of concentrated and centralized State power, rather than its actual or potential use that creates the chilling effect and leads to psychological restraint on the ability of citizens to think freely. Therefore, individuals have a higher expectation of privacy from the State. In the vein, it was further submitted that the State was imposing disproportionate and unreasonable State compulsion. States do not have the power to

compel their citizens to do particular acts, except in a narrow range of defined circumstances. As *sentinels on the qui vive*, Courts are duty bound to protect citizens against State compulsion, whether in the context of forcibly undergoing narco-analysis/lie detectors tests or forcibly undergoing sterilization. Compulsion can be used in limited circumstances such as punishment for law-breaking, compulsion in the aid of law enforcement, and compulsion to prevent potential law-breaking. These include fines, imprisonment, fingerprint collection for criminals and prisoners. Even in medical jurisprudence, the case of *Common Cause* v. *Union of India*[83] elaborates on the concepts of dignity, bodily integrity and decisional autonomy. For DNA tests and blood tests to be conducted a high standard of evidence is required. Similarly 'refusal of treatment' is a constitutionally protected liberty interest in the United States of America as stated in the case of *Cruzan* v. *Director, Missouri Dept. of Health*[84].

242) The petitioners further submitted that although the Aadhaar Act is ostensibly framed as a voluntary entitlement to establish one's identity under section 3 read with Section 4(3) of the Aadhaar Act, the actions of the Executive and private entities

83 Writ Petition (Civil) No. 215 of 2005
84 497 US 361 (1990)

under sections 7 and 57 have made possession of Aadhaar de facto mandatory. Residents have thus been forced to obtain an Aadhaar number, for continued access to statutory entitlements and services. 252 government schemes have been notified by various Ministries/Departments of the Central Government under section 7 (as on 30.11.2017) requiring Aadhaar as a condition precedent for availing services, subsidies and benefits including for persons with disabilities, for SC/STs, and for rehabilitation of Manual Scavengers. It has also been made mandatory for mobile services, banking and tax payments, registration of students of CBSE, amongst other things. It thus pervades every aspect of an individual's life. Concomitantly, there is no opt out option in the Aadhaar Act, which makes consent irrevocable and deprives individuals the ability to make decisions about their life.

243) As per the petitioners, this kind of mandatory nature of Section 7 violates Article 14. They submit that mandatory authentication has caused, and continues to cause, exclusion of the most marginalized sections of society. Proof of possession of an enrolment number or undergoing Aadhaar authentication is a mandatory pre-requisite for receiving subsidised food grain under the National Food Security Act. It creates "undue

burden" on citizen which is unconstitutional. Successful monthly authentication is contingent on harmonious working of all attendant Aadhaar processes and technologies–i.e. correct Aadhaar-seeding, successful fingerprint recognition, mobile and wireless connectivity, electricity, functional POS machines and server capacity–each time. It is also dependant on age, disability (e.g.leprosy), class of work (e.g. manual labour), and the inherently probabilistic nature of biometric. Economic Survey of India 2016 reports that authentication failures have been as high as 49% in Jharkhand and 37% in Rajasthan, recognising that "failure to identify genuine beneficiaries results in exclusion error".

244) The exclusion is not simply a question of poor implementation that can be administratively resolved, but stems from the very design of the Act, i.e. the use of biometric authentication as the primary method of identification. Determination of legal entitlements is contingent on a positive authentication response from the UIDAI. Biometric technology does not guarantee 100% accuracy and is fallible, with inevitable false positives and false negatives that are design flaws of such a probabilistic system, especially because biometrics also change over time.

245) Classification caused by the Act lacks rational nexus. The entitlement of an individual depends upon status, and not proof of identity. At the point of use, The Biometric Authentication divides residents into two classes: those who have and do not have Aadhaar; and those who authenticate successfully, and those who do not. Given that the probability of biometric mismatch is greatest for the aged, disabled, and individuals engaging in manual labour – amongst the most vulnerable sections of society–the decision to use periodic biometric authentications has a direct and disparate effect of violating fundamental rights of this class. This division bears no rational nexus with the question of status for receiving benefits. It leads to under-inclusion, and is thus arbitrary, causing an Article 14 violation.

246) It is also argued that mandatory nature of Section 7 violates Article 21 as well. The Aadhaar Act alters the entire design & institutional structure through which residents were receiving entitlements. Mandatory imposition of Aadhaar violates their rights to choose how to identify themselves to the government in a reasonable and non-intrusive fashion. On

making Aadhaar mandatory, instead of the citizen's right to food and a correlative duty on the State to take action to ensure the proper fulfilment of such rights, the State is exercising its power to convert the constitutional rights of its citizens into liabilities.

247) As per the petitioners, having established the infringement of Article 21, the invasion is not justified under the ***principle of proportionality***. The State's primary justification of eliminating welfare leakages and ensuring "better targeting" does not stand up to judicial scrutiny.

First, it has failed to discharge its burden of showing that the purported leakages were exclusively caused due to identity fraud, and that those leakages would not exist if Aadhaar is implemented. The state has not given any empirical data. Leakages exist due to eligibility frauds, quantity frauds and identity frauds. Studies filed in Petitioner's affidavits show that eligibility and quantity frauds are the substantial cause for leakages. Assuming that the Aadhaar Act prevents leakages, the biometric identification system can, at best, only cure leakages related to identity fraud. The government's claims of savings inter alia of Rs. 14,000 crores in the PDS system, due to the deletion of 2.33 crore ration cards is incorrect, inflated, and

based on wrong assumptions for the following reasons:

(a) it admittedly does not have estimates of leakages in PDS, nor has any study been done to see if POS machines are effective in removing PDS irregularities;

(b) it conflates issue of "bogus /ineligible ration cards" (eligibility fraud) with identity fraud;

(c) the figure of 2.33 crore includes West Bengal, where ration cards are issued to each person, as opposed to each household;

(d) a large number of these 2.33 crore cards were deleted even before Aadhaar-integration and seeding came into effect;

(e) the savings figure includes even those eligible beneficiaries who have been removed from the list due to failure to link Aadhaar properly; and

(f) it does not value the cost of loss of privacy. Most importantly, the basis for reaching such savings figure has not been disclosed.

Similarly, incorrect averments have been made in the context of LPG savings, using Aadhaar-enabled Direct Benefit Transfer ('DBT') scheme known as PAHAL.

Secondly, it has failed to show how the introduction of

Aadhaar will stop the losses causes on any of the grounds above. Aadhaar is susceptible to its own unique forms of mischief by the vendor.

Thirdly, the State has failed to demonstrate that other, less invasive ways would be significantly worse at addressing the problem, especially given recent studies that found a significant reduction in PDS leakages, due to innovations devised to work within the PDS system; alternatives such as food coupons, digitisation of records, doorstep delivery, SMS alerts, social audits, and toll-free helplines have not been looked at.

Fourthly, the absence of proportionality is further established by the fact of systematic exclusion.

248) The respondents refuted, in strongest possible manner, all the aforesaid submissions in the following manner:

(i) <u>No reasonable expectation of privacy</u>

At the outset it was argued that Right to Privacy exists when there is a reasonable expectation of privacy. *K.S. Puttaswamy* judgment, US case law, UK case laws and the European cases on Article 8 of ECHR were referred to to determine the contours of reasonable expectation of privacy. Submission was that the Act

operates in the public and relational sphere and not in the core, private or personal sphere of residents. It involves minimal identity information for effective authentication. The purpose is limited to authentication for identification. Section 29 of the Aadhaar Act, 2016 provides protection against disclosure of identity information without the prior consent of the ANH concerned. Sharing is intended only for authentication purposes. It was also submitted that there is no reasonable expectation of privacy with respect to identity information collected under the Aadhaar Act for the purposes of authentication and therefore Article 21 is not attracted.

249) The respondents point out that four types of information collected for providing Aadhaar (i). Mandatory demographic information comprising name, date of birth, address and gender [Section 2(k) read with Regulation 4(1) of the Aadhaar (Enrolment and Update) Regulations, 2016]; (ii) Optional demographic information [Section 2(k) read with Regulation 4(2) of the Aadhaar (Enrolment and Update) Regulations, 2016]. (iii) Non-core biometric information comprising photograph. (iv) Core biometric information comprising finger print and iris scan.

250) Demographic information, both mandatory and optional, and

photographs does not raise a reasonable expectation of privacy under Article 21 unless under special circumstances such as juveniles in conflict of law or a rape victim's identity. Today, all global ID cards contain photographs for identification alongwith address, date of birth, gender etc. The demographic information is readily provided by individuals globally for disclosing identity while relating with others and while seeking benefits whether provided by government or by private entities, be it registration for citizenship, elections, passports, marriage or enrolment in educational institutions. Email ids and phone numbers are also available in public domain, For example in telephone directories. Aadhaar Act only uses demographic information which are not sensitive and where no reasonable expectation of privacy exists - name, date of birth, address, gender, mobile number and e mail address. Section 2(k) specifically provides that Regulations cannot include race, religion, caste, tribe, ethnicity, language, records of entitlement, income or medical history. Thus, sensitive information specifically stand excluded.

251) Face Photographs for the purpose of identification are not covered by a reasonable expectation of privacy. Barring unpublished intimate photographs and photographs pertaining to confidential situations there will be no zone of privacy with

respect to normal facial photographs meant for identification. Face-photographs are given by people for driving license, passport, voter id, school admissions, examination admit cards, employment cards, enrolment in professions and even for entry in courts. In our daily lives we recognize each other by face which stands exposed to all, all the time. The face photograph by itself reveals no information.

252) There is no reasonable expectation of privacy with respect to fingerprint and iris scan as they are not dealing with the intimate or private sphere of the individual but are used solely for authentication. Iris scan is nothing but a photograph of the eye, taken in the same manner as a face photograph. Fingerprints and iris scans are not capable of revealing any personal information about the individual except for serving the purpose of identification. Fingerprints are largely used in biometric attendance, laptops and mobiles. Even when a privacy right exists on a fingerprint, it will be weak. Finger print and iris scan have been considered to be the most accurate and non-invasive mode of identifying an individual. They are taken for passports, visa and registration by the State and also used in mobile phones, laptops, lockers etc for private use. Biometrics are being used for unique identification in e passports by 120 countries.

(ii) Least intrusive and strict scrutiny tests do not apply in the proportionality test.

Learned Attorney General argued that the “least intrusive test” is not applicable while asserting the test of proportionality. He relied on various U.S. Supreme Court judgments which explicitly rejected the test and the case of *Modern Dental College & Research Centre* which does not use the least intrusive measure test while undertaking the proportionality test.

Mr.Dwivedi contends that the least intrusive means of achieving the state object, while carrying out the proportionality test, has been rejected by Indian courts in a catena of decisions as it involves a value judgment or second guessing of the Legislation. Such a test violates the separation of powers between the legislature and the judiciary. Even assuming that the ‘least intrusive method’ test applies, the exercise of determining the least intrusive method of identification is a technical exercise and cannot be undertaken in the court of law. Moreover, the Petitioners, who have furnished smartcards as an alternative, have not established that smartcards are less intrusive than the Aadhaar card authentication process.

The argument of applying the ‘Strict Scrutiny Test’ to test the Constitutionality of the Aadhaar Act by the Petitioners was

flawed. Strict scrutiny test is a test conceptualised in the United States, only applied to 'super suspect legislations'. This compulsion arises because the scope of reasonable restrictions not having been specified specifically in the U.S. Constitution. That leaves the scrutiny of the Legislations by the courts based on the due process clause in the U.S. Constitution. Such a test does not have applicability in India. In *Ashoka Kumar Thakur* (2008) 6 SCC 1, the court referred to the test of strict scrutiny, narrow tailoring and compelling interest and observed that these principles cannot be applied directly to India as affirmative action is Constitutionally supported.

(iii) Act satisfies Proportionality Test

Ld. Attorney General submitted that the legitimate state interest that the Aadhaar Act fulfils are prevention of leakages and dissipation of subsidies and social welfare benefits that are covered under Section 7 of the Aadhaar Act. He also submits that the larger public/state interest is to be decided by the State and cannot be second guessed by the Judiciary. The state had rejected the idea of 'smart cards' and other alternative models after due deliberations.

The learned Attorney General cited various reports highlighting leakages, wastage, high costs and inefficiencies in

the Public Distribution System, MGNREGA scheme and fuel subsidy. He cited the Thirteenth Finance Commission Report 2010-2015 which stated that creation of a biometric-based unique identity for all residents in the country has potential to address need of the government to ensure that only eligible persons are provided subsidies and that all eligible persons are covered. He also cited the Economic Surveys of 2014-15 and 2015-16 both of which dilated upon the benefits of Aadhaar. The 2015-16 Survey says that the use of Aadhaar has significantly reduced leakages in LPG and MGNREGA with limited exclusion of the poor by linking households' LPG customer numbers with Aadhaar numbers to eliminate 'ghosts' and duplicate households from beneficiary rolls. The United Nations, in its report titled 'Leaving No One Behind: the imperative of inclusive development', praised India's decision of launching Aadhaar as it will be a step forward in ensuring inclusion of all people especially the poorest and the most marginalized.

This court in the case of *PUCL* v. *Union of India*[85] has approved the recommendations of the High-powered committee headed by Justice D.P Wadhwa, which recommended linking

85 (2011) 14 SCC 331

of Aadhaar with PDS and encouraged State Governments to adopt the same. The court also lauded the efforts of State government for using biometric identification. He also referred to the case of *Binoy Viswam* v. *Union of India*[86] where the economic rationale for and benefits of Aadhaar was discussed and validated.

Mr. Dwivedi has argued that 3% of GDP amounting to trillions of rupees is allocated by Governments towards subsidies, scholarships, pensions, education, food and other welfare programmes. But approximately half of if does not reach the intended beneficiaries. Aadhaar is necessary for fixing this problem as there is no other identification document which is widely and commonly possessed by the residents of the country and most of the identity documents do not enjoy the quality of portability. Moreover, Aadhaar lends assurance and accuracy on account of existence of fake, bogus and ghost cards, vide the process of de-duplication and authentication. De-duplication is ensured by the three sub systems are :- (i) demographic de-duplication (ii) multi-ABIS multi-modal biometric de-duplication (iii) manual adjudication. Biometric system provides high accuracy of over 99.86 %. The mixed biometric have been adopted only to

86 (2017) 7 SCC 59

enhance the accuracy and to reduce the errors which may arise on account of some residents either not having biometrics or not having some particular biometric.

(iv) Act empowers various facets of right to life under Article 21

The Ld. Attorney General submitted that Section 7 of the Act is traceable to Article 21 of the Constitution. Right to life is not a mere animal existence but the right to live with human dignity which includes the right to food, the right to shelter, right to employment, right to medical care, etc. Fulfilling these rights will justify the minimal invasion of the right to privacy of the citizens.

The counsel for the respondent also referred to the case of *G. Sundarrajan* v. *Union of India*[87] in which the petitioner therein challenged the violation of their Right to the Life due to the risk posed by the Kudanakulam Nuclear Plant. The court struck a balance between production of nuclear energy, which was of extreme importance for the economic growth, alleviation of poverty, generation of employment , and the violation of right to life and dignity under Article 21 posed by the threat of a nuclear disaster. The court observed that adequate safety measure – both in design and operation - had been taken hence the violation of right to life was justified.

87 (2013) 6 SCC 670

253) The argument of ‘illusory consent’ was refuted with the submission that Section 7 of the Act which mandatorily requires Aadhaar for receipt of benefit, service or subsidy linked to the Consolidated Fund of India, does not violate any Fundamental Rights. It involves a balancing of two Fundamental Rights: the Right to Privacy and the positive obligation of the State to ensure right to food, shelter and employment under Article 21 of the Constitution. Aadhaar enables furtherance of Article 21 by eliminating leakages and ensuring that no deserving individual is denied her/his entitlement. The object of the Act i.e. the efficient, transparent and targeted delivery of subsidies, benefits and services to genuine beneficiaries is in, furtherance of various facets of Article 21 of the poor people of India and in furtherance of the Directive Principles of State Policy inter alia Articles 38,39, 41, 43, 47 and 48.

254) It was further argued that Section 7 is not a restriction at all and it does not require any surrender of Fundamental Rights. It is merely a regulatory procedure to receipt of subsidy, benefit or service. Section 7 purports to enliven the Fundamental Right under Article 21 , and Article 14. To achieve the goal of enlivening Fundamental Rights of the poor and the deprived and to prevent

siphoning off the benefits, service or subsidy, it becomes necessary to require compliance with the condition of undergoing authentication.

255) Section 7 of the Aadhaar Act protects right to human dignity recognized by Article 21 of the Constitution. Aadhaar is used as means of authentication for availing services, benefits and subsidies. Welfare schemes funded from the consolidated fund of India such as PDS, scholarship, mid day meals, LPG subsidies, free education ensure that the Right to Life and Dignity of citizens are being enforced, which includes Justice (Social, Political and Economic). It also eliminates inequality with a view to ameliorate the poor, Dalits and other downtrodden classes and sections of the society.

256) In response to the argument that Fundamental Right to Privacy cannot be waived, the Mr.Dwivedi submits that Section 7 of the Aadhaar Act does not involve any issue of waiver. When an individual undergoes any authentication to establish his identity to receive benefits, services or subsidy, he does so to enliven his Fundamental Right to life and personal liberty under Article 21. When an individual makes a choice to enter into a relational sphere then his choice as to mode of identification would

automatically get restricted on account of the autonomy of the individuals or institution with whom he wishes to relate. This is more so where the individual seeks employment, service , subsidy or benefits. Moreover, Aadhaar is of a Universal nature, unlike any other identification card which are not portable. They generally have a localized value and limited purpose.

257) In response to the arguments of the petitioners that Aadhaar reduces individuals to numbers, it was submitted that the Aadhaar number is absolutely necessary for authentication and it is solely used for that purpose. It was argued that the petitioner have conflated the concepts of identity and identification. Authentication is merely an identification process and does not alter the identity of an individual. Further Aadhaar number is a randomly generated number and bears no relation to the attributes of individuals. It is similar to an examiner allotting codes to examinees for administrative convenience.

258) It was also argued that the State has an obligation to enlivening right to food, right to shelter etc envisaged under Article 21 and for this purpose they may encroach upon the right of privacy of the beneficiaries. The state requires to strike a fair balance between the right of privacy and right to life of beneficiaries. An

example furnished by the counsel for this is the Prohibition Of Employment as Manual Scavengers and their Rehabilitation Act, 2013, which restricts a scavenger's right to practice any profession, occupation, trade or business under Article 19(g) is order to enliven Article 21 and 17. The counsel also gave the example of the practice of dwarftossing, which was banned in France. The law was challenged on ground that it interferes with the economic right of one practicing it. The challenge was negatived on the ground that permitting such a practice even though voluntary will be degrading of human dignity by Human Right Committee. Certain choices are restricted /prohibited by the Constitution itself (Articles 17,18, 23 and 24). Article 23 abolishes forced labour so it prohibits even those choosing to indulge in forced labour from doing so. The aforesaid actually result in enhancement of the Fundamental Right. The person is emancipated from a social condition which is below human dignity. Similarly Section 7 of the Act involves an identification for the purpose of enhancing human dignity.

259) In response to the argument of Aadhaar causing exclusion, the learned Attorney General responded by saying that if authentication fails, despite more than one attempt, then the possession of Aadhaar number can be proved otherwise i.e. by

producing the Aadhaar card. And those who do not have Aadhaar number can make an application for enrolment and produce the enrolment id number).

260) Before we proceed to analyse the respective submissions, it has also to be kept in mind that all matters pertaining to an individual do not qualify as being an inherent part of right to privacy. Only those matters over which there would be a reasonable expectation of privacy are protected by Article 21. This can be discerned from the reading of Paras 297 to 307 of the judgment, relevant portions whereof have already been quoted above.

261) We may also clarify that the arguments of privacy are examined in the context of Sections 7 and 8 and the provisions related thereto under the Aadhaar Act. Validity of the other provisions of the Aadhaar Act, which is questioned in these proceedings, is dealt with separately. As per Section 7 of the Aadhaar Act in case an individual wants to avail any subsidy benefit or services, she is required to produce the Aadhaar number and, therefore, it virtually becomes compulsory for such a person. To that extent the petitioners may be right in submitting that even if enrolment in Aadhaar is voluntary, it assumes the character of compulsory enrolment for those who want to avail the benefits under Section

7. Likewise, authentication, as mentioned in Section 8, also becomes imperative. The relevant question, therefore, is as to whether invasion into this privacy meets the triple requirements or right to privacy.

(i) **Requirement of law** : The Parliament has now passed Aadhaar Act, 2016. Therefore, law on the subject in the form of a statute very much governs the field and, thus, first requirement stands satisfied. We may point out at this stage that insofar as period from 2009 (when the Aadhaar scheme was launched with the creation of Authority vide notification No. A-43011/02/2009-Admin. I dated January 28, 2009 till the date Aadhaar Act came into force i.e. March 26, 2016, it is the argument of the petitioners that insofar as this period is concerned, it is not backed by any law and, therefore, notification dated January 28, 2009 should be struck down on this ground itself and all acts done including enrolment under the Aadhaar scheme from 2009 to 2016 should be invalidated. This aspect we propose to deal at a later stage. At this juncture, we are looking into the *vires* of Aadhaar Act. In that context, the first requirement stands fulfilled.

(ii) **Whether Aadhaar Act serves legitimate State aim?**

'Introduction' to the said Act gives the reasons for passing that Act and the 'Statement of Objects and Reasons' mentions

the objectives sought to be achieved with the enactment of the Aadhaar Act. 'Introduction' reads as under:

> "The Unique Identification Authority of India was established by a resolution of the Government of India in 2009. It was meant primarily to lay down policies and to implement the Unique Identification Scheme, by which residents of India were to be provided unique identity number. This number would serve as proof of identity and could be used for identification of beneficiaries for transfer of benefits, subsidies, services and other purposes.
>
> Later on, it was felt that the process of enrolment, authentication, security, confidentiality and use of Aadhaar related information be made statutory so as to facilitate the use of Aadhaar number for delivery of various benefits, subsidies and services, the expenditures of which were incurred from or receipts therefrom formed part of the Consolidated Fund of India.
>
> The Aadhaar (Targeted Delivery of Financial and Other Subsidies, Benefits and Services) Bill, 2016 inter alia, provides for establishment of Unique Identification Authority of India, issuance of Aadhaar number to individuals, maintenance and updating of information in the Central Identities Data Repository, issues pertaining to security, privacy and confidentiality of information as well as offences and penalties for contravention of relevant statutory provisions."

In the Statement of Objects and Reasons, it is inter alia mentioned that though number of social benefits schemes have been floated by the Government, the failure to establish identity of an individual has proved to be a major hindrance for successful implementation of those programmes as it was becoming difficult to ensure that subsidies, benefits and services reach the

unintended beneficiaries in the absence of a credible system to authenticate identity of beneficiaries. The Statement of Objects and Reasons also discloses that over a period of time, the use of Aadhaar number has been increased manifold and, therefore, it is also necessary to take measures relating to ensuring security of the information provided by the individuals while enrolling for Aadhaar card. Having these parameters in mind, Para 5 of the Statement of Objects and Reasons enumerates the objectives which the Aadhaar Act seeks to achieve. It reads as under:

> "5. The Aadhaar (Targeted Delivery of Financial and Other Subsidies, Benefits and Services) Bill, 2016 inter alia, seeks to provide for—
>
> (a) issue of Aadhaar numbers to individuals on providing his demographic and biometric information to the Unique Identification Authority of India;
>
> (b) requiring Aadhaar numbers for identifying an individual for delivery of benefits, subsidies, and services the expenditure is incurred from or the receipt therefrom forms part of the Consolidated Fund of India;
>
> (c) authentication of the Aadhaar number of an Aadhaar number holder in relation to his demographic and biometric information;
>
> (d) establishment of the Unique Identification Authority of India consisting of a Chairperson, two Members and a Member-Secretary to perform functions in pursuance of the objectives above;
>
> (e) maintenance and updating the information of individuals in the Central Identities Data Repository in such manner as may be specified by regulations;

(f) measures pertaining to security, privacy and confidentiality of information in possession or control of the Authority including information stored in the Central Identities Data Repository; and

(g) offences and penalties for contravention of relevant statutory provisions."

262) After taking into consideration the Statement of Objects and Reasons, a two Judge Bench of this Court in *Binoy Viswam v. Union of India & Ors.*[88], recapitulated the objectives of Aadhaar in the following manner:

> "125. By making use of the technology, a method is sought to be devised, in the form of Aadhaar, whereby identity of a person is ascertained in a flawless manner without giving any leeway to any individual to resort to dubious practices of showing multiple identities or fictitious identities. That is why it is given the nomenclature "unique identity". It is aimed at securing advantages on different levels some of which are described, in brief, below:
>
> 125.1. In the first instance, as a welfare and democratic State, it becomes the duty of any responsible Government to come out with welfare schemes for the upliftment of poverty-stricken and marginalised sections of the society. This is even the ethos of Indian Constitution which casts a duty on the State, in the form of "directive principles of State policy", to take adequate and effective steps for betterment of such underprivileged classes. State is bound to take adequate measures to provide education, health care, employment and even cultural opportunities and social standing to these deprived and underprivileged classes. It is not that Government has not taken steps in this direction from time to time. At the same time, however, harsh reality is that benefits of these schemes have not reached those persons for whom that are actually meant.
>
> 125.1.1. India has achieved significant economic growth since Independence. In particular, rapid economic growth has been achieved in the last 25 years, after the country

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adopted the policy of liberalisation and entered the era of, what is known as, globalisation. Economic growth in the last decade has been phenomenal and for many years, the Indian economy grew at highest rate in the world. At the same time, it is also a fact that in spite of significant political and economic success which has proved to be sound and sustainable, the benefits thereof have not percolated down to the poor and the poorest. In fact, such benefits are reaped primarily by rich and upper middle classes, resulting into widening the gap between the rich and the poor.

125.1.2. Jean Dreze and Amartya Sen pithily narrate the position as under [*An Uncertain Glory : India and its Contradictions*] :

> "Since India's recent record of fast economic growth is often celebrated, with good reason, it is extremely important to point to the fact that the societal reach of economic progress in India has been remarkably limited. It is not only that the income distribution has been getting more unequal in recent years (a characteristic that India shares with China), but also that the rapid rise in real wages in China from which the working classes have benefited greatly is not matched at all by India's relatively stagnant real wages. No less importantly, the public revenue generated by rapid economic growth has not been used to expand the social and physical infrastructure in a determined and well-planned way (in this India is left far behind by China). There is also a continued lack of essential social services (from schooling and health care to the provision of safe water and drainage) for a huge part of the population. As we will presently discuss, while India has been overtaking other countries in the progress of its real income, it has been overtaken in terms of social indicators by many of these countries, even within the region of South Asia itself (we go into this question more fully in Chapter 3, 'India in Comparative Perspective').
>
> To point to just one contrast, even though India has significantly caught up with China in terms of GDP growth, its progress has been very much slower than China's in indicators such as longevity, literacy, child undernourishment and maternal mortality. In South Asia itself, the much poorer economy of

> Bangladesh has caught up with and overtaken India in terms of many social indicators (including life expectancy, immunisation of children, infant mortality, child undernourishment and girls' schooling). Even Nepal has been catching up, to the extent that it now has many social indicators similar to India's, in spite of its per capita GDP being just about one third. Whereas twenty years ago India generally had the second best social indicators among the six South Asian countries (India, Pakistan, Bangladesh, Sri Lanka, Nepal and Bhutan), it now looks second worst (ahead only of problem-ridden Pakistan). India has been climbing up the ladder of per capita income while slipping down the slope of social indicators."

125.1.3. It is in this context that not only sustainable development is needed which takes care of integrating growth and development, thereby ensuring that the benefit of economic growth is reaped by every citizen of this country, it also becomes the duty of the Government in a welfare State to come out with various welfare schemes which not only take care of immediate needs of the deprived class but also ensure that adequate opportunities are provided to such persons to enable them to make their lives better, economically as well as socially. As mentioned above, various welfare schemes are, in fact, devised and floated from time to time by the Government, keeping aside substantial amount of money earmarked for spending on socially and economically backward classes. However, for various reasons including corruption, actual benefit does not reach those who are supposed to receive such benefits. One of the main reasons is failure to identify these persons for lack of means by which identity could be established of such genuine needy class. Resultantly, lots of ghosts and duplicate beneficiaries are able to take undue and impermissible benefits. A former Prime Minister of this country [Late Shri Rajiv Gandhi] has gone on record to say that out of one rupee spent by the Government for welfare of the downtrodden, only 15 paisa thereof actually reaches those persons for whom it is meant. It cannot be doubted that with UID/Aadhaar much of the malaise in this field can be taken care of.

263) It may be highlighted at this stage that the petitioners are making their claim on the basis of dignity as a facet of right to privacy. On

the other hand, Section 7 of the Aadhaar Act is aimed at offering subsidies, benefits or services to the marginalised section of the society for whom such welfare schemes have been formulated from time to time. That also becomes an aspect of social justice, which is the obligation of the State stipulated in Para IV of the Constitution. The rationale behind Section 7 lies in ensuring targeted delivery of services, benefits and subsidies which are funded from the Consolidated Fund of India. In discharge of its solemn Constitutional obligation to enliven the Fundamental Rights of life and personal liberty (Article 21) to ensure Justice, Social, Political and Economic and to eliminate inequality (Article 14) with a view to ameliorate the lot of the poor and the Dalits, the Central Government has launched several welfare schemes. Some such schemes are PDS, scholarships, mid day meals, LPG subsidies, etc. These schemes involve 3% percentage of the GDP and involve a huge amount of public money. Right to receive these benefits, from the point of view of those who deserve the same, has now attained the status of fundamental right based on the same concept of human dignity, which the petitioners seek to bank upon. The Constitution does not exist for a few or minority of the people of India, but “We the people”. The goals set out in the Preamble of the Constitution do not

contemplate statism and do not seek to preserve justice, liberty, equality an fraternity for those who have the means and opportunity to ensure the exercise of inalienable rights for themselves. These goals are predominantly or at least equally geared to "secure to all its citizens", especially, to the downtrodden, poor and exploited, justice, liberty, equality and "to promote" fraternity assuring dignity. Interestingly, the State has come forward in recognising the rights of deprived section of the society to receive such benefits on the premise that it is their fundamental right to claim such benefits. It is acknowledged by the respondents that there is a paradigm shift in addressing the problem of security and eradicating extreme poverty and hunger. The shift is from the welfare approach to a right based approach. As a consequence, right of everyone to adequate food no more remains based on Directive Principles of State Policy (Art 47), though the said principles remain a source of inspiration. This entitlement has turned into a Constitutional fundamental right. This Constitutional obligation is reinforced by obligations under International Convention. The Universal Declaration of Human Rights (Preamble, Article 22 & 23) and International Covenant on Economic, Social and Cultural Rights to which India is a signatory, also casts responsibilities on all State parties to

recognize the right of everyone to adequate food. Eradicating extreme poverty and hunger is one of the goals under the Millennium Development Goals of the United Nations. The Parliament enacted the National Security Food Act, 2013 to address the issue of food security at the household level. The scheme of the Act designs a targeted public distribution system for providing food grains to those below BPL. The object is to ensure to the people adequate food at affordable prices so that people may live a life with dignity. The reforms contemplated under Section 12 of the Act include, application of information and communication technology tools with end to end computerization to ensure transparency and to prevent diversion, and leveraging Aadhaar for unique biometric identification of entitled beneficiaries. The Act imposes obligations on the Central Government, State Government and local authorities vide Chapter VIII, IX and X. Section 32 contemplates other welfare schemes. It provides for nutritional standards in Schedule II and the undertaking of further steps to progressively realize the objectives specified in Schedule III.

264) At this juncture, we would also like to mention that historic judgment of this Court in *His Holiness Kesavananda Bharati*

Sripadagalvaru v. *State of Kerala & Anr.*[89] emphasised on the attainment of socio-economic rights and its interplay with fundamental rights. Following passages from the opinion rendered by Khanna, J. need a specific mention:

> "1477. I may also refer to another passage on p. 99 of *Grammar of Politics* by Harold Laski:
>
> > "The state, therefore, which seeks to survive must continually transform itself to the demands of men who have an equal claim upon that common welfare which is its ideal purpose to promote.
> >
> > We are concerned here, not with the defence of anarchy, but with the conditions of its avoidance. Men must learn to subordinate their self-interest to the common welfare. The privileges of some must give way before the rights of all. Indeed, it may be urged that the interest of the few is in fact the attainment of those rights, since in no other environment is stability to be assured."
>
> 1478. A modern State has to usher in and deal with large schemes having social and economic content. It has to undertake the challenging task of what has been called social engineering, the essential aim of which is the eradication of the poverty, uplift of the downtrodden, the raising of the standards of the vast mass of people and the narrowing of the gulf between the rich and the poor. As occasions arise quite often when the individual rights clash with the larger interests of the society, the State acquires the power to subordinate the individual rights to the larger interests of society as a step towards social justice. As observed by Roscoe Pound on p. 434 of Volume I of *Jurisprudence* under the heading "Limitations on the Use of Property":
>
> > "Today the law is imposing social limitations — limitations regarded as involved in social life. It is endeavouring to delimit the individual interest better with respect to social interests and to confine the

89 (1973) 4 SCC 225

> legal right or liberty or privilege to the bounds of the interest so delimited."

To quote the words of Friedmann in *Legal Theory*:

> "But modern democracy looks upon the right to property as one conditioned by social responsibility by the needs of society, by the 'balancing of interests' which looms so large in modern jurisprudence, and not as pre-ordained and untouchable private right." (Fifth Edition, p. 406)."

265) It would also be worthwhile to mark, in continuity with the aforesaid thought, what Dwivedi, J. emphasised.

> "...The Nation stands to-day at the cross-roads of history and exchanging the time-honoured place of the phrase, may I say that the Directive Principles of State Policy should not be permitted to become "a mere rope of sand". If the State fails to create conditions in which the fundamental freedoms could be enjoyed by all, the freedom of the few will be at the mercy of the many and then all freedoms will vanish. In order, therefore, to preserve their freedom, the privileged few must part with a portion of it."

266) By no stretch of imagination, therefore, it can be said that there is no defined State aim in legislating Aadhaar Act. We may place on record that even the petitioners did not seriously question the purpose *bona fides* of the legislature in enacting this law. In a welfare State, where measures are taken to ameliorate the sufferings of the downtrodden, the aim of the Act is to ensure that these benefits actually reach the populace for whom they are meant. This is naturally a legitimate State aim.

(iii) **Whether Aadhaar Act meets the test of proportionality?**

267) The concept and contours of doctrine of proportionality have already been discussed in detail. We have also indicated the approach that we need to adopt while examining the issue of proportionality. This discussion bring out that following four sub-components of proportionality need to be satisfied:

(a) A measure restricting a right must have a legitimate goal (legitimate goal stage).

(b) It must be a suitable means of furthering this goal (suitability or rationale connection stage).

(c) There must not be any less restrictive but equally effective alternative (necessity stage).

(d) The measure must not have a disproportionate impact on the right holder (balancing stage).

268) We now proceed to examine as to whether these components meet the required parameters in the instant case.

(a) Legitimate Goal Stage: At this stage, the exercise which needs to be undertaken is to see that the State has legitimate goal in restricting the right. It is also to be seen that such a goal is of sufficient importance justifying overriding a constitutional right of freedom. Further, it impairs freedom as little as possible.

269) In our preceding discussion, we have already pointed out above that Aadhaar Act serves the legitimate state aim. That, in fact, provides answer to this component as well. Some additions to the said discussion is as follows:

It is a matter of common knowledge that various welfare schemes for marginalised section of the society have been floated by the successive governments from time to time in last few decades. These include giving ration at reasonable cost through ration shops (keeping in view Right to Food), according certain benefits to those who are below poverty line with the issuance of BPL Cards, LPG connections and LPG cylinders at minimal costs, old age and other kinds of pensions to deserving persons, scholarships, employment to unemployed under Mahatma Gandhi National Rural Employment Guarantee Act, 2005 (MGNREGA) Scheme. There is an emergence of socio-economic rights, not only in India but in many other countries world-wide. There is, thus, recognisation of civil and political rights on the one hand and emergence of socio-economic rights on the other hand. The boundaries between civil and political rights review as well as socio-economic rights review are rapidly crumbling. This rights jurisprudence created in India is a telling example.

270) This Court has developed a reputation as both a protector of Human Rights and an engine of economic and social reforms. In *People's Union for Civil Liberties (PUCL)* v. *Union of India*[90], the Court's treatment of Right to Food as a fundamental right has been seen as victory for India's impoverished population. The Court had passed orders enforcing the Government to take steps to ensure the effective implementation of the Food Distribution Schemes created by the Famine Code. Series of interim orders were passed aimed at bringing immediate relief to the drought affected individuals. The benefits of the schemes were converted into legal entitlements by orders dated November 28, 2001 passed in the said case. Amongst other things, the Court ordered government to complete the identification of people who fell into the groups targeted for food distribution, issue cards to allow these people to collect the grain and distribute the grain to the relevant centres. The order also provided for governmental inspections to ensure fair quality grain. In this and subsequent orders, the court set the requirements on reporting, accountability, monitoring, transparency and dissemination of court orders aimed at ensuring that its orders are followed.

271) The purpose behind these orders was to ensure that the

90 (2001) 5 Scale 303

deserving beneficiaries of the scheme are correctly identified and are able to receive the benefits under the said scheme, which is their entitlement. The orders also aimed at ensuring 'good governance' by bringing accountability and transparency in the distribution system with the pious aim in mind, namely, benefits actually reached those who are rural, poor and starving.

272) Again, in *People's Union for Civil Liberties (PUCL)* case, orders dated January 20, 2010 were passed by the Division Bench of this Court directing the Government of Delhi to respond to the extreme weather conditions 'by setting up more shelters and protecting homeless people from the cold'. The assurance was extracted from the then Additional Solicitor General on behalf of the Government that affected people would be provided with shelter as a matter of priority and that arrangement should be made for this within a day.

273) In the context of Right to Education, this Court in *State of Bihar & Ors.* v. *Project Uchcha Vidya, Sikshak Sangh & Ors.*[91] passed orders on January 3, 2006 thereby directing that a committee be appointed to investigate departures from the State of Bihar's policy concerning the establishment of 'Project Schools' aimed at improving its poor education record. The Court appointed a

91 Civil Appeal No. 6626-6675 of 2001

committee to investigate the matter. The Court's order included details as to the composition and functions of the committee, guidelines as to what would constitute irregularities in the implementation of the policy and an expectation that the State of Bihar would take remedial action if the committee found any irregularities. The Court's approach to affirmative action in education is also instructive.

274) In *Ashoka Thakur* v. *Union of India*[92], the Court upheld the Ninety-Third Amendment to the Constitution, which allows for certain educational institutions to put in place special admissions rules in order to advance India's 'socially or educationally backward classes of citizens or for the Scheduled Castes or the Scheduled Tribes'.[93] The Court held that people who are wealthier and better educated (the 'creamy layer') should be excluded from the 27 per cent quota for 'Other Backward Classes' (OBC). This step was needed to ensure that benefits reached those people living in desperate poverty. In addition, the inclusion of particular groups in the OBC category had to be reviewed every five years.

275) In *Paschim Banga Ket Mazdoor Samity* v. *State of West Bengal*[94], the Court found that Article 21 encompasses a right to adequate

92 Writ Petition (Civil) No. 265 of 2006, judgment delivered on April 10, 2008.
93 The challenge made in the case related to 'Other Backward Classes' rather than the Scheduled Castes or Tribes.
94 (1996) 4 SCC 37

medical facilities or health care. It also interpreted other fundamental rights in light of directive principles. Likewise, in *Mohini Jain* v. *State of Kerala & Ors.*[95], the Court held that the right to equality before the law in Article 14 includes a right to education. In the subsequent case, *Unnikrishnan* v. *State of Andhra Pradesh*[96], the Court clarified its findings in *Mohini Jain*, stating that Article 14 gave rise to a right to primary education. Following the cases on education, in 1997 the Indian government proposed a constitutional Amendment recognising education for children under 14 as a fundamental right. This Amendment was passed in 2002 as Article 21A. One of the Court's earliest cases dealing with the role of the directive principles in constitutional interpretation is arguably also its most celebrated judgment. Some commentators see the decision in *Olga Tellis & Ors.* v. *Bombay Municipal Corporation & Ors.*[97] as a recognition of enforceable right to shelter.

276) The purpose of citing aforesaid judgments is to highlight that this Court expanded the scope of Articles 14 and 21 of the Constitution by recognising various socio-economic rights of the poor and marginalised section of the society and, in the process,

95 (1992) 3 SCC 666
96 (1993) 1 SCC 645
97 1985 SCR Supl. (2) 51

transforming the constitutional jurisprudence by putting a positive obligation on the State to fulfill its duty as per the Charter of Directive Principles of the State Policy, contained in Part IV of the Constitution. It is to be kept in mind that while acknowledging that economic considerations would play a role in determining the full content of the right to life, the Court also held that right included the protection of human dignity and all that is attached to it, 'namely, the bare necessities of life such as adequate nutrition, clothing and shelter and facilities for reading, writing and expressing oneself in diverse forms' (See *Francis Coralie Mullin* v. *The Administrator, Union Territory of Delhi & Ors.*[98]). It is, thus, of some significance to remark that it is this Court which has been repeatedly insisting that benefits to reach the most deserving and should not get frittered mid-way. We are of the opinion that purpose of Aadhaar Act, as captured in the Statement of Objects and Reasons and sought to be implemented by Section 7 of the Aadhaar Act, is to achieve the stated objectives. This Court is convinced by its conscience that the Act is aimed at a proper purpose, which is of sufficient importance.

(b) **Suitability or rationale connection stage:**

277) We are also of the opinion that the measures which are

98 (1981) 2 SCR 516

enumerated and been taken as per the provisions of Section 7 read with Section 5 of the Aadhaar Act are rationally connected with the fulfillment of the objectives contained in the Aadhaar Act. It may be mentioned that the scheme for enrolling under the Aadhaar Act and obtaining the Aadhaar number is optional and voluntary. It is given the nomenclature of unique identity. A person with Aadhaar number gets an identity. No doubt, there are many other modes by which a person can be identified. However, certain categories of persons, particularly those living in abject poverty and those who are illiterate will not be in a position to get other modes of identity like Pan Card, Passport etc. That apart giving unique identity of each resident of the country is a special feature of this scheme, more so, when it comes with the feature stated above, namely, no person can have more than one Aadhaar number; Aadhaar number given to a particular person cannot be reassigned again to any individual even if that is cancelled and there is hardly any possibility to have fake identity.

278) As pointed out above, enrolling for Aadhaar is not the serious concern of the petitioners. It is only the process of authentication and other related issues which bothers the petitioners which shall be considered at the appropriate stage. At this point of time, we are discussing the issue as to whether the limitation on the rights

of the individuals is rationally connected to the fulfillment of the purpose contained in the Aadhaar Act. Here, Section 5 talks of special measures for issuance of Aadhaar number to certain categories of persons. It gives identity to those persons who otherwise may not have any such identity. In that manner, it recognises them as residents of this nation and in that form gives them their 'dignity'.

279) Section 7, which provides for necessity of authentication for receipt of certain subsidies, benefits and services has a definite purpose and this authentication is to achieve the objectives for which Aadhaar Act is enacted, namely, to ensure that such subsidies, benefits and services reach only the intended beneficiaries. We have seen rampant corruption at various levels in implementation of benevolent and welfare schemes meant for different classes of persons. It has resulted in depriving the actual beneficiaries to receive those subsidies, benefits and services which get frittered away though on papers, it is shown that they are received by the persons for whom they are meant. There have been cases of duplicate and bogus ration cards, BPL cards, LPG connections etc. Some persons with multiple identities getting those benefits manifold. Aadhaar scheme has been successful, to a great extent, in curbing the aforesaid

malpractices. By providing that the benefits for various welfare schemes shall be given to those who possess Aadhaar number and after undergoing the authentication as provided in Section 8 of the Aadhaar Act, the purpose is to ensure that only rightful persons receive these benefits. Non-action is not costly. It's the affirmative action which costs the Government. And that money comes from exchequer. So, it becomes the duty of the Government to ensure that it goes to deserving persons. Therefore, second component also stands fulfilled.

(c) **Necessity Stage:**

280) Insofar as third component is concerned, most of it stands answered while in the discussion that has ensued in respect of component No. 1 and 2. The manner in which malpractices have been committed in the past leaves us to hold that apart from the system of unique identity in Aadhaar and authentication of the real beneficiaries, there is no alternative measure with lesser degree of limitation which can achieve the same purpose. In fact, on repeated query by this Court, even the petitioners could not suggest any such method.

(d) **Balancing Stage:**

281) With this, we now advert to the most important component of

proportionality i.e. balancing between importance of achieving the proper purpose and the social importance of preventing the limitation on the constitutional right.

282) Argument of the petitioners is that Aadhaar project creates the architect of surveillance state and society, which is antithetical to the principles of democracy. It is premised on the basis that the Aadhaar project enables the State to profile citizens, track their movements, assess their habits and silently influence their behaviour throughout their lives. It may stifle dissent and influence political decision making. It is also argued that aggregation, storage and use of such stored information is violative of fundamental right to privacy, dignity and individual autonomy. Informational privacy is expected as part of right to privacy. The Act allows data aggregation as well. Such an Act is unconstitutional as there is violation of a fundamental rights but there is absence of procedural safeguards to protect data in the Act. It is also argued that extent of information collected with the use of Aadhaar, specially by the methodology of authentication, is not proportionate to the 'compelling interest of the State' and there are various other methods available for identification. It is, thus, disproportionate and unreasonable state compulsion.

283) The respondents, on the other hand, have argued that there cannot be any reasonable expectation of privacy inasmuch as the Aadhaar Act operates in the public and relationally sphere and not in the core, private or personal sphere of the residents. Moreover, it involves minimal identity information for effective authentication which stands the test of reasonableness. The Act is, thus, least intrusive and strict scrutiny test does not apply in the proportionality test. It is also the case of the respondents that the Aadhaar Act does not allow aggregation at all and, therefore, all the apprehension are ill-founded and have no basis. It is also submitted that the Aadhaar Act is, in fact, the facilitator in empowering various facets of right to life under Article 21 and thereby ensures that unprivileged class is also able to live with human dignity.

284) Before undertaking this exercise of balancing, we would like to point out that we are not convinced with the argument of the respondents that there cannot be any reasonable expectation of privacy. No doubt, the information which is gathered by the UIDAI (whether biometric or demographic) is parted with by the individuals to other agencies/body corporates etc. in many other kinds of transactions as well, as pointed out by the respondents.

However, the matter is to be looked into from the angle that this information is collected and stored by the State or instrumentality of the State. Therefore, it becomes important to find out as to whether it meets the test of proportionality, and satisfies the condition that the measure must not have disproportionate impact on the right-holder (balancing stage). However, at the same time, the fact that such information about individuals is in public domain may become a relevant factor in undertaking the exercise of balancing.

285) We have already traced the objectives with which the Aadhaar Act has been enacted. No doubt, there is a right to privacy, which is now entrenched in fundamental rights. On the other hand, we are also concerned with the rights of those persons whose dignity is sought to be ensured by giving them the facilities which are necessary to live as dignified life. Therefore, balancing has to be done at two levels:

(i) Whether, 'legitimate state interest' ensures 'reasonable tailoring'? There is a minimal intrusion into the privacy and the law is narrowly framed to achieve the objective. Here the Act is to be tested on the ground that whether it is found on a balancing test that the social or public interest and the reasonableness of the restrictions outweigh the particular aspect of privacy, as

claimed by the petitioners. This is the test we have applied in the instant case.

(ii) There needs to be balancing of two competing fundamental rights, right to privacy on the one hand and right to food, shelter and employment on the other hand. Axiomatically both the rights are founded on human dignity. At the same time, in the given context, two facets are in conflict with each other. The question here would be, when a person seeks to get the benefits of welfare schemes to which she is entitled to as a part of right to live life with dignity, whether her sacrifice to the right to privacy, is so invasive that it creates imbalance?

286) In a way, both the aforesaid questions have some overlapping inasmuch as even while finding answer to the second question, it will have to be determined as to whether there is a least intrusion into the privacy of a person while ensuring that the individual gets the benefits under the welfare schemes.

287) The respondents seemed to be right when they argue that all matters pertaining to an individual do not qualify as being an inherent part of right to privacy. Only those which concern matters over which there can be a reasonable expectation of privacy would be protected by Article 21. In this behalf, we may

recapitulate the discussion on some significant aspects in *Puttaswamy*:

Privacy postulates the reservation of a private space, described as the right to be let alone. The integrity of the body and the sanctity of the mind can exist on the foundation of the individual's 'right to preserve a private space in which the human personality can develop' and this involves the ability to make choices. In this sense privacy is a postulate of human dignity itself. The inviolable nature of the human personality is manifested in the ability to make decisions on matters intimate to human life. The autonomy of the individual is associated 'over matters which can be kept private. These are concerns over which there is a legitimate expectation of privacy'. Thoughts and behavioral patterns which are intimate to an individual are entitled to a zone of privacy where one is free of social expectations. In that zone of privacy an individual is not judged by others. The judgment refers to the expert group report and identifies nine privacy principles pertaining to notice, choice and consent, collection limitation, purpose limitation, access and correction, non disclosure of information, security of data, openness or proportionality as to the scale, scope and sensitivity to the data collected, and accountability. At the same time, privacy is a

subset of liberty. All liberties may not be exercised in privacy. It lies across the spectrum of protected freedoms. Further, the notion of reasonable expectation of privacy has both subjective and objective elements. At a subjective level it means 'an individual desires to be left alone'. On an objective plain privacy is defined by those Constitutional values which shape the content of the protected zone where the individual 'ought to be left alone'. Further, the notion of reasonable expectation of privacy ensures that while on the one hand, the individual has a protected zone of privacy, yet on the other 'the exercise of individual choices is subject the right of others to lead orderly lives'. The extent of the zone of privacy would, therefore, depend upon both the subjective expectation and the objective principle which defines a reasonable expectation.

It is pertinent to point out that while dealing with informational privacy, the judgment notes that privacy concerns are seriously an issue in the age of information. It also notes the data mining processes together with knowledge discovery, and the age of big data. The court finds that data regulation and individual privacy raises complex issues requiring delicate balances to be drawn between the legitimate concerns of the State and individual interest in the protection of privacy, and in

this sphere, data protection assumes significance. Data such as medical information would be a category to which a reasonable expectation of privacy attaches. There may be other data which falls outside the reasonable expectation paradigm. Data protection regimes seek to protect the autonomy of the individual. This is a complex exercise involving careful balancing. In this balancing process, following parameters are to be kept in mind:

(i) The judgment also holds that the legitimate expectation of privacy may vary from the intimate zone to the private zone and from the private to the public arenas. However, 'the privacy is not lost or surrendered merely because the individual is in a public space'.

(ii) One of the chief concerns is that 'while the web is a source of lawful activity – both personal and commercial, concerns of National security intervene since the seamless structure of the web can be exploited by terrorist to wreak havoc and destruction on civilized societies.' Noting an article of Richard A. Posner, which says 'privacy is the terrorist's best friend..' It is observed that this formulation indicates that State has legitimate interest when it monitors the web to secure the Nation.

(iii) Apart from National security, State may have justifiable reasons for the collection and storage of data as where it

embarks upon programs to provide benefits to impoverished and marginalized sections of society and for ensuring that scarce public resources are not dissipated and diverted to non-eligible recipients. Digital platforms are a vital tool of ensuring good governance in a social welfare State and technology is a powerful enabler.

288) In the first instance, therefore, it is to be seen as to whether the petitioners claim on the information supplied while authentication to be protected is based on reasonable expectation.

289) 'Reasonable Expectation' involves two aspects. First, the individual or individuals claiming a right to privacy must establish that their claim involves a concern about some harm likely to be inflicted upon them on account of the alleged act. This concern 'should be real and not imaginary or speculative'. Secondly, 'the concern should not be flimsy or trivial'. It should be a reasonable concern. It has to be borne in mind that the concept of 'reasonable expectation' has its genesis in the US case laws. UK judgments adopted the test of reasonable expectation from the US jurisprudence. The ECHR and ECJ judgments reveal a little divergence with regard to right of privacy. The ECHR in general adopts the approach that 'a person's reasonable expectation as

to privacy may be significant, although, not necessarily conclusive factor'. This perhaps explains the apparent conflict as regards finger prints.

290) In the leading case *Katz* v. *US*[99] Reasonable Expectation was stated to embrace two distinct questions. The first was whether the individual, by his conduct has exhibited an actual (subjective expectation of privacy), and the second, whether the subjective expectation is one that the society is prepared to recognize as reasonable. This was also followed in *Smith* v. *Marlyand*[100].

291) In the judgment of Court of Appeal in *R. Wood* v. *Commissioner*[101], the appellant complained against taking and retention of his photograph in Central London in the context of a meeting by the police force to enable identification at a later time in the event of eruption of disorder and commission of offence. The concept of reasonable expectation was examined after surveying a series of judgments which sought to consider violation of Article 8 of the ECHR. The following pertinent aspects emerge:

(i) Whether information related to private or public matter?

(ii) Whether the material obtained was envisaged for a limited

99 389 U.S. 347
100442 US 735
101(2010) 1 WLR 123

use or was likely to be made available to general public?

(iii) Private life was a broad term covering physical and psychological integrity of a person.

(iv) Storing of data relating to private life of an individual interferes with Article 8. However, in determining whether information retained involves any private life aspect would have to be determined with due regard to the specific context.

(v) Article 8, however protean, should not be so construed widely that its claims become unreal and unreasonable. Firstly, the threat to individuals personal autonomy must attain a certain level of seriousness. Secondly, the claimant must enjoy on the facts a reasonable expectation of privacy. Thirdly, the breadth of Article 8(1) may in many instances be greatly curtailed by scope of justifications available to the State.

(vi) Reasonable expectation of privacy is a broad concept which takes into account all the circumstances of the case. They include attributes of the claimants, the nature of the activity in which the claimant was engaged, the place at which it was happening, the nature and purpose of the intrusion, the absence (or presence) of consent, the effect on the claimant and the purpose for which information is taken.

292) Therefore, when a claim of privacy seeks inclusion in Article 21 of

the Constitution of India, the Court needs to apply the reasonable expectation of privacy test. It should, *inter alia,* see:

(i) What is the context in which a privacy claim is set up?

(ii) Does the claim relate to private or family life, or a confidential relationship?

(iii) Is the claim a serious one or is it trivial?

(iv) Is the disclosure likely to result in any serious or significant injury and the nature and extent of disclosure?

(v) Is disclosure relates to personal and sensitive information of an identified person?

(vi) Does disclosure relate to information already disclosed publicly? If so, its implication?

293) Under the Aadhaar Act Architecture, four types of information is to be given at the time of enrolment:

(i) Mandatory demographic information comprising name, date of birth, address and gender (Section 2(k) read with Regulation 4(1) of the Aadhaar (Enrolment and Update) Regulations, 2016).

(ii) Optional demographic information (Section 2(k) read with Regulation 4(2) of the Aadhaar (Enrolment and Update) Regulations, 2016).

(iii) Non core biometric information comprising photograph.

(iv) Core biometric information comprising finger print and iris

scan.

294) Insofar as demographic information is concerned, it is required by the provisions of many other enactments as well like Companies Act, Special Marriage Act, Central Motor Vehicle Rules, Registration of Electoral Rules, The Citizenship Rules, The Passport Act and even Supreme Court Rules.

295) As regards core biometric information which comprises finger prints, iris scan, for the purpose of enrolling in Aadhaar scheme, we have already held earlier that it is minimal information required for enrolment. This information becomes essential for authentication use in a public sphere and in relational context.

296) It may also be mentioned that with the advent of science and technology, finger print and iris scan have been considered to be the most accurate and non invasive mode of identifying an individual. It is for this reason that these are taken also for driving licenses, passports, visa as well as at the time of registration of documents by the State. These are also used in mobile phones, laptops, lockers etc. for private use. International Civil Aviation Organisation (ICAO) has recommended use of biometric passports. Many civilized countries with robust democratic

regime have also introduced biometric based identity cards. Therefore, collection of information in the four different categories mentioned above may not be unreasonable. However, as stated earlier as well, the issue is not of taking the aforesaid information for the purpose of enrolling in Aadhaar and for authentication. It is the storage and retention of this data, whenever authentication takes place, about which the concerns are raised by the petitioners. The fears expressed by the petitioners are that with the storage and retention of such data, profile of the persons can be created which is susceptible to misuse.

297) This aspect has already been dealt with earlier and apprehension of the petitioners are taken care of. To recapitulate, at the time of enrolment, the data collected is minimal and there is no data collection in respect of religion, caste, tribe, language of records of entitlement income or medical history of the applicant at the time of Aadhaar enrolment. Full care is taken that even the minimal data collected at the time of enrolment does not remain with the enrolment agency and immediately gets transmitted to CIDR. Even at the time of authentication, the only exercise which is undertaken by the Authority is to see that the finger prints and/or iris scan of the concerned person sent for authentication

match with the one which is in the system of Authority.

298) Let us advert to the second facet of balancing, namely, balancing of two fundamental rights. As already pointed out above, the Aadhaar Act truly seeks to secure to the poor and deprived persons an opportunity to live their life and exercise their liberty. By ensuring targeted delivery through digital identification, it not only provides them a nationally recognized identity but also attempts to ensure the delivery of benefits, service and subsidies with the aid of public exchequer/Consolidated Fund of India. National Security Food Act, 2013 passed by the Parliament seeks to address the issue of food, security at the household level. The scheme of that Act is aimed at providing food grains to those belonging to BPL categories. Like the MGNREGA Act, 2005 takes care of employment. The MGNREGA Act has been enacted for the enhancement, livelihood, security of the households in rural areas of the country. It guarantees at least 100 days of wage employment in every financial year to at least one able member of every household in the rural area on assets creating public work programme. Sections 3 and 4 of the MGNREGA Act contain this guarantee. The minimum facilities to be provided are set out by Section 5 read with Schedule II.

Section 22 provides for funding pattern and Section 23 provides for transparency and accountability. This Act is another instance of a rights based approach and it enlivens the Fundamental Right to life and personal liberty of Below Poverty Line people in rural areas.

299) We may mention here that Mr. Dwivedi had pointed out not only India but several other countries including western nations which have read socio-economic rights into human dignity and right to life. Hungary and South Africa have gone to the extent of making express provisions in their Constitutions.

The Federal Constitution Court of Germany in a decision dated February 09, 2010 while deciding the question whether the amount of standard benefit aid is compatible with the Basic Law held that:

> "The Fundamental Right to the guarantee of a subsistence minimum is in line with human dignity emerges from Article 1.1 of the Basic Law in conjunction with Article 20.1 of the Basic Law… Article 1.1 of the Basic Law established this claim. The principle of the social welfare State contained in Article 20.1 of the Basic Law, in turn grants to the Legislature the mandate to ensure a subsistence minimum for all that is in line with human dignity".

It is further held that:

> "if a person does not have the material means to guarantee an existence that is in line with human dignity because he or she is unable to obtain it either out of his or her gainful employment, or from own property or by benefits from third parties, the State is obliged within its mandate to protect

> human dignity and to ensure, in the implementation of its social welfare state mandate, that the material prerequisites for this are at the disposal of the person in need of assistance."

Similarly, in a latter judgment dated July 18, 2012 while deciding whether the amount of the cash benefit provided for in the Asylum Seekers Benefits Act was constitutional it reiterated that:

> "the direct constitutional benefit claim to the guarantee of a dignified minimum existence does only cover those means that are absolutely necessary to maintain a dignified life. It guarantees the entire minimum existence as a comprehensive fundamental rights guarantee, that encompasses both humans' physical existence, that is food, clothing, household items, housing, heating, hygiene, and health, and guarantees the possibility maintain interpersonal relationships and a minimal degree of participation in social, cultural and political life, since a human as a person necessarily exists in a social context.."

300) The Constitutional Court of South Africa in *Government of the Republic of South Africa & Ors.* v. *Grootboom*[102] held that:

> "...these rights need to be considered in the context of the socio-economic rights enshrined in the Constitution. They entrench the right to access to land, to adequate housing and to health care, food, water and social security.."

301) In 1995, Hungary's Constitutional Court ruled that the right to social security as contained in Article 70/E of the Constitution obligated the State to secure a minimum livelihood through all of the welfare benefits necessary for the realization of the right to

102(2000) ZACC 19

human dignity.

302) Even in Italy, the Courts have emphasized on the right to social security.

303) In *Budina* v. *Russia*[103], the European Court of Human Rights has recognized, in principle, that inadequate benefits could fall under Article 3 of the European Convention on Human Rights (ECHR) on the right to be free from inhuman and degrading treatment.

304) In 1996, the Swiss Federal Court ruled that three Czechs illegally residing in Switzerland are entitled to social benefit in order to have a minimal level of subsistence for a life in dignity to prevent a situation where people "are reduced to beggars, a condition unworthy of being called human. It held:

> "...The federal constitution does not (though the 1995 draft new constitution is now different) explicitly provide for a fundamental right to a subsistence guarantee. One can however also derive unwritten constitutional right from it. A guarantee of freedoms not mentioned in the constitution by unwritten constitutional law was assumed by the exercise of other freedoms (mentioned in the constitution), or otherwise evidently indispensable components of the democratic constitutional order of the Federation..."
>
> "...The guaranteeing of elementary human needs like food, clothing and shelter is the condition for human existence and development as such. It is at the same time an indispensable component of a constitutional, democratic polity."

103 App. No. 45603/05 decided on 18.06.2009

305) Nelson Mandela in his speech at Trafalgar Square in London in 2005 said:

> "...Massive poverty and obscene inequality are such terrible scourges of our times – times in which the world boasts breathtaking advances in science, technology, industry and wealth accumulation – that they have to rank alongside slavery and apartheid as social evils...And overcoming poverty is not a gesture of charity. It is an act of justice. It is the protection of a fundamental human right, the right to dignity and a decent life. While poverty persists, there is no true freedom."

306) Following passages by James Griffin in his book on "Human Rights" are worth noting :

> "10.1 THE HISTORICAL GROWTH OF RIGHTS:
>
> Contrary to widespread belief, welfare rights are not a twentieth-century innovation, but are among the first human rights ever to be claimed. When in the twelfth and thirteenth centuries our modern conception of a right first appeared, one of the earliest examples offered was the right of those in dire need to receive aid from those in surplus. This right was used to articulate the attractive view of property prevalent in the medieval Church. God has given all things to us in common, but as goods will not be cared for and usefully developed unless assigned to particular individuals, we creatures have instituted systems of property. In these systems, however, an owner is no more than a custodian. We all thus have a right, if we should fall into great need, to receive necessary goods or, failing that, to take them from those in surplus.
>
> One finds, every occasionally, what seem to be human rights to welfare asserted in the Enlightenment, for example, by John Locke, Tom Paine, and William Cobbett. Following the Enlightenment, right to welfare have often appeared in national constitutions; for example, the French constitutions of the 1790s, the Prussian Civil Code (1794), the Constitutions of Sweden (1809), Norway (1814), The Netherlands (1814), Denmark (1849), and, skipping to the twentieth century, the Soviet Union (1936)-though it is not

always clear that the drafters of these various documents thought of these fundamental civil rights as also human rights. By the end of the nineteenth century, political theorists were beginning to make a case that welfare rights are basic in much the sense that Civil and political rights are. But it was **Franklin Roosevelt** who did most to bring welfare rights into public life. The Atlantic Charter (1941), signed by Roosevelt and Churchill but in this respect primarily Roosevelt's initiative, declared that in addition to the classical civil and political freedoms here were also freedoms from want and fear. In his State of the Union message of 1944, Roosevelt averred :

We have come to a clear realization of the fact that true individual freedom cannot exist without economic security and independence. 'Necessitous men are not free men'…

In our day these economic truths have become accepted as self evident. We have accepted, so to speak, a second Bill of Rights…
Among these are : The right to a useful and remunerative job…. The right to earn enough to provide adequate food and clothing and recreation…
The United Nations committee charged with drafting the Universal Declaration of Human Rights (1948), chaired by Eleanor Roosevelt, included most of the now standard welfare rights; rights to social security, to work, to rest and leisure, to medical care, to education, and 'to enjoy the arts and to share in scientific advancements and its benefits'. The Universal Declaration is a good example of how extensive-some would say lavish-proposed welfare rights have become.

...If human rights are protections of a form of life that is autonomous and free, they should protect life as well as that form of it. But if they protect life, must they not also ensure the wherewithal to keep body and soul together-that is, some minimum material provision? And as mere subsistence-that is, keeping body and soul together-is too meager to ensure normative agency, must not human rights guarantee also whatever leisure and education and access to the thought of others that are also necessary to being a normative agent?

That is the heart of the case. It appeals to our picture of human agency and argues that both life and certain supporting goods are integral to it. Life and certain

supporting goods are necessary conditions of being autonomous and free. Many philosophers employ this necessary – condition argument to establish a human right to welfare-or, at least, to establish the right's being as basic as any other rights.

I too want to invoke the necessary-conditions arguments; I should only want to strengthen it. It is now common to say that liberty rights and welfare rights are 'indivisible'. But that, also, is too weak. It asserts that one cannot enjoy the benefits of liberty rights without enjoying the benefits of welfare rights, and vice versa. But something stronger still may be said. There are forms of welfare that are empirically necessary conditions of a person's being autonomous and free, but there are also forms that are logically necessary-part of what we mean in saying that a person has these rights. The value in which human rights are grounded is the value attaching to normative agency. The norm arising from this value, of course, prohibits persons from attacking another's autonomy and liberty. But it prohibits more. The value concerned is being a normative agent, a self-creator, made in god's image…. The value resides not simply in one's having the undeveloped, unused capacities for autonomy and liberty but also in exercising them-not just in being able to be autonomous but also in actually being so. The norm associated with this more complex value would address other ways of failing to be an agent. It would require protecting another person from losing agency, at least if one can do this without great cost to oneself; it would require helping to restore another's agency if it has already been lost, say through giving mobility to the crippled or guidance to the blind, again with the same proviso. All of this is involved simply in having a right to autonomy or to liberty. Welfare claims are already part of the content of these rights. What, then, should we think of the common division of basic rights into 'classical' liberty rights and welfare rights? Into which of these two classes does the right to autonomy or to liberty go? Into which of the two classes do the difficult, apparently borderline cases go, such as rights to life, to property, to the pursuit of happiness, to security of person, and to privacy? The sensible response would be to drop the distinction. What is more, a right to welfare is a human right.

36. Amartya Sen in his book "Development as Freedom" says:

> Development requires the removal of major sources of unfreedom: poverty as well as tyranny, poor economic opportunities as well as systematic social deprivation, neglect of public facilities as well as intolerance or overactivity of repressive states. Despite unprecedented increases in overall opulence, the contemporary world denies elementary freedoms to vast numbers-perhaps even the majority-of people. Sometimes the lack of substantive freedoms relates directly to economic poverty, which robs people of the freedom to satisfy hunger, or to achieve sufficient nutrition, or to obtain remedies for treatable illnesses, or the opportunity to be adequately clothed or sheltered, or to enjoy clean water or sanitary facilities. In other cases, the unfreedom links closely to the lack of public facilities and social care, such as the absence of epidemiological programs, or of organized arrangements for health care or educational facilities, or of effective institutions for the maintenance of local peace and order. In still other cases, the violation of freedom results directly from a denial of political and civil liberties by authoritarian regimes and from imposed restrictions on the freedom to participate in the social, political and economic life of the community."

307) In the aforesaid backdrop, this Court is called upon to find out whether Aadhaar Act strikes a fair balance between the two rights. In this context, we have to examine the importance of achieving the proper purpose and the social importance of preventing the limitation on the constitutional rights. Insofar as importance of achieving the proper purpose is concerned, that has already been highlighted above. To reiterate some of the important features, it is to be borne in mind that the State is using Aadhaar as an enabler for providing deserving section of the society their right to food, right to livelihood, right to receive

pension and other social assistance benefits like scholarships etc. thereby bringing their right to life to fruition. This necessity of Aadhaar has arisen in order to ensure that such benefits are given to only genuine beneficiaries. The Act aims at efficient, transparent and targeted delivery of subsidies, benefits and services. In the process, it wants to achieve the objective of checking the corrupt practices at various levels of distribution system which deprive genuine persons from receiving these benefits. There have been reports relating to leakages in PDS as well as in fuel subsidies and also in working of MGNREGA scheme. Mr. Venugopal, learned Attorney General has given the following details about these reports:

(I) **Reports relating to leakages in PDS**

Several studies initiated by the Government as well as the World Bank and Planning Commission revealed that food grains did not reach the intended beneficiaries and that there was large scale leakages due to the failure to establish identity:

(a) The Comptroller and Auditor General of India in its Audit Report No. 3 of 2000 in its overview for the Audit Report observed that the Public Distribution Scheme suffered from serious targeting problems. 1.93 Crore bogus ration cards were found to be in circulation in 13 States and a significant portion of the subsidized food-grains and other essential commodities did not reach the beneficiaries due to their diversion in the open market.

(b) A Report titled "Budget Briefs: Targeted Public Distribution System (TPDS), GOI 2011-2012" prepared by Avani Kapur and Anirvan Chowdhury and published by the Accountability Initiative observed that there were large

number of fake ration cards which were causing inefficiencies in targeting. Between July 2006 and July 2010, in Bihar, Madhya Pradesh, Uttar Pradesh and Orissa, total of 37 lakh ineligible/fake ration cards for households have been eliminated. Additionally, in Maharashtra and Madhya Pradesh, 29 lakh and 25 lakh ineligible ration cards were discovered and cancelled.

(c) World Bank published a Discussion Paper No. 380 titled "India's Public Distribution System: A National and International Perspective" dated November, 1997 co-authored by R. Radhakrishna and K. Subbarao, in which it was found that in the year in 1986-87 for every one rupee (Re. 1) transferred under the PDS, the expenditure incurred by the central government was Rs. 4.27.

(d) The Planning Commission of India in its Performance Evaluation Report titled "Performance Evaluation Report of Targeted Public Distribution System (TPDS)" dated March, 2005 found as follows:

(i) State-wise figure of excess Ration Cards in various states and the existence of over 1.52 Crore excess Ration Cards issued.

(ii) Existence of fictitious households and identification errors leading to exclusion of genuine beneficiaries.

(iii) Leakage through ghost BPL Ration Cards found to be prevalent in almost all the states under study.

(iv) The Leakage of food grains through ghost cards has been tabulated and the percentage of such leakage on an All India basis has been estimated at 16.67%.

(v) It is concluded that a large part of the subsidized food-grains were not reaching the target group.

(II) **Report relating to Fuel subsidies**

13. With respect of Kerosene subsidies:

(a) A Report titled "Budgetary Subsidies in India – Subsidizing Social and Economic Services" prepared by the National Institute of Public Finance and Policy dated March, found that the key to lowering volume of subsidies was better targeting without which, there was significant

leakage to unintended beneficiaries, with only 70% of the kerosene reaching the poorer section of society.

(b) The Economic Survey 2014-15 at Chapter 3 titled "Wiping Every Tear from every Eye: The JAM Number Trinity Solution" dated February, 2015 noted that only 59 percent of subsidized kerosene allocated via the PDS is actually consumed by households, with the remainder lost to leakage and only 46 percent of total consumption is by poor households.

14. With respect to the MGNREGA Scheme the following reports have found large scale leakages in the scheme:

(a) Report prepared by the V.V. Giri National Labour Institute and sponsored by the Department of Rural Development, Ministry of Rural Development, Government of India as "The study of Schedule of Rates for National Rural Employment Guarantee Scheme" observes that there was great fraud in making fake job cards and it was found that in many cases, it was found that workers performed one day's job, but their attendance was put for 33 days. The workers got money for one day while wages for 32 days were misappropriated by the people associated with the functioning of NREGS.

(b) The National Institute of Public Finance and Policy's report titled as "A Cost-benefit analysis of Aadhaar" dated 09.11.2012 estimated that a leakage of approximately 12 percent is being caused to the government on account of ghost workers and manipulated muster rolls and assumed that 5 percent of the leakages can be plugged through wage disbursement using Aadhaar-enabled bank accounts and 7 percent through automation of muster rolls.

(III) It was also pointed out that the Thirteenth Finance Commission Report for 2010-2015 dated December, 2009 at page 218 in "Chapter 12 – Grants in Aid" states that the creation of a biometric-based unique identity for all residents in the country has the potential to address need of the government to ensure that only eligible persons are provided subsidies and benefits and that all eligible persons are covered.

The relevant findings of the above Report are as follows:

(i) Government of India's expenditure on subsidies is expected to be about Rs.1,11,000 Crore in 2009-10, or nearly 18 per cent of the non-plan revenue expenditure.

(ii) The data base of eligible persons presently maintained has both Type I (exclusion) and Type II (inclusion) errors. The first error arises from the difficulty faced by the poor in establishing their identity in order to be eligible for government subsidies and social safety net programmes. The second error arises because of the inability to cross-verify lists of eligible persons across district-level and state-level data bases to eliminate duplicate and ghost entries. We need to ensure that only eligible persons are provided subsidies and benefits and that all eligible persons are covered.

(iii) Creation of a biometric-based unique identity for all residents in the country has the potential to address both these dimensions simultaneously. It will provide the basis for focusing subsidies to target groups. Possession of such an identity will also enable the poor and underprivileged to leverage other resources like bank accounts, cell phones, which can empower them and catalyse their income growth. These benefits cannot be accessed by them presently due to their inability to provide acceptable identification. The initiative to provide unique IDs has the potential to significantly improve the governance and delivery framework of public services while substantially reducing transaction costs, leakages and frauds.

308) As against the above larger public interest, the invasion into the privacy rights of these beneficiaries is minimal. By no means it can be said that it has disproportionate effect on the right holder.

309) Intensity of review depends upon the particular context of question in a given case. There is yet another significant angle in these matters, which has to be emphasised at this stage viz. dignity in the form of autonomy (informational privacy) and dignity

in the form of assuring better living standards, of the same individual. In the instant case, a holistic view of the matter, having regard to the detailed discussion hereinabove, would amply demonstrate that enrolment in Aadhaar of the unprivileged and marginalised section of the society, in order to avail the fruits of welfare schemes of the Government, actually amounts to empowering these persons. On the one hand, it gives such individuals their unique identity and, on the other hand, it also enables such individuals to avail the fruits of welfare schemes of the Government which are floated as socio-economic welfare measures to uplift such classes. In that sense, the scheme ensures dignity to such individuals. This facet of dignity cannot be lost sight of and needs to be acknowledged. We are, by no means, accepting that when dignity in the form of economic welfare is given, the State is entitled to rob that person of his liberty. That can never be allowed. We are concerned with the balancing of the two facets of dignity. Here we find that the inroads into the privacy rights where these individuals are made to part with their biometric information, is minimal. It is coupled with the fact that there is no data collection on the movements of such individuals, when they avail benefits under Section 7 of the Act thereby ruling out the possibility of creating their profiles. In

fact, this technology becomes a vital tool of ensuring good governance in a social welfare state. We, therefore, are of the opinion that the Aadhaar Act meets the test of balancing as well.

310) We may profitably refer to the judgment of this Court in *People's Union for Civil Liberties (PUCL) & Anr.* v. *Union of India & Anr.*[104] which dealt with the issue of right to privacy vis-a-vis in public interest and leaned in favour of public interest which can be seen from the following discussion:

> "**121.** It has been contended with much force that the right to information made available to the voters/citizens by judicial interpretation has to be balanced with the right of privacy of the spouse of the contesting candidate and any insistence on the disclosure of assets and liabilities of the spouse invades his/her right to privacy which is implied in Article 21. After giving anxious consideration to this argument, I am unable to uphold the same. In this context, I would like to recall the apt words of Mathew, J., in *Gobind* v. *State of M.P.* [1969 UJ (SC) 616] While analysing the right to privacy as an ingredient of Article 21, it was observed: (SCC p. 155, para 22)
>
> > "*22*. There can be no doubt that privacy-dignity claims deserve to be examined with care and to be denied only when an *important countervailing interest is shown to be superior*."
> >
> > (emphasis supplied)
> >
> > It was then said succinctly: (SCC pp. 155-56, para 22)
> >
> > "If the court does find that a claimed right is entitled to protection as a fundamental privacy right, a law infringing it must satisfy the compelling State-interest test. Then the question would be whether a State

104(2003) 4 SCC 399

interest is of such paramount importance as would justify an infringement of the right."

It was further explained: (SCC p. 156, para 23)

"[P]rivacy primarily concerns the individual. It therefore relates to and overlaps with the concept of liberty. The most serious advocate of privacy must confess that there are serious problems of defining the essence and scope of the right. Privacy interest in autonomy must also be placed in the context of other rights and values."

By calling upon the contesting candidate to disclose the assets and liabilities of his/her spouse, the fundamental right to information of a voter/citizen is thereby promoted. When there is a competition between the right to privacy of an individual and the right to information of the citizens, the former right has to be subordinated to the latter right as it serves the larger public interest. The right to know about the candidate who intends to become a public figure and a representative of the people would not be effective and real if only truncated information of the assets and liabilities is given. It cannot be denied that the family relationship and social order in our country is such that the husband and wife look to the properties held by them as belonging to the family for all practical purposes, though in the eye of law the properties may distinctly belong to each of them. By and large, there exists a sort of unity of interest in the properties held by spouses. The property being kept in the name of the spouse *benami* is not unknown in our country. In this situation, it could be said that a countervailing or paramount interest is involved in requiring a candidate who chooses to subject himself/herself to public gaze and scrutiny to furnish the details of assets and liabilities of the spouse as well. That is one way of looking at the problem. More important, it is to be noted that Parliament itself accepted in principle that not only the assets of the elected candidates but also his or her spouse and dependent children should be disclosed to the constitutional authority and the right of privacy should not come in the way of such disclosure;..."

311) In *Vernonia School District 47J* v. *Acton et ux., Guardians Ad Litem for Acton*[105], the Supreme Court of United States, while repelling the Fourth Amendment challenge wherein the petitioner had adopted a Drug Policy which authorised random urinalysis drug testing of students participating in athletics programs, remarked as under:

> "Taking into account all the factors we have considered above- the decreased expectation of privacy, the relative unobtrusiveness of the search, and the severity of the need met by the search-we conclude Vernonia's Policy is reasonable and hence constitutional."

312) This very exercise of balancing of two fundamental rights was also carried out in *Subramanian Swamy* v. *Union of India, Ministry of Law & Ors.*[106] where the Court dealt with the matter in the following manner:

> "**122.** In *State of Madras* v. *V.G. Row* [*State of Madras* v. *V.G. Row*, AIR 1952 SC 196 : 1952 Cri LJ 966], the Court has ruled that the test of reasonableness, wherever prescribed, should be applied to each individual statute impugned and no abstract standard, or general pattern of reasonableness can be laid down as applicable to all cases. The nature of the right alleged to have been infringed, the underlying purpose of the restrictions imposed, the extent and urgency of the evil sought to be remedied thereby, the disproportion of the imposition, the prevailing conditions at the time, should all enter into the judicial verdict.
>
> xx xx xx

105515 US 646 (1995)
106(2016) 7 SCC 221

130. The principles as regards reasonable restriction as has been stated by this Court from time to time are that the restriction should not be excessive and in public interest. The legislation should not invade the rights and should not smack of arbitrariness. The test of reasonableness cannot be determined by laying down any abstract standard or general pattern. It would depend upon the nature of the right which has been infringed or sought to be infringed. The ultimate "impact", that is, effect on the right has to be determined. The "impact doctrine" or the principle of "inevitable effect" or "inevitable consequence" stands in contradistinction to abuse or misuse of a legislation or a statutory provision depending upon the circumstances of the case. The prevailing conditions of the time and the principles of proportionality of restraint are to be kept in mind by the court while adjudging the constitutionality of a provision regard being had to the nature of the right. The nature of social control which includes public interest has a role. The conception of social interest has to be borne in mind while considering reasonableness of the restriction imposed on a right. The social interest principle would include the felt needs of the society.

xx xx xx

Balancing of fundamental rights

136. To appreciate what we have posed hereinabove, it is necessary to dwell upon balancing the fundamental rights. It has been argued by the learned counsel for the petitioners that the right conferred under Article 19(1)(*a*) has to be kept at a different pedestal than the individual reputation which has been recognised as an aspect of Article 21 of the Constitution. In fact the submission is that right to freedom of speech and expression which includes freedom of press should be given higher status and the individual's right to have his/her reputation should yield to the said right. In this regard a passage from *Sakal Papers (P) Ltd.* [*Sakal Papers (P) Ltd.* v. *Union of India*, (1962) 3 SCR 842 : AIR 1962 SC 305] has been commended to us. It says: (AIR pp. 313-14, para 36)

> "*36*. … Freedom of speech can be restricted only in the interests of the security of the State, friendly relations with foreign State, public order, decency or morality or in relation to contempt of court, defamation or incitement to an offence. It cannot, like

the freedom to carry on business, be curtailed in the interest of the general public. If a law directly affecting it is challenged, it is no answer that the restrictions enacted by it are justifiable under clauses (3) to (6). For, the scheme of Article 19 is to enumerate different freedoms separately and then to specify the extent of restrictions to which they may be subjected and the objects for securing which this could be done. *A citizen is entitled to enjoy each and every one of the freedoms together and clause (1) does not prefer one freedom to another. That is the plain meaning of this clause. It follows from this that the State cannot make a law which directly restricts one freedom even for securing the better enjoyment of another freedom*."

(emphasis supplied)

137. Having bestowed our anxious consideration on the said passage, we are disposed to think that the above passage is of no assistance to the petitioners, for the issue herein is sustenance and balancing of the separate rights, one under Article 19(1)(*a*) and the other, under Article 21. Hence, the concept of equipoise and counterweighing fundamental rights of one with other person. It is not a case of mere better enjoyment of another freedom. In *Acharya Maharajshri Narendra Prasadji Anandprasadji Maharaj* v. *State of Gujarat* [*Acharya Maharajshri Narendra Prasadji Anandprasadji Maharaj* v. *State of Gujarat*, (1975) 1 SCC 11], it has been observed that a particular fundamental right cannot exist in isolation in a watertight compartment. One fundamental right of a person may have to coexist in harmony with the exercise of another fundamental right by others and also with reasonable and valid exercise of power by the State in the light of the directive principles in the interests of social welfare as a whole. The Court's duty is to strike a balance between competing claims of different interests…

xx xx xx

194. Needless to emphasise that when a law limits a constitutional right which many laws do, such limitation is constitutional if it is proportional. The law imposing restriction is proportional if it is meant to achieve a proper purpose, and if the measures taken to achieve such a purpose are rationally connected to the purpose, and such measures are necessary. Such limitations should not be arbitrary or of an excessive nature beyond what is required

> in the interest of the public. Reasonableness is judged with reference to the objective which the legislation seeks to achieve, and must not be in excess of that objective (see *P.P. Enterprises* v. *Union of India* [*P.P. Enterprises* v. *Union of India*, (1982) 2 SCC 33 : 1982 SCC (Cri) 341]). Further, the reasonableness is examined in an objective manner from the standpoint of the interest of the general public and not from the point of view of the person upon whom the restrictions are imposed or abstract considerations (see *Mohd. Hanif Quareshi* v. *State of Bihar* [*Mohd. Hanif Quareshi* v. *State of Bihar*, AIR 1958 SC 731])."

313) Thus, even when two aspects of the fundamental rights of the same individual, which appear to be in conflict with each other, is done, we find that the Aadhaar Act has struck a fair balance between the right of privacy of the individual with right to life of the same individual as a beneficiary.

In the face of the all pervading prescript for accomplished socio-economic rights, that need to be given to the deprived and marginalised section of the society, as the constitutional imperative embodied in these provisions of the Act, it is entitled to receive judicial imprimatur.

Re : Argument on Exclusion:

314) Some incidental aspects, however, remain to be discussed. It was argued by the petitioners that the entire authentication process is probabilistic in nature inasmuch as case of a genuine person for authentication can result in rejection as biometric technology does not guarantee 100% accuracy. It may happen

for various reasons, namely, advance age, damage to fingerprints due to accident, etc. Even in case of children the fingerprints may change when they grow up. The emphasis was that there was a possibility of failure in authentication for various reasons and when it happens it would result in the exclusion rather than inclusion. In such eventuality an individual would not only be denied the benefits of welfare schemes, it may threaten his very identity and existence as well and it would be violative of Articles 14 and 21 of the Constitution. The Authority has claimed that biometric accuracy is 99.76%. It was, however, submitted that where more than 110 crores of persons have enrolled themselves, even 0.232% failure would be a phenomenal figure, which comes to 27.60 lakh people. Therefore, the rate of exclusion is alarming and this would result in depriving needy persons to enjoy their fundamental rights, which is the so-called laudable objective trumpeted by the respondents.

TO DICTATE FURTHER

Re. : Studies on exclusion

Re. : Finger prints of disabled, old persons etc. See other mode of identity

315) The aforesaid apprehensions are sought to be assuaged by the respondents by submitting that Section 7 of the Act nowhere says

that if authentication fails, the concerned person would be deprived of subsidies, benefits or services. It is only an enabling provision. It also provides that in case of such a failure, such an individual would be permitted to establish her identity by any other means so that genuine persons are not deprived of their benefits which are mentioned in Section 7 as the entire Act is to facilitate delivery of those benefits to such persons. Learned Attorney General also referred to the Circular dated October 24, 2017 in this behalf which is issued by the Authority. That, according to us, takes care of the problem.

316) We understand and appreciate that execution of the Aadhaar scheme, which has otherwise a laudable objective, is a 'work in progress'. There have been substantial improvements in the system over a period of time from the date of its launch. It was stated by the learned Attorney General as well as Mr. Rakesh Dwivedi, at the Bar, that whenever difficulties in implementation are brought to the notice of the respondents, remedial measures are taken with promptness. Cases of denial of services are specifically looked into which is very much needed in a welfare State and there can be a genuine hope that with the fine tuning of technology, i.e. the mode of advancement at rapid pace, such problems and concerns shall also be completely taken care of.

317) In fairness to the petitioners, it is worth mentioning that they have referred to the research carried out by some individuals and even NGOs which have been relied upon to demonstrate that there are number of instances leading to the exclusion i.e. the benefits are allegedly denied on the ground of failure of authentication. The respondents have refuted such studies. These become disputed question of facts. It will be difficult to invalidate provisions of Parliamentary legislations on the basis of such material, more particularly, when their credence has not been tested.

318) That apart, there is another significant and more important aspect which needs to be highlighted. The objective of the Act is to plug the leakages and ensure that fruits of welfare schemes reach the targeted population, for whom such schemes are actually meant. This is the larger purpose, and very important public purpose, which the Act is supposed to subserve. We have already held that it fulfills legitimate aim and there is a rational connection between the provisions of the Act and the goals which it seeks to attain. The Act passes the muster of necessity stage as well when we do not find any less restrictive measure which could be equally effective in achieving the aim. In a situation like this where the Act is aimed at achieving the aforesaid public purpose,

striving to benefit millions of deserving people, can it be invalidated only on the ground that there is a possibility of exclusion of some of the seekers of these welfare schemes? Answer has to be in the negative. We may hasten to add that by no means, we are accepting that if such an exclusion takes place, it is justified. We are only highlighting the fact that the Government seems to be sincere in its efforts to ensure that no such exclusion takes place and in those cases where an individual who is rightfully entitled to benefits under the scheme is not denied such a benefit merely because of failure of authentication. In this scenario, the entire Aadhaar project cannot be shelved. If that is done, it would cause much more harm to the society.

319) We are also conscious of the situation where the formation of fingerprints may undergo change for various reasons. It may happen in the case of a child after she grows up; it may happen in the case of an individual who gets old; it may also happen because of damage to the fingers as a result of accident or some disease etc. or because of suffering of some kind of disability for whatever reason. Even iris test can fail due to certain reasons including blindness of a person. We again emphasise that no

person rightfully entitled to the benefits shall be denied the same on such grounds. It would be appropriate if a suitable provision be made in the concerned regulations for establishing an identity by alternate means, in such situations. Furthermore, if there is a 0.232% failure in authentication, it also cannot be said that all these failures were only in those cases where authentication was for the purpose of utilising for the benefit of the welfare schemes, i.e. with reference to Section 7 of the Act. It could have happened in other cases as well. Be as it may, there is yet another angle which has to be kept in mind and cannot be ignored. We have already highlighted above as to how the Aadhaar project is aimed at serving a much larger public interest. The Authority has claimed that biometric accuracy is 99.76% and the petitioners have also proceeded on that basis. In this scenario, if the Aadhaar project is shelved, 99.76% beneficiaries are going to suffer. Would it not lead to their exclusion? It will amount to throwing the baby out of hot water along with the water. In the name of 0.232% failure (which can in any case be remedied) should be revert to the pre-Aadhaar stage with a system of leakages, pilferages and corruption in the implementation of welfare schemes meant for marginalised section of the society, the full fruits thereof were not reaching to

such people? The Aadhaar programme was conceived and conceptualised by Mr. Nandan Nilekani under the leadership of then Prime Minister, a great economist himself. It went through rigorous process of testing about its effectiveness before it is launched. This has been stated in the beginning. The entire aim behind launching this programme is the 'inclusion' of the deserving persons who need to get such benefits. When it is serving much larger purpose by reaching hundreds of millions of deserving persons, it cannot be crucified on the unproven plea of exclusion of some. We again repeat that the Court is not trivialising the problem of exclusion if it is there. However, what we are emphasising is that remedy is to plug the loopholes rather than axe a project, aimed for the welfare of large section of the society. Obviously, in order to address the failures of authentication, the remedy is to adopt alternate methods for identifying such persons, after finding the causes of failure in their cases. We have chosen this path which leads to better equilibrium and have given necessary directions also in this behalf.

320) Another facet which needs examination at this stage is the meaning that is to be assigned to the expression 'benefits'

occurring in Section 7 of the Aadhaar Act, along with 'subsidies' and 'services'. It was argued that the expression 'benefits' is very lose and wide and the respondents may attempt to bring within its sweep any and every kind of governmental activity in the name of welfare of communities, which would result in making the requirement of Aadhaar virtually mandatory. It was pointed out that by issuing various circulars the Government has already brought within the sweep of Section 7, almost 139 such subsidies, services and benefits.

321) No doubt, the Government cannot take umbrage under the aforesaid provision to enlarge the scope of subsidies, services and benefits. 'Benefits' should be such which are in the nature of welfare schemes for which resources are to be drawn from the Consolidated Fund of India.

Therefore actions by CBSE, NEET, JEE and UGC requirements for scholarship shall not be covered under Section 7, unless it is demonstrated that the expenditure is incurred from Consolidated Fund of India. Further, the expression 'benefit' has to be read *ejusdem generis* with the preceding word 'subsidies'.

322) We also make it clear that a benefit which is earned by an

individual (e.g. pension by a government employee) cannot be covered under Section 7 of the Act, as it is the right of the individual to receive such benefit.

At the same time, we have gone through the list of notifications which are issued under Section 7 of the Aadhaar Act. We find that most of these notifications pertain to various welfare schemes under which benefits, subsidies or services are provided to the intending recipients. Moreover, in order to avail the benefits, only one time verification is required except for few services where annual verification is needed. It is only in respect of fertilizer subsidy where authentication is required every time the fertilizer is disbursed. However, it is clarified that fertilizer is also given on the basis of other documents such as Kisan Credit Card, etc. At the same time, we hope that the respondents shall not unduly expand the scope of 'subsidies, services and benefits' thereby widening the net of Aadhaar, where it is not permitted otherwise. Insofar as notifications relating to children are concerned, we have already dealt with the same separately. We, thus, conclude this aspect as under:

(a) 'benefits' and 'services' as mentioned in Section 7 should be those which have the colour of some kind of subsidies etc., namely, welfare schemes of the Government whereby

Government is doling out such benefits which are targeted at a particular deprived class.

(b) The expenditure thereof has to be drawn from the Consolidated Fund of India.

(c) On that basis, CBSE, NEET, JEE, UGC etc. cannot make the requirement of Aadhaar mandatory as they are outside the purview of Section 7 and are not backed by any law.

Children:

323) Though, we have upheld, in general, the validity of Section 7 of the Aadhaar Act, one specific aspect thereof is yet to be considered. Section 7 mandates requirement of Aadhaar for the purposes of receiving certain subsidies, benefits and services. Thus, any individual who wants to seek any of these subsidies, benefits and services is compulsorily required to have an Aadhaar number. This will include children as well. Some of the petitioners as well as some other applicants who have intervened in these petitions have expressed their concern about the mandatory requirement of Aadhaar for children and subsequent linking for realising their basic rights including education. They have referred to various circulars and notifications issued through various functionaries, schools, The Ministry of Human Resource

Development (MHRD) which have mandated production of Aadhaar card details for the children seeking admission to schools and to link the Aadhaar of the students already enrolled. We have held that Aadhaar is a voluntary scheme and, therefore, the Aadhaar number is to be alloted to an individual on his 'consent'. No doubt, for the purposes of utilising any of the benefits under Section 7 of the Aadhaar Act, it becomes necessary to have Aadhaar number. However, the question is as to whether it can be extended to children? It is more so when they are not under legal capacity to provide any 'consent' under the law.

324) Article 21A of the Constitution guarantees right to education and makes it fundamental right of the children between 6 years and 14 years of age. Such a right cannot be taken away by imposing requirement of holding Aadhaar card, upon the children.

325) In view thereof, admission of a child in his school cannot be covered under Section 7 of the Aadhaar Act as it is neither subsidy nor service. No doubt, the expression 'benefit' occurring in Section 7 is very wide. At the same time, it has to be given restrictive meaning and the admission of children in the schools, when they have fundamental right to education, would not be

covered by Section 7, in our considered view. The respondents made an attempt to justify the linkage of Aadhaar with child information and records by arguing that there have been several instances of either impersonations at examinations or bogus admissions which have the potential to pilfer away various scholarship schemes which the Government provides for weaker sections from time to time. If this is the objective, then also requirement of Aadhaar cannot insisted at the time of admission but only at the stage of application for Government scholarships. Insofar as impersonation at examination is concerned, that can be easily checked and contained by other means with effective checks and balances. When there are alternative means, insistence on Aadhaar would not satisfy the test or proportionality. This would violate the privacy right of the children importance whereto is given by the Constitution Bench in *K.S. Puttaswamy* in the following words:

> "633. Children around the world create perpetual digital footprints on social network websites on a 24/7 basis as they learn their 'ABCs': Apple, Bluetooth, and Chat followed by Download, E-Mail, Facebook, Google, Hotmail, and Instagram. They should not be subjected to the consequences of their childish mistakes and naivety, their entire life. Privacy of children will require special protection not just in the context of the virtual world, but also the real world."

326) It is also important to note herein that the Juvenile Justice Act,

2015 while addressing children in need of care and protection and children in conflict with law enunciates that the records of the children are confidential and will not be parted with unless requested by the Children's Court. In contrast, the submission of the Union justifying linking of Aadhaar with student records on malpractice in examinations and potential bogus admissions with no safeguards whatsoever.

327) It has to be kept in mind that when the children are incapable of giving consent, foisting compulsion of having Aadhaar card upon them would be totally disproportionate and would fail to meet the proportionality test. As the law exists today, a child can hold property, operate a bank account, be eligible to be a nominee in an insurance policy or a bank account or have any financial transaction only through a legal guardian who has to be a major of sound mind. In cases where a child is in conflict with the law, the child is given a special criminal trial under the Juvenile Justice (Care and Protection of Children) Act, 2015 and there is a mandatory requirement for the records to be kept confidential and destroyed so that the criminal record of the child is not maintained. This is the position in law contained in Section 11 of the Indian Contract Act, 1872, Section 45ZA of the Banking

Regulation Act, 1949, Section 39 of the Insurance Act, 1938, Section 90 of the Indian Penal Code (which provides that consent of the child who is under 12 years of age shall not be regarded as consent) etc. Thus, when a child is not competent to contract; not in a position to consent; barred from transferring property; prohibited from taking employment; and not allowed to open/operate bank accounts and, as a consequence, not in a position to negotiate her rights, thirsting upon compulsory requirement of holding Aadhaar would be an inviable inroad into their fundamental rights under Article 21. The restriction imposed on such a right in the form of an Aadhaar cannot be treated as constitutionally justified. We may also mention here that State is supposed to keep in mind the best interest of the children which is regarded as primary consideration in our Constitution (See *R.D. Upadhyay* v. *State of Andhra Pradesh & Ors.*[107]). The convention on the Rights of Child[108] reiterates that the best interests of the child will be the basic concern of the parents or legal guardians of the child. The Constitution affirms acting in the best interest of the children and confers the responsibility on the State to not only safeguard the best interests of children but also act in furtherance of it. Therefore, we are of the opinion that the

107(2007) 15 SCC 49

108India acceded to the UN Convention on the Rights of the Child in December 1992 to reiterate its commitment to the cause of the children.

State is constitutionally bound to facilitate and enable the parents and guardians of the children to assert their rights and act in their best interest and this has to be done without having any mandatory directives to it. The onus of overseeing and lawfully safeguarding the rights and immunities, to which children are entitled to, rests on the State and the authorities under it. Giving proper education to children and ensuring that they become valuable citizens of this nation subserves public interest. This is the mandate of Convention on the Rights of Child (CRC) as well. We may reproduce Article 27 of the CRC:

> "States Parties recognize the right of every child to a standard of living adequate for the child's physical, mental, spiritual, moral and social development.
>
> 2. The parent(s) or others responsible for the child have the primary responsibility to secure, within their abilities and financial capacities, the conditions of living necessary for the child's development.
>
> 3. States Parties, in accordance with national conditions and within their means, shall take appropriate measures to assist parents and others responsible for the child to implement this right and shall in case of need provide material assistance and support programmes, particularly with regard to nutrition, clothing and housing."

328) Article 8 of the CRC provides that:

> "(2) For the purpose of guaranteeing and promoting the rights set forth in the present Convention, States Parties shall render appropriate assistance to parents and legal guardians in the performance of their child-rearing responsibilities and shall ensure the development of institutions, facilities and services for the care of children.

> (3) States Parties shall take all appropriate measures to ensure that children of working parents have the right to benefit from child-care services and facilities for which they are eligible."

329) Further, Article 16 of the Convention on the Rights of Child, 1989 bars children from being subject to arbitrary or unlawful interference in their privacy, family, home, or correspondence. One of the principles espousing the Juvenile Justice Act, 2015 is the principle of confidentiality. Section 24 of the Act, dealing with children in conflict with law, further emphasizes:

> "(2) The Board shall make an order directing the Police, or by the Children's court to its own registry that the relevant records of such conviction shall be destroyed after the expiry of the period of appeal or, as the case may be, a reasonable period as may be prescribed."

330) Section 3 of the Juvenile Justice Act, 2015 expounds the principles underlying the process in dealing with children under the Statute. The principle of right to privacy and confidentiality emphasizes, "Every child shall have a right to protection of his privacy and confidentiality, by all means and throughout the judicial process."

331) We would like to reproduce the following observations of English quote in *Murray* v. *Big Pictures (UK) Ltd.*[109] where greatest

109(2008) 3 WLR 1360

significance is attached to the privacy right when it comes to children. That was a case where photographer had taken a series of photographs of a writer's infant son, which were later published in a newspaper. The issue was whether there was misuse of private information by taking photographs. It was held that:

> "The question of whether there is a reasonable expectation of privacy is a broad one, which takes account of all the circumstances of the case. They include the attributes of the claimant, the nature of the activity in which the claimant was engaged, the place at which it was happening, the nature and purpose of the intrusion, the absence of consent and whether it was known or could be inferred, the effect on the claimant and the circumstances in which and the purposes for which the information came into the hands of the publisher...It is at least arguable that David had a reasonable expectation of privacy. The fact that he is a child is in our view of greater significance than the judge thought."

We may also record at this stage that various circulars, orders and notifications are issued by different Ministries and Departments under Section 7 of the Aadhaar Act which pertain to children. Some of these are:

(1) National Child Labour Project (NCLP).

(2) Scholarship schemes which are given to school students, like National Means-cum-Merit Scholarship Scheme; National Scheme of Incentive to Girls for Secondary Education; Benefit to 6 to 14 years children under Sarva Shiksha Abhiyan; Inclusive Education of the Disabled at

Secondary State; and Mid-day Meal for Children.

(3) Assistance/Scholarship given by the Department of Empowerment to the Persons with Disabilities, which include Scholarship Schemes for education of students with disabilities.

(4) Following Schemes floated by the Ministry of Women and Child Development, some of which relate to children:

(a) Supplementary Nutrition Programme under ICDS Scheme.

(b) Payment of honorarium to AWWs & AWHs under ICDS Scheme.

(c) Supplementary Nutrition for children offered at Creche Centres.

(d) Honorarium paid towards the Creche Workers and Creche Helpers.

(e) Maternity Benefit Programme (MBP).

(f) Scheme for Adolescent Girls.

(g) National Mission for Empowerment of Women.

(h) ICDS Training Programme.

(i) Ujjawala Scheme.

(j) Swadhar Scheme.

(k) Integrated Child Protection Scheme.

(l) STEP programme.

(m) Rashtriya Mahila Kosh.

(n) Pradhan Mantri Matru Vanana Yojana.

(5) Painting and Essay competitions for school children under IEC component of Human Resource Development and Capacity Building.

332) After considering the matter in depth and having regard to the discussion aforesaid, we hold as under:

(a) For the enrolment of children under the Aadhaar Act, it would be essential to have the consent of their parents/guardian.

(b) On attaining the age of majority, such children who are enrolled under Aadhaar with the consent of their parents, shall be given the right to exit from Aadhaar, if they so choose.

(c) Insofar as the school admissions of children are concerned, requirement of Aadhaar would not be compulsory as it is neither a service nor subsidy. Further, having regard to the fact that a child between the age of 6 to 14 years has the fundamental right to education under Article 21A of the Constitution, school admission cannot be treated as 'benefit' as well.

(d) Benefits to children between 6 to 14 years under *Sarva Shiksha Abhiyan*, likewise, shall not require mandatory Aadhaar

enrolment.

(e) For availing the benefits of other welfare schemes which are covered by Section 7 of the Aadhaar Act, though enrolment number can be insisted, it would be subject to the consent of the parents, as mentioned in (a) above.

(f) We also clarify that no child shall be denied benefit of any of these schemes if, for some reasons, she is not able to produce the Aadhaar number and the benefit shall be given by verifying the identity on the basis of any other documents. We may record that a statement to this effect was also made by Mr. K.K. Venugopal, learned Attorney General for India, at the Bar.

Challenge to the other provisions of the Aadhaar Act:

333) The petitioners have challenged the constitutionality of certain other provisions of Aadhaar Act as well. They have submitted their reasons on the basis of which they are seeking the declaration to the effect these provisions are unconstitutional. We reproduce the provisions of Aadhaar Act as well as reasons given by the petitioners in tabulated form, as under:

S.No.	Provisions of the Aadhaar Act	Reason for being unconstitutional
1.	Section 2(c) and 2(d) - authentication and authentication record, read with Section 32	'Authentication Record' includes the time of authentication and the identity of the requesting entity. The UIDAI and the Authentication Service Agency (ASA) is

		permitted to store this authentication record for 2+5 years (as per Regulations 20 and 26/27 of the Authentication Regulations). By definition it provides for real-time surveillance and profiling. The record stores both the time and the identity of the requesting entity.
2.	Section 2(h) read with Section 10 of CIDR	The notion of CIDR is by itself an unconstitutional database. The statute cannot operate without a CIDR. The notion of a CIDR where every individual's biometric as well as demographic information is centrally stored is an authoritarian or police state construct and has no place in a democracy that guarantees individual freedom. A CIDR from where data can be backed, and which is operated not by the respondents but by foreign entities, is conceptually and constitutionally an impermissible compromise on national sovereignty and security. Notably, Section 10 empowers UIDAI to appoint one or more entity to establish and maintain the CIDR.
3.	Section 2(l) read with Regulation 23 of the Aadhaar (Enrolment and Updates) Regulation - 'enrolling agency'	The notion of an enrolling agency as defined in Section 2(l) is also unconstitutional inasmuch as the agency, as defined, need not be a Government entity but could be a private entity. The collection of sensitive personal biometric and demographic data and information for the purposes of storage must be conducted by a Government agency alone since this is a bare minimum procedural safeguard against the misuse and commercial exploitation of private personal information. The State, acting as a trustee and fiduciary, cannot delegate or require private enrolling agencies to discharge this non-delegable function. Moreover, an enrolling agency that is operated privately cannot be entrusted with the crucial tasks of explaining the voluntary nature of Aadhaar

		enrolments and securing informed consent.
4.	Section 2(v) - 'resident'	The expression 'Resident' defined in Section 2(v) is arbitrary and unconstitutional inasmuch as the Act creates no credible machinery for evaluating a claim that a person has been residing in India for a period of 182 days or more, in the 12 months immediately preceding the date of application for enrolment. The forms being used by the respondents as also proof of identification and proof of address requirement being used by the respondents until enactment of the statute nowhere require any proof relating to residence for 182 days. The impugned Act purports to validate all these enrolments. The forms being used by the respondents do not even contain a declaration regarding the enrolee being resident for 182 days. Further, there is no requirement in the definition of 'Resident' that the person has to be legally resident and the expression would wrongly take in illegal immigrants as well.
5.	Section 3 – Aadhaar Number	It is an 'entitlement'. It cannot be understood to be mandatory. The information provided under Section 3(2) is of no relevance if obtaining Aadhaar is made mandatory. By design, Aadhaar was never meant to be mandatory.
6.	Section 5 – Special treatment to children	Section 5 of the Aadhaar Act, inasmuch as it extends to children and persons with disabilities, implies that the State is securing biometric and demographic data even before the age of consent insofar as children are concerned. The Act in its coercive reach and application to children who have not attained the age of consent is *per se* unconstitutional and violate of the fundamental rights of the children.
7.	Section 6 – Update of information	Section 6 of the Act is unconstitutional inasmuch as it enables the respondents to continually compel residents to periodically furnish demographic and biometric information. This provision is coercive in

		operation and effect and not only undermines the so-called 'voluntary' nature of the programme (as falsely claimed by the respondents) but also undermines the false claim with respect to the 'reliability of biometrics'.
8.	Section 8	Section 8 is unconstitutional inasmuch as it enables tracking, tagging and profiling of individuals through the authentication process. It is a charter for surveillance in real time and with a degree of specificity that enables persons' physical movements to be traced in real time. The authentication mandate in terms of Section 8 is not being worked by the respondents through any proprietary technology and is outsourced to foreign entities or entities under the ownership and control of foreign companies and corporations. The entire framework and working of the authentication procedure in terms of Section 8 is an impermissible, permanent and irreversible compromise of national sovereignty and national security.
9.	Section 9	Section 9 of the Aadhaar Act is also unconstitutional inasmuch as the Aadhaar number is *de facto* serving as proof of citizenship and domicile. This is seen from various media reports where even in the absence of any rigorous verification process, Aadhaar numbers are being issued. The petitioners submit that equally subversive of national security and national integrity is the practice of passports being issued based upon an Aadhaar card. In other words, persons who may not be entitled to passports are having Aadhaar numbers issued and thereafter securing passports in violation of the citizenship provisions.
10.	Chapter IV – Sections 11 to 23	The petitioners submit that the whole of Chapter IV of the Act comprising Sections 11 to 23 is *ultra vires* and unconstitutional. The Constitution does not permit the establishment of an authority that in turn

		through an invasive programme can chain every Indian citizen/resident to a central data bank and maintain lifelong records and logs of that individual. The Constitution of India when read as a whole is designed for a nation of free individuals who enjoy a full range of rights and who are entitled under the Constitution to lead their lives without any monitoring or scrutiny or continuous oversight by the State or any of its organs. The high value of personal freedom runs throughout the fabric of the Indian Constitution and any authority created for the purpose of 'cradle to grave' scrutiny is directly violative of the personal freedom charter built into the Indian Constitution. The Constitution of India does not contemplate a 'nanny state' where the State oversees every individual's conduct and maintains a record of individual interactions. The UIDAI by design and function is created for an absolutely unconstitutional objective of invading privacy, electronically overseeing individuals and tethering them to a central data repository that will maintain lifelong records. The notion of individual freedom must entail the right to be alone; the right of an individual to be free from any monitoring so long as that individual does not breach or transgress any criminal law. Here, the establishment of the second respondent is for an unconstitutional purpose of overseeing and monitoring individual conduct even where the person does not remotely fall foul of any law. The second respondent is a State organ designed to invade individual freedom and whose purpose is to constrict individual freedom.
11.	Sections 23 and 54 – excessive delegation	Section 23, read with Section 54 of the Aadhaar Act, is unconstitutional on the ground of excessive delegation. A perusal of the sub-clauses in Section 23(2) and Section 54(2) indicate that on every crucial aspect pertaining to biometric

		data, demographic information, the operation and working of the CIDR, generating and assigning Aadhaar numbers, authentication of Aadhaar numbers, omitting and deactivating Aadhaar numbers, commercial exploitation of information collected by the Government, etc. are all left entirely to the UIDAI without any sufficient defined legislative policy indicating the limits within which the UIDAI may legitimately operate. Having regard to the invasive nature of the Aadhaar programme, its deep and pervasive impact on civil liberties and the fiduciary/trusteeship principle based on which data and information is being collected, it was incumbent upon the legislature to set out detailed and adequate limits to restrict the discretion conferred on the UIDAI. The impugned provisions virtually give an unlimited charter to the UIDAI to ride rough shod over fundamental rights by framing regulations as it pleases.
12.	Section 23(2)(g) read with Chapter VI & VII – Regulations 27 to 32 of the Aadhaar (Enrolment and Update) Regulations, 2016	This empowers the UIDAI alone to omit and deactivate an Aadhaar number with almost no redressal to the individual Aadhaar number holder. Regulation 27(2) provides that upon cancellation of an Aadhaar number, all services provided by the authority shall be permanently disabled. Regulation 28(2) provides that upon deactivation of an Aadhaar number, all numbers shall be temporarily suspended till such time that the Aadhaar number holder updates or rectifies the alleged error. Notably, as per Regulation 30, there shall be a *post facto* communication of omission or deactivation of the Aadhaar number shall be informed to the Aadhaar number holder. The only redressal mechanism provided under the Aadhaar Act is under Regulation 32 wherein a grievance redressal call centre shall be provided by the UIDAI. This provision provides unbridled power to the

		UIDAI to switch of the life of an individual. There is absolutely no redressal mechanism for the individual. He is not even provided with an opportunity of hearing prior to deactivation, which violates principles of natural justice.
13.	Section 29	This Section is liable to be struck down inasmuch as it pertains sharing of identity information. The provisions suffer from the vice of permitting the spread and dissemination of sensitive personal information through a network of entities and individuals for commercial gain or otherwise and allows for the sharing of information beyond the ostensible object of targeted deliveries. Both the biometric as well as the demographic information are entitled to the highest degree of protection and the impugned provision, inasmuch as it draws a distinction between core biometric information and other information, creates an artificial distinction into two classes of information which in law are both entitled to equal protection against sharing or dissemination. Sub-section (4) permits UIDAI by regulation to permit 'core biometric information' to be displayed publicly.
14.	Section 33	Section 33 is unconstitutional inasmuch as it provides for the use of the Aadhaar database for police investigation pursuant to an order of a competent court. Section 3 violates the protection against self-incrimination as enshrined under Article 20(3) of the Constitution of India. Furthermore, Section 33 does not afford an opportunity of hearing to the concerned individual whose information is sought to be released by the UIDAI pursuant to the Court's order. This is contrary to the principles of natural justice. Section 33(2) provides for disclosure of

		information in the interest of national security pursuant to a direction of a competent officer. The said provision is also hit by the principles of protection against self-incrimination, as enshrined under Article 20(3) of the Constitution. Further, the impugned Act does not define 'interest of national security' or otherwise limit the circumstances where the said provision can be invoked. This makes the impugned provision unconstitutional as it suffers from the vice of vagueness and arbitrariness.
15.	Section 47	Section 47 of the impugned Act is unconstitutional inasmuch as it does not allow an individual citizen who finds that there is a violation of the impugned Act to initiate the criminal process. There could be several circumstances where UIDAI itself or some third party is guilty of having committed offences under the Act. By restricting the initiation of the criminal process, the Aadhaar Act renders the penal machinery ineffective and sterile. The said section creates a bar on a court to take cognizance of any offence under the impugned Act, save on a complaint made by the UIDAI or an officer authorized by it. In effect there is a bar of cognizance of a complaint made by an individual for breach of his biometric or demographic information which has been collected by the respondent. Such bar is unconstitutional as it forecloses legal remedy to affected individuals.
16.	Section 48 – Power of Central Government to supersede UIDAI	This Section is vague and arbitrary inasmuch as it permits the Central Government to take over the UIDAI. The Act does not define a 'pubic emergency'. This Section empowers the Central Government in an 'emergency' situation to be in a position to completely control the life of every citizen who is enrolled with the UIDAI.
17.	Section 57	Section 57 is patently unconstitutional

		inasmuch as it allows an unrestricted extension of the Aadhaar platform to users who may be Government agencies or private sector operators. This provision clearly shows that the impugned Act has a much wider scope than what may legitimately be considered as a Money Bill. Moreover, this provision enables the seeding of the Aadhaar number across service providers and other gateways and thereby enables the establishment of a surveillance state. The impugned provision enables the spread of applications and Aadhaar dependent delivery systems that are provided not from Consolidated Fund of India resources but through any other means. It is submitted that Section 57 also enables commercial exploitation of an individual's biometrics and demographic information by the respondents as well as private entities. It ensures that creation of a surveillance society, where every entity assists the State to snoop upon an Aadhaar holder.
18.	Section 59	Section 59 of the impugned Act is unconstitutional inasmuch as it seeks to validate all action undertaken by the Central Government pursuant to the Notification dated January 28, 2009. It is submitted that there was no consent, let alone informed consent obtained from individuals at the time of enrolment under the said notification. Such enrolment which has been conducted without obtaining adequate consent is unconstitutional as it amounts to wrongful deprivation of the most intimate personal information of an individual. Indeed, taking of an individual's biometric information without informed consent is a physical invasion of his or her bodily integrity. The collection of demographic information through private entities and without proper counselling or written informed consent is

		illegal and incapable of being retrospectively ratified. All these records which have been illegally obtained and created without necessary consent out to be destroyed and cannot be said to be validated by the impugned provision. The Parliament cannot create a legal fiction of 'consent' where there was none. The executive under the Constitution of India cannot take away someone's fundamental right to privacy and then support its action on the proposition of law that 'retrospectively' deems consent must have been given. The said provision seeks to validate any action taken by the Central Government alone. The action of private enrolers is not even sought to be protected. Therefore, all collections made by private entities under the said notification should also stand invalidated and all data collected by private entities should be destroyed forthwith.

334) We have already dealt with the issue of validity of some of the provisions. We would now advert to the remaining provisions, validity whereof is questioned.

Keeping in view the preceding discussion, challenge to most of these provisions would fail. Insofar as Section 2(l) read with Regulation 23 of the Aadhaar (Enrolment and Update) Regulations is concerned which deals with 'enrolling agency', main challenge is on the ground that the work of an enrolment could not have been given to a private entity as private entity cannot be entrusted with the crucial task of explaining the nature

of Aadhaar enrolment and securing informed consent. Further, the task of collection of sensitive personal biometric and demographic data and information for the purpose of storage cannot be given to private hands. However, having regard to the nature of process that has been explained by the Authority, which ensures that immediately on enrolment, the concerned data collected by the private entity is beyond its control; it gets encrypted; and stands transmitted to CIDR, we do not find any basis of the apprehension expressed by the petitioners.

335) Insofar as Section 2(v) is concerned which defines resident, there is nothing wrong with the definition. The grievance of the petitioners is that the Aadhaar Act creates no credible machinery for availing a claim that a person has been residing in India for 182 days or more. Apprehension is expressed that this expression may also facilitate the entry of illegal immigrants. These aspects can be taken care of by the respondents by providing appropriate mechanism. We direct the respondents to do the needful in this behalf. However, that would not render the definition unconstitutional.

336) Section 3, by the very language thereof, mentions that it is an enabling provision which 'entitles' every resident to obtain Aadhaar number. Therefore, it is voluntary in nature. This is so

held by Division Bench of this Court in *Binoy Viswam* in the following words:

> "93. Before proceeding to discuss this argument, one aspect of the matter needs clarification. There was a debate as to whether the Aadhaar Act is voluntary or even that Act makes enrolment under Aadhaar mandatory.
>
> 94. First thing that is to be kept in mind is that the Aadhaar Act is enacted to enable the Government to identify individuals for delivery of benefits, subsidies and services under various welfare schemes. This is so mentioned in Section 7 of the Aadhaar Act which states that proof of Aadhaar number is necessary for receipt of such subsidies, benefits and services. At the same time, it cannot be disputed that once a person enrols himself and obtains Aadhaar number as mentioned in Section 3 of the Aadhaar Act, such Aadhaar number can be used for many other purposes. In fact, this Aadhaar number becomes the Unique Identity (UID) of that person. Having said that, it is clear that there is no provision in the Aadhaar Act which makes enrolment compulsory. May be for the purpose of obtaining benefits, proof of Aadhaar card is necessary as per Section 7 of the Act. The proviso to Section 7 stipulates that if an Aadhaar number is not assigned to enable an individual, he shall be offered alternate and viable means of identification for delivery of the subsidy, benefit or service. According to the petitioners, this proviso, which acknowledges alternate and viable means of identification, and therefore makes Aadhaar optional and voluntary and the enrolment is not necessary even for the purpose of receiving subsidies, benefits and services under various schemes of the Government. The respondents, however, interpret the proviso differently and their plea is that the words "if an Aadhaar number is not assigned to an individual" deal with only that situation where application for Aadhaar has been made but for certain reasons Aadhaar number has not been assigned as it may take some time to give Aadhaar card. Therefore, this proviso is only by way of an interim measure till Aadhaar number is assigned, which is otherwise compulsory for obtaining certain benefits as stated in Section 7 of the Aadhaar Act. Fact remains that as per the Government and UIDAI itself, the requirement of obtaining Aadhaar number is voluntary.

> It has been so claimed by UIDAI on its website and clarification to this effect has also been issued by UIDAI.
>
> 95. Thus, enrolment under Aadhaar is voluntary. However, it is a moot question as to whether for obtaining benefits as prescribed under Section 7 of the Aadhaar Act, it is mandatory to give Aadhaar number or not is a debatable issue which we are not addressing as this very issue is squarely raised which is the subject-matter of other writ petition filed and pending in this Court."

Therefore, the apprehension of the petitioners that Section 3 is mandatory stands assuaged.

337) Section 5 is a special measure for issuance of Aadhaar number to certain category of persons which attempts to take care of certain disabilities with which certain individuals may be suffering. Therefore, this provision is for the benefit of the categories of persons mentioned in Section 5. No doubt, it mentions children and persons with disabilities as well, that is an aspect is already dealt with separately.

338) Section 6 deals only with the updation of demographic and biometric information. This may become necessary under certain circumstances. That by itself does not take away the voluntary nature of the programme.

339) Insofar Section 9 is concerned, validity thereof is challenged primarily on the ground that it serves as a proof of citizenship and

domicile as well and some apprehensions are expressed on that basis. Such apprehensions have already been taken care of while discussing the issue no. 1 pertaining to surveillance.

340) We have already discussed in detail the purpose of constituting the Authority. In fact, the Act cannot operate without such an Authority and, therefore, it's constitution is imperative. Challenge to validity of Sections 11 to 23 is predicated on the arguments of surveillance etc. fails, having regard to our detailed discussion on the said aspect.

341) Section 23 read with Section 54 give power to the Authority to make certain Regulations. We do not find that this provision gives excessive delegation to the Authority. These aspects have already been discussed while determining the issue pertaining to surveillance.

342) Apprehension expressed *qua* Section 29 are equally unfounded. This Section rather imposes restrictions on sharing information. No doubt, sub-section (2) states that the identity information (and specifically excludes core biometric information) can be shared only in accordance with the provisions of the Act and in such a manner as may be specified by Regulations. That would not

make the provision unconstitutional when it is with the consent of the individual. In case, any regulation is made which permits sharing of information that may contain undesirable circumstance/reason for sharing information, such a regulation can always be struck down. Insofar as sub-section (4) is concerned, it is generally in favour of the residents/individuals inasmuch as it states that information collected or created under this Act shall not be published, displayed or posted publicly. The is grievance, however, is that this provision enables the Authority to publish or display etc. such an information 'for the purposes as may be specified by regulations'. The apprehension is that under this provision, the Government can always make regulations permitting publication of such information under certain circumstances. At present, regulations which are in force are the Aadhaar (Sharing of Information) Regulations, 2016. Chapter II thereof is titled 'restriction on sharing of identity information'. Regulation 3(1) which falls under this chapter puts a categorical ban on sharing of core biometric information collected by the Authority under the Act, by mandating that it shall not be sharing with anyone for any reason whatsoever. Sub-regulation (2) of Regulation 3 permits sharing of demographic information and photograph of an individual collected by the Authority under the

Act, only with the consent of the Aadhaar number holder, that too for authentication process in accordance with Authentication Regulations. As already held by us, insofar as utilisation of subsidies, benefits and services are concerned, the authentication would be needed by the provider of such services which would be the requesting entity and this provision has already been upheld. Sub-regulation (3) permits sharing of authentication records of Aadhaar number holder with him in accordance with Regulation 28 of the Authentication Regulations. This provision facilitates obtaining the information from the Authority by the Aadhaar number holder herself. We are, thus, of the opinion that Section 29 and the sharing regulations are the provisions enacted to protect the interest of Aadhaar card holders as they put restrictions on the sharing of information, which may be described as provisions pertaining to data protection and surveying legitimate state aim/interest as well. No doubt, Section 29 gives power to the delegatee to make regulations. However, as already clarified above, as and when a regulation is made, which impinges upon the privacy right of the Aadhaar card holders, that can always be challenged. As of now, sharing regulations do not contain any such provision.

343) Section 33 provides for disclosure of information in certain cases. The challenge to this provision is predicated on the ground that it provides for the use of Aadhaar database for police verification, which is against the ethos of Article 20(3) of the Constitution of India, which is a rule against self-incrimination. In order to appreciate this argument, we would like to reproduce Section 33 in its entirety:

> "33. (1) Nothing contained in sub-section (2) or sub-section (5) of section 28 or sub-section (2) of section 29 shall apply in respect of any disclosure of information, including identity information or authentication records, made pursuant to an order of a court not inferior to that of a District Judge:
>
> Provided that no order by the court under this sub-section shall be made without giving an opportunity of hearing to the Authority.
>
> (2) Nothing contained in sub-section (2) or sub-section (5) of section 28 and clause (b) of sub-section (1), sub-section (2) or sub-section (3) of section 29 shall apply in respect of any disclosure of information, including identity information or authentication records, made in the interest of national security in pursuance of a direction of an officer not below the rank of Joint Secretary to the Government of India specially authorised in this behalf by an order of the Central Government:
>
> Provided that every direction issued under this sub-section, shall be reviewed by an Oversight Committee consisting of the Cabinet Secretary and the Secretaries to the Government of India in the Department of Legal Affairs and the Department of Electronics and Information Technology, before it takes effect:
>
> Provided further that any direction issued under this sub-section shall be valid for a period of three months from the date of its issue, which may be extended for a further

period of three months after the review by the Oversight Committee."

344) A close look at sub-section (1) of Section 33 would demonstrate that the sub-section (1) is an exception to Section 28(2), Section 28(5) and Section 29(2) of the Act. Those provisions put a bar on the disclosure of an information thereby protecting the information available with the UIDAI in respect of any person. However, as per sub-section (1), such information can be disclosed if there is an order of a court which order is not inferior to that of a District Judge. This provision, therefore, only states that in suitable cases, if court passes an order directing an Authority to disclose such an information, then the Authority would be obliged to do so. Thus, an embargo contained in Sections 28 and 29 is partially lifted only in the eventuality on passing an order by the court not inferior to that of District Judge. This itself is a reasonable safeguard. Obviously, in any proceedings where the Court feels such an information is necessary for the determination of controversy that is before the Court, before passing such an order, it would hear the concerned parties which will include the person in respect of whom the disclosure of information is sought. We, therefore, clarify that provisions of sub-section (1) of Section 33 by reading into the provisions that an individual whose

information is sought to be released shall be afforded an opportunity of hearing. There is a reasonable presumption that the said court shall take into consideration relevant law including Article 20(3) of the Constitution as well as privacy rights or other rights of that person before passing such an order. Moreover, a person in respect of whom order is passed shall also be heard and will have right to challenge the order in a higher forum. Not only this, proviso to Section 33(1) puts an additional safeguard by providing that even UIDAI shall be heard before an order is passed to this effect by the Court. In that sense, the Authority is to act as trustee and it may object to passing of the order by the court. Such a happening is actually taken place. We have already noticed that against the order of the High Court of Bombay in some criminal proceedings, order was passed directing the Authority to give biometric information of a person, the Authority had filed Special Leave Petition (Criminal) No. 2524 of 2014 challenging the said order on the ground that giving of such biometric information was contrary to the provisions of the Aadhaar Act as the information was confidential. This Court stays the operation of the said order which depicts that there are sufficient safeguards provided in sub-section (1) of Section 33 itself.

345) Adverting to sub-section (2) of Section 33, it can be seen that this provision enables disclosure of information including identity information records in the interest of national security. This provision further states that the Authority is obliged to disclose such information in pursuance of a direction of an officer not below the rank of Joint Secretary to the Government of India specially authorised in this behalf by an order of the Central Government. Proviso thereto sub-section (2) puts an additional safeguard by prescribing that every direction issued under this sub-section shall be reviewed by an Oversight Committee consisting of the Cabinet Secretary and the Secretaries to the Government of India in the Department of Legal Affairs and the Department of Electronics and Information Technology before it takes effect. Further, such a direction is valid only for a period of three months from the date of its issue which can be extended by another three months.

346) Main contention of the petitioners in challenging the provisions of sub-section (2) of Section 33 are that no definition of national security is provided and, therefore, it is a loose ended provision susceptible to misuse. It is also argued that there is no independent oversight disclosure of such data on the ground of

security and also that the provision is unreasonable and disproportionate and, therefore, unconstitutional.

347) We may point out that this Court has held in *Ex-Armymen's Protection Services Private Limited* v. *Union of India & Ors.*[110] that what is in the interest of national security is not a question of law but it is a matter of policy. We would like to reproduce following discussion therefrom:

> "**16.** What is in the interest of national security is not a question of law. It is a matter of policy. It is not for the court to decide whether something is in the interest of the State or not. It should be left to the executive. To quote Lord Hoffman in *Secy. of State for Home Deptt.* v. *Rehman* [(2003) 1 AC 153 : (2001) 3 WLR 877 : (2002) 1 All ER 122 (HL)] : (AC p. 192C)
>
> > "… [in the matter] of national security is not a question of law. It is a matter of judgment and policy. Under the Constitution of the United Kingdom and most other countries, decisions as to whether something is or is not in the interests of national security are not a matter for judicial decision. They are entrusted to the executive."
>
> **17.** Thus, in a situation of national security, a party cannot insist for the strict observance of the principles of natural justice. In such cases, it is the duty of the court to read into and provide for statutory exclusion, if not expressly provided in the rules governing the field. Depending on the facts of the particular case, it will however be open to the court to satisfy itself whether there were justifiable facts, and in that regard, the court is entitled to call for the files and see whether it is a case where the interest of national security is involved. Once the State is of the stand that the issue involves national security, the court shall not disclose the reasons to the affected party."

110 (2014) 5 SCC 409

348) Even in *K.S. Puttaswamy*, this Court has recognised data retention by the Government which may be necessitated in the public interest and in the interest of national security. We may also usefully refer to the judgment of *People's Union for Civil Liberties (PUCL)* v. *Union of India & Anr.*[111]. In that case, action of telephone tapping was challenged as serious invasion of individual's privacy. The Court found that Section 5(2) of the Telegraph Act, 1885 permits the interception of messages in circumstances mentioned therein i.e. 'occurrence of any public emergency' or 'in the interest of public safety'. The Court explained these expressions in the following manner:

> "**28.** Section 5(2) of the Act permits the interception of messages in accordance with the provisions of the said section. "Occurrence of any public emergency" or "in the interest of public safety" are the sine qua non for the application of the provisions of Section 5(2) of the Act. Unless a public emergency has occurred or the interest of public safety demands, the authorities have no jurisdiction to exercise the powers under the said section. Public emergency would mean the prevailing of a sudden condition or state of affairs affecting the people at large calling for immediate action. The expression "public safety" means the state or condition of freedom from danger or risk for the people at large. When either of these two conditions are not in existence, the Central Government or a State Government or the authorised officer cannot resort to telephone-tapping even though there is satisfaction that it is necessary or expedient so to do in the interests of sovereignty and integrity of India etc. In other words, even if the Central Government is satisfied that it is necessary or expedient so to do in the interest of the sovereignty and integrity of India or the security of the State or friendly relations with sovereign States or public order or for

111 (1997) 1 SCC 301

> preventing incitement to the commission of an offence, it cannot intercept the messages or resort to telephone-tapping unless a public emergency has occurred or the interest of public safety or the existence of the interest of public safety requires. Neither the occurrence of public emergency nor the interest of public safety are secretive conditions or situations. Either of the situations would be apparent to a reasonable person."

349) Having regard to the aforesaid legal position, disclosure of information in the interest of national security cannot be faulted with. However, we are of the opinion that giving of such important power in the hands of Joint Secretary may not be appropriate. There has to be a higher ranking officer along with, preferably, a Judicial Officer. The provisions contained in Section 33(2) of the Act to the extent it gives power to Joint Secretary is, therefore, struck down giving liberty to the respondents to suitably enact a provision on the aforesaid lines, which would adequately protect the interest of individuals.

350) We now advert to the challenge laid to Section 47 of the Aadhaar Act, which is captioned as 'cognizance of offences', it reads as under:

> "47. (1) No court shall take cognizance of any offence punishable under this Act, save on a complaint made by the Authority or any officer or person authorised by it.
>
> (2) No court inferior to that of a Chief Metropolitan Magistrate or a Chief Judicial Magistrate shall try any offence punishable under this Act."

351) Certain acts in Chapter VII are treated as offences and penalties are also provided, from Section 34 to Section 43.

352) Section 44 clarifies that this Act would apply for offence or contravention committed even outside India. Insofar as investigation of these offences is concerned, Section 45 provides that a police officer not below the rank of Inspector of Police shall investigate any offence under this Act. Section 46, thereafter, clarifies that penalties imposed under this Act shall not prevent the imposition of any other penalty or punishment under any other law for the time being in force. This scheme of Chapter VII makes very strict provisions in respect of enforcement of the Act which includes data protection as well. Last provision in Chapter VII is Section 47 which provides that the cognizance would be taken only on a complaint made by the Authority or any officer or person authorised by it. Petitioners feel aggrieved by this provision as it does not permit an individual citizen whose rights are violated, to initiate the criminal process. Apprehensions are expressed by submitting that there may be a possibility where the Authority itself or some Governmental Authority may be guilty of committing the offences under the Act and, in such a situation, the Authority or any officer or person authorised by it may choose

not to file any complaint.

353) According to the respondents, the rationale behind Section 47 is to maintain purity and integrity of CIDR and the entire enrolment storage in the CIDR and authentication exercise can be handled only by the Authority. For this reason, it is the Authority which is empowered to lodge the complaint. It is also pointed out that similar provisions akin to Section 47 of the Aadhaar Act are contained in many other statutes. Reference is made to Section 22 of the Mines and Minerals (Development and Regulation) Act, 1957, Section 34 of the Bureau of Indian Standards Act, 1986, Section 34 of the Telecom Regulatory Authority of India Act, 1997, Section 47 of the Banking Regulation Act, 1949, Section 26(1) of the Securities and Exchange Board of India Act, 1992, Section 19 of the Environment (Protection) Act, 1986, Section 43 of the Air (Prevention and Control of Pollution) Act, 1981 and Section 57(1) of the Petroleum and Natural Gas Regulatory Board Act, 2006. The respondents have also submitted that validity of such provisions have been tested and affirmed by this Court. Reference is made to the judgment in *Raj Kumar Gupta* v. *Lt. Governor, Delhi & Ors.*[112]. The respondents have also taken support of the decision of this Court in *State (NCT of Delhi)* v.

112(1997) 1 SCC 556

Sanjay[113] wherein Section 22 of the Mines and Minerals (Development and Regulation) Act, 1957 was tested. Insofar as grievance and apprehension of the petitioners is concerned, it can be taken care on interpreting the provisions by holding that the Authority can lodge a complaint of its own motion or at the request of the individual whose rights are affected thereby.

Notwithstanding the above, we are of the opinion that it would be in the fitness of things if Section 47 is amended by allowing individual/victim whose right is violated, to file a complaint and initiate the proceedings. We hope that this aspect shall be addressed at the appropriate level and if considered fit, Section 47 would be suitably amended.

354) Section 48 cannot be treated as vague or arbitrary. 'Public Emergency' is the expression which has been used in several other enactments and held to be constitutional. It can always be subject to scrutiny of the Courts.

355) With this, now we come to a provision which was highly debated. At the time of arguments, the petitioners had taken strong exception to some of its aspects. We may first take note of the exact language of this provision:

113(2014) 9 SCC 772

> "57. Nothing contained in this Act shall prevent the use of Aadhaar number for establishing the identity of an individual for any purpose, whether by the State or any body corporate or person, pursuant to any law, for the time being in force, or any contract to this effect: Provided that the use of Aadhaar number under this section shall be subject to the procedure and obligations under section 8 and Chapter VI."

356) In first blush, the provision appears to be innocuous. It enables Aadhaar holder to establish her identity for any purpose as well. In that sense, it may amount to empowering the Aadhaar number holder, when she is carrying unique identity. It is her identity card which she is able to use not only for the purposes mentioned in the Aadhaar Act but also for any other purpose.

357) The petitioners, however, have pricked the provision with the submission that it may be susceptible to making deep in-roads in the privacy of individuals and is utterly disproportionate. The taint in the provision, as projected by the petitioners, is that it brings in private parties as well, apart from the State within the fold of Aadhaar network giving untrammeled opportunity to them to invade the privacy of such user. The offending portion of the provision, according to them, is that:

(a) It allows 'any body corporate or person' (thereby encompassing private bodies/persons as well) to make use of authentication process, once an individual offers Aadhaar number

for establishing her identity.

(b) The expression 'for any purpose' is wide enough, which may be susceptible to misuse.

(c) This is permitted not only pursuant to any law for time being in force but also pursuant to 'any contract to this effect' which would mean that individuals may be forced to give their consent in the form of contract for a purpose that may be justified or not thereby permitting the private parties to collect biometric information about the said individual.

358) It is argued that there are no procedural safeguards governing the actions of the private entities. Equally no remedy is provided in case such body corporate or person fails or denies services. In this hue, it is also argued that it is an excessive piece of legislation inasmuch as taking the umbrage of 'any law', the regulations etc. can be framed by including within its fold much more than what is provided by Section 7 of the Aadhaar Act. It, therefore, according to the petitioners, does not meet the test of proportionality. Mr. Divan submits that Section 57 is also patently unconstitutional inasmuch as it allows an unrestricted extension of the Aadhaar platform to users who may be government agencies or private sector operators. Moreover, this provision

enables the seeding of the Aadhaar number across service providers and other gateways and thereby enables the establishment of a surveillance state. The impugned provision enables the spread of applications and Aadhaar dependent delivery systems that are provided not from Consolidated Fund of India resources but through any other means. He also submits that section 57 also enables commercial exploitation of an individual's biometrics and demographic information by the Respondents as well as private entities.

359) As mentioned above, the respondents contend that it is only an enabling provision which gives further facilities to Aadhaar card holder, as per her choice and is, thus, enacted for the benefit of such individuals.

360) We have already discussed in detail the principles on which doctrine of proportionality is built upon and the test which need to be satisfied. To put in nutshell, the proportionality principles seek to safeguard citizens from excessive Government measures. The inquiry, in such cases, is that a particular measure must not be disproportionate in two distinctive utilitarian senses:

(i) The cost or burdens of the measure must not clearly exceed the likely benefits, which can be described as 'ends' or 'ends-

benefits' proportionality.

(ii) The measure must not be clearly more costly or more burdensome than equally alternative measures, which is also described by some jurists as a concept of necessity and narrow tailoring and can be referred to as 'means' or 'alternative-means' proportionality.

361) We have also discussed in detail the principle of proportionality that is developed in certain foreign legal regimes, particularly Germany and Canada. The Supreme Court of Canada in ***R.*** v. ***Oakes***[114] developed a two-tier constitutional control test. Once the claimant has proved a violation of a right guaranteed in the charter, the government must satisfy two criteria to establish that the limit on individual rights "can be demonstrably justified in a free and democratic society."

362) First, measures limiting a constitutionally protected right must serve an important objective that "relate[s] to concerns which are pressing and substantial in a free and democratic society." Legislation limiting the rights of English-speaking parents in Quebec to educate their children in English-speaking schools[115] has been found lacking an important public objective. Likewise,

114(1986) 1 SCR 103
115Quebec Ass'n of Protestant Sch. Bds. v. Quebec (A.G.), (1984) 2 SCR 66

the Supreme Court of Canada was unable to find any legitimate public objective that justified denying protection to gays and lesbians under Alberta's human rights law in *Vriend* v. *Alberta*[116]. In *R.* v. *Zundel*[117], it also prohibited an intrusive use of a law that was unrelated to the objectives originally contemplated by the Parliament when that law was enacted.

363) Secondly, once an important public objective or end has been established, the selected means to attain it must be "reasonable and demonstrably justified." The Court said in *R.* v. *Big M Drug Mart Ltd.*[118] that this determination involves "a form of proportionality test". Although, it varies depending on the facts of the case, the test involves the balancing of public and individual interests based on three principles, which are as follows:

(i) the means must be rationally related to the objective. The court has infrequently struck down legislation for lack of any rational relation to the objective pursued. It employs a rather deferential and contextual approach to determine the rational relation of a provision to the desired end.

(ii) The means should "impair 'as little as possible' the right or freedom in question." This is believe to be the decisive element

116(1998) 1 SCR 493
117(1992) 2 SCR 731
118 (1985) 1 SCR 295

of proportionality review. It requires that the legislature adopt the least intrusive measure capable of attaining the desired objective.

(iii) The public objective and actual effects of the means adopted for its attainment must be proportionate to an important public end or objective. The court noted that even if the means satisfies the first two criteria, it may be declared unconstitutional in view of its disproportionate harmful effects on an individual.

364) Insofar as development of law in Germany is concerned, as already discussed in detail, proportionality is defined "as an expression of general right of the citizen towards the State that his freedom should be limited by the public authorities only to the extent indispensable for the protection of the public interest."[119] The principle of proportionality in German law incorporates three important subprinciples: suitability, necessity, and proportionality in the narrower sense. According to the High Court of Germany, any government interference with basic rights must be suitable and necessary for reaching the ends sought. Its disadvantages to individuals "are generally only permissible if the protection of others or of the public interest requires them, after having due regard to the principle of proportionality."

119 See Nicholas Emiliou, The Principle of Proportionality in European Law: A comparative Study 5 (Kluwer Law Int'l. 1996).

365) The European Union has, by and large, adopted the German system. We have also taken note of the development of doctrine of proportionality in India through various judgments[120].

366) We may mention here that insofar as U.S. Supreme Court is concerned, it has refused to apply the least intrusive test[121] Though there was a debate at the bar as to whether this Court should adopt European approach of applying least intrusive test or go by American approach which repeatedly refused to apply this test. Without going into this debate, even when we apply the accepted norms laid down by this Court in *Modern Dental College and Research Centre* and *K.S. Puttaswamy* cases, we are of the view that a part of Section 57 does not pass the muster of proportionality doctrine.

367) The respondents may be right in their explanation that it is only an enabling provision which entitles Aadhaar number holder to take the help of Aadhaar for the purpose of establishing his/her identity. If such a person voluntary wants to offer Aadhaar card as a proof of his/her identity, there may not be a problem.

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120 *Om Kumar & Ors.* v. *Union of India*, (2001) 2 SCC 386 where R. v. Oakes was referred to and relied upon; *Teri Oat Estates (P) Ltd.* v. *U.T., Chandigarh & Ors.*, (2004) 2 SCC 130 where the Court stressed upon maintaining a proper balance between adverse effect which the legislation or the administrative order may have on the rights, liberties or interests of persons keeping in mind the purpose which they were intended to serve; Modern Dental College and Research Centre and K.S. Puttaswamy amongst others.

121 *Vernonia School District* v. *Wayne Acton,* 515 US 646, 132 L.Ed. 2D 564, *Board of Education of Independent School District* v. *Lindsay Earls*, 536 US 822=153 L.Ed.2d. 735.

368) Section 59, which is the last provision in the Act is aimed at validating actions taken by the Central Government pursuant to notification dated January 28, 2009 till the passing of the Act. It reads as under:

> "59. Anything done or any action taken by the Central Government under the Resolution of the Government of India, Planning Commission bearing notification number A-43011/02/2009-Admin. I, dated the 28th January, 2009, or by the Department of Electronics and Information Technology under the Cabinet Secretariat Notification bearing notification number S.O. 2492(E), dated the 12th September, 2015, as the case may be, shall be deemed to have been validly done or taken under this Act."

369) The challenge to this provision is on the premise that in the regime which prevailed prior to the passing of the Act and the enrolments into Aadhaar scheme were done, that happened without the consent of the persons who sought enrolment and, therefore, those enrolments cannot be validated by making such a provision. It was argued that even the Act makes provisions for informed consent which is to be obtained from individuals at the time of enrolment and absence of such consent makes the very enrolment as impermissible thereby violating the right to privacy and such acts cannot be validated.

370) The contention of the respondents, on the other hand, is that by the very nature of the provision, it is intended to be prospective in

nature with a clear purport in mind, namely, to validate the notification dated August 21, 2009 vide which the Authority was created and the Aadhaar scheme was launched by administrative fiat. The purpose is to give it a statutory backing.

371) We find that Section 59 uses the expression 'anything done or any action under the resolution'. According to us, this terminology used in the provision by the legislature is clearly to cover all actions of the Authority including enrolment of individuals into Aadhaar scheme. The words 'shall be deemed to have been validly done or taken under this Act' at the end of the Section put the things beyond any pale of doubt. The legislative intent is clear, namely, to make the provision retrospective so as to cover the actions of the Authority from the date of its establishment. Reading the provision in the manner the petitioners suggest would have the effect of annulling Section 59 itself. Such an interpretation cannot be countenanced. We are of the opinion that case is squarely covered by the Constitution Bench judgment of this Court in *West Ramnad Electric Distribution Co., Ltd.* v. *State of Madras & Anr.*[122]as well as *Bishambhar Nath Kohli & Ors.* v. *State of Uttar Pradesh & Ors.*[123].

122 (1963) 2 SCR 747
123 (1966) 2 SCR 158

372) We would also like to point out that the submission of the petitioners that a particular action or a provision or statute which is hit by Article 14 cannot be allowed to be validated is repelled by this Court in *State of Mysore & Anr.* v. *D. Achiah Chetty, Etc.*[124].

The legislature is, thus, empowered to incorporate deeming provisions in a statute. This proposition has also been repeatedly affirmed by this Court. We may refer in this behalf the decision in *State of Karnataka* v. *State of Tamil Nadu & Ors.*[125] will be of relevance wherein the Court held as under:

> "**72.** The second limb of submission of Mr Rohatgi as regards the maintainability pertains to the language employed under Section 6(2) of the 1956 Act, which reads as follows:
>
> > "**6. (2)** The decision of the Tribunal, after its publication in the Official Gazette by the Central Government under sub-section (1), shall have the same force as an order or decree of the Supreme Court."
>
> **73.** Relying on Section 6(2), which was introduced by way of the Amendment Act, 2002 (Act 14 of 2002) that came into force from 6-8-2002, it is submitted by Mr Rohatgi that the jurisdiction of this Court is ousted as it cannot sit over in appeal on its own decree. The said submission is seriously resisted by Mr Nariman and Mr Naphade, learned Senior Counsel contending that the said provision, if it is to be interpreted to exclude the jurisdiction of the Supreme Court of India, it has to be supported by a constitutional amendment adding at the end of Article 136(2) the words "or to any determination of any tribunal constituted under the law made by Parliament under Article 262(2)" and, in such a situation, in all possibility such an amendment to the Constitution may be ultra vires affecting the power of

124(1969) 1 SCC 248
125(2017) 3 SCC 362

judicial review which is a part of basic feature of the Constitution. The learned Senior Counsel for the respondent has drawn a distinction between the conferment and the exclusion of the power of the Supreme Court of India by the original Constitution and any exclusion by the constitutional amendment. Be that as it may, the said aspect need not be adverted to, as we are only required to interpret Section 6(2) as it exists today on the statute book. The said provision has been inserted to provide teeth to the decision of the Tribunal after its publication in the Official Gazette by the Central Government and this has been done keeping in view the Sarkaria Commission's Report on Centre-State Relations (1980). The relevant extract of the Sarkaria Commission's Report reads as follows:

> "17.4.19. The Act was amended in 1980 and Section 6-A was inserted. This section provides for framing a scheme for giving effect to a Tribunal's award. The scheme, inter alia provides for the establishment of the authority, its term of office and other conditions of service, etc. But the mere creation of such an agency will not be able to ensure implementation of a Tribunal's award. Any agency set up under Section 6-A cannot really function without the cooperation of the States concerned. Further, to make a Tribunal's award binding and effectively enforceable, it should have the same force and sanction behind it as an order or decree of the Supreme Court. We recommend that the Act should be suitably amended for this purpose.
>
> ***
>
> 17.6.05. The Inter-State Water Disputes Act, 1956 should be amended so that a Tribunal's award has the same force and sanction behind it as an order or decree of the Supreme Court to make a Tribunal's award really binding."

74. The Report of the Commission as the language would suggest, was to make the final decision of the Tribunal binding on both the States and once it is treated as a decree of this Court, then it has the binding effect. It was suggested to make the award effectively enforceable. The language employed in Section 6(2) suggests that the decision of the Tribunal shall have the same force as the

order or decree of this Court. There is a distinction between having the same force as an order or decree of this Court and passing of a decree by this Court after due adjudication. Parliament has intentionally used the words from which it can be construed that a legal fiction is meant to serve the purpose for which the fiction has been created and not intended to travel beyond it. The purpose is to have the binding effect of the Tribunal's award and the effectiveness of enforceability. Thus, it has to be narrowly construed regard being had to the purpose it is meant to serve.

75. In this context, we may usefully refer to the *Principles of Statutory Interpretation*, 14th Edn. by G.P. Singh. The learned author has expressed thus:

> "In interpreting a provision creating a legal fiction, the court is to ascertain for what purpose the fiction is created [*State of Travancore-Cochin* v. *Shanmugha Vilas Cashewnut Factory*, AIR 1953 SC 333; *State of Bombay* v. *Pandurang Vinayak*, AIR 1953 SC 244 : 1953 Cri LJ 1094] , and after ascertaining this, the Court is to assume all those facts and consequences which are incidental or inevitable corollaries to the giving effect to the fiction. [*East End Dwellings Co. Ltd.*v. *Finsbury Borough Council*, 1952 AC 109 : (1951) 2 All ER 587 (HL); *CIT* v. *S. Teja Singh*, AIR 1959 SC 352] But in so construing the fiction it is not to be extended beyond the purpose for which it is created [*Bengal Immunity Co. Ltd.* v. *State of Bihar*, AIR 1955 SC 661; *CIT* v. *Amarchand N. Shroff*, AIR 1963 SC 1448], or beyond the language of the section by which it is created. [*CIT* v. *Shakuntala*, AIR 1966 SC 719; *Mancheri Puthusseri Ahmed* v. *Kuthiravattam Estate Receiver*, (1996) 6 SCC 185 : AIR 1997 SC 208] It cannot also be extended by importing another fiction. [*CIT* v. *Moon Mills Ltd.*, AIR 1966 SC 870] The principles stated above are 'well-settled'. [*State of W.B.* v. *Sadan K. Bormal*, (2004) 6 SCC 59 : 2004 SCC (Cri) 1739 : AIR 2004 SC 3666] A legal fiction may also be interpreted narrowly to make the statute workable. [*Nandkishore Ganesh Joshi* v. *Commr., Municipal Corpn. of Kalyan and Dombivali*, (2004) 11 SCC 417 : AIR 2005 SC 34] "

76. In *Aneeta Hada* v. *Godfather Travels and Tours* [*Aneeta Hada* v. *Godfather Travels and Tours*, (2012) 5

SCC 661 : (2012) 3 SCC (Civ) 350 : (2012) 3 SCC (Cri) 241] , a three-Judge Bench has ruled thus: (SCC p. 681, paras 37-38)

> "*37*. In *State of T.N.* v. *Arooran Sugars Ltd.* [*State of T.N.* v. *Arooran Sugars Ltd.*, (1997) 1 SCC 326] the Constitution Bench, while dealing with the deeming provision in a statute, ruled that the role of a provision in a statute creating legal fiction is well settled. Reference was made to *Chief Inspector of Mines* v. *Karam Chand Thapar* [*Chief Inspector of Mines* v. *Karam Chand Thapar*, AIR 1961 SC 838 : (1961) 2 Cri LJ 1], *J.K. Cotton Spg. and Wvg. Mills Ltd.* v. *Union of India*[*J.K. Cotton Spg. and Wvg. Mills Ltd.* v. *Union of India*, 1987 Supp SCC 350 : 1988 SCC (Tax) 26], *M. Venugopal* v. *LIC* [*M. Venugopal* v. *LIC*, (1994) 2 SCC 323 : 1994 SCC (L&S) 664] and *Harish Tandon* v. *ADM, Allahabad* [*Harish Tandon* v. *ADM, Allahabad*, (1995) 1 SCC 537] and eventually, it was held that when a statute creates a legal fiction saying that something shall be deemed to have been done which in fact and truth has not been done, the Court has to examine and ascertain as to for what purpose and between which persons such a statutory fiction is to be resorted to and thereafter, the courts have to give full effect to such a statutory fiction and it has to be carried to its logical conclusion.
>
> *38*. From the aforesaid pronouncements, the principle that can be culled out is that it is the bounden duty of the court to ascertain for what purpose the legal fiction has been created. It is also the duty of the court to imagine the fiction with all real consequences and instances unless prohibited from doing so. That apart, the use of the term "deemed" has to be read in its context and further, the fullest logical purpose and import are to be understood. It is because in modern legislation, the term "deemed" has been used for manifold purposes. The object of the legislature has to be kept in mind."

77. In *Hari Ram* [*State of U.P.* v. *Hari Ram*, (2013) 4 SCC 280 : (2013) 2 SCC (Civ) 583] , the Court has held that (SCC p. 293, para 18) in interpreting the provision creating a legal fiction, the court is to ascertain for what purpose the fiction is created and after ascertaining the same, the court is to assume all those facts and consequences which are

incidental or inevitable corollaries for giving effect to the fiction."

373) There is yet another angle from which the matter can be looked into. In any case, when the Aadhaar scheme/project under the Act has been saved from the challenge to its constitutionality, we see no reason to invalidate the enrolments which were made prior to the passing of this Act as it would lead to unnecessary burden and exercise of enrolling these persons all over again. Instead the problem can be solved by eliciting 'consent' of all those persons who were enrolled prior to the passing of the Act. Since, we have held that enrolment is voluntary in nature, those who specifically refuse to give the consent, they would be allowed to exit from Aadhaar scheme. After all, by getting Aadhaar card, an individual so enrolled is getting a form of identity card. It would still be open to such an individual to make use of the said Aadhaar number or not. Those persons who need to avail any subsidy, benefit or service would need Aadhaar in any case. It would not be proper to cancel their Aadhaar cards. If direction is given to invalidate all those enrolments which were made prior to 2016 then such persons will have to undergo the rigours of getting themselves enrolled all over again. On the other hand, those who do not get any benefit of the nature prescribed under

Section 7 of the Act, it would always be open for them not to make use of Aadhaar card or to make use of this card in a limited sense, namely, showing it as a proof of their identity, without undergoing any authentication process. Therefore, to a large extent, it does not harm this later category as well.

We, thus, uphold the validity of Section 59. As a corollary, Aadhaar for the period from 2009 to 2016 also stands validated.

LIMITED GOVERNMENT, GOOD GOVERNANCE, CONSTITUTIONAL TRUST AND CONSTITUTIONALISM

374) Mr. Shyam Divan and Mr. Gopal Subramanium, learned senior counsel, submit that a fundamental feature of the Constitution is the sovereignty of the people with limited government authority. The Constitution limits governmental authority in various ways, amongst them Fundamental Rights, the distribution of powers amongst organs of the state and the ultimate check by way of judicial review. Article 245 of the Constitution of India is an express embodiment of the principle of limited government to the legislature inasmuch as it subjects laws to the Constitution:

> "(1) Subject to the provisions of this Constitution, Parliament may make laws for the whole or any part of the territory of India, and the Legislature of a State may make laws for the whole or any part of the State."

375) The concept of limited government is the underlying difference

between a ‘Constitution’ and ‘Constitutionalism’. Mr. Shyam Divan refers to the introductory chapter of his book *Indian Constitutional Law*, Prof. M.P. Jain writes:

> “Modern political thought draws a distinction between ‘Constitutionalism’ and ‘Constitution’. A country may have the ‘Constitution’ but not necessary ‘Constitutionalism’. For example, a country with a dictatorship, where the dictator’s word is law, can be said to have a ‘Constitution’ but not ‘Constitutionalism’.
>
> The underlying difference between the two concepts is that a Constitution ought not merely to confer powers on the various organs of the government, but also seek to restrain those powers. Constitutionalism recognises the need for government but insists upon limitations being placed upon governmental powers. Constitutionalism envisages checks and balances and putting the powers of the legislature and the executive under some restraints and not making them uncontrolled and arbitrary. Unlimited powers jeopardise freedom of the people ... If the Constitution confers unrestrained power on either the legislature or the executive, it might lead to an authoritarian, oppressive government... to preserve the basic freedoms of the individual, and to maintain his dignity and personality, the Constitution should be permeated with ‘Constitutionalism’: it should have some in-built restrictions on the powers conferred by it on governmental organs.
>
> ‘Constitutionalism’ connotes in essence limited government or a limitation on government. Constitutionalism is the antithesis of arbitrary powers…
>
> ... As PROFESSOR VILE has remarked: “Western institutional theorists have concerned themselves with the problems of ensuring that the exercise of governmental power...should be controlled in order that it should not itself be destructive of the values it was intended to promote.”

376) Mr. Divan then cited various paragraphs from the cases of S*tate of M.P.* v. *Thakur Bharat Singh*[126], (1967) 2 SCR 454, *Gobind v.*

126(1967) 2 SCR 454

State of M.P.[127]*, S.P. Sampath Kumar* v. *Union of India*[128], *Sub-Committee on Judicial Accountability* v. *Union of India*[129], *I.R. Coelho v. State of T.N.*[130], *Nandini Sundar* v. *State of Chhattisgarh*[131], which have reiterated and upheld the principle of limited governments and constitutionalism as a fundamental principle of our constitutional scheme.

377) He submitted that limited government is also enshrined within our Preamble, which is the essence of the Constitution of India, and entitles every individual citizen and the citizenry collectively to live, work, and enjoy their varied lives without being under the continuous gaze of the State. He cites Chelameswar, J. in *K.S. Puttaswamy* wherein he observed:

> "The Constitution of any country reflects the aspirations and goals of the people of that country (…) The Constitution cannot be seen as a document written in ink to replace one legal regime by another. It is a testament created for securing the goals professed in the Preamble. Part-III of the Constitution is incorporated to ensure achievement of the objects contained in the Preamble. 'We the People' of this country are the intended beneficiaries of the Constitution. Man is not a creature of the State. Life and liberty are not granted by the Constitution. Constitution only stipulates the limitations on the power of the State to interfere with our life and liberty. Law is essential to enjoy the fruits of liberty; it is not the source of liberty and emphatically not the exclusive source."

127(1975) 2 SCC 148
128(1987) 1 SCC 124
129(1991) 4 SCC 699
130(2007) 2 SCC 1
131 (2011) 7 SCC 547

378) The Directive Principles of State Policy also envisage a limited government. Violation of fundamental rights cannot be justified by the State on grounds of administrative convenience in meeting its obligations under the Directive Principles of State Policy. Protection of fundamental rights is essential for public welfare contemplated under the Directive Principles of State Policy. This has been upheld in various cases such as *Minerva Mills Ltd.* v. *Union of India*[132], where Y.V. Chandrachud, C.J observed:

> "57. (…) just as the rights conferred by Part III would be without a radar and a compass if they were not geared to an ideal, in the same manner the attainment of the ideals set out in Part IV would become a pretence for tyranny if the price to be paid for achieving that ideal is human freedoms."

379) Similarly, in *Kesavananda Bharati* v. *State of Kerala*[133], S.M. Sikri, C.J., *inter alia*, held:

> "209. ...In my view that meaning would be appropriate which would enable the country to achieve a social and economic revolution without destroying the democratic structure of the Constitution and the basic inalienable rights guaranteed in Part III and without going outside the contours delineated in the Preamble.
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> xx xx xx
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> 299. I am unable to hold that these provisions show that some rights are not natural or inalienable rights. As a matter of fact, India was a party to the Universal Declaration of Rights which I have already referred to and that Declaration describes some fundamental rights as

132 (1980) 3 SCC 625
133 (1973) 4 SCC 225

inalienable. Various decisions of this Court describe fundamental rights as 'natural rights' or 'human rights' ..."

380) Mr. Divan quotes Seervai in his book *Constitutional Law of India*[134]*: A Critical Commentary* where he writes:

> "17.14... In India "Public Welfare" and "Welfare State" became in the language of the Chaldean Oracle, "God-given names of unexplained power", which absolved judges from a critical examination of the nature of fundamental rights, and why they were made legally enforceable and the nature of directive principles and why they were made legally unenforceable
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> xx xx xx
>
> 17.20...it is simply not true that persons entrusted with the duty of implementing the directives will strive in good faith to implement them according to the expectations of the community.
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> xx xx xx
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> The question then arises: What is the agency for bringing about social and economic changes which would enable a welfare state to be created? The answer is, legislative and executive power controlled by constitutional limitations including fundamental rights …
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> xx xx xx
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> 17.30 ... the conferment of legally enforceable fundamental rights by our Constitution on persons, citizens and groups of persons was the most effective way of securing public welfare...Anything which enables those objectives to be realised as fully as is practicable must, broadly speaking, subserve public welfare...However, the Preamble, and to a large extent, Fundamental Rights, enable us to say that our Constitution has rejected a totalitarian form of government in favour of a liberal democracy. The emphasis of the Preamble is on securing the dignity of the individual …

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134 H.M. Seervai, *Constitutional Law of India: A Critical Commentary* (N.M. Tripathi Private Limited, Bombay, 4th Ed., Vol. 2, 1993) at pages 1928-1937.

xx xx xx

> 17.34 But can fundamental rights acting as limitations on legislative and executive power secure public welfare as the framers of our Constitution intended? The answer is "Yes". For, when during the Emergency of 1975-77, almost all the fetters on legislative power became unenforceable, the public welfare suffered gravely and our free democratic constitution was twisted out of shape and came near to a dictatorship or a Police State ..."

381) The principles of constitutional trust, constitutional morality and good governance are also deeply intertwined with the principle of minimum government. In *Manoj Narula v. Union of India*[135], the Court, *inter alia*, held:

> "1. … Democracy, which has been best defined as the government of the people, by the people and for the people, expects prevalence of genuine orderliness, positive propriety, dedicated discipline and sanguine sanctity by constant affirmance of constitutional morality which is the pillar stone of good governance.
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> xx xx xx
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> 75. The principle of constitutional morality basically means to bow down to the norms of the Constitution and not to act in a manner which would become violative of the rule of law or reflectible of action in an arbitrary manner. It actually works at the fulcrum and guides as a laser beam in institution building. The traditions and conventions have to grow to sustain the value of such a morality. The democratic values survive and become successful where the people at large and the persons in charge of the institution are strictly guided by the constitutional parameters without paving the path of deviancy and reflecting in action the primary concern to maintain institutional integrity and the requisite constitutional restraints. Commitment to the Constitution is a facet of constitutional morality."

135 (2014) 9 SCC 1

xx xx xx

82. In a democracy, the citizens legitimately expect that the Government of the day would treat the public interest as the primary one and any other interest secondary. The maxim salus populi suprema lex, has not only to be kept in view but also has to be revered. The faith of the people is embedded in the root of the idea of good governance which means reverence for citizenry rights, respect for fundamental rights and statutory rights in any governmental action, deference for unwritten constitutional values, veneration for institutional integrity, and inculcation of accountability to the collective at large. It also conveys that the decisions are taken by the decision-making authority with solemn sincerity and policies are framed keeping in view the welfare of the people, and including all in a homogeneous compartment. The concept of good governance is not a Utopian conception or an abstraction. It has been the demand of the polity wherever democracy is nourished. The growth of democracy is dependent upon good governance in reality and the aspiration of the people basically is that the administration is carried out by people with responsibility with service orientation.

83. … The issue of constitutional trust arises in the context of the debate in the Constituent Assembly that had taken place pertaining to the recommendation for appointment of a Minister to the Council of Ministers. Responding to the proposal for the amendment suggested by Prof. K.T. Shah with regard to the introduction of a disqualification of a convicted person becoming a Minister, Dr B.R. Ambedkar had replied: (CAD Vol. VII, p. 1160)

> "His last proposition is that no person who is convicted may be appointed a Minister of the State. Well, so far as his intention is concerned, it is no doubt very laudable and I do not think any Member of this House would like to differ from him on that proposition. But the whole question is this: whether we should introduce all these qualifications and disqualifications in the Constitution itself. Is it not desirable, is it not sufficient that we should trust the Prime Minister, the legislature and the public at large watching the actions of the Ministers and the actions of the legislature to see that no such infamous thing is done by either of them?I think this is a case which

> may eminently be left to the good sense of the Prime Minister and to the good sense of the legislature with the general public holding a watching brief upon them. I therefore say that these amendments are unnecessary."

382) It is submitted by Mr. Divan that the Aadhaar project is destructive of limited government, constitutionalism and constitutional trust. The Constitution is not about the power of the State, but about the limits on the power of the State. Post Aadhaar, the State will completely dominate the citizen and alter the relationship between citizen and State. The features of a Totalitarian State is seen from:

(a) A person cannot conduct routine activities such as operating a bank account, holding an investment in mutual funds, receiving government pension, receiving scholarship, receiving food rations, operating a mobile phone without the State knowing about these activities.(Sections 7, 32 and 57 of the Aadhaar Act).

(b) The State can build a profile of the individual based on the trail of authentication from which the nature of the citizen's activity can be determined. (Sections 2(d) and 32 of the Aadhaar Act and Regulation 20, 26 and 27 of the Aadhaar (Authentication) Regulation, 2016.

(c) By disabling Aadhaar the State can cause the civil death of

the person.(Sections 23(2)(g) of the Aadhaar Act and Regulation 27 and 28 of the Aadhaar (Enrolment and Updates) Act, 2016).

(d) By making Aadhaar compulsory for other activities such as air travel, rail travel, directorship in companies, services and benefits extended by State governments and municipal corporations etc. there will be virtually no zone of activity left where the citizen is not under the gaze of the State. This will have a chilling effect on the citizen.

(e) In such a society, there is little or no personal autonomy. The State is pervasive, and dignity of the individual stands extinguished.

(f) This is an inversion of the accountability in the Right to Information age: instead of the State being transparent to the citizen, it is the citizen who is rendered transparent to the State.

383) Mr. Sibal also added that accountability of governments and the state is a phenomenon which is accepted across the world. In furtherance of the Right to information Act, 2005 was passed intended to ensure transparency and state accountability. Through Aadhaar, on the other hand, the state seeks transparency and accountability of an individual's multifarious

activities in the course of his everyday life. This fundamentally alters the relationship between the citizen and the State and skews the balance of power in favour of the State, which is anathema to the Constitution.

384) There is no dispute about the exposition of the principles of limited government and good governance, etc., as highlighted by the learned counsel for the petitioners and noted above.

We may add that we are the Republic and it becomes the duty of the Court to keep it. That can be achieved by asking the stakeholders to follow the Constitution, which we have. There are six key constitutional notions, a brilliant exposition whereof has been provided in the case of Manoj Narula v. Union of India[136]. The idea of constitutional renaissance was first sounded in the said judgment. It is further elaborated in the case of *Government of NCT of Delhi* v. *Union of India*[137] in the opinion penned down by one of us[138]. It stands severally described now as "a constant awakening as regards the text, context, perspective, purpose, and the rule of law", an awakening that makes space for a "resurgent constitutionalism" and "allows no room for absolutism" nor any "space for anarchy". It is held, therein the term "rational

136 (2014) 9 SCC 1
137 (2018) SCC Online SC 661
138 Dipak Misra, CJI

anarchism" has "no entry in the field of constitutional governance or the rule of law" and by the same token constitutional text and context resolutely repudiate the lineages of absolutism or the itineraries of dictatorship. One may then say that "constitutionalism" is the space between "absolutism" and "anarchy" and its constant repair and renewal is the prime function of adjudication.

385) In an illuminating Article titled *'A Constitutional Renaissance'* on the aforesaid verdict authored by Prof. Upendra Baxi[139], the learned Professor has made following pertinent comments:

> "Awakening is a constant process; renaissance has a beginning but knows no end because everyday fidelity to the vision, spirit and letter of the Constitution is the supreme obligation of all constitutional beings. One ought to witness in daily decisions an "acceptance of constitutional obligations" not just within the text of the Constitution but also its "silences". To thus reawaken is to be "obeisant to the constitutional conscience with a sense of constitutional vision". Second, courts should adopt that approach to interpretation which "glorifies the democratic spirit of the Constitution". "Reverence" for the Constitution (or constitutionalism) is the essential first step towards constitutional renaissance. Third, people are the true sovereigns, never to be reduced to the servile status of being a subject; rather as beings with rights, they are the source of trust in governance and founts of legitimacy. The relatively autonomous legislative, executive, administrative and adjudicatory powers are legitimate only when placed at the service of constitutional ends. All forms of public power are held in trust. And political power is not an end but a means to constitutional governance."

139 Published in The Indian Express on July 16, 2018

386) Since the arguments on limited government advanced by Mr. Shyam Divan were the same as advanced by him during the hearing of *Binoy Viswam*, our purpose would be served by reproducing the following discussion from the said judgment:

> "85. There cannot be any dispute about the manner in which Mr Shyam Divan explained the concept of "limited Government" in his submissions. Undoubtedly, the Constitution of India, as an instrument of governance of the State, delineates the functions and powers of each wing of the State, namely, the Legislature, the Judiciary and the Executive. It also enshrines the principle of separation of powers which mandates that each wing of the State has to function within its own domain and no wing of the State is entitled to trample over the function assigned to the other wing of the State. This fundamental document of governance also contains principle of federalism wherein the Union is assigned certain powers and likewise powers of the State are also prescribed. In this context, the Union Legislature i.e. Parliament, as well as the State Legislatures are given specific areas in respect of which they have power to legislate. That is so stipulated in Schedule VII to the Constitution wherein List I enumerates the subjects over which Parliament has the dominion, List II spells out those areas where the State Legislatures have the power to make laws while List III is the Concurrent List which is accessible both to the Union as well as the State Governments. The scheme pertaining to making laws by Parliament as well as by the legislatures of the State is primarily contained in Articles 245 to 254 of the Constitution. Therefore, it cannot be disputed that each wing of the State has to act within the sphere delineated for it under the Constitution. It is correct that crossing these limits would render the action of the State ultra vires the Constitution. When it comes to power of taxation, undoubtedly, power to tax is treated as sovereign power of any State. However, there are constitutional limitations briefly described above.
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> 86. In a nine Judge Bench decision of this Court in *Jindal Stainless Ltd. & Anr.* v. *State of Haryana & Ors.* discussion on these constitutional limitations are as follows:

"20. Exercise of sovereign power is, however, subject to Constitutional limitations especially in a federal system like ours where the States also to the extent permissible exercise the power to make laws including laws that levy taxes, duties and fees. That the power to levy taxes is subject to constitutional limitations is no longer res-integra. A Constitution Bench of this Court has in *Synthetics and Chemicals Ltd.* v. *State of U.P.* (1990) 1 SCC 109 recognised that in India the Centre and the States both enjoy the exercise of sovereign power, to the extent the Constitution confers upon them that power. This Court declared:

> "56 … We would not like, however, to embark upon any theory of police power because the Indian Constitution does not recognise police power as such. But we must recognise the exercise of Sovereign power which gives the State sufficient authority to enact any law subject to the limitations of the Constitution to discharge its functions. Hence, the Indian Constitution as a sovereign State has power to legislate on all branches except to the limitation as to the division of powers between the Centre and the States and also subject to the fundamental rights guaranteed under the Constitution. The Indian States, between the Centre and the States, has sovereign power. The sovereign power is plenary and inherent in every sovereign State to do all things which promote the health, peace, morals, education and good order of the people. Sovereignty is difficult to define. This power of sovereignty is, however, subject to constitutional limitations."This power, according to some constitutional authorities, is to the public what necessity is to the individual. Right to tax or levy impost must be in accordance with the provisions of the Constitution."

21. What then are the Constitutional limitations on the power of the State legislatures to levy taxes or for that matter enact legislations in the field reserved for them under the relevant entries of List II and III of the Seventh Schedule. The first and the foremost of these

limitations appears in Article 13 of the Constitution of India which declares that all laws in force in the territory of India immediately before the commencement of the Constitution are void to the extent they are inconsistent with the provisions of Part III dealing with the fundamental rights guaranteed to the citizens. It forbids the States from making any law which takes away or abridges, any provision of Part III. Any law made in contravention of the said rights shall to the extent of contravention be void. There is no gain saying that the power to enact laws has been conferred upon the Parliament subject to the above Constitutional limitation. So also in terms of Article 248, the residuary power to impose a tax not otherwise mentioned in the Concurrent List or the State List has been vested in the Parliament to the exclusion of the State legislatures, and the States' power to levy taxes limited to what is specifically reserved in their favour and no more.

22. Article 249 similarly empowers the Parliament to legislate with respect to a matter in the State List for national interest provided the Council of States has declared by a resolution supported by not less than two-thirds of the members present and voting that it is necessary or expedient in national interest to do so. The power is available till such time any resolution remains in force in terms of Article 249(2) and the proviso thereunder.

23. Article 250 is yet another provision which empowers the Parliament to legislate with respect to any matter in the State List when there is a proclamation of emergency. In the event of an inconsistency between laws made by Parliament under Articles 249 and 250, and laws made by legislature of the States, the law made by Parliament shall, to the extent of the inconsistency, prevail over the law made by the State in terms of Article 251.

24. The power of Parliament to legislate for two or more States by consent, in regard to matters not otherwise within the power of the Parliament is regulated by Article 252, while Article 253 starting with a non-obstante clause empowers Parliament to make any law for the whole country or any part of the territory of India for implementing any treaty, agreement or convention with any other country

> or countries or any decision made at any international conference, association or other body."
>
> 87. Mr. Divan, however, made an earnest endeavour to further broaden this concept of 'limited Government' by giving an altogether different slant. He submitted that there are certain things that the States simply cannot do because the action fundamentally alters the relationship between the citizens and the State. In this hue, he submitted that it was impermissible for the State to undertake the exercise of collection of bio-metric data, including fingerprints and storing at a central depository as it puts the State in an extremely dominant position in relation to the individual citizens. He also submitted that it will put the State in a position to target an individual and engage in surveillance thereby depriving or withholding the enjoyment of his rights and entitlements, which is totally impermissible in a country where governance of the State of founded on the concept of 'limited Government'. Again, this concept of limited government is woven around Article 21 of the Constitution.
>
> 88. Undoubtedly, we are in the era of liberalised democracy. In a democratic society governed by the Constitution, there is a strong trend towards the constitutionalisation of democratic politics, where the actions of democratically elected Government are judged in the light of the Constitution. In this context, judiciary assumes the role of protector of the Constitution and democracy, being the ultimate arbiter in all matters involving the interpretation of the Constitution."

387) We may observe that the matter is examined keeping in view the fundamental principles of constitutionalism in mind, and more particularly the principle that the concept of 'limited government' is applicable having regard to the fact that the three limbs of the State are to act within the framework of a written Constitution which assigns specific powers to each of the wing of the State and this presupposes that the sovereign power of the Parliament

is circumscribed by the provisions of the Constitution and the legislature is supposed to Act within the boundaries delineated by the Constitution. The constitutionalism, which is the bedrock of rule of law, is to be necessarily adhered to by the Parliament. Further, the power of judicial review which is accorded to the courts can be exercised to strike down any legislation or executive action if it is unconstitutional.

388) When we examine this issue in the context of discussion on various issues already dealt with, it is difficult to agree with the sweeping proposition advanced by the petitioners that the Aadhaar project is destructive of limited government and constitutional trust. These submissions are premised on the architecture of the Aadhaar being constitutionally intrusive which threatens the autonomy of individuals and has a tendency of creating a surveillance state. In support, the petitioners have referred to certain provisions of the Aadhaar Act. Some provisions which we found offending are struck down, some others have been read down and some are tweaked with. We feel that the statutory regime that would now govern the citizenry, wards off such a danger, if any.

MONEY BILL

Is the Aadhaar Act a validly enacted law having been passed as a Money Bill?

389) Mr. Chidambaram and Mr. Datar had laid attack on the Act on the ground that the Bill it could not have been introduced and passed by the Parliament as Money Bill. It was argued that the Aadhaar (Targeted Delivery of Financial and Other Subsidies, Benefits and Services) Bill, 2016 (for short the 'Bill') was wrongly certified as Money Bill under Article 110 of the Constitution of India by the Hon'ble Speaker of the Lok Sabha, thereby, virtually excluding the Rajya Sabha from the legislative process and depriving the Hon'ble President of his power of return. This, according to them, is illegal and grossly violates the constitutional provisions.

390) It was submitted that Bills are of three kinds:

(i) Ordinary Bills (Article 107);

(ii) Financial Bills viz. subset of Ordinary Bills (Article 117);

(iii) Money Bill viz. subset of Financial Bills (Article 110).

391) Article 110 reads as under:

> "Article 110 - Definition of "Money Bills".-
>
> (1) For the purposes of this Chapter, a Bill shall be deemed to be a Money Bill if it contains only provisions dealing with all or any of the following matters, namely:--
>
> (a) the imposition, abolition, remission, alteration or regulation of any tax;

(b) the regulation of the borrowing of money or the giving of any guarantee by the Government of India, or the amendment of the law with respect to any financial obligations undertaken or to be undertaken by the Government of India;

(c) the custody of the Consolidated Fund or the Contingency Fund of India, the payment of moneys into or the withdrawal of moneys from any such Fund;

(d) the appropriation of moneys out of the Consolidated Fund of India;

(e) the declaring of any expenditure to be expenditure charged on the Consolidated Fund of India or the increasing of the amount of any such expenditure;

(f) the receipt of money on account of the Consolidated Fund of India or the public account of India or the custody or issue of such money or the audit of the accounts of the Union or of a State; or

(g) any matter incidental to any of the matters specified in sub-clauses (a) to (f).

(2) A Bill shall not be deemed to be a Money Bill by reason only that it provides for the imposition of fines or other pecuniary penalties, or for the demand or payment of fees for licenses or fees for services rendered, or by reason that it provides for the imposition, abolition, remission, alteration or regulation of any tax by any local authority or body for local purposes.

(3) If any question arises whether a Bill is a Money Bill or not, the decision of the Speaker of the House of the People thereon shall be final.

(4) There shall be endorsed on every Money Bill when it is transmit led to the Council of States under article 109, and when it is presented to the President for assent under article 111, the certificate of the Speaker of the House of the People signed by him that it is a Money Bill."

392) It was submitted that a Money Bill may provide for matters

enumerated in Clause (a) to (f) of Article 110. Clause (g) has been added because it may be necessary to include provisions that are only "incidental" to any of matters specified in (a) to (f). The learned counsel pointed out the distinguishing features of a Money Bill are as below:

(i) It shall be introduced only on the recommendation of President (Article 117(1)).

(ii) It shall be introduced only in the House of the People (Article 117(1), 109(1)).

(iii) A Money Bill is transmitted by the Lok Sabha to the Rajya Sabha. Rajya Sabha thereafter may only make recommendations and return the Bill and not make amendments. The recommendations may or may not be accepted by the Lok Sabha. If the Money Bill is not returned within 14 days, it is deemed to have been passed by both the Houses. (Article 109(2) to Article 109(5)).

(iv) Upon submission of a Money Bill to the President for his assent, the President cannot return the Money Bill with the message requesting that the Houses will reconsider the Bill (proviso to Article 111).

Hence, it is manifest that a Money Bill that a Money Bill is a special kind of Bill that has the effect of denuding the power of the

Rajya Sabha of its power to amend the Bill and depriving the President of his power to return the bill for reconsideration. On that premise, it was argued that the provisions of a Money Bill must be construed very strictly and narrowly and only if a Bill falls strictly under definition of a Money Bill (Article 110), it can be passed as a Money Bill. If the provisions of the Bill fall outside the strict definition of Money Bill, the said Bill cannot be passed as a Money Bill.

393) Great emphasis was laid on the word 'only' appearing in Article 110 which signified that to qualify as a Money Bill, it has to strictly fall within one or more of the clauses of Article 110. For the interpretation of the word 'only', reference was made to the judgment in the case of *Hari Ram & Ors.* v. *Babu Gokul Prasad*[140]:

> "**3.** Section 166 of M.P. Land Revenue Code, 1954 reads as under:
>
> > "166. Any person who holds land for agricultural purposes from a tenure holder and who is not an occupancy tenant under Section 169 or a protected lessee under the Berar Regulation of Agricultural Leases Act, 1951, shall be ordinary tenant of such land.
> >
> > *Explanation*.— For the purposes of this section —

140(1991) Supp. 2 SCC 608

(i) any person who pays lease money in respect of any land in the form of crop share shall be deemed to hold such land;

(ii) any person who cultivates land in partnership with the tenure holder shall not be deemed to hold such land;

(iii) any person to whom only the right to cut grass or to graze cattle or to grow singhara (Trapa bispinosa) or to propagate or collect lac is granted in any land shall not be deemed to hold such land for agricultural purposes."

A bare perusal of the section indicates that any tenant other than occupancy tenant if he held the land for agricultural purposes from a tenure holder, then he became ordinary tenant by operation of law. Doubt if any stood removed by the explanation which clarifies the class of persons who could be deemed to be covered under a tenant other than occupancy tenant. Since it has been found that the land was let out to appellant not only for the right to cut grass, he could not be held to be a person who was not holding the land for agricultural purposes. The word 'only' in Explanation (iii) is significant. It postulates that entire land should have been used for the purposes enumerated. If part of the land was used for cultivation, then the land could not be deemed to have been granted for cutting grass only. It has been found that out of 5 and odd acres of land, the land under cultivation was 2 acres. Therefore, the negative clause in Explanation (iii) did not apply and the appellant became ordinary tenant under Section 166. In 1959, M.P. Land Revenue Code was enacted and Section 185 provided for the persons who could be deemed to be occupancy tenants. Its relevant part is extracted below:

"185. *Occupancy tenants*.— (1) Every person who at the coming into force of this Code holds—
(i) in the Mahakoshal Region—
(*a*) ***
(*b*) ***
(*c*) any land as an ordinary tenant as defined in the Madhya Pradesh Land Revenue Code, 1954 (2 of 1955);"

394) The learned counsel also referred to *M/s. Saru Smelting (P) Ltd.*

v. *Commissioner of Sales Tax, Lucknow*[141]:

> "**3.** The contention of the respondent is that Phosphorous Bronze is an alloy containing not only the metals mentioned in the aforesaid entry but Phosphorous also and as such it is not covered under the aforesaid entry. The words "other alloy containing any of these metals only" mean that the alloy made of these metals i.e. copper, tin, nickel or zinc only and that alone is covered under the said entry. It was submitted that if any other metal or substance is included in such an alloy, the same would not be covered under the aforesaid entry.
>
> xx xx xx
>
> **5.** We were referred to various dictionary meanings of the words 'Phosphorous Bronze' which have been noticed by the learned Judge dealing with the case in the High Court. We are really concerned with the interpretation of the entry. The emphasis in the entry is — either it should be pure copper, tin, nickel or zinc and if it is an alloy containing two or more metals, it must be an alloy containing these metals only. The expression "only" is very material for understanding the meaning of the entry. Since the alloy in dispute contains Phosphorous, may be in a very small quantity, it cannot fall within Entry 2(*a*) of the aforesaid Notification. The appeal consequently fails and is dismissed with costs."

395) In order to demonstrate as to what would be the nature and scope of the Money Bill, reference was made to the following literature:

> "**RELEVANT EXCERPTS FROM ERSKINE MAY'S "PARLIAMENTARY PRACTICE"**
>
> Definition of Money Bill –
>
> Section 1(2) of the Act defines a 'Money Bill' as a public bill which in the opinion of the Speaker of the House of Commons contains *only* provisions dealing with all or any of the following subjects, namely, the imposition, repeal, remission, alteration, or regulation of taxation; the imposition for the payment of debt or other financial

141(1993) Supp. 3 SCC 97

purposes of charges on the Consolidated Fund or the national Loans Fund, or on money provided by Parliament or the variation or repeal of any such charges; Supply; the appropriation, receipt, custody, issue or audit of accounts of public money; the raising or guarantee of any loan or the repayment thereof; or subordinate matters incidental to those subjects or any of them. For the purposes of this definition the expressions 'taxation', 'public money', and 'loan' respectively do not include any taxation, money, or loan raised by local authorities or bodies for local purposes, matters which, on the other hand, *are* included within the scope of Commons financial privilege.

PROCEDURE IN PASSING MONEY BILL

A 'Money Bill' which has been passed by the House of Commons and sent up to the House of Lords at least one month before the end of the session, but is not passed by the House of Lords without amendment within one month after it is so sent up, is, unless the House of Commons direct to the contrary, to be presented for the Royal Assent and becomes an Act of Parliament on the Royal Assent being signified to it. A 'Money Bil', when it is sent up to the House of Lords and when it is presented to Her Majesty, must be endorsed with the Speaker's certificate that it is such a bill. Before giving this certificate the Speaker is directed to consult, if practicable, those two members of the Panel of Chairs who are appointed for the purpose at the beginning of each session by the Committee of Selection.

When the Speaker has certified a bill to be a 'Money Bill' this is recorded in the Journal; and Section 3 of the Parliament Act 1911 stipulates that such certificate is conclusive for all purposes and may not be questioned in a court of law.

No serious practical difficulty normally arises in deciding whether a particular bill is or is not a 'Money Bill'; and criticism has seldom been voiced of the Speaker's action in giving or withholding a certificate. A bill which contains any of the enumerated matters and nothing besides is indisputably a 'Money bill'. If it contains any other matters, then, unless these are 'subordinate matters incidental to' any of the enumerated matters so contained in the bill, the bill is not a 'Money bill'. Furthermore, even if the main object of a bill is to create a new charge on the

Consolidated Fund or on money provided by Parliament, the bill will not be certified if it is apparent that the primary purpose of the new charge is not purely financial."

THE PARLIAMENTARY ACT, 1911

Chapter 13 of the Parliament Act, 1911 wherein Money Bill is defined as under:

"(1) …

(2) A Money Bill means a Public Bill which in the opinion of the Speaker of the House of Commons contains only provisions dealing with all or any of the following subjects, namely, the imposition, repeal, remission, alteration, or regulation of taxation; the imposition for the payment of debt or other financial purposes of charges on the Consolidated Fund, or on money provided by Parliament, or the variation or repeal of any such charges; supply; the appropriation, receipt, custody, issue or audit of accounts of public money; the raising or guarantee of any loan or the repayment thereof; or subordinate matters incidental to those subjects or any of them. In this subsection the expressions "taxation", "public money", and "loan" respectively do not include any taxation, money, or loan raised by local authorities or bodies for local purposes.

(3) There shall be endorsed on every Money Bill when it is sent up to the House of Lords and when it is presented to His Majesty for assent the certificate of the Speaker of the House of Commons signed by him that it is a Money Bill. Before giving his certificate, the Speaker shall consult, if practicable, two members to be appointed from the Chairmen's Panel at the beginning of each Session by the Committee of Selection."

RELEVANT EXCERPTS FROM THE CONSTITUTION OF IRELAND

(1) A Money Bill means a Bill which contains only provisions dealing with all or any of the following matters, namely, the imposition, repeal, remission, alteration or regulation of taxation; the imposition for the payment of debt or other financial purposes of charges on public moneys or the variation or repeal of any such charges; supply, the appropriation, receipt, custody, issue or audit of accounts of public money; the raising or guarantee of any

loan or the repayment thereof; matters subordinate and incidental to these matters or any of them.

(2) In this definition the expressions "taxation", "public money" and "loan" respectively do not include any taxation, money or loan raised by local authorities or bodies for local purposes.

RELEVANT EXCERPTS FROM KAUL & SHAKDER'S "PRACTICE AND PROCEDURE OF PARLIAMENT", LOK SABHA SECRETARIAT AT INDIA

Speaker Mavalankar observed as follows:

"Prima facie, it appears to me that the words of article 110 (imposition, abolition, remission, alteration, regulation of any tax) are sufficiently wide to make the Consolidated Bill a Money Bill. A question may arise as to what is the exact significance or scope of the word 'only' and whether and how far that word goes to modify or control the wide and general words 'imposition, abolition, remission, etc.'.

I think, *prima facie*, that the word 'only' is not restrictive of the scope of the general terms. If a Bill substantially deals with the imposition, abolition, etc., of a tax, then the mere fact of the inclusion in the Bill of other provisions which may be necessary for the administration of that tax or, I may say, necessary for the achievement of the objective of the particular Bill, cannot take away the Bill from the category of Money Bills. One has to look to the objective of the bill. Therefore, if the substantial provisions of the Bill aim at imposition, abolition, etc., of any tax then the other provisions would be incidental and their inclusion cannot be said to take it away from the category of a Money Bill. Unless one construes the word 'only' in this way it might lead to make article 110 a nullity. No tax can be imposed without making provisions for its assessment, collection, administration, reference to courts or tribunals, etc, one can visualise only one section in a Bill imposing the main tax and there may be fifty other sections which may deal with the scope, method, manner, etc., of that imposition.

Further, we have also to consider the provisions of sub-clause (2) of article 110; and these provisions may be

helpful to clarify the scope of the word 'only', not directly but indirectly."

396) It was further submitted that though clause (3) of Article 110 stipulates that decision of the Speaker on whether a Bill is a Money Bill or not is final, that did not mean that it was not subject to the judicial scrutiny and, therefore, in a given case, the Court was empowered to decide as to whether decision of the Speaker was constitutionally correct. In respect of Bill in question, it was argued that though Section 7 states that subsidies, benefits and services shall be provided from Consolidated Fund of India which was an attempt to give it a colour of Money Bill, some of the other provisions, namely, clauses 23(2)(h), 54(2)(m) and 57 of the Bill (which corresponds to Sections 23(2)(h), 54(2)(m) and 57 of the Aadhaar Act) do not fall under any of the clauses of Article 110 of the Constitution. Therefore, some provisions which were other than those covered by Money Bill and, therefore, introduction of the Bill as Money Bill was clearly inappropriate. It was also argued that, in this scenario, entire Act was bound to fail as there is no provision for severing clauses in Indian Constitution, unlike Section 55 of the Australian Constitution. Insofar as justiciability of the Speaker's decision is concerned, following judgments were referred to:

(i) *Sub-Committee on Judicial Accountability* v. *Union of India & Ors.*[142]

(ii) *S.R. Bommai & Ors.* v. *Union of India & Ors.*[143]

(iii) *Raja Ram Pal* v. *Hon'ble Speaker, Lok Sabha & Ors.*[144]

(iv) *Ramdas Athawale* v. *Union of India & Ors.*[145]

(v) *Kihoto Hollohan* v. *Zachillhu & Ors.*[146]

397) It was emphasised that the creation and composition of the Rajya Sabha (Upper House) is an indicator of, and is essential to, constitutional federalism. It is a part of basic structure of the Constitution as held in *Kuldip Nayar & Ors.* v. *Union of India & Ors.*[147]. Therefore, Rajya Sabha could not have been by-passed while passing the legislation in question and doing away with this process and also right of the President to return the Bill has rendered the statute unconstitutional.

398) The learned Attorney General as well as Mr. Dwivedi and some other counsel appearing for respondents refuted the aforesaid submissions in a strongest manner possible. It was argued that the Bill was rightly characterised as a Money Bill and introduced under Article 110 of the Constitution. According to them, the

142(1991) 4 SCC 699
143(1994) 3 SCC 1
144(2007) 3 SCC 184
145(2010) 4 SCC 1
146(1992) Supp. 2 SCC 651
147(2006) 7 SCC 1

heart of the Aadhaar Act is Section 7. It is not the creation of Aadhaar number per se which is the core of the Act, rather, that is only a means to identify the correct beneficiary and ensure "targeted delivery of subsidies, benefits and services", the expenditure for which is incurred from the Consolidated Fund of India. A conjoint reading of the preamble to the Act along with Section 7 clearly discloses the legislative intent and the object of the Act, which is to ensure that subsidy, benefit or service for which expenditure is incurred from or the receipt therefrom forms part of, the Consolidated Fund of India should be targeted to reach the intended beneficiary. It was argued, without prejudice to the above, that the decision of the Speaker incorporated into a certificate sent to the President is final and cannot be the subject matter of judicial review. To support the aforesaid proposition, reference was made to the judgment in the case of *Mohd. Saeed Siddiqui* v. *State of Uttar Pradesh & Anr.*[148] wherein the Court held as under:

> "**7.** Leave granted in the special leave petition. This appeal is directed against the order dated 27-8-2012 passed by the Division Bench of the High Court of Judicature of Allahabad in *Mukul Upadhyay* v. *N.K. Mehrotra* [Civil Misc. Writ Petition No. 24905 of 2012 (Writ-C 24905 of 2012), order dated 27-8-2012 (All)] whereby the High Court, while allowing the amendment application to the writ petition and holding the writ petition to be maintainable, directed to list the petition on 27-9-2012 for hearing on merits. By way of

148(2014) 11 SCC 415

the said amendment application, the writ petitioner sought to add two grounds in the writ petition viz. the Amendment Act is violative of the provisions of the Constitution of India and the same was wrongly introduced as a Money Bill in clear disregard to the provisions of Article 199 of the Constitution of India. Accordingly, it was prayed to issue a writ, order or direction in the nature of mandamus declaring the Amendment Act as ultra vires the provisions of the Constitution of India.

xx xx xx

12. It was further submitted by Mr Venugopal that the Amendment Act was not even passed by the State Legislature in accordance with the provisions of the Constitution of India and is, thus, a mere scrap of paper in the eye of the law. The Bill in question was presented as a Money Bill when, on the face of it, it could never be called as a Money Bill as defined in Articles 199(1) and 199(2) of the Constitution of India. Since the procedure for an ordinary Bill was not followed and the assent of the Governor was obtained to an inchoate and incomplete Bill which had not even gone through the mandatory requirements under the Constitution of India, the entire action was unconstitutional and violative of Article 200 of the Constitution of India.

xx xx xx

31. The main apprehension of the petitioner is that the Bill that led to the enactment of the Amendment Act was passed as a Money Bill in violation of Articles 197 and 198 of the Constitution of India which should have been passed by both the Houses viz. U.P. Legislative Assembly and U.P. Legislative Council and was wrongly passed only by the U.P. Legislative Assembly. During the course of hearing, Mr Desai, learned Senior Counsel appearing for the State of U.P., placed the original records pertaining to the proceedings of the Legislative Assembly, decision of the Speaker as well as the Governor, which we are going to discuss in the latter part of our judgment.

xx xx xx

34. The above provisions make it clear that the finality of the decision of the Speaker and the proceedings of the State Legislature being important privilege of the State

Legislature viz. freedom of speech, debate and proceedings are not to be inquired by the courts. The "proceeding of the legislature" includes everything said or done in either House in the transaction of the parliamentary business, which in the present case is enactment of the Amendment Act. Further, Article 212 precludes the courts from interfering with the presentation of a Bill for assent to the Governor on the ground of non-compliance with the procedure for passing Bills, or from otherwise questioning the Bills passed by the House. To put it clear, proceedings inside the legislature cannot be called into question on the ground that they have not been carried on in accordance with the Rules of Business. This is also evident from Article 194 which speaks about the powers, privileges of the Houses of the Legislature and of the members and committees thereof.

35. We have already quoted Article 199. In terms of Article 199(3), the decision of the Speaker of the Legislative Assembly that the Bill in question was a Money Bill is final and the said decision cannot be disputed nor can the procedure of the State Legislature be questioned by virtue of Article 212. We are conscious of the fact that in the decision of this Court in *Raja Ram Pal* v. *Lok Sabha* [(2007) 3 SCC 184] , it has been held that the proceedings which may be tainted on account of substantive or gross irregularity or unconstitutionality are not protected from judicial scrutiny.

36. Even if it is established that there was some infirmity in the procedure in the enactment of the Amendment Act, in terms of Article 255 of the Constitution the matters of procedure do not render invalid an Act to which assent has been given by the President or the Governor, as the case may be.

xx xx xx

43. As discussed above, the decision of the Speaker of the Legislative Assembly that the Bill in question was a Money Bill is final and the said decision cannot be disputed nor can the procedure of the State Legislature be questioned by virtue of Article 212. Further, as noted earlier, Article 252 also shows that under the Constitution the matters of procedure do not render invalid an Act to which assent has been given by the President or the Governor, as the case may be. Inasmuch as the Bill in question was a Money Bill,

> the contrary contention by the petitioner against the passing of the said Bill by the Legislative Assembly alone is unacceptable."

399) It was submitted that the challenge on identical grounds was, thus, repelled in the aforesaid case wherein validity of legislative enactment of a State in question, on the same ground, namely, it could not called Money Bill as defined in Article 199 of the Constitution, which was pari materia with Article 110 of the Constitution *qua* the Parliament. Judgment in the case of *Yogendra Kumar Jaiswal & Ors.* v. *State of Bihar & Ors.*[149] was also referred to wherein the Court was concerned with Orissa Special Courts Act, 2006 which was also passed as Money Bill and was challenged as violative of Article 199 of the Constitution. It was argued that the Court held in this case that decision of the Speaker that the Bill in question is a Money Bill is final and such a decision cannot be disputed nor can the procedure of the state legislature can be questioned by virtue of Article 212 of the Constitution. The learned Attorney General specifically read out the following portion from the said judgment:

> "**42.** In this regard, we may profitably refer to the authority in *Mohd. Saeed Siddiqui* v. *State of U.P.* [*Mohd. Saeed Siddiqui* v. *State of U.P.*, (2014) 11 SCC 415], wherein a three-Judge Bench while dealing with such a challenge, held that Article 212 precludes the courts from interfering with the presentation of a Bill for assent to the Governor on

149(2016) 3 SCC 183

> the ground of non-compliance with the procedure for passing Bills, or from otherwise questioning the Bills passed by the House, for proceedings inside the legislature cannot be called into question on the ground that they have not been carried on in accordance with the Rules of Business. Thereafter, the Court referring to Article 199(3) ruled that the decision of the Speaker of the Legislative Assembly that the Bill in question was a Money Bill is final and the said decision cannot be disputed nor can the procedure of the State Legislature be questioned by virtue of Article 212. The Court took note of the decision in *Raja Ram Pal* [*Raja Ram Pal* v. *Lok Sabha*, (2007) 3 SCC 184] wherein it has been held that the proceedings which may be tainted on account of substantive or gross irregularity or unconstitutionality are not protected from judicial scrutiny. Eventually, the Court repelled the challenge.
>
> **43.** In our considered opinion, the authorities cited by the learned counsel for the appellants do not render much assistance, for the introduction of a Bill, as has been held in *Mohd. Saeed Siddiqui* [*Mohd. Saeed Siddiqui* v. *State of U.P.*, (2014) 11 SCC 415] , comes within the concept of "irregularity" and it does come within the realm of substantiality. What has been held in *Special Reference No. 1 of 1964* [*Powers, Privileges and Immunities of State Legislatures, In re, Special Reference No. 1 of 1964*, AIR 1965 SC 745] has to be appositely understood. The factual matrix therein was totally different than the case at hand as we find that the present controversy is wholly covered by the pronouncement in *Mohd. Saeed Siddiqui* [*Mohd. Saeed Siddiqui* v. *State of U.P.*, (2014) 11 SCC 415] and hence, we unhesitatingly hold that there is no merit in the submission so assiduously urged by the learned counsel for the appellants."

400) Reliance was also placed on three judgments of Constitution Bench of this Court[150]. The learned Attorney General also submitted that even if it is presumed that there is illegality of procedure in the conduct of business in the Parliament, such

150 *Mangalore Ganesh Beedi Works* v. *State of Mysore & Anr.*, 1963 Supp (1) SCR 275; *Ramdas Athawale* v. *Union of India & Ors.*, (2010) 4 SCC 1, and; *M.S.M. Sharma* v. *Dr. Shree Krishna Sinha & Ors.*, AIR 1960 SC 1186

parliamentary proceedings were immune from challenge. Attention of the Court was also drawn to Article 122, which prohibits any proceedings of Parliament being called in question on the ground of "***any alleged irregularity of procedure***". It was submitted that the decision and certification of the Speaker being a matter of procedure is included in the Chapter under the heads "Legislative Procedure" being Articles 107 to 111, "Procedure in Financial Matters" being Articles 112 to 117 and "Procedure Generally" being Article 118 to 122 placing beyond doubt that separation of powers is embedded in these provisions clearly excluding judicial review in matters of procedure. Submission was that if this is clearly a Money Bill, being placed beyond challenge in a Court of Law, then to term it as a Financial Bill as contended by the petitioners would be wholly unjustified. Dilating the aforesaid proposition, it was pointed out that in the Draft Constitution prepared by the drafting committee, Article 101 provided for immunity of Parliamentary proceedings from judicial intervention on 'alleged irregularity of procedure'. This article finally got renumbered as Article 122 in the Constitution of India. During the Constituent Assembly debates, Shri H.V. Kamath suggested an amendment to draft Article 101 to clarify that the validity of any Parliamentary proceedings shall not be called in

question in any court. Accordingly, he suggested that the words 'called in question' be replaced with 'called in question in any court'. Refuting this suggested amendment, Dr. B.R. Ambedkar categorically stated:

> "Sir, with regard to the amendment of Mr. Kamath, I do not think it is necessary, because where can the proceedings of Parliament be questioned in a legal manner except in a court? Therefore the only place where the proceedings of Parliament can be questioned in a le-gal manner and legal sanction obtained is the Court. Therefore it is unnecessary to mention the words which Mr. Kamath wants in his amendment. For the reason I have explained, ***the only forum there the proceedings can be questioned in a legal manner and legal relief obtained either against the President or the Speaker or any officer or Member, being the Court, it is unnecessary to specify the forum.*** Mr. Kamath will see that the marginal note makes it clear."

401) Support of the judgment rendered by Patna High Court in *Patna Zilla Truck Owners Association & Ors.* v. *State of Bihar & Ors.*[151] was also taken, which has been approved by the Constitution Bench judgment of this Court in *State of Punjab* v. *Sat Pal Dang & Ors.*[152]. It was also argued that the legal position was similar in other Parliamentary democracies like Australia and Canada.

402) In any case, argued the learned Attorney General and Mr. Dwivedi, the Bill was rightly introduced as Money Bill as it merited such a description in law as well. To buttress this submission, doctrine of pith and substance was invoked as a guiding test. It

151AIR 1963 Pat 16
152(1969) 1 SCR 478

was argued that Section 7 which was the heart and soul of the Aadhaar Act fulfilled this requirement as the subsidies, benefits and services, the expenditure of which is incurred from the Consolidated Fund of India. Therefore, conditions laid down in Article 110 were fully satisfied. Following judgments[153] explaining the doctrine of pith and substance were pressed into substance. It was submitted that undoubtedly in pith and substance, the object of the Aadhaar Act is to identify the correct beneficiaries and ensure the "targeted delivery of subsidies, benefits and services", the expenditure for which is incurred from the Consolidated Fund of India. The creation of the Aadhaar number and authentication facility are in furtherance of the object of the Aadhaar Act, which is permissible under Article 110(g). It was also argued that Section 57, which has been attacked as being untraceable to any of the sub-clauses of (a) to (f) of Article 110 cannot be looked at in isolation. This Bill in its pith and substance should pass the test of being a Money Bill and not isolated provisions. On the contrary, Section 57 of the Act is also incidental to the object of the Act and creates a limitation upon use of Aadhaar by private parties wherein even though nothing prevents them from using Aadhaar for other purposes, the same

153*A.S. Krishna* v. *State of Madras*, (1957) SCR 399; *Union of India & Ors.* v. *Shah Goverdhan L. Kabra Teachers' College*, (2002) 8 SCC 228, and; *P.N. Krishna Lal & Ors.* v. *Government of Kerala & Anr.*, 1995 Supp (2) SCC 187

has been subjected to the procedure and obligations of Section 8, which requires, inter alia, informed consent of the Aadhaar number holder, purpose limitation, i.e. the identity information will be used only for submission to CIDR for authentication and the private entity must provide alternatives to submission of such identity information, which, in other words, means that private parties cannot insist upon Aadhaar and make Aadhaar mandatory, unless required by law. Therefore, Section 57 is a limitation imposed under the Aadhaar Act on the use of Aadhaar number by private parties which is purely incidental to the object of the Act and would squarely fall within Article 110(g) of the Constitution.

403) At the outset, we would like to recognise the importance of Rajya Sabha (Upper House) in a bicameral system of the Parliament. The significance and relevance of the Upper House has been succinctly exemplified by this Court in *Kuldip Nayar's* case in the following words:

> "74. The growth of "bicameralism" in parliamentary forms of Government has been functionally associated with the need for effective federal structures. This nexus between the role of "Second Chambers" or Upper Houses of Parliament and better coordination between the Central Government and those of the constituent units, was perhaps first laid down in definite terms with the Constitution of the United States of America, which was ratified by the thirteen original States of the Union in the

year 1787. The Upper House of the Congress of USA, known as the Senate, was theoretically modelled on the House of Lords in the British Parliament, but was totally different from the latter with respect to its composition and powers.

75. Since then, many nations have adopted a bicameral form of Central Legislature, even though some of them are not federations. On account of colonial rule, these British institutions of parliamentary governance were also embodied in the British North America Act, 1867 by which the Dominion of Canada came into existence and the Constitution of India, 1950. In Canada, Parliament consists of the House of Commons and the Senate (the Upper House). Likewise, the Parliament of the Union of India consists of the Lok Sabha (House of the People) and the Rajya Sabha (Council of States, which is the Upper House). In terms of their functions as agencies of representative democracies, the Lower Houses in the legislatures of India, USA and Canada, namely, the Lok Sabha, the House of Representatives and the House of Commons broadly follow the same system of composition. As of now, Members of the Lower Houses are elected from pre-designated constituencies through universal adult suffrage. The demarcation of these constituencies is in accordance with distribution of population, so as to accord equity in the value of each vote throughout the territory of the country. However, with the existence of constituent States of varying areas and populations, the representation accorded to these States in the Lower House becomes highly unequal. Hence, the composition of the Upper House has become an indicator of federalism, so as to more adequately reflect the interests of the constituent States and ensure a mechanism of checks and balances against the exercise of power by Central authorities that might affect the interests of the constituent States.

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79. The genesis of the Indian Rajya Sabha on the other hand benefited from the constitutional history of several nations which allowed the Constituent Assembly to examine the federal functions of an Upper House. However, “bicameralism” had been introduced to the provincial legislatures under the British rule in 1921. The Government of India Act, 1935 also created an Upper House in the federal legislature, whose members were to

be elected by the members of provincial legislatures and in case of Princely States to be nominated by the rulers of such territories. However, on account of the realities faced by the young Indian Union, a Council of States (the Rajya Sabha) in the Union Parliament was seen as an essential requirement for a federal order. Besides the former British provinces, there were vast areas of Princely States that had to be administered under the Union. Furthermore, the diversity in economic and cultural factors between regions also posed a challenge for the newly-independent country. Hence, the Upper House was instituted by the Constitution-framers which would substantially consist of members elected by the State Legislatures and have a fixed number of nominated members representing non-political fields. However, the distribution of representation between the States in the Rajya Sabha is neither equal nor entirely based on population distribution. A basic formula is used to assign relatively more weightage to smaller States but larger States are accorded weightage regressively for additional population. Hence the Rajya Sabha incorporates unequal representation for States but with proportionally more representation given to smaller States. The theory behind such allocation of seats is to safeguard the interests of the smaller States but at the same time giving adequate representation to the larger States so that the will of the representatives of a minority of the electorate does not prevail over that of a majority.

80. In India, Article 80 of the Constitution of India prescribes the composition of the Rajya Sabha. The maximum strength of the House is 250 members, out of which up to 238 members are the elected representatives of the States and the Union Territories [Article 80(1)(*b*)], and 12 members are nominated by the President as representatives of non-political fields like literature, science, art and social services [Articles 80(1)(*a*) and 80(3)]. The members from the States are elected by the elected members of the respective State Legislative Assemblies as per the system of proportional representation by means of the single transferable vote [Article 80(4)]. The manner of election for representatives from the Union Territories has been left to prescription by Parliament [Article 80(5)]. The allocation of seats for the various States and Union Territories of the Indian Union is enumerated in the Fourth Schedule to the Constitution, which is read with Articles 4(1) and 80(2). This allocation

has obviously varied with the admission and reorganisation of States."

404) The Rajya Sabha, therefore, becomes an important institution signifying constitutional fedaralism. It is precisely for this reason that to enact any statute, the Bill has to be passed by both the Houses, namely, Lok Sabha as well as Rajya Sabha. It is the constitutional mandate. The only exception to the aforesaid Parliamentary norm is Article 110 of the Constitution of India. Having regard to this overall scheme of bicameralism enshrined in our Constitution, strict interpretation has to be accorded to Article 110. Keeping in view these principles, we have considered the arguments advanced by both the sides.

405) We would also like to observe at this stage that insofar as submission of the respondents about the justiciability of the decision of the Speaker of the Lok Sabha is concerned, we are unable to subscribe to such a contention. Judicial review would be admissible under certain circumstances having regard to the law laid down by this Court in various judgments which have been cited by Mr. P. Chidambaran, learned senior counsel appearing for the petitioners, and taken note of in paragraph 396.

406) From the submissions of the learned counsel for the parties as

taken note of above, it is clear that the petitioners accept that Section 7 of the Aadhaar Act has the elements of 'Money Bill'. The attack is on the premise that some other provisions, namely, clauses 23(2)(h), 54(2)(m) and 57 of the Bill (which corresponds to Sections 23(2)(h), 54(2)(m) and 57 of the Aadhaar Act) do not fall under any of the clauses of Article 110 of the Constitution and, therefore, Bill was not limited to only those subjects mentioned in Article 110. Insofar as Section 7 is concerned, it makes receipt of subsidy, benefit or service subject to establishing identity by the process of authentication under Aadhaar or furnish proof of Aadhaar etc. It is also very clearly declared in this provision that the expenditure incurred in respect of such a subsidy, benefit or service would be from the Consolidated Fund of India. It is also accepted by the petitioners that Section 7 is the main provision of the Act. In fact, Introduction to the Act as well as the Statement of Objects and Reasons very categorically record that the main purpose of Aadhaar Act is to ensure that such subsidies, benefits and services reach those categories of persons, for whom they are actually meant. Sections 2(f), (w) and (x) of the Aadhaar Act define benefit, service and subsidy respectively. These provisions read as under:

> "2(f) "benefit" means any advantage, gift, reward, relief, or payment, in cash or kind, provided to an individual or a

> group of individuals and includes such other benefits as may be notified by the Central Government;
>
> 2(w) "service" means any provision, facility, utility or any other assistance provided in any form to an individual or a group of individuals and includes such other services as may be notified by the Central Government;
>
> 2(x) "subsidy" means any form of aid, support, grant, subvention, or appropriation, in cash or kind, to an individual or a group of individuals and includes such other subsidies as may be notified by the Central Government."

407) As all these three kinds of welfare measures are sought to be extended to the marginalised section of society, a collective reading thereof would show that the purpose is to expand the coverage of all kinds of aid, support, grant, advantage, relief provisions, facility, utility or assistance which may be extended with the support of the Consolidated Fund of India with the objective of targeted delivery. It is also clear that various schemes which can be contemplated by the aforesaid provisions, relate to vulnerable and weaker section of the society. Whether the social justice scheme would involve a subsidy or a benefit or a service is merely a matter of the nature and extent of assistance and would depend upon the economic capacity of the State. Even where the state subsidizes in part, whether in cash or kind, the objective of emancipation of the poor remains the goal.

408) The respondents are right in their submission that the expression subsidy, benefit or service ought to be understood in the context of targeted delivery to poorer and weaker sections of society. Its connotation ought not to be determined in the abstract. For as an abstraction one can visualize a subsidy being extended by Parliament to the King; by Government to the Corporations or Banks; etc. The nature of subsidy or benefit would not be the same when extended to the poor and downtrodden for producing those conditions without which they cannot live a life with dignity. That is the main function behind the Aadhaar Act and for this purpose, enrolment for Aadhaar number is prescribed in Chapter II which covers Sections 3 to 6. Residents are, thus, held entitled to obtain Aadhaar number. We may record here that such an enrolment is of voluntary nature. However, it becomes compulsory for those who seeks to receive any subsidy, benefit or service under the welfare scheme of the Government expenditure whereof is to be met from the Consolidated Fund of India. It follows that authentication under Section 7 would be required as a condition for receipt of a subsidy, benefit or service only when such a subsidy, benefit or service is taken care of by Consolidated Fund of India. Therefore, Section 7 is the core

provision of the Aadhaar Act and this provision satisfies the conditions of Article 110 of the Constitution. Upto this stage, there is no quarrel between the parties.

409) In this context, let us examine provisions of Sections 23(2)(h), 54(2)(m) and 57 of the Aadhaar Act. Insofar as Section 23 is concerned, it deals with powers and functions of the Authority. Sub-section (1) thereof says that the Authority shall develop the policy, procedure and systems for issuing Aadhaar numbers to individuals and perform authentication thereof under this Act. As mentioned above, under Section 3 of the Aadhaar Act, Aadhaar number is to be issued and authentication is performed under Section 8 of the Aadhaar Act. Sub-section (2) stipulates certain specified powers and functions which the Authority may perform and sub-section (h) thereof reads as under:

> "23(2)(h) specifying the manner of use of Aadhaar numbers for the purposes of providing or availing of various subsidies, benefits, services and other purposes for which Aadhaar numbers may be used."

410) This provision, thus, enables the Authority to specify the manner of use of Aadhaar with specific purpose in mind, namely, for providing or availing of various subsidies, benefits and services. These are relatable to Section 7. However, it uses the expression 'other purposes' as well. The expression 'other

purposes' can be read *ejusdem generis* which would have its relation to subsidies, benefits and services as mentioned in Section 7 and it can be confined only to that purpose i.e. scheme of targeted delivery for giving any grant, relief etc. when it is chargeable to Consolidated Fund of India. Therefore, this provision, according to us, can be read as incidental to the main provision and would be covered by Article 110(g) of the Constitution. Section 54 confers power upon the Authority to make regulations consistent with the Act and rules made thereunder, for carrying out the provisions of the Act. Clause (m) of sub-section (2) of Section 54 relates to Section 23(2)(h) as can be seen from its language.

> "54(2)(m) the manner of use of Aadhaar numbers for the purposes of providing or availing of various subsidies, benefits, services and other purposes for which Aadhaar numbers may be used under clause (h) of sub-section (2) of section 23."

411) The interpretation which we have given to Section 23(2)(h) would apply here as well and, therefore, we do not find any problem with this provision also. Coming to Section 57 of the Aadhaar Act, it mentions that Aadhaar Act would not prevent use of Aadhaar number for other purposes under the law. It is only an enabling provision as it permits the use of Aadhaar number for other purposes as well. This provision is to be viewed in the

backdrop that Section 7 is the core provision. We have already held that it has substantial nexus with the appropriation of funds from the Consolidated Fund of India and is directly connected with Article 110 of the Constitution. To facilitate this, UIDAI is established as Authority under the Act which performs various functions including that of a regulator needing funds for staff salary and it's own expenses. Respondents have rights remarked that the Authority is the performer in chief, the predominant dramatis personae. It appoints Registrars, enrollers, REs and ASAs; it lays down device and software specifications, and develops softwares too; it enrols; it de-duplicates; it establishes CIDR and manages it; it authenticates; it inspects; it prosecutes; it imposes disincentives; etc. And all this it does based on funds obtained by appropriations from Consolidated Fund of India (Section 24).

412) When we examine the provision of Section 57 in the aforesaid backdrop, as stated above, it only enables holder of Aadhaar number to use the said number for other purposes as well. That would not take away or dilute the sheen of clause 7 (now Section 7) for which purposes the Bill was introduced as Money Bill. In any case, a part of Section 57 has already declared

unconstitutional whereby even a body corporate in private sector or person may seek authentication from the Authority for establishing the identity of an individual.

For all the aforesaid reasons, we are of the opinion that Bill was rightly introduced as Money Bill. Accordingly, it is not necessary for us to deal with other contentions of the petitioners, namely, whether certification by the Speaker about the Bill being Money Bill is subject to judicial review or not, whether a provision which does not relate to Money Bill is severable or not. We reiterate that main provision is a part of Money Bill and other are only incidental and, therefore, covered by clause (g) of Article 110 of the Constitution.

Section 139AA of the Income Tax Act, 1961:

413) The Division Bench of this Court in *Binoy Viswam* has already upheld the validity of Section 139AA of the Income Tax Act, 1961 by repelling the contention predicated on Articles 14 and 19 of the Constitution of India. No doubt, in the said judgment, the Court held that insofar as scope of judicial review of legislative act is concerned, it is available on two grounds, namely:

(i) The Act is not within the competence of the legislature which passed the law, and/or

(ii) It is in contravention of any fundamental rights stipulated in

Part III of the Constitution or any other rights/provisions of the Constitution.

414) We have already acknowledged the existence of third ground as pointed out in *Shayara Bano* case, namely, 'manifest arbitrariness'. An Act which is manifestly arbitrary would be unreasonable and contrary to rule of law and, therefore, violative of Article 14 of the Constitution. Even when we consider the provisions of Section 139AA of the Income Tax Act, 1961 from this point of view, it cannot be said that the provision suffers from the vice of manifest arbitrariness. On the contrary, in ***Binoy Viswam*** itself, the benevolent purpose for inserting such a provision as a bona fide move has been highlighted. Therefore, the provision needs this test as well. In this behalf, the Court observed:

> "101. The varying needs of different classes or sections of people require differential and separate treatment. The legislature is required to deal with diverse problems arising out of an infinite variety of human relations. It must, therefore, necessarily have the power of making laws to attain particular objects and, for that purpose, of distinguishing, selecting and classifying persons and things upon which its laws are to operate. The principle of equality of law, thus, means not that the same law should apply to everyone but that a law should deal alike with all in one class; that there should be an equality of treatment under equal circumstances. It means that equals should not be treated unlike and unlikes should not be treated alike. Likes should be treated alike."

415) Since the issue as to whether right to privacy is a facet of fundamental rights or not was pending before the Constitution Bench, the challenge to Section 139AA was not examined in the context of privacy rights, specifically Article 21 of the Constitution though this aspect was argued. The Division Bench observed in this behalf, as under:

> "**136.** Subject to the aforesaid, these writ petitions are disposed of in the following manner:
>
> **136.1.** We hold that Parliament was fully competent to enact Section 139-AA of the Act and its authority to make this law was not diluted by the orders of this Court.
>
> **136.2.** We do not find any conflict between the provisions of the Aadhaar Act and Section 139-AA of the Income Tax Act inasmuch as when interpreted harmoniously, they operate in distinct fields.
>
> **136.3.** Section 139-AA of the Act is not discriminatory nor it offends equality clause enshrined in Article 14 of the Constitution.
>
> **136.4.** Section 139-AA is also not violative of Article 19(1)(*g*) of the Constitution insofar as it mandates giving of Aadhaar enrolment number for applying for PAN cards, in the income tax returns or notified Aadhaar enrolment number to the designated authorities. Further, the proviso to sub-section (2) thereof has to be read down to mean that it would operate only prospectively.
>
> **136.5.** The validity of the provision upheld in the aforesaid manner is subject to passing the muster of Article 21 of the Constitution, which is the issue before the Constitution Bench in Writ Petition (Civil) No. 494 of 2012 and other connected matters. Till then, there shall remain a partial stay on the operation of the proviso to sub-section (2) of Section 139-AA of the Act, as described above. No costs."

416) The nine Judge Bench has already, since then, answered the

reference by holding that right to privacy is a fundamental right. Having regard to that, validity of Section 139AA of the Act needs to be tested on this ground.

417) As already explained above, the Constitution Bench has held that in *K.S. Puttaswamy* though privacy is a fundamental right *inter alia* traceable to the right to liberty enshrined in Article 21 of the Constitution, it is not an absolute right but subject to limitations. The Court also laid down the triple test which need to be satisfied for judging the permissible limits for invasion of privacy while testing the validity of any legislation. These are:

(a) The existence of a law.

(b) A "legitimate State interest"; and

(c) Such law should pass the "test of proportionality".

418) In the present case, there is no dispute that first requirement stands satisfied as Section 139AA is a statutory provision and, therefore, there is a backing of law. Mr. Tushar Mehta, learned ASG had argued that not only other two requirements are also satisfied, rather these have been specifically dealt with by the Division Bench in *Binoy Viswam* inasmuch as these aspects were eluded to, consider, examined and the Court recorded its findings on these aspects. We find force in this submission of Mr. Mehta.

Insofar as requirement of 'legitimate State interest' is concerned, he pointed out that though Nariman, J. provided for a lenient test, namely, 'larger public interest' as against 'legitimate State interest', the provision satisfies both the tests. We agree with his submission, as Section 139AA of the Income Tax Act, 1961 seeks to safeguard the following interest:

> "To prevent income tax evasion by requiring, through an amendment to the Income Tax Act, that the Aadhaar number be linked with the PAN."

419) The mandatory requirement of quoting/producing PAN number is given in Rule 114 and the Form 49A. While mandating that "every person", (the term "person" as defined under Section 2(31) of the Act), shall apply for and get a PAN, the legislature also provided for the requirement so as to how such number will be given to every "person" in Rule 114 of the Income Tax Rules, the relevant part of which is Rule 114(1). While complying with the mandatory requirement (which have been in existence since 1989) and that for all "persons", many facts were required to be disclosed and such disclosure was/is in public interest including demographic details and biometrics i.e. left thumb impression/signature.

420) The Parliament, considering the "legitimate State interest" as well

as the "larger public interest" has now introduced Section 139AA which is only an extension of Section 139A which requires linking of PAN number with Aadhaar number which is issued under the Act for the purpose of eliminating duplicate PANs from the system with the help of a robust technology solution. Therefore, those who have PAN number and have already provided the information required to get PAN number cannot claim to have any legitimate expectation of withholding any data required for Aadhaar under the ground of "privacy".

421) The respondents have demonstrated with empirical data, in the common additional affidavit of respondent Nos. 1 and 3 the existence of the "legitimate State interest" and "larger public interest". Being a unique identifier, the problem of bogus or duplicate PANs can be dealt with in a more systematic and full-proof manner (though, in the context of Articles 14 and 19 of the Constitution, but at the same time, relevant from the perspective of legitimate State interest also). Discussion on this aspect, in *Binoy Viswam*, proceeds as under:

> "**60.2.** PAN is the key or identifier of all computerised records relating to the taxpayer. The requirement for obtaining of PAN is mandated through Section 139-A of the Act. The procedure for application for PAN is prescribed in Rule 114 of the Rules. The forms prescribed for PAN application are Forms 49-A and 49-AA for Indian and foreign citizens/entities. Quoting of PAN has been

mandated for certain transactions above specified threshold value in Rule 114-B of the Rules.

60.3. For achieving the objective of one PAN to one assessee, it is required to maintain uniqueness of PAN. The uniqueness of PAN is achieved by conducting a de-duplication check on all already existing allotted PAN against the data furnished by new applicant. Under the existing system of PAN only demographic data is captured. De-duplication process is carried out using a phonetic algorithm whereby a Phonetic PAN (PPAN) is created in respect of each applicant using the data of applicant's name, father's name, date of birth, gender and status. By comparison of newly generated PPAN with existing set of PPANs of all assessees duplicate check is carried out and it is ensured that same person does not acquire multiple PANs or one PAN is not allotted to multiple persons. Due to prevalence of common names and large number of PAN holders, the demographic way of de-duplication is not foolproof. Many instances are found where multiple PANs have been allotted to one person or one PAN has been allotted to multiple persons despite the application of abovementioned de-duplication process. While allotment of multiple PANs to one person has the risk of diversion of income of person into several PANs resulting in evasion of tax, the allotment of same PAN to multiple persons results in wrong aggregation and assessment of incomes of several persons as one taxable entity represented by single PAN.

60.4. Presently verification of original documents in only 0.2% cases (200 out of 1,00,000 PAN applications) is done on a random basis which is quite less. In the case of Aadhaar, 100% verification is possible due to availability of online Aadhaar authentication service provided by the UIDAI. Aadhaar seeding in PAN database will make PAN allotment process more robust.

60.5. Seeding of Aadhaar number into PAN database will allow a robust way of de-duplication as Aadhaar number is de-duplicated using biometric attributes of fingerprints and iris images. The instance of a duplicate Aadhaar is almost non-existent. Further seeding of Aadhaar will allow the Income Tax Department to weed out any undetected duplicate PANs. It will also facilitate resolution of cases of one PAN allotted to multiple persons.

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104. Insofar as the impugned provision is concerned, Mr Datar had conceded that first test that of reasonable classification had been satisfied as he conceded that individual assessees form a separate class and the impugned provision which targeted only individual assessees would not be discriminatory on this ground. His whole emphasis was that Section 139-AA of the Act did not satisfy the second limb of the twin tests of classification as, according to him, this provision had no rational nexus with the object sought to be achieved. In this behalf, his submission was that if the purpose of the provision was to curb circulation of black money, such an object was not achievable by seeding PAN with Aadhaar inasmuch as Aadhaar is only for individuals. His submission was that it is only the individuals who are responsible for generating black money or money laundering. This was the basis for Mr Datar's submission. We find it somewhat difficult to accept such a submission.

105. Unearthing black money or checking money laundering is to be achieved to whatever extent possible. Various measures can be taken in this behalf. If one of the measures is introduction of Aadhaar into the tax regime, it cannot be denounced only because of the reason that the purpose would not be achieved fully. Such kind of menace, which is deep-rooted, needs to be tackled by taking multiple actions and those actions may be initiated at the same time. It is the combined effect of these actions which may yield results and each individual action considered in isolation may not be sufficient. Therefore, rationality of a particular measure cannot be challenged on the ground that it has no nexus with the objective to be achieved. Of course, there is a definite objective. For this purpose alone, individual measure cannot be ridiculed. We have already taken note of the recommendations of SIT on black money headed by Justice M.B. Shah. We have also reproduced the measures suggested by the Committee headed by Chairman, CBDT on “Measures to Tackle Black Money in India and Abroad”. They have, in no uncertain terms, suggested that one singular proof of identity of a person for entering into finance/business transactions, etc. may go a long way in curbing this foul practice. That apart, even if solitary purpose of de-duplication of PAN cards is taken into consideration, that may be sufficient to meet the second test of Article 14. It has come on record that 11.35

lakh cases of duplicate PAN or fraudulent PAN cards have already been detected and out of this 10.52 lakh cases pertain to individual assessees. Seeding of Aadhaar with PAN has certain benefits which have already been enumerated. Furthermore, even when we address the issue of shell companies, fact remains that companies are after all floated by individuals and these individuals have to produce documents to show their identity. It was sought to be argued that persons found with duplicate/bogus PAN cards are hardly 0.4% and, therefore, there was no need to have such a provision. We cannot go by percentage figures. The absolute number of such cases is 10.52 lakhs, which figure, by no means, can be termed as miniscule, to harm the economy and create adverse effect on the nation. The respondents have argued that Aadhaar will ensure that there is no duplication of identity as biometrics will not allow that and, therefore, it may check the growth of shell companies as well.

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127. It would be apposite to quote the following discussion by the Comptroller and Auditor General in his report for the year 2011:

> "Widening of Tax Base
>
> The assessee base grew over the last five years from 297.9 lakh taxpayers in 2005-06 to 340.9 lakh taxpayers in 2009-10 at the rate of 14.4 per cent.
>
> The Department has different mechanisms available to enhance the assessee base which include inspection and survey, information sharing with other tax departments and third-party information available in annual information returns. Automation also facilitates greater crosslinking. Most of these mechanisms are available at the level of assessing officers. The Department needs to holistically harness these mechanisms at macro level to analyse the gaps in the assessee base. Permanent Account Numbers (PANs) issued up to March 2009 and March 2010 were 807.9 lakhs and 958 lakhs respectively. The returns filled in 2008-09 and 2009-10 were 326.5 lakhs and 340.9 lakhs respectively. The gap between PANs and the number of returns filed was 617.1 lakhs in 2009-10. The Board needs to identify the reasons

for the gap and use this information for appropriately enhancing the assessee base. *The gap may be due to issuance of duplicate PAN cards and death of some PAN card holders. The Department needs to put in place appropriate controls to weed out the duplicate PANs and also update the position in respect of deceased assessee. It is significant to note that the number of PAN card holders has increased by 117.7 per cent between 2005-06 to 2009-10 whereas the number of returns filed in the same period has increased by 14.4 per cent only*.

The total direct tax collection has increased by 128.8 per cent during the period 2005-06 to 2009-10. The increase in the tax collection was around nine times as compared to increase in the assessee base. It should be the constant endeavour of the Department to ensure that the entire assessee base, once correctly identified is duly meeting the entire tax liability. However, no assurance could be obtained that the tax liability on the assessee is being assessed and collected properly. This comment is corroborated in Para 2.4.1 of Chapter 2 of this report where we have mentioned about our detection of undercharge of tax amounting to Rs 12,842.7 crores in 19,230 cases audited during 2008-09. However, given the fact that ours is a test audit, the Department needs to take firm steps towards strengthening the controls available on the existing statutes towards deriving an assurance on the tax collections."

(emphasis supplied)

128. Likewise, the Finance Minister in his Budget speech in February 2013 described the extent of tax evasion and offering lesser income tax than what is actually due thereby labelling India as tax non-compliant, with the following figures:

"India's tax to GDP ratio is very low, and the proportion of direct tax to indirect tax is not optional from the viewpoint of social justice. I place before you certain data to indicate that our direct tax collection is not commensurate with the income and consumption pattern of Indian economy. As against estimated 4.2 crore persons engaged in organised sector employment, the number of individuals filing return for salary income are only 1.74 crores. As against 5.6

crore informal sector individual enterprises and firms doing small business in India, the number of returns filed by this category are only 1.81 crores. Out of the 13.94 lakh companies registered in India up to 31-3-2014, 5.97 lakh companies have filed their returns for Assessment Year 2016-17. Of the 5.97 lakh companies which have filed their returns for Assessment Year 2016-17 so far, as many as 2.76 lakh companies have shown losses or zero income. 2.85 lakh companies have shown profit before tax of less than Rs 1 crore. 28,667 companies have shown profit between Rs 1 crore to Rs 10 crores, and only 7781 companies have profit before tax of more than Rs 10 crores. Among 3.7 crore individuals who filed the tax returns in 2015-16, 99 lakhs show income below the exemption limit of Rs 2.5 lakh p.a. 1.95 crores show income between Rs 2.5 to Rs 5 lakhs, 52 lakhs show income between Rs 5 to Rs 10 lakhs and only 24 lakh people show income above Rs 10 lakhs. Of the 76 lakh individual assessees who declare income above Rs 5 lakhs, 56 lakhs are in the salaried class. The number of people showing income more than 50 lakhs in the entire country is only 1.72 lakhs. We can contrast this with the fact that in the last five years, more than 1.25 crore cars have been sold, and number of Indian citizens who flew abroad, either for business or tourism, is 2 crores in the year 2015. From all these figures we can conclude that we are largely a tax non-compliant society. The predominance of the cash in the economy makes it possible for the people to evade their taxes. When too many people evade the taxes, the burden of their share falls on those who are honest and compliant."

129. The respondents have also claimed that linking of Aadhaar with PAN is consistent with India's international obligations and goals. In this behalf, it is pointed out that India has signed the Inter-Governmental Agreement (IGA) with USA on 9-7-2015, for Improving International Tax Compliance and implementing the Foreign Account Tax Compliance Act (FATCA). India has also signed a multilateral agreement on 3-6-2015, to automatically exchange information based on Article 6 of the Convention on Mutual Administrative Assistance in Tax Matters under the Common Reporting Scheme (CRS), formally referred to as the Standard for Automatic Exchange of Financial Account Information (AEoI). As part of India's commitment

> under FATCA and CRS, financial sector entities capture the details about the customers using the PAN. In case the PAN or submitted details are found to be incorrect or fictitious, it will create major embarrassment for the country. Under Non-filers Monitoring System (NMS), the Income Tax Department identifies non-filers with potential tax liabilities. Data analysis is carried out to identify non-filers about whom specific information was available in AIR, CIB data and TDS/TCS returns. Email/SMS and letters are sent to the identified non-filers communicating the information summary and seeking to know the submission details of income tax return. In a large number of cases (more than 10 lakh PANs every year) it is seen that the PAN holder neither submits the response and in many cases the letters are return unserved. Field verification by field formations have found that in a large number of cases, the PAN holder is untraceable. In many cases, the PAN holder mentions that the transaction does not relate to them. There is a need to strengthen PAN by linking it with Aadhaar/biometric information to prevent use of wrong PAN for high value transactions."

422) Adverting to the aspect of proportionality, here again there was a specific discussion in *Binoy Viswam* as this argument was raised, though in the context of Article 19 of the Constitution. The Court after explaining the doctrine of proportionality specifically held that proportionality test stood applied with. Following discussion in the said judgment would amply demonstrate this proposition:

> "**65.** While monitoring the PILs relating to night shelters for the homeless and the right to food through the public distribution system, this Court has lauded and complimented the efforts of the State Governments for inter alia carrying out biometric identification of the head of family of each household to eliminate fictitious, bogus and ineligible BPL/AAY household cards.
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125.2. Menace of corruption and black money has reached alarming proportion in this country. It is eating into the economic progress which the country is otherwise achieving. It is not necessary to go into the various reasons for this menace. However, it would be pertinent to comment that even as per the observations of the Special Investigation Team (SIT) on black money headed by Justice M.B. Shah, one of the reasons is that persons have the option to quote their PAN or UID or passport number or driving licence or any other proof of identity while entering into financial/business transactions. Because of this multiple methods of giving proofs of identity, there is no mechanism/system at present to collect the data available with each of the independent proofs of ID. For this reason, even SIT suggested that these databases be interconnected. To the same effect is the recommendation of the Committee headed by Chairman, CBDT on measures to tackle black money in India and abroad which also discusses the problem of money laundering being done to evade taxes under the garb of shell companies by the persons who hold multiple bogus PAN numbers under different names or variations of their names. That can be possible if one uniform proof of identity, namely, UID is adopted. It may go a long way to check and minimise the said malaise.

125.3. Thirdly, Aadhaar or UID, which has come to be known as the most advanced and sophisticated infrastructure, may facilitate law-enforcement agencies to take care of problem of terrorism to some extent and may also be helpful in checking the crime and also help investigating agencies in cracking the crimes. No doubt, going by the aforesaid, and may be some other similarly valid considerations, it is the intention of the Government to give fillip to Aadhaar movement and encourage the people of this country to enrol themselves under the Aadhaar Scheme.

126. Whether such a scheme should remain voluntary or it can be made mandatory imposing compulsiveness on the people to be covered by Aadhaar is a different question which shall be addressed at the appropriate stage. At this juncture, it is only emphasised that mala fides cannot be attributed to this scheme. In any case, we are concerned with the vires of Section 139-AA of the Income Tax Act, 1961 which is a statutory provision. This Court is, thus, dealing with the aspect of judicial review of legislation.

> Insofar as this provision is concerned, the explanation of the respondents in the counter-affidavit, which has already been reproduced above, is that the primary purpose of introducing this provision was to take care of the problem of multiple PAN cards obtained in fictitious names. Such multiple cards in fictitious names are obtained with the motive of indulging into money laundering, tax evasion, creation and channelising of black money. It is mentioned that in de-duplication exercises, 11.35 lakh cases of duplicate PANs/fraudulent PANs have been detected. Out of these, around 10.52 lakhs pertain to the individual assessees. Parliament in its wisdom thought that one PAN to one person can be ensured by adopting Aadhaar for allotment of PAN to individuals. As of today, that is the only method available i.e. by seeding of existing PAN with Aadhaar. It is perceived as the best method, and the only robust method of de-duplication of PAN database. It is claimed by the respondents that the instance of duplicate Aadhaar is almost non-existent. It is also claimed that seeding of PAN with Aadhaar may contribute to widening of the tax case as well, by checking the tax evasions and bringing into tax hold those persons who are liable to pay tax but deliberately avoid doing so."

423) It has been stated by the respondents, on affidavit, that analysis of Form 61/60 data using PAN Aadhaar linkage shows that a large number of PAN holders do not quote their PAN in the prescribed transactions to prevent linking of the transactions to the PAN. The analysis was performed by matching the Aadhaar number and person name reported in Form 61 (which was possible only due to linking of financial transactions/accounts with Aadhaar) with the Aadhaar and name of the entity available in the ITD PAN database (possible due to linking of PAN with Aadhaar). This analysis identified 1.65 crore non-PAN transactions reported

through Form 61 (relating to FY 2016-17 and FY 2017-18) where PAN of the transacting party was present in the PAN database and was not mentioned filing a wrong form deliberately. These transactions totalled to around Rs. 33,000 crore (based on transaction amount reported). This is the amount of undisclosed high value transaction which would have gone undetected had it not been for Aadhaar linkage. Similar matching has also helped populating PAN in 1.12 lakh non-PAN transactions reported under Statement of Financial Transactions (SFT). Majority of the non-PAN transactions reported are around Deposit in Cash, Investment in time deposit, Sale of immovable property, Purchase of immovable property and Opening an account (other than savings and time deposit). Thus, linking of PAN with Aadhaar will significantly enhance legitimate collection of country's revenue.

424) Taking into account the aforesaid consideration as well as other factors mentioned above, we feel that there is a justifiable reason with the State for collection and storage of data in the form of Aadhaar and linking it with PAN insofar as Section 139AA of the Income Tax Act is concerned. We would like to reproduce para 311 of *K.S. Puttaswamy* judgment, which reads as under:

> "311. Apart from national security, the State may have justifiable reasons for the collection and storage of data. In a social welfare State, the Government embarks upon

programmes which provide benefits to impoverished and marginalised sections of society. There is a vital State interest in ensuring that scarce public resources are not dissipated by the diversion of resources to persons who do not qualify as recipients. Allocation of resources for human development is coupled with a legitimate concern that the utilisation of resources should not be siphoned away for extraneous purposes. Data mining with the object of ensuring that resources are properly deployed to legitimate beneficiaries is a valid ground for the State to insist on the collection of authentic data. But, the data which the State has collected has to be utilised for legitimate purposes of the State and ought not to be utilised unauthorisedly for extraneous purposes. This will ensure that the legitimate concerns of the State are duly safeguarded while, at the same time, protecting privacy concerns. Prevention and investigation of crime and protection of the revenue are among the legitimate aims of the State. Digital platforms are a vital tool of ensuring good governance in a social welfare State. Information technology—legitimately deployed is a powerful enabler in the spread of innovation and knowledge."

425) Following passages from *Subramanian Swamy* v. *Union of India, Ministry of Law & Ors.*[154] may also be relevant in this behalf and the same are reproduced below:

> "122. In *State of Madras* v. *V.G. Row*, the Court has ruled that the test of reasonableness, wherever prescribed, should be applied to each individual statute impugned and no abstract standard, or general pattern of reasonableness can be laid down as applicable to all cases. The nature of the right alleged to have been infringed, the underlying purpose of the restrictions imposed, the extent and urgency of the evil sought to be remedied thereby, the disproportion of the imposition, the prevailing conditions at the time, should all enter into the judicial verdict.
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> 130. The principles as regards reasonable restriction as has been stated by this Court from time to time are that the

154(2016) 7 SCC 221

> restriction should not be excessive and in public interest. The legislation should not invade the rights and should not smack of arbitrariness. The test of reasonableness cannot be determined by laying down any abstract standard or general pattern. It would depend upon the nature of the right which has been infringed or sought to be infringed. The ultimate "impact", that is, effect on the right has to be determined. The "impact doctrine" or the principle of "inevitable effect" or "inevitable consequence" stands in contradistinction to abuse or misuse of a legislation or a statutory provision depending upon the circumstances of the case. The prevailing conditions of the time and the principles of proportionality of restraint are to be kept in mind by the court while adjudging the constitutionality of a provision regard being had to the nature of the right. The nature of social control which includes public interest has a role. The conception of social interest has to be borne in mind while considering reasonableness of the restriction imposed on a right. The social interest principle would include the felt needs of the society.
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> 194. Needless to emphasise that when a law limits a constitutional right which many laws do, such limitation is constitutional if it is proportional. The law imposing restriction is proportional if it is meant to achieve a proper purpose, and if the measures taken to achieve such a purpose are rationally connected to the purpose, and such measures are necessary. Such limitations should not be arbitrary or of an excessive nature beyond what is required in the interest of the public. Reasonableness is judged with reference to the objective which the legislation seeks to achieve, and must not be in excess of that objective (see *P.P. Enterprises*v. *Union of India*). Further, the reasonableness is examined in an objective manner from the standpoint of the interest of the general public and not from the point of view of the person upon whom the restrictions are imposed or abstract considerations (see *Mohd. Hanif Quareshi* v. *State of Bihar*)

On independent examination of the matter, the aforesaid exercise undertaken in the *Binoy Viswam* is hereby affirmed as we are in agreement therewith. We, thus, hold that the provisions

of Section 139AA of the Income Tax Act, 1961 meet the triple test of right to privacy, contained in *K.S. Puttaswamy*.

Prevention of Money Laundering Rules:

426) The petitioners have challenged amendment to Rule 9 of the Prevention of Money Laundering (Maintenance of Records) Rules, 2005, (Rules, 2005) which was amended by Prevention of Money Laundering (Maintenance of Records) Seventh Amendment Rules, 2017. Rule 9 of the aforesaid Rules is amended by Second Amendment Rules, 2017 whereby following additions are made. The amendment reads as under:

> "(b) in rule 9, for sub-rule (4) to sub-rule (9), the following sub-rules shall be substituted, namely:-
>
> (4) Where the client is an individual, who is eligible to be enrolled for an Aadhaar number, he shall for the purpose of sub-rule (1) submit to the reporting entity,-
>
> (a) the Aadhaar number issued by the Unique Identification Authority of India; and
>
> (b) the Permanent Account Number or Form No. 60 as defined in Income Tax Rules, 1962,
>
> and such other documents including in respect of the nature of business and financial status of the client as may be required by the reporting entity:
>
> Provided that where an Aadhaar number has not been assigned to a client, the client shall furnish proof of application of enrolment for Aadhaar and in case the Permanent Account Number is not submitted, one certified copy of an 'officially valid document' shall be submitted.

Provided further that photograph need not be submitted by a client falling under clause (b) of sub-rule (1).

(4A) Where the client is an individual, who is not eligible to be enrolled for an Aadhaar number, he shall for the purpose of sub-rule (1), submit to the reporting entity, the Permanent Account Number or Form No. 60 as defined in the Income Tax Rules, 1962:

Provided that if the client does not submit the Permanent Account Number, he shall submit one certified copy of an 'officially valid document' containing details of his identity and address, one recent photograph and such other documents including in respect of the nature or business and financial status of the client as may be required by the reporting entity.

(5) Notwithstanding anything contained in sub-rules (4) and (4A), an individual who desires to open a small account in a banking company may be allowed to open such an account on production of a self-attested photograph and affixation of signature or thumb print, as the case may be, on the form for opening the account:

Provided that-

(i) the designated officer of the banking company, while opening the small account, certifies under his signature that the person opening the account has affixed his signature or thumb print, as the case may be, in his presence;

(ii) the small account shall be opened only at Core Banking Solution linked banking company branches or in a branch where it is possible to manually monitor and ensure that foreign remittances are not credited to a small account and that the stipulated limits on monthly and annual aggregate of transactions and balance in such accounts are not breached, before a transaction is allowed to take place;

(iii) the small account shall remain operational initially for a period of twelve months, and thereafter for a further period of twelve months if the holder of such an account provides evidence before the banking company of having applied for any of the officially valid documents within twelve months of the opening of the said account, with the

entire relaxation provisions to be reviewed in respect of the said account after twenty-four months;

(iv) the small account shall be monitored and when there is suspicion of money laundering or financing of terrorism or other high risk scenarios, the identity of client shall be established through the production of officially valid documents, as referred to in sub-rule (4) and the Aadhaar number of the client or where an Aadhaar number has not been assigned to the client, through the production of proof of application towards enrolment for Aadhaar along with an officially valid document;

Provided further that if the client is not eligible to be enrolled for an Aadhaar number, the identity of client shall be established through the production of an officially valid document;

(v) the foreign remittance shall not be allowed to be credited into the small account unless the identity of the client is fully established through the production of officially valid documents, as referred to in sub-rule (4) and the Aadhaar number of the client or where an Aadhaar number has not been assigned to the client, through the production of proof of application towards enrolment for Aadhaar along with an officially valid document:

Provided that if the client is not eligible to be enrolled for the Aadhaar number, the identity of client shall be established through the production of an officially valid document.

(6) Where the client is a company, it shall for the purposes of sub-rule (1), submit to the reporting entity the certified copies of the following documents:-

(i) Certificate of incorporation;

(ii) Memorandum and Articles of Association;

(iii) A resolution from the Board of Directors and power of attorney granted to its managers, officers or employees to transact on its behalf;

(iv) (a) Aadhaar numbers; and

(b) Permanent Account Numbers or Form 60 as defined in the Income Tax Rules, 1962,

issued to managers, officers or employees holding an attorney to transact on the company's behalf or where an Aadhaar number has not been assigned, proof of application towards enrolment for Aadhaar and in case Permanent Account Number is not submitted an officially valid document shall be submitted:

Provided that for the purpose of this clause if the managers, officers or employees holding an attorney to transact on the company's behalf are not eligible to be enrolled for Aadhaar number and do not submit the Permanent Account Number, certified copy of an officially valid document shall be submitted.

(7) Where the client is a partnership firm, it shall, for the purposes of sub-rule (1), submit to the reporting entity the certified copies of the following documents:-

(i) registration certificate;

(ii) partnership deed; and

(iii) (a) Aadhaar number; and

(b) Permanent Account Number or Form 60 as defined in the Income Tax Rules, 1962,

issued to the person holding an attorney to transact on its behalf or where an Aadhaar number has not been assigned, proof of application towards enrolment for Aadhaar and in case Permanent Account Number is not submitted an officially valid document shall be submitted:

Provided that for the purpose of this clause, if the person holding an attorney to transact on the company's behalf is not eligible to be enrolled for Aadhaar number and does not submit the Permanent Account Number, certified copy of an officially valid document shall be submitted.

(8) Where the client is a trust, it shall, for the purposes of sub-rule (1) submit to the reporting entity the certified copies of the following documents:-

(i) registration certificate;

(ii) trust deed; and

(iii) (a) Aadhaar number; and

(b) Permanent Account Number or Form 60 as defined in the Income Tax Rules, 1962,

issued to the person holding an attorney to transact on its behalf or where Aadhaar number has not been assigned, proof of application towards enrolment for Aadhaar and in case Permanent Account Number is not submitted an officially valid document shall be submitted:

Provided that for the purpose of this clause if the person holding an attorney to transact on the company's behalf is not eligible to be enrolled for Aadhaar number and does not submit the Permanent Account Number, certified copy of an officially valid document shall be submitted.

(9) Where the client is an unincorporated association or a body of individuals, it shall submit to the reporting entity the certified copies of the following documents:-

(i) resolution of the managing body of such association or body of individuals;

(ii) power of attorney granted to him to transact on its behalf;

(iii) (a) the Aadhaar number; and

(b) Permanent Account Number or Form 60 as defined in the Income Tax Rules, 1962,

issued to the person holding an attorney to transact on its behalf or where Aadhaar number has not been assigned, proof of application towards enrolment for Aadhaar and in case the Permanent Account Number is not submitted an officially valid document shall be submitted; and

(iv) such information as may be required by the reporting entity to collectively establish the legal existence of such an association or body of individuals:

Provided that for the purpose of this clause if the person holding an attorney to transact on the company's

behalf is not eligible to be enrolled for Aadhaar number and does not submit the Permanent Account Number, certified copy of an officially valid document shall be submitted."

(c) after sub-rule (14), the following sub-rules shall be inserted, namely,-

(15) Any reporting entity, at the time of receipt of the Aadhaar number under provisions of this rule, shall carry out authentication using either e-KYC authentication facility or Yes/No authentication facility provided by Unique Identification Authority of India.

(16) In case the client referred to in sub-rules (4) to (9) of rule 9 is not a resident or is a resident in the States of Jammu and Kashmir, Assam or Meghalaya and does not submit the Permanent Account Number, the client shall submit to the reporting entity one certified copy of officially valid document containing details of his identity and address, one recent photograph and such other document including in respect of the nature of business and financial status of the client as may be required by the reporting entity.

(17) (a) In case the client, eligible to be enrolled for Aadhaar and obtain a Permanent Account Number, referred to in sub-rules (4) to (9) of rule 9 does not submit the Aadhaar number or the Permanent Account Number at the time of commencement of an account based relationship with a reporting entity, the client shall submit the same within a period of six months from the date of the commencement of the account based relationship:

Provided that the clients, eligible to be enrolled for Aadhaar and obtain the Permanent Account Number, already having an account based relationship with reporting entities prior to date of this notification, the client shall submit the Aadhaar number and Permanent Account Number by 31st December, 2017.

(b) As per regulation 12 of the Aadhaar (Enrolment and Update) Regulations, 2016, the local authorities in the State Governments or Union-territory Administrations have become or are in the process of becoming UIDAI Registrars for Aadhaar enrolment and are organising special Aadhaar enrolment camps at convenient locations for providing enrolment facilities in consultation with UIDAI

and any individual desirous of commencing an account based relationship as provided in this rule, who does not possess the Aadhaar number or has not yet enrolled for Aadhaar, may also visit such special Aadhaar enrolment camps for Aadhaar enrolment or any of the Aadhaar enrolment centres in the vicinity with existing registrars of UIDAI.

(c) In case the client fails to submit the Aadhaar number and Permanent Account Number within the aforesaid six months period, the said account shall cease to be operational till the time the Aadhaar number and Permanent Account Number is submitted by the client:

Provided that in case client already having an account based relationship with reporting entities prior to date of this notification fails to submit the Aadhaar number and Permanent Account Number by 31st December, 2017, the said account shall cease to be operational till the time the Aadhaar number and Permanent Account Number is submitted by the client.

(18) In case the identity information relating to the Aadhaar number or Permanent Account Number submitted by the client referred to in sub-rules (4) to (9) of rule 9 does not have current address of the client, the client shall submit an officially valid documents to the reporting entity."

As can be seen from the above, linking of Aadhaar with the bank account is now mandatory. It applies not only to those bank accounts which would be opened after the bringing into force the amendment but even the existing accounts as well.

427) Linking of a banking account to Aadhaar is challenged as violative of Articles 14, 19(1)(g) and 21 of the Constitution and also of Prevention of Money Laundering Act, 2002. Elaborate submissions were made by Mr. Arvind Datar on the aforesaid

aspects. It was argued that those persons who do not choose to enrol for Aadhaar number would not be in a position to open the bank account or even operate the existing bank account and there is no valid explanation as to why all bank accounts had to be authenticated. It was also argued that provisions of the Rule referred to companies, firms, trust etc. as well, though the Aadhaar Act is meant for establishing identity of individuals only. It was further submitted that in case a person fails to link Aadhaar with the bank account, such person would be rendered ineligible to operate the bank account, which would amount to forfeiting her money lying in the account which belongs to her. This amounts to depriving the person from her property and is, therefore, violative of Article 300A of the Constitution as such a deprivation can take place only by primary legislation and not by subordinate legislation in the form of Rules. Much emphasis was also laid on the argument that the amended Rule does not pass the proportionality test.

428) Mr. Tushar Mehta, learned Additional Solicitor General, refuted the aforesaid submissions. He pointed out the objective with which the Prevention of Money Laundering Act was enacted, namely, to curb money laundering and black money, which is

becoming a menace. Therefore, the amendment to Rules serves a legitimate State aim. He argued that the Rules are not arbitrary and satisfies the proportionality test also, having regard to the laudable objective which it seeks to serve.

429) After giving our thoughtful consideration to the various aspects, we feel that it is not even necessary to deal with each and every contention raised by the petitioners. Our considered opinion is that it does not meet the test of proportionality and is also violative of right to privacy of a person which extends to banking details.

430) This Court has held in *Ram Jethmalani & Ors*. v. *Union of India & Ors.*[155] that revelation of bank details without *prima facie* ground of wrong doing would be violative of right to privacy. The said decision has been approved in *K.S. Puttaswamy*. Under the garb of prevention of money laundering or black money, there cannot be such a sweeping provision which targets every resident of the country as a suspicious person. Presumption of criminality is treated as disproportionate and arbitrary.

431) Nobody would keep black money in the bank account. We accept the possibility of opening an account in an assumed name

155(2011) 8 SCC 1

and keeping black money therein which can be laundered as well. However, the persons doing such an Act, if at all, would be very few. More importantly, those having bank accounts with modest balance and routine transactions can be safely ruled out. Therefore, the provision in the present form does not meet the test of proportionality. Therefore, for checking this possible malice, there cannot be a mandatory provision for linking of every bank account.

432) In *Lal Babu Hussein* v. *Electoral Registration Officer and Others*[156], this Court had struck down the order of the Electoral Officer asking the residents of a particular *en masse* to prove their identity as unconstitutional. The Court held that the Electoral officer asking residents of a particular area en masse to prove their identity was unconstitutional. In the case, the EO went on the assumption that all inhabitants of a particular area were foreigners, notwithstanding their name appearing in earlier electoral rolls. The court held the following:

(a) Right to vote cannot be disallowed by insisting only on 4 proofs of identity-voters can rely on any other proof of identity and obtain right to vote.

(b) Notices were quashed because they failed to distinguish

156(1995) 3 SCC 100

between existing voters who had voted several times and new voters.

(c) Large-scale presumption of illegality impermissible.

433) This linking is made compulsory not only for opening a new bank account but even for existing bank accounts with a stipulation that if the same is not done then the account would be deactivated, with the result that the holder of the account would not be entitled to operate the bank account till the time seeding of the bank account with Aadhaar is done. This amounts to depriving a person of his property. We find that this move of mandatory linking of Aadhaar with bank account does not satisfy the test of proportionality. To recapitulate, the test of proportionality requires that a limitation of the fundamental rights must satisfy the following to be proportionate: (i) it is designated for a proper purpose; (ii) measures are undertaken to effectuate the limitation are rationally connected to the fulfilment of the purpose; (iii) there are no alternative less invasive measures; and (iv) there is a proper relation between the importance of achieving the aim and the importance of limiting the right.

434) The Rules are disproportionate for the following reasons:

(a) a mere ritualistic incantation of “money laundering”, “black

money" does not satisfy the first test;

(b) no explanations have been given as to how mandatory linking of every bank account will eradicate/reduce the problems of "money laundering" and "black money";

(c) there are alternative methods of KYC which the banks are already undertaking, the state has not discharged its burden as to why linking of Aadhaar is imperative. We may point out that RBI's own Master Direction (KYC Direction, 2016) No. DBR.AML.BC. No. 81/14.01.001/2015-16 allows using alternatives to Aadhaar to open bank accounts.

435) There may be legitimate State aim for such a move as it aims at prevention of money laundering and black money. However, there has not been a serious thinking while making such a provision applicable for every bank account. Maintaining back account in today's world has almost become a necessity. The Government itself has propagated the advantages thereof and is encouraging people to open the bank account making it possible to have one even with Zero Balance under the *Pradhan Mantri Jan Dhan Yojana*. The Government has taken various measures to give a boost to digital economy. Under these schemes, millions of persons, who are otherwise poor, are opening their bank accounts. They are also becoming habitual to the good

practice of entering into transactions through their banks and even by using digital modes for operation of the bank accounts. Making the requirement of Aadhaar compulsory for all such and other persons in the name of checking money laundering or black money is grossly disproportionate. There should have been a proper study about the methods adopted by persons who indulge in money laundering, kinds of bank accounts which such persons maintain and target those bank accounts for the purpose of Aadhaar. It has not been done.

436) We, thus, hold the amendment to Rule 9, by the Seventh Amendment Rules, 2017, in the present form, to be unconstitutional.

Linking of Mobile Number with Aadhaar

437) By a Circular dated March 23, 2017, the Department of Telecommunications has directed that all licensees shall reverify the existing mobile subscribers (pre-paid and post-paid) through Aadhaar based e-KYC process. In fine, it amounts to mandatory linking of mobile connections with Aadhaar, which requirement is not only in respect of those individuals who would be becoming mobile subscribers, but applies to existing subscribers as well.

438) It was the submission of the petitioners that such a linking of the SIM card with Aadhaar number violates their right to privacy. It is argued that since it is a fundamental right, the restrictions/curb thereupon in the form of said linking does not satisfy the tests laid down in *K.S. Puttaswamy* inasmuch as it is neither backed by any law nor it serves any legitimate state aim nor does it meet the requirement of proportionality test.

439) At the outset, it may be mentioned that the respondents have not been able to show any statutory provision which permits the respondents to issue such a circular. It is administrative in nature. The respondents have, however, tried to justify the same on the ground that there have been numerous instances where non-verification of SIM cards have posed serious security threats. Having regard to the same, this Court had given direction in *Lokniti Foundation* v. *Union of India & Anr.*[157] for the linking of SIM card with Aadhaar and it is pursuant to those directions that the Telecom Regulatory Authority of India (TRAI) recommended this step. Therefore, as per the respondents, Circular dated March 23, 2017 is the outcome of the aforesaid directions and recommendations which should be treated as backing of law. According to them, direction of this Court is a law under Article

157 (2017) 7 SCC 155

141 of the Constitution. In addition, it is also argued that since Section 4 of the Indian Telegraph Act, 1885 empowers the Central Government to issue licenses for establishing, maintaining and working telegraphs, it is within the power of the Central Government to grant such licenses with condition and, therefore, Circular dated March 23, 2017 may be read as condition for grant of licenses. On this premise, attempt is to show that the Circular is issued in exercise of the powers contained in Section 4 of the Indian Telegraph Act, 1885 which is the force of law.

440) In order to appreciate the respondents' contentions, we reproduce the relevant portion of Circular dated March 23, 2017, which reads as under:

> "Hon'ble Supreme Court, in its order dated 06.02.2017 passed in Writ Petition (C) No. 607/2016 filed by Lokniti Foundation v/s Union of India, while taking into cognizance of "Aadhaar based e-KYC process for issuing new telephone connection" issued by the Department, has inter-alia observed that "an effective process has been evolved to ensure identity verification, as well as, the addresses of all mobile phone subscribers for new subscribers. In the near future, and more particularly, within one year from today, a similar verification will be completed, in case of existing subscribers." This amounts to a direction which is to be completed within a time frame of one year.
>
> 2. A meeting was held on 13.02.2017 in the Department with the telecom industry wherein UIDAI, TRAI and PMO representatives also participated to discuss the way forward to implement the directions of Hon'ble Supreme Court. Detailed discussions and deliberations were held in

> the meeting. The suggestions received from the industry have been examined in the Department.
>
> 3. Accordingly, after taking into consideration the discussions held in the meeting and suggestions received from telecom industry, the undersigned is directed to convey the approval of competent authority that all Licensees shall re-verify all existing mobile subscribers (prepaid and postpaid) through Aadhaar based e-KYC process as mentioned in this office letter No. 800-29/2010-VAS dated 16.08.2016. The instructions mentioned in subsequent paragraphs shall be strictly followed while carrying out the re-verification exercise."

441) In the first instance, it may be noticed that reference is made to the judgment of this Court in *Lokniti Foundation* which has prompted the Ministry of Communications to issue this circular. Paragraph 1 of the Circular itself states that the observations of the Court in *Lokniti Foundation* amount to a direction. Thus, the Circular is not issued in exercise of powers under Section 4 of the Indian Telegraph Act, 1885 (though that itself would be debatable as to whether Section 4 gives such a power at all). Insofar as observations of this Court in that case are concerned, it is clear that in the said brief order, this Court did not go into the issue as to whether linking of SIM card with Aadhaar would be violate of privacy rights of the citizens. In that petition filed as a Public Interest Litigation, a prayer was made to the effect that identity of each subscriber and also the numbers should be verified so that unidentified and unverified subscribers are not allowed to misuse

mobile numbers. In response, the Union of India had filed the counter affidavit bringing to the notice of the Court that the Department had launched Aadhaar based e-KYC for issuing mobile connections. Based on this statement, orders were passed by this Court. *Lis*, which is the subject matter of instant petitions, was not raised in the said case. Obviously, the Court did not deliberate on the aspects of necessity of such a provision in the light of right to privacy. It was a case where both the sides were at *ad idem*. In the absence of any such issue or discussion thereupon, such a case cannot be treated as precedent and as a corollary it cannot be termed as 'law' within the meaning of Article 13 or Article 141 of the Constitution. Moreover, we are unable to read the order in *Lokniti Foundation* as a direction of the Court. It simply disposed of the petition after recording the submission of the Union of India to the effect that the grievance of the petitioner therein stood redressed by evolving the procedure of linking. On that the Court simply observed that undertaking given to this Court will be seriously taken and given effect to. No doubt, the Central Government, as a licensor, can impose conditions while granting licenses under Section 4 of the Indian Telegraph Act, 1885. However, such directions/conditions have to be legally valid. When it affects the rights of the third parties (like the

petitioners herein who are not party to the licenses granted by the Government to the Telecom Service Providers) they have a right to challenge such directions. Here, the case made out by the petitioners is that it infringes their right to privacy.

442) We are of the opinion that not only such a circular lacks backing of a law, it fails to meet the requirement of proportionality as well. It does not meet 'necessity stage' and 'balancing stage' tests to check the primary menace which is in the mind of the respondent authorities. There can be other appropriate laws and less intrusive alternatives. For the misuse of such SIM cards by a handful of persons, the entire population cannot be subjected to intrusion into their private lives. It also impinges upon the voluntary nature of the Aadhaar scheme. We find it to be disproportionate and unreasonable state compulsion. It is to be borne in mind that every individual/resident subscribing to a SIM card does not enjoy the subsidy benefit or services mentioned in Section 7 of the Act.

We, therefore, have no hesitation in declaring the Circular dated March 23, 2017 as unconstitutional.

Violation of the orders passed by this Court:

Whether certain actions of the respondents are in contravention of the interim orders passed by the Court, if so, the effect

thereof?

443) It was vehemently argued that this Court had passed number of interim orders (which have already been taken note of in the beginning of this judgment) categorically stating that the Aadhaar enrolment is voluntary; that no person would be forced to enrol under the scheme; that a person would be told about the voluntary nature of the scheme; and that enrolment shall not be given to any illegal migrant. As per the petitioners, notwithstanding these orders, the Central Government as well as the State Governments have issued various notifications requiring Aadhaar authentication for benefits, subsidies and schemes mandatory. In this manner, according to the petitioners, the respondents have violated the orders of this Court and it is the majesty of the Court which is at stake.

444) It is not in dispute that the aforesaid orders were passed when the Aadhaar Act had not come into force. After the enactment, Section 7 had altered the position statutorily. The notifications and circulars etc. are issued under this provision. Therefore, technically speaking, it cannot be held that these circulars are issued in contravention of the orders passed by this Court.

445) We feel that it would have been better had a clarification been

obtained from the Court after the passing of the Aadhaar Act before issuing such circulars and orders under Section 7. When the matter is *sub judice* in the Court and certain orders operating, the respondents should have shown some fairness by taking that route, which expectation would be high where the respondent is the State. However, it would be difficult to hold the respondents in contempt of the orders passed by this Court. We may note that similar argument was advanced in *Binoy Viswam*, namely, insertion of Section 139AA in the Income Tax Act was in breach of interim orders passed by this Court. This argument was repelled in the following manner:

> "99. Main emphasis, however, is on the plea that Parliament or any State Legislature cannot pass a law that overrules a judgment thereby nullifying the said decision, that too without removing the basis of the decision. This argument appears to be attractive inasmuch as few orders are passed by this Court in pending writ petitions which are to the effect that the enrolment of Aadhaar would be voluntary. However, it needs to be kept in mind that the orders have been passed in the petitions where Aadhaar Scheme floated as an executive/administrative measure has been challenged. In those cases, the said orders are not passed in a case where the Court was dealing with a statute passed by Parliament. Further, these are interim orders as the Court was of the opinion that till the matter is decided finally in the context of right to privacy issue, the implementation of the said Aadhaar Scheme would remain voluntary. In fact, the main issue as to whether Aadhaar card scheme whereby biometric data of an individual is collected violates right to privacy and, therefore, is offensive of Article 21 of the Constitution or not is yet to be decided. In the process, the Constitution Bench is also called upon to decide as to whether right to privacy is a part of Article 21 of the Constitution at all. Therefore, no

> final decision has been taken. In a situation like this, it cannot be said that Parliament is precluded from or it is rendered incompetent to pass such a law. That apart, the argument of the petitioners is that the basis on which the aforesaid orders are passed has to be removed, which is not done. According to the petitioners, it could be done only by making the Aadhaar Act compulsory. It is difficult to accept this contention for two reasons: first, when the orders passed by this Court which are relied upon by the petitioners were passed when the Aadhaar Act was not even enacted. Secondly, as already discussed in detail above, the Aadhaar Act and the law contained in Section 139-AA of the Income Tax Act deal with two different situations and operate in different fields. This argument of legislative incompetence also, therefore, fails."

Summary and Conclusions:

446) (a) The architecture and structure of the Aadhaar Act reveals that the UIDAI is established as a statutory body which is given the task of developing the policy, procedure and system for issuing Aadhaar numbers to individuals and also to perform authentication thereof as per the provisions of the Act. For the purpose of enrolment and assigning Aadhaar numbers, enrolling agencies are recruited by the Authority. All the residents in India are eligible to obtain an Aadhaar number. To enable a resident to get Aadhaar number, he is required to submit demographic as well as biometric information i.e., apart from giving information relating to name, date of birth and address, biometric information in the form of photograph, fingerprint, iris scan is also to be provided. Aadhaar number given to a particular person is treated

as unique number as it cannot be reassigned to any other individual.

(b) Insofar as subsidies, benefits or services to be given by the Central Government or the State Government, as the case may be, is concerned, these Governments can mandate that receipt of these subsidies, benefits and services would be given only on furnishing proof of possession of Aadhaar number (or proof of making an application for enrolment, where Aadhaar number is not assigned). An added requirement is that such individual would undergo authentication at the time of receiving such benefits etc. A particular institution/body from which the aforesaid subsidy, benefit or service is to be claimed by such an individual, the intended recipient would submit his Aadhaar number and is also required to give her biometric information to that agency. On receiving this information and for the purpose of its authentication, the said agency, known as Requesting Entity (RE), would send the request to the Authority which shall perform the job of authentication of Aadhaar number. On confirming the identity of a person, the individual is entitled to receive subsidy, benefit or service. Aadhaar number is permitted to be used by the holder for other purposes as well.

(c) In this whole process, any resident seeking to obtain an

Aadhaar number is, in the first instance, required to submit her demographic information and biometric information at the time of enrolment. She, thus, parts with her photograph, fingerprint and iris scan at that stage by giving the same to the enrolling agency, which may be a private body/person. Likewise, every time when such Aadhaar holder intends to receive a subsidy, benefit or service and goes to specified/designated agency or person for that purpose, she would be giving her biometric information to that RE, which, in turn, shall get the same authenticated from the Authority before providing a subsidy, benefit or service.

(d) Attack of the petitioners to the Aadhaar programme and its formation/structure under the Aadhaar Act is founded on the arguments that it is a grave risk to the rights and liberties of the citizens of this country which are secured by the Constitution of India. It militates against the constitutional abiding values and its foundational morality and has the potential to enable an intrusive state to become a surveillance state on the basis of information that is collected in respect of each individual by creation of a joint electronic mesh. In this manner, the Act strikes at the very privacy of each individual thereby offending the right to privacy which is elevated and given the status of fundamental right by tracing it to Articles 14, 19 and 21 of the Constitution of India by a

nine Judge Bench judgment of this Court in *K.S. Puttaswamy*.

(e) The respondents, on the other hand, have attempted to shake the very foundation of the aforesaid structure of the petitioners' case. They argue that in the first instance, minimal biometric information of the applicant, who intends to have Aadhaar number, is obtained which is also stored in CIDR for the purpose of authentication. Secondly, no other information is stored. It is emphasised that there is no data collection in respect of religion, caste, tribe, language records of entitlement, income or medical history of the applicant at the time of Aadhaar enrolment. Thirdly, the Authority also claimed that the entire Aadhaar enrolment eco-system is foolproof inasmuch as within few seconds of the biometrics having been collected by the enrolling agency, the said information gets transmitted the Authorities/CIDR, that too in an encrypted form, and goes out of the reach of the enrolling agency. Same is the situation at the time of authentication as biometric information does not remain with the requesting agency. Fourthly, while undertaking the authentication process, the Authority simply matches the biometrics and no other information is received or stored in respect of purpose, location or nature or transaction etc. Therefore, the question of profiling does not arise at all.

(f) In the aforesaid scenario, it is necessary, in the first instance, to find out the extent of core information, biometric as well as demographic, that is collected and stored by the Authority at the time of enrolment as well as at the time of authentication. This exercise becomes necessary in order to consider the argument of the petitioners about the profiling of the Aadhaar holders. On going through this aspect, on the basis of the powerpoint presentation given by Dr. Ajay Bhushan Pandey, CEO of UIDAI, and the arguments of both the sides, including the questions which were put by the petitioners to Dr. Pandey and the answers thereupon, the Court has come to the conclusion that minimal possible data, demographic and biometric, is obtained from the Aadhaar holders.

(g) The Court also noticed that the whole architecture of Aadhaar is devised to give unique identity to the citizens of this country. No doubt, a person can have various documents on the basis of which that individual can establish her identify. It may be in the form of a passport, PAN card, ration card and so on. For the purpose of enrolment itself number of documents are prescribed which an individual can produce on the basis of which Aadhaar card can be issued. Thus, such documents, in a way, are also proof of identity. However, there is a fundamental difference

between the Aadhaar card as a mean of identity and other documents through which identity can be established. Enrolment for Aadhaar card also requires giving of demographic information as well as biometric information which is in the form of iris and fingerprints. This process eliminates any chance of duplication. It is emphasised that an individual can manipulate the system by having more than one or even number of PAN cards, passports, ration cards etc. When it comes to obtaining Aadhaar card, there is no possibility of obtaining duplicate card. Once the biometric information is stored and on that basis Aadhaar card is issued, it remains in the system with the Authority. Wherever there would be a second attempt for enrolling for Aadhaar and for this purpose same person gives his biometric information, it would be immediately get matched with the same biometric information already in the system and the second request would stand rejected. It is for this reason the Aadhaar card is known as Unique Identification (UID). Such an identity is unparalleled.

(h) There is, then, another purpose for having such a system of issuing unique identification cards in the form of Aadhaar card. A glimpse thereof is captured under the heading 'Introduction' above, while mentioning how and under what circumstances the whole project was conceptualised. To put it tersely, in addition to

enabling any resident to obtain such unique identification proof, it is also to empower marginalised section of the society, particularly those who are illiterate and living in abject poverty or without any shelter etc. It gives identity to such persons also. Moreover, with the aid of Aadhaar card, they can claim various privileges and benefits etc. which are actually meant for these people.

(i) Identity of a person has a significance for every individual in his/her life. In a civilised society every individual, on taking birth, is given a name. Her place of birth and parentage also becomes important as she is known in the society and these demographic particulars also become important attribute of her personality. Throughout their lives, individuals are supposed to provide such information: be it admission in a school or college or at the time of taking job or engaging in any profession or business activity, etc. When all this information is available in one place, in the form of Aadhaar card, it not only becomes unique, it would also qualify as a document of empowerment. Added with this feature, when an individual knows that no other person can clone her, it assumes greater significance.

(j) Thus, the scheme by itself can be treated as laudable when it comes to enabling an individual to seek Aadhaar number, more

so, when it is voluntary in nature. Howsoever benevolent the scheme may be, it has to pass the muster of constitutionality. According to the petitioners, the very architecture of Aadhaar is unconstitutional on various grounds.

(k) The Court has taken note of the heads of challenge of the Act, Scheme and certain Rules etc. and clarified that the matter is examined with objective examination of the issues on the touchstone of the constitutional provisions, keeping in mind the ethos of constitutional democracy, rule of law, human rights and other basic features of the Constitution.

Discussing the scope of judicial review, the Court has accepted that apart from two grounds noticed in *Binoy Viswam*, on which legislative Act can be invalidated [(a) the Legislature does not have competence to make the law; and b) law made is in violation of fundamental rights or any other constitutional provision], another ground, namely, manifest arbitrariness, can also be the basis on which an Act can be invalidated. The issues are examined having regard to the aforesaid scope of judicial review.

(l) From the arguments raised by the petitioners and the grounds of challenge, it becomes clear that the main plank of challenge is that the Aadhaar project and the Aadhaar Act

infringes right to privacy. Inbuilt in this right to privacy is the right to live with dignity, which is a postulate of right to privacy. In the process, discussion leads to the issue of proportionality, viz. whether measures taken under the Aadhaar Act satisfy the doctrine of proportionality.

(m) In view of the above, the Court discussed the contours of right to privacy, as laid down in *K.S. Puttaswamy,* principle of human dignity and doctrine of proportionality. After taking note of the discussion contained in different opinions of six Hon'ble Judges, it stands established, without any pale of doubt, that privacy has now been treated as part of fundamental right. The Court has held that, in no uncertain terms, that privacy has always been a natural right which given an individual freedom to exercise control over his or her personality. The judgment further affirms three aspects of the fundamental right to privacy, namely:

(i) intrusion with an individual's physical body,

(ii) informational privacy and

(iii) privacy of choice.

(n) As succinctly put by Nariman, J., first aspect involves the person himself/herself and guards a person's rights relatable to his physical body thereby controlling the uncalled invasion by the State. Insofar as second aspect, namely, informational privacy is

concerned, it does not deal with a person's body but deals with a person's mind. In this manner, it protects a person by giving her control over the dissemination of material that is personal to her and disallowing unauthorised use of such information by the State. Third aspect of privacy relates to individual's autonomy by protecting her fundamental personal choices. These aspects have functional connection and relationship with dignity. In this sense, privacy is a postulate of human dignity itself. Human dignity has a constitutional value and its significance is acknowledged by the Preamble. Further, by catena of judgments, human dignity is treated as fundamental right as a facet not only of Article 21, but that of right to equality (Article 14) and also part of bouquet of freedoms stipulated in Article 19. Therefore, privacy as a right is intrinsic of freedom, liberty and dignity. Viewed in this manner, one can trace positive and negative contents of privacy. The negative content restricts the State from committing an intrusion upon the life and personal liberty of a citizen. Its positive content imposes an obligation on the State to take all necessary measures to protect the privacy of the individual.

(o) In developing the aforesaid concepts, the Court has been receptive to the principles in international law and international instruments. It is a recognition of the fact that certain human

rights cannot be confined within the bounds of geographical location of a nation but have universal application. In the process, the Court accepts the concept of universalisation of human rights, including the right to privacy as a human right and the good practices in developing and understanding such rights in other countries have been welcomed. In this hue, it can also be remarked that comparative law has played a very significant role in shaping the aforesaid judgment on privacy in Indian context, notwithstanding the fact that such comparative law has only persuasive value.

The whole process of reasoning contained in different opinions of the Hon'ble Judges would, thus, reflect that the argument that it is difficult to precisely define the common denominator of privacy, was rejected. While doing so, the Court referred to various approaches to formulating privacy

(p) We have also remarked above, the taxonomy of privacy, namely, on the basis of 'harms', 'interest' and 'aggregation of rights'. We have also discussed the scope of right to privacy with reference to the cases at hand and the circumstances in which such a right can be limited. In the process, we have also taken note of the passage from the judgment rendered by Nariman, J. in *K.S. Puttaswamy* stating the manner in which law has to be

tested when it is challenged on the ground that it violates the fundamental right to privacy.

(q) One important comment which needs to be made at this stage relates to the standard of judicial review while examining the validity of a particular law that allegedly infringes right to privacy. The question is as to whether the Court is to apply 'strict scrutiny' standard or the 'just, fair and reasonableness' standard. In the privacy judgment, different observations are made by the different Hon'ble Judges and the aforesaid aspect is not determined authoritatively, may be for the reason that the Bench was deciding the reference on the issue as to whether right to privacy is a fundamental right or not and, in the process, it was called upon to decide the specific questions referred to it. This Court preferred to adopt a 'just, fair and reasonableness' standard which is in tune with the view expressed by majority of Judges in their opinion. Even otherwise, this is in consonance with the judicial approach adopted by this Court while construing 'reasonable restrictions' that the State can impose in public interest, as provided in Article 19 of the Constitution. Insofar as principles of human dignity are concerned, the Court, after taking note of various judgments where this principle is adopted and elaborated, summed up the essential ingredients of dignity

jurisprudence by noticing that the basic principle of dignity and freedom of the individual is an attribute of natural law which becomes the right of all individuals in a constitutional democracy. Dignity has a central normative role as well as constitutional value. This normative role is performed in three ways:

First, it becomes basis for *constitutional rights*;

Second, it serves as an *interpretative principle* for determining the scope of constitutional rights; and,

Third, it determines the *proportionality of a statute* limiting a constitutional right. Thus, if an enactment puts limitation on a constitutional right and such limitation is disproportionate, such a statute can be held to be unconstitutional by applying the doctrine of proportionality.

(r) As per Dworkin, there are two principles about the concept of human dignity, First principle regards an 'intrinsic value' of every person, namely, every person has a special objective value which value is not only important to that person alone but success or failure of the lives of every person is important to all of us. It can also be described as self respect which represents the free will of the person, her capacity to think for herself and to control her own life. The second principle is that of 'personal responsibility', which means every person has the responsibility

for success in her own life and, therefore, she must use her discretion regarding the way of life that will be successful from her point of view.

(s) Sum total of this exposition can be defined by explaining that as per the aforesaid view dignity is to be treated as 'empowerment' which makes a triple demand in the name of 'respect' for human dignity, namely:

(i) respect for one's capacity as an agent to make one's own free choices;

(ii) respect for the choices so made; and

(iii) respect for one's need to have a context and conditions in which one can operate as a source of free and informed choice.

(t) In the entire formulation of dignity right, 'respect' for an individual is the fulcrum, which is based on the principle of freedom and capacity to make choices and a good or just social order is one which respects dignity via assuring 'contexts' and 'conditions' as the 'source of free and informed choice'. The aforesaid discourse on the concept of human dignity is from an individual point of view. That is the emphasis of the petitioners as well. That would be one side of the coin. A very important feature which the present case has brought into focus is another

dimension of human dignity, namely, in the form of 'common good' or 'public good'. Thus, our endeavour here is to give richer and more nuanced understanding to the concept of human dignity.

(u) We, therefore, have to keep in mind humanistic concept of Human Dignity which is to be accorded to a particular segment of the society and, in fact, a large segment. Their human dignity is based on the socio-economic rights that are read in to the Fundamental Rights as already discussed above.

When we read socio-economic rights into human dignity, the community approach also assumes importance along with individualistic approach to human dignity. It has now been well recognised that at its core, human dignity contains three elements, namely, Intrinsic Value, Autonomy and Community Value. These are known as core values of human dignity. These three elements can assist in structuring legal reasoning and justifying judicial choices in 'hard cases'.

(v) When it comes to dignity as a community value, it emphasises the role of the community in establishing collective goals and restrictions on individual freedoms and rights on behalf of a certain idea of good life. The relevant question here is in what circumstances and to what degree should these actions be

regarded as legitimate in a constitutional democracy? The liberal predicament that the state must be neutral with regard to different conceptions of the good in a plural society is not incompatible, of course, with limitation resulting from the necessary coexistence of different views and potentially conflicting rights. Such interferences, however, must be justified on grounds of a legitimate idea of justice, an "overlapping consensus"[158] that can be shared by most individuals and groups. Whenever such tension arises, the task of balancing is to be achieved by the Courts.

We would like to highlight one more significant feature which the issues involved in the present case bring about. It is the balancing of two facets of dignity of the same individual. Whereas, on the one hand, right of personal autonomy is a part of dignity (and right to privacy), another part of dignity of the same individual is to lead a dignified life as well (which is again a facet of Article 21 of the Constitution). Therefore, in a scenario where the State is coming out with welfare schemes, which strive at giving dignified life in harmony with human dignity and in the process some aspect of autonomy is sacrificed, the balancing of the two becomes an important task which is to be achieved by the

158"Overlapping consensus" is a term coined by John Rawls that identifies basic ideas of justice that can be shared by supporters of different religious, political, and moral comprehensive doctrines.

Courts. For, there cannot be undue intrusion into the autonomy on the pretext of conferment of economic benefits.

(w) In this way, the concept of human dignity has been widened to deal with the issues at hand. As far as doctrine of proportionality is concerned, after discussing the approaches that are adopted by the German Supreme Court and the Canadian Supreme Court, which are somewhat different from each other, this Court has applied the tests as laid down in *Modern Dental College & Research Centre*, which are approved in *K.S. Puttaswamy* as well. However, at the same time, a modification is done by focusing on the parameters set down of Bilchitz which are aimed at achieving a more ideal approach.

447) After stating the aforesaid manner in which different issues that arose are specified and discussed, these questions and conclusions thereupon are summarised below:

(1) *Whether the Aadhaar Project creates or has tendency to create surveillance state and is, thus, unconstitutional on this ground?*

Incidental Issues:

(a) What is the magnitude of protection that need to be accorded to collection, storage and usage of biometric data?

(b) Whether the Aadhaar Act and Rules provide such protection, including in respect of data minimisation, purpose limitation, time period for data retention and

data protection and security?

Answer:

(a) The architecture of Aadhaar as well as the provisions of the Aadhaar Act do not tend to create a surveillance state. This is ensured by the manner in which the Aadhaar project operates.

(b) We have recorded in detail the powerpoint presentation that was given by Dr. Ajay Bhushan Pandey, CEO of the Authority, which brings out the following salient features:

(i) During the enrolment process, minimal biometric data in the form of iris and fingerprints is collected. The Authority does not collect purpose, location or details of transaction. Thus, it is purpose blind. The information collected, as aforesaid, remains in silos. Merging of silos is prohibited. The requesting agency is provided answer only in '*Yes'* or '*No'* about the authentication of the person concerned. The authentication process is not exposed to the Internet world. Security measures, as per the provisions of Section 29(3) read with Section 38(g) as well as Regulation 17(1)(d) of the Authentication Regulations, are strictly followed and adhered to.

(ii) There are sufficient authentication security measures taken as well, as demonstrated in Slides 14, 28 and 29 of the presentation.

(iii) The Authority has sufficient defence mechanism, as explained in Slide 30. It has even taken appropriate protection measures as demonstrated in Slide 31.

(iv) There is an oversight by Technology and Architecture Review Board (TARB) and Security Review Committee.

(v) During authentication no information about the nature of transaction etc. is obtained.

(vi) The Authority has mandated use of Registered Devices (RD) for all authentication requests. With these, biometric data is signed within the device/RD service using the provider key to ensure it is indeed captured live. The device provider RD service encrypts the PID block before returning to the host application. This RD service encapsulates the biometric capture, signing and encryption of biometrics all within it. Therefore, introduction of RD in Aadhaar authentication system rules out any possibility of use of stored biometric and replay of biometrics captured from other source. Requesting entities are not legally allowed to store biometrics captured for Aadhaar authentication under Regulation 17(1)(a) of the Authentication Regulations.

(vii) The Authority gets the AUA code, ASA code, unique device code, registered device code used for authentication. It does not get any information related to the IP address or the GPS location

from where authentication is performed as these parameters are not part of authentication (v2.0) and e-KYC (v2.1) API. The Authority would only know from which device the authentication has happened, through which AUA/ASA etc. It does not receive any information about at what location the authentication device is deployed, its IP address and its operator and the purpose of authentication. Further, the authority or any entity under its control is statutorily barred from collecting, keeping or maintaining any information about the purpose of authentication under Section 32(3) of the Aadhaar Act.

(c) After going through the Aadhaar structure, as demonstrated by the respondents in the powerpoint presentation from the provisions of the Aadhaar Act and the machinery which the Authority has created for data protection, we are of the view that it is very difficult to create profile of a person simply on the basis of biometric and demographic information stored in CIDR. Insofar as authentication is concerned, the respondents rightly pointed out that there are sufficient safeguard mechanisms. To recapitulate, it was specifically submitted that there was security technologies in place (slide 28 of Dr. Pandey's presentation), 24/7 security monitoring, data leak prevention, vulnerability management programme and independent audits (slide 29) as well as the

Authority's defence mechanism (slide 30). It was further pointed out that the Authority has taken appropriate pro-active protection measures, which included disaster recovery plan, data backup and availability and media response plan (slide 31). The respondents also pointed out that all security principles are followed inasmuch as: (a) there is PKI-2048 encryption from the time of capture, meaning thereby, as soon as data is given at the time of enrolment, there is an end to end encryption thereof and it is transmitted to the Authority in encrypted form. The said encryption is almost foolproof and it is virtually impossible to decipher the same; (b) adoption of best-in-class security standards and practices; and (c) strong audit and traceability as well as fraud detection. Above all, there is an oversight of Technology and Architecture Review Board (TARB) and Security Review Committee. This Board and Committee consists of very high profiled officers. Therefore, the Act has endeavoured to provide safeguards.

(d) Insofar as use and protection of data is concerned, having regard to the principles enshrined in various cases, Indian and foreign, the matter is examined from the stand point of data minimisation, purpose limitation, time period for data retention, data protection and security (*qua* CIDR, requisite entities,

enrolment agencies and Registrars, authentication service agency, hacking, biometric solution providers, substantive procedural or judicial safeguards). After discussing the aforesaid aspect with reference to certain provisions of the Aadhaar Act, we are of the view that apprehensions of the petitioners stand assuaged with the striking down or reading down or clarification of some of the provisions, namely:

(i) Authentication records are not to be kept beyond a period of six months, as stipulated in Regulation 27(1) of the Authentication Regulations. This provision which permits records to be archived for a period of five years is held to be bad in law.

(ii) Metabase relating to transaction, as provided in Regulation 26 of the aforesaid Regulations in the present form, is held to be impermissible, which needs suitable amendment.

(iii) Section 33(1) of the Aadhaar Act is read down by clarifying that an individual, whose information is sought to be released, shall be afforded an opportunity of hearing.

(iv) Insofar as Section 33(2) of the Act in the present form is concerned, the same is struck down.

(v) That portion of Section 57 of the Aadhaar Act which enables body corporate and individual to seek

authentication is held to be unconstitutional.

(vi) We have also impressed upon the respondents, to bring out a robust data protection regime in the form of an enactment on the basis of Justice B.N. Srikrishna (Retd.) Committee Report with necessary modifications thereto as may be deemed appropriate.

(2) *Whether the Aadhaar Act violates right to privacy and is unconstitutional on this ground?*

Answer:

(a) After detailed discussion, it is held that all matters pertaining to an individual do not qualify as being an inherent part of right to privacy. Only those matters over which there would be a reasonable expectation of privacy are protected by Article 21. This can be discerned from the reading of Paras 297 to 307 of the judgment.

(b) The Court is also of the opinion that the triple test laid down in order to adjudge the reasonableness of the invasion to privacy has been made. The Aadhaar scheme is backed by the statute, i.e. the Aadhaar Act. It also serves legitimate State aim, which can be discerned from the Introduction to the Act as well as the Statement of Objects and Reasons which reflect that the aim in passing the Act was to ensure that social benefit schemes reach

the deserving community. The Court noted that the failure to establish identity of an individual has proved to be a major hindrance for successful implementation of those programmes as it was becoming difficult to ensure that subsidies, benefits and services reach the unintended beneficiaries in the absence of a credible system to authenticate identity of beneficiaries. The Statement of Objects and Reasons also discloses that over a period of time, the use of Aadhaar number has been increased manifold and, therefore, it is also necessary to take measures relating to ensuring security of the information provided by the individuals while enrolling for Aadhaar card.

(c) It may be highlighted that the petitioners are making their claim on the basis of dignity as a facet of right to privacy. On the other hand, Section 7 of the Aadhaar Act is aimed at offering subsidies, benefits or services to the marginalised section of the society for whom such welfare schemes have been formulated from time to time. That also becomes an aspect of social justice, which is the obligation of the State stipulated in Para IV of the Constitution. The rationale behind Section 7 lies in ensuring targeted delivery of services, benefits and subsidies which are funded from the Consolidated Fund of India. In discharge of its solemn Constitutional obligation to enliven the Fundamental

Rights of life and personal liberty (Article 21) to ensure Justice, Social, Political and Economic and to eliminate inequality (Article 14) with a view to ameliorate the lot of the poor and the Dalits, the Central Government has launched several welfare schemes. Some such schemes are PDS, scholarships, mid day meals, LPG subsidies, etc. These schemes involve 3% percentage of the GDP and involve a huge amount of public money. Right to receive these benefits, from the point of view of those who deserve the same, has now attained the status of fundamental right based on the same concept of human dignity, which the petitioners seek to bank upon. The Constitution does not exist for a few or minority of the people of India, but "We the people". The goals set out in the Preamble of the Constitution do not contemplate statism and do not seek to preserve justice, liberty, equality an fraternity for those who have the means and opportunity to ensure the exercise of inalienable rights for themselves. These goals are predominantly or at least equally geared to "secure to all its citizens", especially, to the downtrodden, poor and exploited, justice, liberty, equality and "to promote" fraternity assuring dignity. Interestingly, the State has come forward in recognising the rights of deprived section of the society to receive such benefits on the premise that it is their

fundamental right to claim such benefits. It is acknowledged by the respondents that there is a paradigm shift in addressing the problem of security and eradicating extreme poverty and hunger. The shift is from the welfare approach to a right based approach. As a consequence, right of everyone to adequate food no more remains based on Directive Principles of State Policy (Art 47), though the said principles remain a source of inspiration. This entitlement has turned into a Constitutional fundamental right. This Constitutional obligation is reinforced by obligations under International Convention.

(d) Even the petitioners did not seriously question the purpose and *bona fides* of the Legislature enacting the law.

(e) The Court also finds that the Aadhaar Act meets the test of proportionality as the following components of proportionality stand satisfied:

(i) A measure restricting a right must have a legitimate goal (legitimate goal stage).

(ii) It must be a suitable means of furthering this goal (suitability or rationale connection stage).

(iii) There must not be any less restrictive but equally effective alternative (necessity stage).

(iv) The measure must not have a disproportionate impact on the right holder (balancing stage).

(f) In the process, the Court has taken note of various

judgments pronounced by this Court pertaining to right to food, issuance of BPL Cards, LPG connections and LPG cylinders at minimal cost, old age and other kind of pensions to deserving persons, scholarships and implementation of MGNREGA scheme.

(g) The purpose behind these orders was to ensure that the deserving beneficiaries of the scheme are correctly identified and are able to receive the benefits under the said scheme, which is their entitlement. The orders also aimed at ensuring 'good governance' by bringing accountability and transparency in the distribution system with the pious aim in mind, namely, benefits actually reached those who are rural, poor and starving.

(h) All this satisfies the necessity stage test, particularly in the absence of any less restrictive but equally effective alternative.

(i) Insofar as balancing is concerned, the matter is examined at two levels:

(i) Whether, 'legitimate state interest' ensures 'reasonable tailoring'? There is a minimal intrusion into the privacy and the law is narrowly framed to achieve the objective. Here the Act is to be tested on the ground that whether it is found on a balancing test that the social or public interest and the reasonableness of the restrictions outweigh the particular

aspect of privacy, as claimed by the petitioners. This is the test we have applied in the instant case.

(ii) There needs to be balancing of two competing fundamental rights, right to privacy on the one hand and right to food, shelter and employment on the other hand. Axiomatically both the rights are founded on human dignity. At the same time, in the given context, two facets are in conflict with each other. The question here would be, when a person seeks to get the benefits of welfare schemes to which she is entitled to as a part of right to live life with dignity, whether her sacrifice to the right to privacy, is so invasive that it creates imbalance?

(j) In the process, sanctity of privacy in its functional relationship with dignity is kept in mind where it says that legitimate expectation of privacy may vary from intimate zone to the private zone and from the private to public arena. Reasonable expectation of privacy is also taken into consideration. The Court finds that as the information collected at the time of enrolment as well as authentication is minimal, balancing at the first level is met. Insofar as second level, namely, balancing of two competing fundamental rights is concerned, namely, dignity in the form of autonomy (informational

privacy) and dignity in the form of assuring better living standards of the same individual, the Court has arrived at the conclusion that balancing at the second level is also met. The detailed discussion in this behalf amply demonstrates that enrolment in Aadhaar of the unprivileged and marginalised section of the society, in order to avail the fruits of welfare schemes of the Government, actually amounts to empowering these persons. On the one hand, it gives such individuals their unique identity and, on the other hand, it also enables such individuals to avail the fruits of welfare schemes of the Government which are floated as socio-economic welfare measures to uplift such classes. In that sense, the scheme ensures dignity to such individuals. This facet of dignity cannot be lost sight of and needs to be acknowledged. We are, by no means, accepting that when dignity in the form of economic welfare is given, the State is entitled to rob that person of his liberty. That can never be allowed. We are concerned with the balancing of the two facets of dignity. Here we find that the inroads into the privacy rights where these individuals are made to part with their biometric information, is minimal. It is coupled with the fact that there is no data collection on the movements of such individuals, when they avail benefits under Section 7 of the Act thereby ruling out the possibility of creating their profiles. In

fact, this technology becomes a vital tool of ensuring good governance in a social welfare state. We, therefore, are of the opinion that the Aadhaar Act meets the test of balancing as well.

(k) Insofar as the argument based on probabilistic system of Aadhaar, leading to 'exclusion' is concerned, the Authority has claimed that biometric accuracy is 99.76% and the petitioners have also proceeded on that basis. In this scenario, if the Aadhaar project is shelved, 99.76% beneficiaries are going to suffer. Would it not lead to their exclusion? It will amount to throwing the baby out of hot water along with the water. In the name of 0.232% failure (which can in any case be remedied) should be revert to the pre-Aadhaar stage with a system of leakages, pilferages and corruption in the implementation of welfare schemes meant for marginalised section of the society, the full fruits thereof were not reaching to such people?

(l) The entire aim behind launching this programme is the 'inclusion' of the deserving persons who need to get such benefits. When it is serving much larger purpose by reaching hundreds of millions of deserving persons, it cannot be crucified on the unproven plea of exclusion of some. It is clarified that the Court is not trivialising the problem of exclusion if it is there. However, what we are emphasising is that remedy is to plug the

loopholes rather than axe a project, aimed for the welfare of large section of the society. Obviously, in order to address the failures of authentication, the remedy is to adopt alternate methods for identifying such persons, after finding the causes of failure in their cases. We have chosen this path which leads to better equilibrium and have given necessary directions also in this behalf, viz:

(i) We have taken on record the statement of the learned Attorney General that no deserving person would be denied the benefit of a scheme on the failure of authentication.

(ii) We are also conscious of the situation where the formation of fingerprints may undergo change for various reasons. It may happen in the case of a child after she grows up; it may happen in the case of an individual who gets old; it may also happen because of damage to the fingers as a result of accident or some disease etc. or because of suffering of some kind of disability for whatever reason. Even iris test can fail due to certain reasons including blindness of a person. We again emphasise that no person rightfully entitled to the benefits shall be denied the same on such grounds. It would be appropriate if a suitable provision be made in the concerned regulations for establishing an identity by alternate

means, in such situations.

(m) As far as subsidies, services and benefits are concerned, their scope is not to be unduly expanded thereby widening the net of Aadhaar, where it is not permitted otherwise. In this respect, it is held as under:

(i) 'Benefits' and 'services' as mentioned in Section 7 should be those which have the colour of some kind of subsidies etc., namely, welfare schemes of the Government whereby Government is doling out such benefits which are targeted at a particular deprived class.

(ii) It would cover only those 'benefits' etc. the expenditure thereof has to be drawn from the Consolidated Fund of India.

(iii) On that basis, CBSE, NEET, JEE, UGC etc. cannot make the requirement of Aadhaar mandatory as they are outside the purview of Section 7 and are not backed by any law.

(3) *Whether children can be brought within the sweep of Sections 7 and 8 of the Aadhaar Act?*

Answer:

(a) For the enrolment of children under the Aadhaar Act, it would be essential to have the consent of their parents/guardian.

(b) On attaining the age of majority, such children who are enrolled under Aadhaar with the consent of their parents, shall be given the option to exit from the Aadhaar project if they so choose in case they do not intend to avail the benefits of the scheme.

(c) Insofar as the school admission of children is concerned, requirement of Aadhaar would not be compulsory as it is neither a service nor subsidy. Further, having regard to the fact that a child between the age of 6 to 14 years has the fundamental right to education under Article 21A of the Constitution, school admission cannot be treated as 'benefit' as well.

(d) Benefits to children between 6 to 14 years under *Sarv Shiksha Abhiyan*, likewise, shall not require mandatory Aadhaar enrolment.

(e) For availing the benefits of other welfare schemes which are covered by Section 7 of the Aadhaar Act, though enrolment number can be insisted, it would be subject to the consent of the parents, as mentioned in (a) above.

(f) We also clarify that no child shall be denied benefit of any of these schemes if, for some reasons, she is not able to produce the Aadhaar number and the benefit shall be given by verifying the identity on the basis of any other documents. This we say having regard to the statement which was made by Mr. K.K.

Venugopal, learned Attorney General for India, at the Bar.

(4) *Whether the following provisions of the Aadhaar Act and Regulations suffer from the vice of unconstitutionality:*

(i) Sections 2(c) and 2(d) read with Section 32
(ii) Section 2(h) read with Section 10 of CIDR
(iii) Section 2(l) read with Regulation 23
(iv) Section 2(v)
(v) Section 3
(vi) Section 5
(vii) Section 6
(viii) Section 8
(ix) Section 9
(x) Sections 11 to 23
(xi) Sections 23 and 54
(xii) Section 23(2)(g) read with Chapter VI & VII – Regulations 27 to 32
(xiii) Section 29
(xiv) Section 33
(xv) Section 47
(xvi) Section 48
(xvii) Section 57
(xviii) Section 59

Answer:

(a) Section 2(d) which pertains to authentication records, such records would not include metadata as mentioned in Regulation 26(c) of the Aadhaar (Authentication) Regulations, 2016. Therefore, this provision in the present form is struck down. Liberty, however, is given to reframe the regulation, keeping in view the parameters stated by the Court.

(b) Insofar as Section 2(b) is concerned, which defines 'resident', the apprehension expressed by the petitioners was that

it should not lead to giving Aadhaar card to illegal immigrants. We direct the respondent to take suitable measures to ensure that illegal immigrants are not able to take such benefits.

(c) Retention of data beyond the period of six months is impermissible. Therefore, Regulation 27 of Aadhaar (Authentication) Regulations, 2016 which provides archiving a data for a period of five years is struck down.

(d) Section 29 in fact imposes a restriction on sharing information and is, therefore, valid as it protects the interests of Aadhaar number holders. However, apprehension of the petitioners is that this provision entitles Government to share the information 'for the purposes of as may be specified by regulations'. The Aadhaar (Sharing of Information) Regulations, 2016, as of now, do not contain any such provision. If a provision is made in the regulations which impinges upon the privacy rights of the Aadhaar card holders that can always be challenged.

(e) Section 33(1) of the Act prohibits disclosure of information, including identity information or authentication records, except when it is by an order of a court not inferior to that of a District Judge. We have held that this provision is to be read down with the clarification that an individual, whose information is sought to be released, shall be afforded an opportunity of hearing. If such

an order is passed, in that eventuality, he shall also have right to challenge such an order passed by approaching the higher court. During the hearing before the concerned court, the said individual can always object to the disclosure of information on accepted grounds in law, including Article 20(3) of the Constitution or the privacy rights etc.

(f) Insofar as Section 33(2) is concerned, it is held that disclosure of information in the interest of national security cannot be faulted with. However, for determination of such an eventuality, an officer higher than the rank of a Joint Secretary should be given such a power. Further, in order to avoid any possible misuse, a Judicial Officer (preferably a sitting High Court Judge) should also be associated with. We may point out that such provisions of application of judicial mind for arriving at the conclusion that disclosure of information is in the interest of national security, are prevalent in some jurisdictions. In view thereof, Section 33(2) of the Act in the present form is struck down with liberty to enact a suitable provision on the lines suggested above.

(g) Insofar as Section 47 of the Act which provides for the cognizance of offence only on a complaint made by the Authority or any officer or person authorised by it is concerned, it needs a

suitable amendment to include the provision for filing of such a complaint by an individual/victim as well whose right is violated.

(h) Insofar as Section 57 in the present form is concerned, it is susceptible to misuse inasmuch as: (a) It can be used for establishing the identity of an individual 'for any purpose'. We read down this provision to mean that such a purpose has to be backed by law. Further, whenever any such "law" is made, it would be subject to judicial scrutiny. (b) Such purpose is not limited pursuant to any law alone but can be done pursuant to 'any contract to this effect' as well. This is clearly impermissible as a contractual provision is not backed by a law and, therefore, first requirement of proportionality test is not met. (c) Apart from authorising the State, even 'any body corporate or person' is authorised to avail authentication services which can be on the basis of purported agreement between an individual and such body corporate or person. Even if we presume that legislature did not intend so, the impact of the aforesaid features would be to enable commercial exploitation of an individual biometric and demographic information by the private entities. Thus, this part of the provision which enables body corporate and individuals also to seek authentication, that too on the basis of a contract between the individual and such body corporate or person, would impinge

upon the right to privacy of such individuals. This part of the section, thus, is declared unconstitutional.

(i) Other provisions of Aadhaar Act are held to be valid, including Section 59 of the Act which, according to us, saves the pre-enactment period of Aadhaar project, i.e. from 2009-2016.

(5) *Whether the Aadhaar Act defies the concept of Limited Government, Good Governance and Constitutional Trust?*

Answer:

Aadhaar Act meets the concept of Limited Government, Good Governance and Constitutional Trust.

(6) *Whether the Aadhaar Act could be passed as 'Money Bill' within the meaning of Article 110 of the Constitution?*

Answer:

(a) We do recognise the importance of Rajya Sabha (Upper House) in a bicameral system of the Parliament. The significance and relevance of the Upper House has been succinctly exemplified by this Court in *Kuldip Nayar's* case. The Rajya Sabha, therefore, becomes an important institution signifying constitutional fedaralism. It is precisely for this reason that to enact any statute, the Bill has to be passed by both the Houses, namely, Lok Sabha as well as Rajya Sabha. It is the constitutional mandate. The only exception to the aforesaid

Parliamentary norm is Article 110 of the Constitution of India. Having regard to this overall scheme of bicameralism enshrined in our Constitution, strict interpretation has to be accorded to Article 110. Keeping in view these principles, we have considered the arguments advanced by both the sides.

(b) The petitioners accept that Section 7 of the Aadhaar Act has the elements of 'Money Bill'. The attack is on the premise that some other provisions, namely, clauses 23(2)(h), 54(2)(m) and 57 of the Bill (which corresponds to Sections 23(2)(h), 54(2)(m) and 57 of the Aadhaar Act) do not fall under any of the clauses of Article 110 of the Constitution and, therefore, Bill was not limited to only those subjects mentioned in Article 110. Insofar as Section 7 is concerned, it makes receipt of subsidy, benefit or service subject to establishing identity by the process of authentication under Aadhaar or furnish proof of Aadhaar etc. It is also very clearly declared in this provision that the expenditure incurred in respect of such a subsidy, benefit or service would be from the Consolidated Fund of India. It is also accepted by the petitioners that Section 7 is the main provision of the Act. In fact, introduction to the Act as well as Statement of Objects and Reasons very categorically record that the main purpose of Aadhaar Act is to ensure that such subsidies, benefits and

services reach those categories of persons, for whom they are actually meant.

(c) As all these three kinds of welfare measures are sought to be extended to the marginalised section of society, a collective reading thereof would show that the purpose is to expand the coverage of all kinds of aid, support, grant, advantage, relief provisions, facility, utility or assistance which may be extended with the support of the Consolidated Fund of India with the objective of targeted delivery. It is also clear that various schemes which can be contemplated by the aforesaid provisions, relate to vulnerable and weaker section of the society. Whether the social justice scheme would involve a subsidy or a benefit or a service is merely a matter of the nature and extent of assistance and would depend upon the economic capacity of the State. Even where the state subsidizes in part, whether in cash or kind, the objective of emancipation of the poor remains the goal.

(d) The respondents are right in their submission that the expression subsidy, benefit or service ought to be understood in the context of targeted delivery to poorer and weaker sections of society. Its connotation ought not to be determined in the abstract. For as an abstraction one can visualize a subsidy being

extended by Parliament to the King; by Government to the Corporations or Banks; etc. The nature of subsidy or benefit would not be the same when extended to the poor and downtrodden for producing those conditions without which they cannot live a life with dignity. That is the main function behind the Aadhaar Act and for this purpose, enrolment for Aadhaar number is prescribed in Chapter II which covers Sections 3 to 6. Residents are, thus, held entitled to obtain Aadhaar number. We may record here that such an enrolment is of voluntary nature. However, it becomes compulsory for those who seeks to receive any subsidy, benefit or service under the welfare scheme of the Government expenditure whereof is to be met from the Consolidated Fund of India. It follows that authentication under Section 7 would be required as a condition for receipt of a subsidy, benefit or service only when such a subsidy, benefit or service is taken care of by Consolidated Fund of India. Therefore, Section 7 is the core provision of the Aadhaar Act and this provision satisfies the conditions of Article 110 of the Constitution. Upto this stage, there is no quarrel between the parties.

(e) On examining of the other provisions pointed out by the petitioners in an attempt to take it out of the purview of Money

Bill, we are of the view that those provisions are incidental in nature which have been made in the proper working of the Act. In any case, a part of Section 57 has already been declared unconstitutional. We, thus, hold that the Aadhaar Act is validly passed as a 'Money Bill'.

(7) *Whether Section 139AA of the Income Tax Act, 1961 is violative of right to privacy and is, therefore, unconstitutional?*

Answer:

Validity of this provision was upheld in the case of *Binoy Viswam* by repelling the contentions based on Articles 14 and 19 of the Constitution. The question of privacy which, at that time, was traced to Article 21, was left open. The matter is reexamined on the touchstone of principles laid down in *K.S. Puttaswamy*. The matter has also been examined keeping in view that manifest arbitrariness is also a ground of challenge to the legislative enactment. Even after judging the matter in the context of permissible limits for invasion of privacy, namely: (i) the existence of a law; (ii) a 'legitimate State interest'; and (iii) such law should pass the 'test of proportionality', we come to the conclusion that all these tests are satisfied. In fact, there is specific discussion on these aspects in *Binoy Viswam's* case as well.

(8) *Whether Rule 9 of the Prevention of Money Laundering (Maintenance of Records) Rules, 2005 and the notifications*

issued thereunder which mandates linking of Aadhaar with bank accounts is unconstitutional?

Answer:

(a) We hold that the provision in the present form does not meet the test of proportionality and, therefore, violates the right to privacy of a person which extends to banking details.

(b) This linking is made compulsory not only for opening a new bank account but even for existing bank accounts with a stipulation that if the same is not done then the account would be deactivated, with the result that the holder of the account would not be entitled to operate the bank account till the time seeding of the bank account with Aadhaar is done. This amounts to depriving a person of his property. We find that this move of mandatory linking of Aadhaar with bank account does not satisfy the test of proportionality. To recapitulate, the test of proportionality requires that a limitation of the fundamental rights must satisfy the following to be proportionate: (i) it is designated for a proper purpose; (ii) measures are undertaken to effectuate the limitation are rationally connected to the fulfilment of the purpose; (iii) there are no alternative less invasive measures; and (iv) there is a proper relation between the importance of achieving the aim and the importance of limiting the right.

(c) The Rules are held to be disproportionate for the reasons

stated in the main body of this Judgment.

(9) *Whether Circular dated March 23, 2017 issued by the Department of Telecommunications mandating linking of mobile number with Aadhaar is illegal and unconstitutional?*

Answer:

Circular dated March 23, 2017 mandating linking of mobile number with Aadhaar is held to be illegal and unconstitutional as it is not backed by any law and is hereby quashed.

(10) Whether certain actions of the respondents are in contravention of the interim orders passed by the Court, if so, the effect thereof?

Answer:

This question is answered in the negative.

448) In view of the aforesaid discussion and observations, the writ petitions, transferred cases, special leave petition, contempt petitions and all the pending applications stand disposed of.

.....CJI.
(DIPAK MISRA)

.....J.
(A.K. SIKRI)

.....J.
(A.M. KHANWILKAR)

NEW DELHI;
SEPTEMBER 26, 2018.