REPORTABLE

IN THE SUPREME COURT OF INDIA
CIVIL ORIGINAL JURISDICTION

WRIT PETITION (CIVIL) NO. 494 OF 2012

JUSTICE K.S.PUTTASWAMY (RETD.) AND ANR. ...PETITIONERS

VERSUS

UNION OF INDIA AND ORS. ... RESPONDENTS

WITH

T.C.(C) No.151/2013, T.C.(C) No.152/2013, W.P.(C) No.833/2013 (PIL-W), W.P.(C) No.829/2013 (PIL-W), T.P.(C) No.1797/2013, W.P.(C) No.932/2013 (PIL-W), T.P.(C) No.1796/2013, CONMT. PET.(C) No.144/2014 In W.P.(C) No.494/2012 (PIL-W), T.P.(C) No.313/2014, T.P.(C) No.312/2014, SLP(Crl.) No.2524/2014, W.P.(C) No.37/2015 (PIL-W), W.P.(C) No.220/2015 (PIL-W), CONMT. PET.(C) No.674/2015 In W.P.(C) No.829/2013 (PIL-W), T.P.(C) No.921/2015, CONMT. PET.(C) No.470/2015 In W.P.(C) No.494/2012 (PIL-W), W.P.(C) No.231/2016 (PIL-W), CONMT. PET.(C) No.444/2016 In W.P.(C) No.494/2012 (PIL-W), CONMT. PET.(C) No.608/2016 In W.P.(C) No.494/2012 (PIL-W), W.P.(C) No.797/2016 (PIL-W), CONMT. PET.(C) No.844/2017 In W.P.(C) No.494/2012 (PIL-W), W.P.(C) No.342/2017 (PIL-W), W.P.(C) No.372/2017, W.P.(C) No.841/2017, W.P.(C) No.1058/2017 (PIL-W), W.P.(C) No.966/2017 (PIL-W), W.P.(C) No. 1014/2017 (PIL-W), W.P. (C) No.1002/2017 (PIL-W), W.P.(C) No.1056/2017 and CONMT. PET.(C) No.34/2018 in W.P.(C) No.1014/2017 (PIL-W)

J U D G M E N T

ASHOK BHUSHAN, J.

The challenge in this batch of cases can be

divided in two parts, firstly, the challenge to Executive's Scheme dated 28.01.2009 notified by the Government of India, by which the Unique Identification Authority of India (hereinafter referred to as "UIDAI") was constituted to implement the UIDAI Scheme, and secondly challenge to The Aadhaar (Targeted Delivery of Financial and Other Subsidies, Benefits and Services) Act, 2016 (hereinafter referred to as "Act, 2016").

2. The group of cases can be divided into four broad heads. First head consists of the sixteen Writ Petitions filed under Article 32 of the Constitution of India in this Court challenging the notification dated 28.01.2009 and/or the Act, 2016.

Second group consists of seven Transfer Cases/Transfer petitions to be heard alongwith Writ Petitions filed under Article 32.

Group three consists of only one Special Leave Petition (Criminal) No. 2524 of 2014 filed by UIDAI and Anr. Fourth group consists of seven Contempt

Petitions, which have been filed alleging violation of the interim orders passed by this Court in Writ Petitions and SLP (Criminal) as noted above.

3. Before we come to the different prayers made in the Writ Petitions wherein Executive Scheme dated 28.01.2009 as well as Act, 2016 has been challenged, it is useful to notice certain background facts, which lead to issuance of notification dated 28.01.2009 as well as the Act, 2016.

4. India is a country, which caters a sea of population. When the British left our country in 1947, total population of the country was only 330 million, which has rapidly increased into enormous figure of 1.3 billion as on date. The Citizenship Act, 1955 was enacted by the Parliament for the acquisition and determination of Indian Citizenship. Our constitutional framers have provided for adult franchise to every adult citizens. Election Commission of India had taken steps to provide for an identity

card to each person to enable him to exercise his franchise. The Citizenship Act, 1955 was amended by the Act 6 of 2004 whereas Section 14A was inserted providing that Central Government may compulsorily register every citizen of India and issue national identity card to him. The Planning Commission of the Government of India conceived a Unique Identification Project for providing a Unique Identity Number for each resident across the country, which was initially envisaged primarily as the basis for the efficient delivery of welfare services.

5. At first, in the year 2006, administrative approval was granted for the project “Unique Identity for BPL Families”. A Process Committee was constituted, which prepared a strategic vision on the Unique Identification Project. The Process Committee furnished a detailed proposal to the Planning Commission in the above regard. The Prime Minister approved the constitution of an empowered Group of Ministers to collate the two spheres, the national

population register under the Citizenship Act, 1955 and the Unique Identification Number Project of the Department of Information Technology. The empowered Group of Ministers recognised the need for creating an identity related resident database and to establish an institutional mechanism, which shall own the database and shall be responsible for its maintenance and updations on ongoing basis. The empowered Group of Ministers held various meetings to which inputs were provided from different sources including Committee of Secretaries. The recommendation of empowered Group of Ministers to constitute Unique Identification Authority of India (hereinafter referred to as "UIDAI") was accepted with several guidelines laying down the roles and responsibilities of the UIDAI. The UIDAI was constituted under the aegis of Planning Commission of India. The Notification dated 28.01.2009 was issued constituting the UIDAI, providing for its composition, roles and responsibilities.

6. In the year 2010, a bill namely the National Identification Authority of India Bill, 2010 providing for the establishment of the National Identification Authority of India for the purpose of issuing identification numbers to individuals residing in India and to certain other classes of individuals, manner of authentication of such individuals to facilitate access to benefits and services to which they are entitled and for matters connected therewith or incidental thereto was introduced. The Bill was pending in the Parliament when the first Writ Petition i.e. Writ Petition (C) No. 494 of 2012 — Justice K.S. Puttaswamy (Retd.) & Anr. Vs. Union of India & Ors. Was filed. The Writ Petition under Article 32 was filed on the ground that fundamental rights of the innumerable citizens of India namely Right to Privacy falling under Article 21 of the Constitution of India are adversely affected by the Executive action of the Central Government proceeding to implement an Executive order dated 28.01.2009 and thereby issuing Aadhaar numbers to both citizens as also illegal

immigrants presently illegally residing in the country. While the Bill namely "National Identification Authority of India Bill, 2010", which had already been introduced in the Rajya Sabha on 03.12.2010 and referred to the Standing Committee, had been rejected. The Writ Petition prayed for following reliefs:-

> (A) ISSUE a writ in the nature of mandamus restraining the respondents Nos. 1 to 3 from issuing Aadhaar Numbers by way of implementing its Executive order dated 28.01.2009 (Annexure "P-1") which tentamount to implementing the provisions of the National Identification Authority of India Bill, 2010 pending before the Parliament until and unless the said Bill is considered and passed by the Parliament and becomes an Act of Parliament.
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> (B) Pass such other order/s as this Hon'ble Court may deem fit and proper in the circumstances of the case.

7. Writ Petition (C) No. 829 of 2013 - Mr. S.G. Vombatkere & Anr. Vs. Union of India & Ors., was filed by Mr. S.G. Vombatkere and Bezwada Wilson questioning the UID Project and Aadhaar Scheme. The UID Project and Aadhaar Scheme were contended to be illegal and

violative of fundamental rights. It was also contended that the Scheme has no legislative sanction. Various other grounds for attacking the Scheme were enumerated in the Writ Petition. Writ Petition (C) No. 833 of 2013 – Ms. Aruna Roy & Anr. Vs. Union of India & Ors., was also filed challenging the UID Scheme. Other Writ Petitions being Writ Petition (C) No. 932 of 2013 and Writ Petition (C) No. 37 of 2015 came to be filed challenging the UID Scheme.

8. S.G. Vombatkere and Bezwada Wilson filed another Writ Petition (C) No. 220 of 2015 challenging the exercise of preparation of the National Population Register. Section 14A of the Citizenship Act, 1955 was also challenged as void and ultra vires. Petitioners have referred to earlier Writ Petition (C) No. 829 of 2013 and adopted the grounds already raised in the earlier Writ Petition. Writ petitioner had also challenged the collection of confidential biometric informations, which is neither sanctioned nor authorised under any Act or Rules.

9. The Parliament enacted the Act, 2016, which contains following preamble:-

> "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."

10. The Writ Petition (C) No. 231 of 2016- Shri Jairam Ramesh Vs. Union of India & Ors., was filed by Shri Jairam Ramesh seeking a direction declaring the Act, 2016 as unconstitutional, null and void and ultra vires. Writ Petition (C) No. 797 of 2016 - S.G. Vombatkere & Ors. Vs. Union of India & Ors., was also filed by S.G. Vombatkere and Bezwada Wilson challenging the Act, 2016. The petitioners have also referred to earlier Writ Petition (C) No. 829 of 2013 and Writ Petition (C) No. 220 of 2015. The writ petitioners alleged various grounds for challenging the Act, 2016. Apart from seeking a direction to declare the Act, 2016 ultra vires, unconstitutional and null and void, prayers for declaring various

Sections of Act, 2016 as ultra vires, unconstitutional and null and void were also made. The writ petitioners claimed lots of reliefs from a to w, it is useful to quote the reliefs a to d, which are to the following effect:-

> "a) Issue a Writ, order or direction in the nature of Certiorari or any other appropriate writ/order/direction declaring that the Aadhaar (Targeted Delivery of Financial and Other Subsidies, Benefits and Services) Act, 2016 is ultra vires, unconstitutional, null and void and in particular violate Articles 14, 19 and 21 of the Constitution of India;
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> b) Issue a Writ, order or direction in the nature of Certiorari or any other appropriate writ/order/direction declaring that sections 2(h), 2(l), 2(m), 2(v), 3, 5, 6, 7, 8, 9, 10, Chapter IV, Section 23 read with Section 54, Section 29, Section 30, Section 33, Section 47, Section 57 and Section 59 of the Aadhaar (Targeted Delivery of Financial and Other Subsidies, Benefits and Services) Act, 2016 are ultra vires, unconstitutional, null and void and in particular violate Articles 14, 19, 20(3) and 21 of the Constitution of India;
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> c) Issue a Writ, order or direction in the nature of Certiorari or any other appropriate writ/order/direction declaring that the right to privacy is a fundamental right guaranteed under Part III of the Constitution of India;

d) Issue a Writ, order or direction in the nature of Certiorari or any other appropriate writ/order/direction declaring that no person may be deprived of receiving any financial subsidy or other subsidy or benefit or services from the State on the ground that he or she does not have an Aadhaar number;"

11. Writ Petition (C) No. 342 of 2017 - Shantha Sinha & Anr. Vs. Union of India & Anr. Was filed challenging the Act, 2016. Apart from seeking a direction to declare various Sections of Act, 2016 as null and void, writ petitioners also prayed for a direction declaring Sections 2(h), 2(l), 2(m), 2(v), 3, 5, 6, 7, 8, 9, 10, Chapter IV, Section 23 read with Section 54, Section 29, Section 30, Section 33, Section 47, Section 57 and Section 59 of the Act, 2016 as ultra vires, unconstitutional and null and void. Writ Petition (Civil) NO. 372 of 2017 - Shankar Prasad Dangi Vs. Bharat Cooking Coal Limited & Another, was filed by Shankar Prasad Dangi, who claims to be employed under the Bharat Cooking Coal Limited. Petitioner filed the writ petition seeking a mandamus directing the respondents not to compel the petitioner

to submit the Aadhaar Card copy. The petitioner placed reliance on Order of this Court dated 14.09.2016 in Writ Petition (C) No. 686 of 2016. Writ Petition (C) No. 841 of 2017 has also been filed by State of West Bengal challenging various notifications issued under Section 7 of the Act, 2016. The petitioner also sought a direction declaring that no person may be deprived of receiving any benefit or services from the State on the ground that he or she does not have an Aadhaar number or Aadhaar enrolment. Writ Petition (C) No. 1058 of 2017 – Mathew Thomas Vs. Union of India & Ors. has been filed challenging the Act, 2016. The writ petitioner also prayed for declaring Prevention of Money Laundering Rules (Second Amendment) 2017 as violative of Articles 14, 19 and 21 of the Constitution. Section 139AA of the Income Tax Act, 1961 was also prayed to be declared as violative of Articles 14, 19 and 21 of the Constitution.

12. Writ Petition (C) No. 966 of 2017 – Raghav Tankha Vs. Union of India through its Secretary & Ors. has been filed seeking following prayers:-

"a) Issue a Writ of Mandamus or any other appropriate writ, order or direction under Article 32 of the Constitution of India, directing the Respondents to declare that Aadhaar is not mandatory for the purpose of authentication while obtaining a mobile connection; or the re-verification of Subscribers, being completely illegal, arbitrary and mala fide; and/or

b) Issue a Writ of Mandamus or any other appropriate writ, order or direction under Article 32 of the Constitution of India, directing the Respondents Number 2 to 6, to take immediate steps in the present situation, for restraining and banning the transfer of data from UIDAI to Private Telecom Service Providers and Aadhaar being made the only option of authentication; and/or"

13. Writ Petition (C) No. 1014 of 2017 — M.G. Devasahayam and Ors. Vs. Union of India & Anr. has been filed, where following prayers have been made:-

"a) This Hon'ble Court may be pleased to issue an appropriate writ, order or direction declaring Rule 9 of the Prevention of Money Laundering Rules, 2017 as amended by the Prevention of Money Laundering (Second Amendment) Rules, 2017 as ultra vires, unconstitutional, null and void and in particular violate Articles 14, 19 and 21 of the Constitution of India;

b) This Hon'ble Court may be pleased to issue an appropriate writ, order or

direction declaring that bank accounts will not be denied or ceased on the basis that he or she does not have an Aadhaar number;

c) This Hon'ble Court may be pleased to issue an appropriate writ, order or direction in the nature of mandamus against the Respondents directing them to forthwith forbear from implementing or acting pursuant to or in implementation of Rule 9 of the Prevention of Money Laundering Rules, 2017 as amended by the Prevention of Money Laundering (Second Amendment) Rules, 2017;

d) This Hon'ble Court may be pleased to issue an appropriate writ, order or direction in the nature of mandamus against the Respondents directing them to forthwith clarify by issuing appropriate announcements, circulars and/or directions that no citizen of India is required to obtain an Aadhaar number/Aadhaar card and that the program under the Aadhaar Act is entirely voluntary even for opening or maintaining the bank accounts and carrying financial transactions;

e) This Hon'ble Court may be pleased to award costs relating to the present petition to the petitioners; and

f) This Hon'ble Court may be pleased to issue any other writ/order/direction in the nature of mandamus as this Hon'ble Court may deem fit an proper in the circumstances of the case."

14. Writ Petition (C) No. 1002 of 2017 – Dr. Kalyani

Menon Sen Vs. Union of India and Others, also sought declaration that Rule 2(b) of the Prevention of Money Laundering (Maintenance of Records) Second Amendment Rules, 2017 is ultra vires. Circular dated 23.03.2017 issued by the Department of Telecommunication was also sought to be declared as ultra vires, unconstitutional, null and void. A further direction was sought declaring that pursuant to the Circular dated 23.03.2017, the mobile phone numbers of subscribers will not be made in-operational, and future applicants will not be coerced to submit their Aadhaar numbers. Certain other reliefs have also been claimed in the writ petition. Writ Petition (C) No. 1056 of 2017 — Nachiket Udupa & Anr. Vs. Union of India & Ors. has been filed challenging the Act, 2016 and with other prayers, which is as follows:-

> A. Issue a Writ of Declaration and Mandamus or any other appropriate Writ, Direction, Order or such other appropriate remedy to declare the Aadhaar (Targeted Delivery of Financial and Other Subsidies, Benefits and Services) Act, 2016 [ACT No. 18 of 2016] as illegal and violative of Articles 14, 19(1)(a) and 21 of the Constitution of India;

B. In the alternative to Prayer (A), issue a Writ of Declaration and Mandamus or any other appropriate Writ, Direction, Order or such other appropriate remedy against Respondent No. 3 to provide 'opt-out' or process to delete identity information from Central Identities Data Repository at the option of Aadhaar Number Holders;

C Issue a Writ of Declaration and Mandamus or any other appropriate Writ, Direction, Order or such other appropriate remedy to declare the Aadhaar (Enrolment and Update) Regulations, 2016 being illegal, and ultra vires the Aadhaar Act and violative of Articles 14 and 21 of the Constitution of India;

D. Issue a Writ of Declaration and Mandamus or any other appropriate Writ, Direction, Order or such other appropriate remedy to declare the Aadhaar (Authentication) Regulations, 2016 as being illegal and ultra vires the Aadhaar Act and violative of Articles 14 and 21 of the Constitution of India;

E. Issue a Writ of Declaration and Mandamus or any other appropriate Writ, Direction, Order or such other appropriate remedy to declare the Aadhaar (Data Security) Regulations, 2016 as being illegal, and ultra vires the Aadhaar Act and violative of Articles 14 and 21 of the Constitution of India;

F. Issue a Writ of Declaration and

Mandamus or any other appropriate Writ, Direction, Order or such other appropriate remedy to declare the Aadhaar (Sharing of Information) Regulations, 2016 as being illegal, and ultra vires the Aadhaar Act and violative of Articles 14 and 21 of the Constitution of India;

G. Issue a Writ of Declaration and Mandamus or any other appropriate Writ, Direction, Order or such other appropriate remedy to declare the Direction issued by Respondent No. 2 on 23.03.2017 vide File No. 800-262/2016-AS.II, as being illegal, ultra vires the Aadhaar Act and violative the Articles 14, 19(1)(a) and 21, of the Constitution;

H. In the alternative to Prayer (G) above, issue a Writ of Declaration and Mandamus or any other appropriate Writ, Direction, Order or such other appropriate remedy to Respondent No. 2 to prohibit all Telecom Service Providers from storing, retaining, making copies or in any manner dealing with Aadhaar Number, biometric information or any demographic information received from Respondent No. 3 in the process of authentication and/or identity verification of mobile numbers;

I. Pass such further and other orders as this Hon'ble Court may deem fit and proper in the instant facts and circumstances."

15. There are seven Transfer Cases/Transfer Petitions

to be heard alongwith the Writ Petitions filed under Article 32, where the issues pertaining to UID Scheme and other related issues were also raised before different High Courts. Four Transfer Applications have been filed by Indian Oil Corporation Limited praying for transfer of different writ petitions pending in different High Courts to be heard alongwith Writ Petition (C) No. 494 of 2012 – Justice K.S. Puttaswamy (Retd.) & Anr. Vs. Union of India & Ors., which was considering the same issues. This Court had passed order in few transfer petitions allowing the same and issued certain directions, rest of transfer petitions are also allowed.

16. One Transfer Petition has also been filed by Union of India for transferring Writ Petition (C) No. 2764 of 2013 – Sri V. Viswanandham Vs. Union of India & Ors., pending in the High Court of Hyderabad. It is not necessary to notice various issues in the pending different writ petitions, which were sought to be transferred by above transfer petitions/transfer

cases. Issues pending in different High Courts were more or less same, which have been raised in leading Writ Petition (C) No. 494 of 2012 - Justice K.S. Puttaswamy (Retd.) & Anr. Vs. Union of India & Ors. and other writ petitions, which were entertained and pending in this Court. Special Leave Petition (Crl.) No. 2524 of 2014 has been filed by UIDAI and Anr. challenging the interim order dated 18.03.2014 passed by High Court of Bombay at Goa in Criminal Writ Petition No. 10 of 2014 — Unique Identification Authority of India Through its Director General & Anr. Vs. Central Bureau of Investigation. On an application filed by the Central Bureau of Investigation, a Magistrate passed an order on 22.10.2013 directing the UIDAI to provide certain data with regard to a case of a rape of seven years old child. The Bombay High Court at Goa passed an order dated 18.03.2014 issuing certain interim directions, which were challenged by UIDAI in the aforesaid special leave petition. This Court passed an interim order on 24.03.2014 staying the order passed by Bombay High Court at Goa. This

Court also by the interim order restrained the UIDAI to transfer any biometric information of any person who has been allotted the Aadhaar number to any other agency without his consent in writing. This special leave petition was directed to be listed alongwith Writ Petition (C) No. 494 of 2012.

17. This Court in Writ Petition (C) No. 494 of 2012 has issued various Interim Orders dated 23.09.2013, 24.03.2014, 16.03.2015, 11.08.2015 and 15.10.2015.

18. Seven Contempt Petitions have been filed. Out of seven, five contempt petitions have been filed alleging violation of the aforesaid interim orders and praying for issuing proceedings against the respondents contemnor for willful disobeying the interim orders. One Contempt Petition (C) No. 674 of 2015 in W.P.(C) No.829 of 2013 has been filed for issuing proceedings against the respondents contemnor for wilfully disobeying the orders dated 23.09.2013, 24.03.2014 and 16.03.2015 passed by this Court. The

other Contempt Petition (C) No. 34 of 2018 in W.P.(C) No. 1014 of 2017 has been filed against the respondent contemnors for wilfully disobeying the order dated 03.11.2017 passed by this Court in the aforesaid writ petition. All the contempt applications are pending without any order of issuing notice in the contempt petitions.

19. Writ Petition (C) No.494 of 2012 : Justice K.S. Puttaswamy(Retd.) and another vs. Union of India and others, has been treated as leading petition wherein various orders and proceedings have been taken, few of such orders and proceedings also need to be noted. An interim order dated 23.09.2013 was passed in Writ Petition (C) No.494 of 2012 which is to the following effect:

> "Issue notice in W.P.(C) No. 829/2013. Application for deletion of the name of petitioner no. 1 in T.P.(C) Nos. 47 of 2013 is allowed.
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> T.P.(C)nos. 47-48 of 2013 and T.P.(C) No. 476 of 2013 are allowed in terms of the signed order.

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 inspite 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."

20. By order dated 26.11.2013 all the States and Union Territories were impleaded as respondents to give effective directions. Interim order passed earlier was also continued. On 24.03.2014 following order was passed in SLP(Crl.) No.2524 of 2014:

"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.494/2012."

21. This court on 16.03.2015 in Writ Petition (C) No.494 of 2012 directed both the Union of India and the States and all their functionaries should adhere to the order dated 23.09.2013.

22. A three-Judge Bench on 11.08.2015 passed an order referring the matter to a Bench of appropriate strength. After reference was made on a prayer made by the petitioners, following interim directions were also passed by the 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 UIDA 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 the LPG Distribution Scheme;
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> 4. The information about an individual obtained by the Unique 15 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. Ordered accordingly."

23. A Constitution Bench of five Judges on 15.10.2015 passed an order after hearing application filed by the Union of India for seeking certain clarification/modification in the earlier order dated 11.08.2015, part of order, which is relevant for the present case is as follows:

> "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 the L.P.G. Distribution Scheme, the Schemes like The Mahatma Gandhi National Rural Employment Guarantee Scheme 12 (MGNREGS), 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.
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> 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."

24. A three-Judge Bench of this Court in its reference order dated 11.08.2015 noticed that these cases raise far-reaching questions of importance, which involves interpretation of the Constitution. Two earlier decisions of this Court, i.e., ***M.P. Sharma & Others Vs. Satish Chandra & Others, 1954 AIR SC 300,*** rendered by eight Judges and another judgment rendered by six-Judges Bench in ***Kharak Singh Vs. State of U.P. & Others, AIR 1963 SC 1295*** were noticed and it was observed that in the event the observations made in the above two judgments are to be read literally and accepted as the law of this country, the fundamental rights guaranteed under the Constitution of India and more particularly right to liberty under Article 21 would be denuded of vigour and vitality. The three-

Judge Bench observed that to give quietus to the kind of controversy raised in this batch of cases once for all, it is better that the ratio decidendi of ***M.P. Sharma (supra) and Kharak Singh (supra)*** is scrutinized and the jurisprudential correctness of the subsequent decisions of this Court where the right to privacy is either asserted or referred be examined and authoritatively decided by a Bench of appropriate strength.

25. By order dated 18.07.2017, a Constitution Bench considered it appropriate that the issue be resolved by a Bench of Nine Judge. Following order was passed on 18.07.2017 by a Constitution Bench:

> "During the course of the hearing today, it seems that it has become essential for us to determine whether there is any fundamental right of privacy under the Indian Constitution. The determination of this question would essentially entail whether the decision recorded by this Court in M.P. Sharma and Ors. vs. Satish Chandra, District Magistrate, Delhi and Ors. - 1950 SCR 1077 by an eight-Judge Constitution Bench, and also, in Kharak Singh vs. The State of U.P. and Ors. - 1962 (1) SCR 332 by a six-Judge Constitution Bench, that there is no such fundamental right, is the correct expression of the constitutional position.

> Before dealing with the matter any further, we are of the view that the issue noticed hereinabove deserves to be placed before the nine-Judge Constitution Bench. List these matters before the Nine-Judge Constitution Bench on 19.07.2017.
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> Liberty is granted to the learned counsel appearing for the rival parties to submit their written briefs in the meantime."

26. A nine-Judge Constitution Bench proceeded to hear and decide all aspects of right of privacy as contained in the Constitution of India.

27. Dr. D.Y. Chandrachud delivered opinion on his behalf as well as on behalf of Khehar, CJ., Agrawal, J. and Nazeer, J. Jasti Chelameswar, J., Bobde, J., Sapre, J. and Kaul, J. also delivered concurring, but separate opinions. The opinion of all the nine Judges delivered in above cases held that right of privacy is a right which is constitutionally protected and it is a part of protection guaranteed under Article 21 of the Constitution of India. Explaining the essential nature of privacy, Dr. D.Y. Chandrachud, J. in paragraphs 297 and 298 laid down following:

> "**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.

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. Liberty has a broader meaning of which privacy is a subset. All liberties may not be exercised in privacy. Yet others can be fulfilled only within a private space. Privacy enables the individual to retain the autonomy of the body and mind. The autonomy of the individual is the ability to make decisions on vital matters of concern to life. Privacy has not been couched as an independent fundamental right. But that does not detract from the constitutional protection afforded to it, once the true nature of privacy and its relationship with those fundamental rights which are expressly protected is understood. Privacy lies across the spectrum of protected freedoms. The guarantee of equality is a guarantee against arbitrary State action. It prevents the State

from discriminating between individuals. The destruction by the State of a sanctified personal space whether of the body or of the mind is violative of the guarantee against arbitrary State action. Privacy of the body entitles an individual to the integrity of the physical aspects of personhood. The intersection between one's mental integrity and privacy entitles the individual to freedom of thought, the freedom to believe in what is right, and the freedom of self-determination. When these guarantees intersect with gender, they create a private space which protects all those elements which are crucial to gender identity. 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. An individual may perceive that the best form of expression is to remain silent. Silence postulates a realm of privacy. An artist finds reflection of the soul in a creative endeavour. A writer expresses the outcome of a process of thought. A musician contemplates upon notes which musically lead to silence. The silence, which lies within, reflects on the ability to choose how to convey thoughts and ideas or interact with others. These are crucial aspects of personhood. The freedoms under Article 19 can be fulfilled where the individual is entitled to decide upon his or her preferences. Read in conjunction with Article 21, liberty enables the individual to have a choice of preferences on various facets of life including what and how one will eat, the way one will dress, the faith one will espouse and a myriad other matters on which autonomy and self-determination require a choice to be made within the privacy of the mind. The constitutional right

> to the freedom of religion under Article 25 has implicit within it the ability to choose a faith and the freedom to express or not express those choices to the world. These are some illustrations of the manner in which privacy facilitates freedom and is intrinsic to the exercise of liberty. The Constitution does not contain a separate article telling us that privacy has been declared to be a fundamental right. Nor have we tagged the provisions of Part III with an alpha-suffixed right to privacy: this is not an act of judicial redrafting. Dignity cannot exist without privacy. Both reside within the inalienable values of life, liberty and freedom which the Constitution has recognised. Privacy is the ultimate expression of the sanctity of the individual. It is a constitutional value which straddles across the spectrum of fundamental rights and protects for the individual a zone of choice and self-determination."

28. Privacy has been held to be an intrinsic element of the right to life and personal liberty Under Article 21 and has a constitutional value which is embodied in the fundamental freedoms embedded in Part III of the Constitution. It was further held that 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.

29. The nine-Judge Constitution Bench also noticed the context of right of privacy under the international covenants. The protection of right of privacy as developed in U.K. decision, decisions of US Supreme Court, constitutional right to privacy in South Africa, constitutional right to privacy in Canada, privacy under European convention on human rights and under Charter of fundamental rights of European Union were considered with reference to decision rendered by foreign courts.

30. Justice D.Y. Chandradhud in his judgment traced the right of privacy from the judgments of this Court which were rendered for the last five decades. Referring to International Law on the subject, following observations were made by Justice D.Y. Chandradhud, J.:

> "103...In the view of this Court, international law has to be construed as a

> part of domestic law in the absence of legislation to the contrary and, perhaps more significantly, the meaning of constitutional guarantees must be illuminated by the content of international conventions to which India is a party. Consequently, as new cases brought new issues and problems before the Court, the content of the right to privacy has found elaboration in these diverse contexts."

31. All contours of the right of privacy having been noticed with all its dimensions, precautions and safeguards to be applied to protect fundamental rights guaranteed under the Constitution of India, we while proceeding to decide the issues raised herein have to proceed in the light of nine-Judge Constitution Bench of this Court as noticed above.

32. We have been manifestly benefited by able and elaborate submissions raised before us by many eminent learned senior counsel appearing for both the parties. Learned counsel for both the parties have advanced their submissions with clarity, conviction and lot of persuasions. On occasions very passionate arguments were advanced to support the respective submissions.

33. Different aspects of the case have been taken up and advanced by different counsel as per understanding between them which enlightened the Court on varied aspects of the case. The submissions have been advanced on behalf of the petitioners by learned senior Advocates, namely, Shri Kapil Sibal, Shri Gopal Subramanium, Shri P. Chidambaram, Shri Shyam Divan, Shri K.V. Viswanathan, Shri Neeraj Kishan Kaul, Ms. Meenakshi Arora, Shri C.U. Singh, Shri Anand Grover, Shri Sanjay R. Hegde, Shri Arvind P. Datar, Shri V.Giri, Shri Sajan Poovayya and Shri P.V. Surendra Nath. A large number of other counsel also assisted us including Mr. Gopal Sankaranarayanan. On behalf of respondents arguments were led by the learned Attorney General, Shri K.K. Venugopal. We have also heard Shri Tushar Mehta, Additional Solicitor General, Shri Rakesh Dwivedi, learned senior counsel and Shri Zohaib Hossain.

34. We also permitted Dr. Ajay B. Pandey, Chief Executive Officer, UIDAI to give a power presentation

to explain actual working of the system. After the power presentation was presented by Dr. Pandey in the presence of the learned counsel for the parties, learned counsel have also thereafter raised certain questions in respect of the power presentation, which the respondents during submissions have tried to explain. In view of the enormity of submissions raised by the different learned counsel appearing for the petitioners, we proceed to notice different part of submissions together. As noted above writ petitions have been filed at two stages, firstly, when UIDAI Scheme was being impleaded by the Executive order dated 28.01.2009. Secondly, challenge was raised when Act, 2016 was enacted. The challenge to the Scheme dated 24.01.2009 contained almost same grounds on which Act, 2016 has been attacked. Additional ground to challenge the Scheme was that Scheme having not been backed by law, the entire exercise was unconstitutional and violative of fundamental rights guaranteed under the Constitution of India and deserved to be set aside. The Act, 2016 having enacted

and now statutory scheme is in place, we shall first proceed to notice the submissions attacking the Act, 2016 which challenge has been substantial and elaborately raised before us.

Petitioner's Submissions

35. The submissions advanced by different learned counsel for the petitioners instead of noticing individually are being noted together in seriatim, which are as follows:-

36. The Aadhaar project initiated by Executive notification dated 28.01.2009 as well as impugned Act, 2016 violates Article 21. The constitutional rights of a person protected under Articles 19 and 21 of the Constitution is violated as individuals are compelled to part with their demographic and biometric information at the point of collection. Biometric data is part of one's body and control over one's body lies on the very centre of the Right of Privacy. Decisional privacy allows individual to make a

decision about their own body and is an aspect of right of self-determination. The Aadhaar Project including the Aadhaar Act violate the informational privacy. Data collection at the enrolment centres, the Data retention at Central Identities Data Repositories (CIDR), usage and sharing of data violates Right of Privacy. There is complete absence of safeguards at the stage of collection, retention and use of data. Act, 2016 and Regulations framed thereunder lack safeguards to secure sensitive personal data of a person.

37. The Aadhaar project including Act, 2016 creates an architecture for pervasive surveillance, which again violate fundamental Right to Privacy. Personal data collected under the Executive scheme dated 28.01.2009 was without any individual's consent. The Act, 2016 although contemplate that enrolment under Aadhaar is voluntary but in actual working of the Act, it becomes defacto compulsory. The Act, 2016 does not pass the three-fold test as laid down by Nine Judges Bench in

Privacy Judgment - **K.S. Puttaswamy Vs. Union of India, (2017) 10 SCC 1,** hereinafter referred to as "Puttaswamy case". The Three-fold test laid down in Puttaswamy's case are:-

(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;

38. It is submitted that a law to pass under Article 21 should be a law according to procedure established by law. The Act, 2016 violates both Article 14 and Article 21 of the Constitution of India. A legitimate State aim, which ensure that nature and content of the law, which imposes the restriction falls within the reasonable restrictions mandated by Article 14 is also not fulfilled. State has not been able to discharge its burden that Aadhaar project has been launched for

a legitimate State aim. The third requirement, which require that the means that are adopted by the legislature are proportional to the object sought to be fulfilled by the law is also not fulfilled since the provisions of the Act and Regulations framed thereunder does not satisfy the Proportionality Test. The various provisions of Act, 2016 and Regulations framed thereunder are unconstitutional. Section 6 of the Act, 2016 is unconstitutional inasmuch as it enable the respondents to continually compel residents to periodically furnish demographic and biometric information. Section 7 of the Act, 2016 is unconstitutional inasmuch as it seeks to render the constitutional and statutory obligations of the State to provide benefits, subsidies and services, conditional upon an individual bartering his or her biometric and demographic information. Section 8 is unconstitutional since it enables tracking, tagging and profiling of individuals through the authentication process. Section 8 delineate a regime of surveillance, which enables persons' physical

movements to be traced. Section 9 of the Act, 2016 is also unconstitutional inasmuch as the Aadhaar number is de facto serving as proof of citizenship and domicile. The provisions of Chapter IV, i.e., Sections 11 to 33 are ultra vires and unconstitutional. The Constitution does not permit the establishment of an authority that in turn through an invasive programme can claim every Indian citizen/resident to a central data bank and maintain lifelong records and logs of that individual. Sections 23 and 54 of the Act, 2016 are also unconstitutional on the ground of excessive delegation. Section 29 of the Act, 2016 is also liable to be struck down inasmuch as it permits sharing of identity information. Section 33 is unconstitutional inasmuch as it provides for the use of the Aadhaar data base for police investigation pursuant to an order of a competent court. Section 33 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 47 is also unconstitutional inasmuch as it does not allow an individual citizen who finds that there is a violation of the Act, 2016 to initiate the criminal process. Section 48, which empowers the Central Government to supersede UIDAI is vague and arbitrary.

39. Elaborating submission with regard to Section 7, it is submitted that Section 7 is unconstitutional and violative of Article 14 making Aadhaar mandatory, which has no nexus with the subsidies, benefits and services. A person cannot be forced into parting with sensitive personal information as a condition for availing benefits or services. Section 7 also falls foul of Article 14 since firstly such mandatory authentication has caused, and continues to cause, exclusion of the most marginalised sections of society; and secondly, this 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. There is large scale exclusion to the mostly marginalised society not being able to identify themselves by identification process. There is sufficient material on record to indicate general deprivation, which itself is sufficient to struck down Section 7 of the Act.

40. Elaborating submission on unconstitutionality of Section 57, it is contended that Section 57 allows an unrestricted extension of the Aadhaar information to users who may be Government agencies or private sector operators. Section 57 enables commercial exploitation of an individual's biometrics and demographic information by the respondents as well as private entities. The provision also ensures creation of a surveillance society, where every entity assists the State to snoop upon an Aadhaar holder. The use of Aadhaar infrastructure by private entities is unconstitutional.

41. Elaborating submissions on Section 59, it is contended that Section 59 is unconstitutional inasmuch as it seeks to validate all action undertaken by the Central Government pursuant to the notification dated 28.01.2009. Enrolment in pursuance of notification dated 28.01.2009 having been done without an informed consent amounts to deprivation of the intimate personal information of an individual violating the fundamental Right of Privacy. All steps taken under the notification dated 28.01.2009 were not backed by any law, hence unconstitutional and clearly violate Article 21, which cannot be cured in a manner as Section 59 pretend to do.

42. The Act is unconstitutional since it collects the identify information of children between five to eighteen years without parental consent. The Aadhaar architecture adopts foreign technologies, on which UIDAI does not have any control, exposing data leak endangering life of people and security of nation.

43. Rule 9 as amended by PMLA Rules, 2017 is

unconstitutional being violative of Articles 14, 19(1)(g), 21 and 300A of the Constitution of India. Rule 9 also violates Sections 3, 7 and 51 of the Act, 2016 and ultra vires to the provisions of PMLA Act, 2002.

44. Section 139AA of the Income Tax Act, 1961 is liable to be struck down as violative of Articles 14, 19(1)(g) and 21 of the Constitution in view of Privacy Judgment – **Puttaswamy (supra).**

45. The Mobile Linking Circular dated 23.03.2017 issued by Ministry of Communications, Department of Telecommunications is ultra vires.

46. The Aadhaar Act, 2016 has wrongly been passed as a Money Bill. The Aadhaar Act, 2016 is not a Money Bill. The Speaker of Lok Sabha wrongly certified the bill as a Money Bill under Article 110 of the Constitution of India virtually excluding the Rajya Sabha from legislative process and depriving the Hon'ble President of his power of return. Clauses 23(2)(g), Section 54(2)(m) and Section 57 of The

Aadhaar (Targeted Delivery of Financial and Other Subsidies, Benefits and Services) Bill, 2016 and the corresponding Sections of the Act, 2016 as notified clearly do not fall under any of the Clauses of Article 110 of the Constitution. The Act of Speaker certifying the bill as a Money Bill is clearly violation of constitutional provisions. Judicial Review of decision of Speaker certifying it as Money Bill is permissible on the ground of illegality. The Aadhaar Bill being not a money bill and having been passed by Parliament as a Money Bill, this ground alone is sufficient to strike down the entire Act, 2016.

47. Learned Attorney General replying the above submissions of the counsel for the petitioners submits:-

48. In the Privacy Judgment ***P.S. Puttaswamy case (supra)*** all nine Judges uniformly agreed that privacy is a fundamental right traceable to the right to liberty under Article 21 of the Constitution and hence

subject to the same limitations as applicable to the said Article. It has further been held that right of privacy is not absolute and is subject to limitations. Justice D.Y. Chandrachud in his lead judgment laid down that following three tests are required to be satisfied for judging the permissible limits of the invasion of privacy under Article 21 of the Constitution:

(a) The existence of a law

(b) A legitimate State interest; and

(c) The said Law should pass the test of proportionality.

49. The above tests have also been agreed by other Judges who have delivered the separate judgment. Justice J. Chelameswar and Justice A.N. Sapre have used the test of compelling State interest whereas Justice R.F. Nariman stated that if this test is applied, the result is that one would be entitled to invoke larger public interest in lieu of legitimate State aim. The legitimate State aim obviously will lead to public interest, hence in the event test of

legitimate State aim is fulfilled, the test of public interest stands fulfilled. After enactment of Act, 2016, the first condition in regard to the existence of a law stands satisfied. The Act requires only the bare demographic particulars, while eschewing most other demographic particulars. The Act further contains adequate safeguards for protection of information and preventing abuse through a catena of offences and penalties. The provisions of Act ensure that the law is a just, fair and reasonable and not fanciful, oppressive or arbitrary.

50. The legitimate State interest or a larger public interest permeates through the Act, 2016 which is clearly indicated by the following:

A. Preventing the dissipation of subsidies and social welfare benefits which is covered by Section 7 of the Aadhaar Act;

B. Prevention of black money and money laundering by imposing a requirement by law for linking Aadhaar for opening bank accounts;

C. To prevent income tax evasion by requiring, through an amendment to the Income Tax Act, that the Aadhaar number be linked with the PAN; and

D. To prevent terrorism and protect national security by requiring that Aadhaar be linked to SIM cards for mobile phones."

51. The Aadhaar Act, 2016 was enacted with prolonged deliberations and study. The petitioners have failed to establish any arbitrariness in the Act. The right to life under Article 21 is not the right to a mere animal existence, but the right to live with human dignity which would include the right to food, the right to shelter, the right to employment, the right to medical care, education etc. If these rights are juxtaposed against the right to privacy, the former will and prevail over the latter. In so far as implementation of Aadhaar project prior to coming into force of Act, 2016, since obtaining an Aadhaar number or an enrolment number was voluntary, especially because of the interim orders passed by this Court, no issue of violation of any right, leave alone a fundamental right, could arise. The judgments of this Court in ***M.P. Sharma and Kharak Singh (supra)*** being those of eight Judges and six Judges respectively, holding that the right to privacy is not a fundamental

right, the judgments of smaller benches delivered during the period upto 2016 would be *per incuriam*, as a result of which the State need not to have proceeded on the basis that a law was required for the purpose of getting an Aadhaar number or an enrolment number. As a result, the Executive instructions issued for this purpose would be valid as well as the receipt of benefits and subsidies by the beneficiaries. In any view of the matter, Section 59 of the Act protects all actions taken during the period 2010 until the passing of the Aadhaar Act in 2016.

52. Learned Attorney General submitted that Aadhaar Act has rightly been characterised as Money Bill as understood under Article 110 of the Constitution. The 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.

The decision of the Speaker incorporated into a certificate sent to the President is final and cannot be the subject matter of judicial review.

53. The decision and certification of the Speaker being a matter of procedure is included in the Chapter under the head 'Legislative Procedure' which clearly excluded judicial review. The present issue is squarely covered by the decisions of this Court.

54. 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. The Bill in its pith and substance should pass the test of being a Money Bill and not isolated provisions.

55. Learned Additional Solicitor General of India, Shri Tushar Mehta, also advanced submissions on few aspects of the matter. On Section 139AA of Income Tax Act, 1961 it is submitted that petitioners can succeed only when they demonstrate that Section 139AA is violative of right to privacy on the following tests

as laid down by nine-Judge Constitution Bench in ***Puttaswamy case:***

(i) absence of a law;

(ii) absence of legitimate State interest"

(iii) provisions being hit by lack of proportionality;

(iv) the provisions being manifestly arbitrary.

56. It is submitted that two-Judge Bench judgment of this Court in ***Binoy Biswam Vs. Union of India and others, (2017) 7 SCC 59,*** had upheld the vires of Section 139AA subject to issue of privacy which at that point of time was pending consideration. It is further submitted that provision pertaining to Permanent Account Number (PAN) was inserted in the Income Tax Act by Section 139A with effect from 01.04.1989 which obliged every person to quote PAN for different purposes as enumerated in Section 139A. The Petitioners or anyone else never felt aggrieved by requirement of getting PAN under Section 139A and Parliament on considering the legitimate State interest has introduced Section 139AA which is only an

extension of Section 139A which requires linking of PAN with Aadhaar number.

57. The Income Tax Act was amended by the Parliament by inserting Section 139AA in the legitimate State interest and in larger public interest. The object of linking was to remove bogus PAN cards by linking with Aadhaar, expose shell companies and thereby curb the menace of black money, money laundering and tax evasion. Problem of multiple PAN cards to same individuals and PAN cards in the name of fictitious individuals are common medium of money laundering, tax evasion, creation and channeling of black money.

58. Linking of Aadhaar with PAN is consistent with India's international obligations and Goals. India has signed the Inter-Governmental Agreement (IGA) with the USA on July, 9, 2015, for improving International Tax Compliance and implementing the Foreign Account Tax Compliance Act. It is submitted that prior to 01.07.2017 already 1.75 crore tax payers had linked their PAN with Aadhaar on a voluntary basis. Replying

the arguments based on the interim orders passed by this Court in the present group of petitions, it is submitted that enactment of Aadhaar Act, 2016 has taken away and cured the basis of the interim order passed by this Court since one of the submissions which was made before this Court in passing the interim orders was that there was no law, that Aadhaar project was being implemented without backing of any law and during the said period the interim orders were passed. The Aadhaar Act addresses the concern of this Court as reflected in the interim orders passed before enactment of the Act.

59. Shri Mehta further contended that there is presumption to the constitutionality of a statute and unless one attacking the statute satisfies the Court that the statute is unconstitutional, the presumption will be there that statute is constitutional. Shri Mehta has further submitted that there is no presumption of criminality or guilt on the requirement to link Aadhaar.

60. Elaborating the doctrine of proportionality, Additional Solicitor General submits that Section 139A fully satisfies the aforesaid test of proportionality.

61. Additional Solicitor General in support of Prevention of Money-laundering (Maintenance of Records) Second Amendment Rules, 2017 submits that the State has sought to make the provisions of PMLA more robust and ensure that the ultimate object of the Act is achieved. The Amendment Rules, 2017 place an obligation on part of the reporting entity to seek the details with regard to Aadhaar number of every client. It is submitted that the said Rules have to be read in consonance with the object of the PMLA and the principles of “beneficial owner” behind the corporate veil of shell companies, etc. It is submitted that the PMLA empowers the State to utilise the uniqueness of Aadhaar in order to tackle the problem of money laundering. It is submitted that the PMLA Act, with a clear emphasis on the investigation of the biological persons behind the corporate entities, establishes a mechanism wherein receiving benefits through benami or

shell companies through related/connected Directors, fictitious persons or other personnel is eliminated.

62. Section 139AA and PMLA Rules amended in 2017 are co-ordinated in their operation. The PMLA Rules are not ultra vires. Mr. Mehta has also referred to international Conventions declaring money laundering to be a very serious offence. He submits that Prevention of Money Laundering Act, 2002 was enacted in the context of concrete international efforts to tackle the menace of money laundering. Shri Mehta has also emphasised on the necessity of verification of bank accounts with Aadhaar number. He submits that the verification of bank account by way of Aadhaar is done for the reason that often bank accounts are opened in either fictitious names or in the name of wrong persons on the basis of forged identity documents and financial crimes are committed. It is seen that accommodation entries are mostly provided through the banking channels by bogus companies to convert black money into white. Benami transactions routinely take place through banking channels. All of the above, can

to a large extent be checked by verifying Aadhaar with bank accounts to ensure that the account belongs to the person who claims to be the account holder and that he or she is a genuine person. Verification of bank account with Aadhaar also ensures that the direct benefit transfer of subsidies reach the Aadhaar verified bank account and is not diverted to some other account. Shell companies are often used to open bank accounts to hold unaccounted money of other entities under fictitious identities which will also be curbed once Aadhaar verification is initiated.

63. Shri Mehta further contends that impugned PMLA Rules do not violate Article 300A. Amendment Rules, 2017 also cannot be said to be ultra vires to the parent Act since it advances the object of the Act and is not ultra vires of any provision of the Act. The Amendment Rules are required to be placed before the Parliament which serve a purpose of check by the Legislature. As per Section 159 of the Act any notification under Section 29 is to be placed before the Parliament and Parliament may amend or reject the

same. The Rules, 2017 are just, fair and reasonable and in furtherance of the object of the Act and do not provide for any arbitrary, uncanalised or unbridled power.

64. Shri Rakesh Dwivedi, learned senior counsel, appearing on behalf of UIDAI and State of Gujarat has made elaborate submissions while replying the arguments of petitioners. The right to privacy is part of Article 21. The autonomy of individual is associated over matters which can be kept private. These are concerns over which there is a reasonable expectation of privacy. The reasonable expectation involves two aspects. Firstly, 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 inflated.

65. The Act, 2016 operates in the 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 authenticate for identification. The Act operates in a public sphere. Section 29 of the Aadhaar Act, 2016 provides protection against disclosure of identity information without the prior consent of the Aadhaar Number holder concerned. Sharing is intended only for authentication purposes.

66. It is submitted that by their very nature the demographic information and photograph sought to be collected cannot be said to be of such a nature as would make it a part of a reasonable expectation paradigm. Today, globally all ID cards and passports contain photographs for identification along with address, date of birth, gender etc. The demographic information is readily provided by individuals globally for disclosing identity while relating with others; while seeking benefits whether provided by government or by private entities. People who get

registered for engaging in a profession, who take admissions in Schools/Colleges/university, who seek employment in the government or private concerns and those who engage in various trade and commerce are all required to provide demographic information and even photographs. There is no expectation of privacy in providing those information for the above purposes.

67. There are lot of enactments which require disclosure of demographic information comprising name, address, email address etc., for example Central Motor Vehicle Rules, 1989, Companies Act, 2013, Special Marriage Act, The Registration of Electoral Rules, 1960, The Citizenship (Registration of Citizens and Issue of National Identity Cards) Rules, 2009 and the Passports Act. However, there are certain special contexts in which non-disclosure of demographic information could be considered as raising a reasonable expectation of privacy such as where juveniles in conflict with law are involved or where a rape victim's identity or medical information is involved. Thus, unless some such special context or

aggravating factor is established, there would not be any reasonable expectation of privacy with respect to demographic information.

68. As regards the core biometric information, comprising finger prints and iris scans it would be pertinent to bear in mind that the Aadhaar Act is not dealing with the intimate or private sphere of the individual. The core biometrics are being collected from residents for authentication use in a public sphere and in relational context in which regard there is no reasonable expectation of privacy in relation to fingerprints and iris scans. Iris scan is nothing but a photograph of the eyes taken from a camera. From fingerprints and iris scans nothing is revealed with regard to a person.

69. Use of fingerprints with regard to registration of documents is an accepted phenomena. The use of mandatory requirement of biometric attendance is increasing day by day both in public and private sector. Thus, requirement of fingerprints and iris

scan would not attract the fundamental right of privacy. The fingerprint and iris scan have been considered to be most accurate and non-invasive mode of identifying an individual.

70. The information collected under the Act, 2016 does not involve processing for economic and sociological purposes. Further, in the data center de-duplication process is based on anonymization and what is stored in the servers for authentication process are simply templates and encrypted information of Aadhaar number and demographics. The identity data collected is stored offline. There is no internet connectivity. Thus, there is more than a reasonable security protection under the Act.

71. The rationale of 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 and to eliminate inequality with a view to

ameliorate the lot of the poor and the Dalits, the Central Government has launched several welfare schemes. Some of such schemes are PDS, scholarship, mid day meals, LPG subsidies, free education,etc.

72. The requirement to undergo authentication on the basis of Aadhaar number is made mandatory by Section 7. This requirement is only for "undertaking authentication". However, 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 (EID). This takes care of non-exclusion.

73. 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 recognised identity but also attempts to ensure the delivery of benefits, service

and subsidies with the aid of public exchequer/Consolidated Fund of India. And it does so without impacting the Fundamental Right to Privacy of the Indians or at best minimally impacting it with adequate safeguards.

74. Regarding the numerization or numericalization of individual argument, it is submitted that the Aadhaar number does not convert the human being into a number. The objective of the Aadhaar number is to enable authentication which is done on a 1:1 matching basis, i.e., to say when the requesting entity feeds the Aadhaar number along with some identity information then the CIDR picks up the template having that Aadhaar number automatically and matches identity information with the encrypted information in the template. This Aadhaar number is, therefore, absolutely essential for the technological success of authentication. It is, therefore, a technology requirement and it does not amount to numerization or numericalisation. The contention of the petitioners ignores the distinction between identity and

identification. The 12 digit Aadhaar number is not given by UIDAI to alter the identity of the individual. It is provided to the enrolled individual to enable his identification through authentication. Authentication is a multi dimensional identifying process. The Aadhaar number is one element or one identifier in the process of identification through authentication. It is identificational in nature. Section 2(a) of Aadhaar Act defines Aadhaar number to mean "an identification number". Section 2(c) defines authentication as a process requiring submission of Aadhaar number to CIDR for verification. Further, Section 4(2) provides that the Aadhaar number shall be a random number and shall bear no relation to the attributes or identity of the Aadhaar number holder. It is proof of identity and not identity itself.

75. Replying the submission of the petitioners that fundamental right of privacy/dignity/autonomy under Article 21 could not be waived. It is submitted that Section 7 of Aadhaar Act does not involve any issue of waiver. When an individual undergoes any

authentication to establish his identity to receive benefits, services or subsidies, he does so to enliven his fundamental right to life and personal liberty under Article 21.

76. With regard to Section 57, it is submitted that since an infrastructure for establishing identity of residents is available, therefore, Parliament intends to make the use of Aadhaar number available for other purposes provided the need for the service of authentication arises pursuant to any law or contract. The rationale seems to be that due to liberalisation and privatisation in many governmental and public sector zones, private corporate bodies are operating in parallel and in competition with public sector — banking, insurance, defence, health etc. These are vital core sectors absolutely essential for National integrity, National economy and life of people. In many areas private bodies operate under common regulators such as TRAI, Airport Authority, IRDA etc. Then there is rapidly growing e-commerce.

77. In Reply to the submission of Shri Kapil Sibal that the real object of the Act was to provide data to the digital giants like Google, Facebook and other private players, it is contended that there is no factual foundation for this submission in any writ petition. In the Act there is a complete bar with respect to sharing of core biometric information vide Section 29(1). The non-core biometric information is to be shared only as per the provisions of the Act and Regulations and with prior consent and only for the purpose of authentication.

78. On the submission of the petitioners that power of UIDAI to add identity information by Regulation is unguided and violative of Article 14, it is submitted that clauses (g) and (j) of Section 2 use the expression 'such other biological attribute'. This general expression needs to be construed by applying the doctrine of *ejusdem generis*. The use of word 'such' implies similarity with what is specifically mentioned before the general expression. The Regulations framed by UIDAI are required to be laid

before the Parliament under Section 55. Section 55 is a mandatory provision. The Parliament has power to modify the Regulation and also to reject the Regulation. This is a legislative check on the Regulation making power.

79. Almost 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 it does not reach the intended beneficiaries. A former Prime Minister said only 15 out of 100 rupees reaches the target person. This was confirmed by the Planning Commission. In the Audit Report No.3 of 2000 CAG stated in “Overview” that programmes suffered from serious targeting problems. It noted that bogus ration cards were being used for diversions (1.93 crores bogus).

80. Even otherwise, 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.

They also do not lend assurance and accuracy on account of existence of fake, bogus and ghost cards. Therefore, there was need of a biometric Aadhaar number which enables de-duplication and authentication.

81. Shri Dwivedi submits that security and data privacy is ensured in the following manner:-

(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 purposes 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 to 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.

82. Biometrics are being used for unique identification in e-passports by 120 countries. Out of these many countries use fingerprints and/or iris scans. Additionally 19 European Countries have smart National Identity cards having chips containing

biometric information. A number of African and Asian countries are also using biometrics for identification. The ECHR and ECJ have not declared the use of biometrics or the collection and storage of data for the said purpose to be violative of Human Rights. It has infact been upheld in the context of passports, by the ECJ.

83. On the submissions that de-duplication/ authentication software has been received from three foreign suppliers and since the source code of the algorithm is with the foreign suppliers, therefore, they can easily obtain the data in the CIDR merely by manipulation of the algorithm, Shri Dwivedi submits that foreign biometric solution providers only provide the software, the server and hardware belongs to UIDAI. So far the software is concerned UIDAI uses the software as licensee. There is no free access to the server room which is wholly secured by security guards. The enrolment data packet, after being received in the data center, is decrypted for a short duration to enable extraction of minutiae and

preparation of templates. Once the template is prepared the entire biometric data is stored offline under the complete control of the UIDAI officials.

84. It is correct that the source code for the algorithms provided are retained by the BSPs which constitutes the intellectual property right of the BSP, however, it does not introduce any insecurity of data in the CIDR as the softwares operate automatically in the servers located in the server rooms and also because the software functions only on the basis of the templates whilst the biometric data is stored offline.

85. During the submissions, Shri Dwivedi also emphasised on prohibition of sharing of core biometric information. As per Section 29(1) read with Regulation 17(1) of the Aadhaar (Sharing of Information) Regulations, 2016. Referring to various Regulations of the above Regulations. Shri Dwivedi submitted that the architecture of Aadhaar and its functioning does not permit CIDR to note about parties of any transaction

or location of the individual seeking identification of his Aadhaar number. Requesting Agency is strictly restricted to sharing of only demographic information plus photograph and for authentication only, and this is also with express and separate prior consent of the ANH. Requesting Entities cannot share authentication logs with any person other than the ANH or for grievance redressal and resolution of disputes or with the Authority for audit and shall not be used for any purpose other than stated in Regulation 18(5).

86. Elaborating on security Shri Dwivedi submitted that Section 28(4) mandates that the UIDAI shall ensure that the agencies appointed by it have in place the appropriate technical and organizational security measures for the information and ensure that the agreements or arrangements entered into with such agencies impose obligations equivalent to those imposed on the Authority and require such agencies to act only on instructions from the Authority.

87. RE shall ensure that the identity information of

the ANH or any other information generated during the authentication is kept confidential, secure and protected against access, use and disclosure not permitted under the Act and regulations.[Regulation 17(1)(e)]. The private key used for digitally signing the authentication request and the license keys are kept secure and access controlled[Regulation 17(1)(f) and 22(3)]. All relevant laws and regulations in relation to data storage and data protection relating to Aadhaar based identity information in their systems, that of their agents and with authentication devices are compiled with [Regulation 17(1)(g)].

88. Regulation 22(4) provides that RE shall adhere to all regulations, information security policies, processes, standards, specifications and guidelines issued from time to time.

89. By virtue of Section 56 and 61 of the Aadhaar Act, 2016, the provisions of IT Act, 2000 are applicable except where it is inconsistent with Aadhaar Act. The regular regime under the IT Act with all its provisions for punishment and penalty are attracted

since the biometric information is an electronic record and the data is sensitive personal data or information as defined in the IT Act, 2000. On submission of the petitioner that there is no mechanism for raising any grievance, Shri Dwivedi submits that UIDAI has set up grievance redressal cell as contemplated under Section 23(1)(s) of the Act. Any ANH can make a complaint for redressal of grievance.

90. The petitioner's submission that Aadhaar Act enables the State to put the entire population of the country in an electronic leash and to track them all the time and it has converted itself as the State into a totalitarian State, it is submitted that none of the four clauses of Regulation 26 entitle the authority to store data about the purpose for which authentication is being done. Section 32(3) of the Aadhaar Act specifically prohibits the authority from collecting, storing or maintaining, whether directly or indirectly any information about the purpose of authentication. The proviso to Regulation 26 is also to the same effect. Here, “the purpose of authentication” means

the nature of activity being conducted by ANH in relation to which the authentication is required and is being done.

91. It is submitted that the devices which are used for the purpose of authentication are not geared or designed to record the nature of the activity being done by the ANH which necessitates authentication. The device can only tell the authority about the time of authentication, the identity of the RE, the PID, the time and nature of response, the code of the device and the authentication server side configurations. Hence, with the aid of authentication record it is not possible for the UIDAI to track the nature of activity being engaged into by the ANH. In fact, in overwhelming majority of cases the authentication record would not enable the authority to know even the place/location where the activity is performed by the ANH. The reason is that there are about 350 number of REs. The REs alone can authenticate with the help of CIDR and this is done by them through the ASA. In a large number of cases, the organizations requiring

authentication would be doing so through some RE with whom they have some agreements. To illustrate nic.in is an RE which provides authentication service to large number of government organizations 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 organization which is requiring authentication through the RE. In most cases the authentication is one time.

92. It is submitted that biometrics is being increasingly resorted to for identification purposes by many countries. At least 19 countries in Europe are using biometric smart cards where data is stored in the chip. These smart cards are similar to the smart cards which were used under the 2006 Act in U.K. The important difference lies in the extent of data of the individual which is stored in the smart card. The European cards unlike the UK, do not store 50 categories of data which was being stored in the UK card that came to be abolished in 2010 by the

Repealing Act, 2010. In some European countries the smart cards are issued in a decentralized manner, as in Germany. But in some other countries the smart cards are issued in a centralized manner. In either case, the State is possessed of all the information which is stored in the chip of the smart card, though it may not involve authentication. These smart cards are considered to be property of the State and the State can require the production of the smart card for identification at any time. Estonia is considered to be a pioneer and leader in the field of the use of biometrics and it has a centralized data base.

93. It is submitted that the architecture of the Aadhaar Act does not lead to any real possibility, proximate or remote of mass surveillance in real time by the State. This is not an Act for empowering surveillance by the State. It merely empowers the State to ensure proper delivery of welfare measures mandated by Directive Principles of State Policy(Part IV of the Constitution) which actually enliven the Fundamental Rights under Article 14, 19 and 21 of the

Constitution for a vast majority of the poor and down trodden in the country and thereby to bring about their comprehensive emancipation. It seeks to ensure, justice, social, economic and political for the little Indians.

94. Responding on the arguments raised by the petitioner on Section 47 of the Act, it is submitted that Section 47 has rationale. The offences and penalties under Chapter VII are all intended to maintain the purity and integrity of CIDR which has been established of the ANH. Secondly, the entire enrolment, storage in CIDR and authentication exercise is so vast and that any breach can be handled with efficiency and effectively only by UIDAI. There are similar enactments which contain similar provisions which have been upheld by this Court. An individual can make a complaint to UIDAI directly or through grievance redressal cell. The authority would be obliged to examine the complaints and to lodge the complaint in the Court as per Section 47. Additionally, the individual is generally likely to

have a complaint of identity theft, cheating or disclosure. In such a situation he can always invoke the provisions of Sections 66C, 66D and 72A of the IT Act, 2000. The said offences carry identical penalties.

95. Elaborating on Section 59 of the Act, it is submitted that Section 59 purports to provide a statutory basis to the resolution of the Government of India, Planning Commission dated 28.01.2009 and also to validate anything done or any action taken by the Central Government under the said resolution. Section 59 of the Aadhaar Act seeks to continue what was done and the actions which were taken under the Resolution dated 28.01.2009. Section 59 is clearly extending its protection retrospectively to that which was done under the notification dated 28.01.2009.

96. Section 59 provides a deemed fiction. As a result of this deemed fiction one has to imagine that all the actions taken under the aforesaid notifications were done under the Act and not under the aforesaid notifications.

97. Replying the submission of the petitioner that large scale of marginal section of the society is deprived due to exclusion from getting the benefits and the Act violates Article 14 of the Constitution, it is submitted that there is no exclusion on account of de-duplication. It cannot be denied that there may be some cases where due to non-identification, a person may have been put to some dis-advantage but on failure of authentication the authorities have clear discretion to accept other means of identification to deliver the subsidies and benefits. In any view of the matter on some administrative lapses and some mistakes in implementation does not lead to conclude that Act is unconstitutional and wrong implementation of the Act does not effect the constitutionality of the statutes.

98. Learned counsel for the parties have placed reliance on several judgments of this Court and Foreign Courts in support of their respective

submissions which we shall notice while considering the respective submissions hereinafter.

99. Apart from hearing elaborate submissions made by the learned counsel for the petitioners as well as the respondents, we have also heard several learned counsel for the intervener. The submission made by the intervener has already been covered by learned counsel for the petitioners as well as for the respondents, hence it needs no repetition.

100. We have considered the submissions raised before us. From the pleadings on record and the submissions made following <u>are the main issues which arise for consideration:-</u>

(1) Whether requirement under Aadhaar Act to give one's demographic and biometric information is violative of fundamental right of privacy ?

(2) Whether the provisions of Aadhaar Act requiring demographic and biometric information from a resident for Aadhaar number are unconstitutional and do not pass three fold test as laid down in

Puttaswamy case ?

(3) Whether collection of data of residents, its storage, retention and use violates fundamental right of privacy ?

(4) Whether Aadhaar Act creates an architecture for pervasive surveillance amounting to violation of fundamental right of privacy ?

(5) Whether the Aadhaar Act provides protection and safety of the data collected and received from individual ?

(6) Whether Section 7 of Aadhaar Act is unconstitutional since it requires that for purposes of establishment of identity of an individual for receipt of a subsidy, benefit or service such individual should undergo authentication or furnish proof of possession of Aadhaar number or satisfy that such person has made an application for enrolment ? Further the provision deserves to be struck down on account

of large number of denial of rightful claims of various marginalised section of society and down trodden?

(7) Can the State while enlivening right to food, right to shelter etc. envisaged under Article 21 encroach upon the rights of privacy of the beneficiaries ?

(8) Whether Section 29 of the Aadhaar Act is liable to be struck down inasmuch as it permits sharing of identity information ?

(9) Whether Section 33 is unconstitutional inasmuch as it provides for the use of Aadhaar data base for Police investigation, which violates the protection against self-incrimination as enshrined under Article 20(3) of the Constitution of India ?

(10) Whether Section 47 of Aadhaar Act is unconstitutional inasmuch as it does not allow an individual who finds that there is a

violation of Aadhaar Act to initiate a criminal process ?

(11) Whether Section 57 of Aadhaar Act which allows an unrestricted extension of Aadhaar information of an individual for any purpose whether by the State or any body, corporate or person pursuant to any law or contact is unconstitutional ?

(12) Whether Section 59 is capable of validating all actions taken by the Central Government under notification dated 28.01.2009 or under notification dated 12.09.2015 and all such actions can be deemed to be taken under the Aadhaar Act?

(13) Whether Aadhaar Act is unconstitutional since it collects the identity information of children between 5 to 18 years without parental consent ?

(14) Whether Rule 9 as amended by PMLA (Second Amendment) Rules, 2017 is unconstitutional being violative of Article 14, 19(1)(g), 21 and 300A

of Constitution of India and Section 3,7, 51 of Aadhaar Act. Further, whether Rule 9 is ultra vires to the PMLA Act, 2002. itself.

(15) Whether circular dated 23.02.2017 issued by the Department of Telecommunications, Government of India is ultra vires.

(16) Whether Aadhaar Act could not have been passed as Money Bill ? Further, whether the decision of Speaker of Lok Sabha certifying the Aadhaar (Targeted Delivery of Financial and other Subsidies, Benefits and Services) Bill, 2016 as Money Bill is subject to judicial review ?

(17) Whether Section 139-AA of the Income Tax Act, 1961 is unconstitutional in view of the Privacy judgment in Puttaswamy case?

(18) Whether Aadhaar Act violates the Interim Orders passed by this Court in Writ Petition (C) No. 494 of 2012 & other connected cases?

Issue Nos.1 and 2	**Whether requirement under Aadhaar Act to give one's demographic and biometric information is violative of fundamental right of privacy ? And** **Whether the provisions of Aadhaar Act requiring demographic and biometric information from a resident for Aadhaar number are unconstitutional and do not pass three fold test as laid down in *Puttaswamy case ?***

101. Before we answer the above issues we need to look into the object and purpose for which Aadhaar Act was enacted. The Statement of Objects and Reasons particularly paragraph 5 of such Statement throws light on the object for which Legislation came into existence. Paragraph 5 of the Statement of Objects and Reasons is as follows:

> "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."

102. Preamble to any Act is a key to read and unfold an enactment. The Preamble of Aadhaar Act 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."

103. Section 2 of the Act is definition clause. Section 2(a) defines "Aadhaar number" in the following manner:

> "2(a) "Aadhaar number" means an identification number issued to an individual under sub-section (3) of section 3;"

104. Sections 2(g) and 2(k) define "biometric information" and "demographic information" which is to the following effect:

> "2(g) "biometric information" means photograph, finger print, Iris scan, or such other biological attributes 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;

105. Section 3 of the Act deals with Aadhaar enrolment. Section 3 is as follows:

> "3.(1) Every resident shall be entitled to obtain an Aadhaar number by submitting his demographic information and biometric information by undergoing the process of enrolment: Provided that the Central Government may, from time to time, notify such other category of individuals who may be entitled to obtain an Aadhaar number.
>
> (2) 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.
>
> (3) On receipt of the demographic information and biometric information under sub-section (1), the Authority shall, after verifying the information, in such manner as may be specified by regulations, issue an Aadhaar number to such individual."

106. The challenge in this batch of cases is challenge to the Act and its various provisions on the ground that the Act and its provisions violate right of privacy which is now recognised as fundamental right.

All aspects of privacy right, which is accepted as a fundamental right under Article 21, have been elaborately and authoritatively dealt by nine-Judge Constitution Bench of this Court in ***Puttaswamy case (supra)***.

107. **Alan F. Westin** in his work "Privacy and Freedom" defined privacy as "the desire of people to choose freely under what circumstances and to what extent they will expose themselves, their attitudes and their behaviour to others".

108. Dr. D.Y. Chandrachud, J., in his opinion (which expresses majority opinion) in paragraph 3 of the judgment while analysing the concept of privacy held:

> "**3.** Privacy, in its simplest sense, allows each human being to be left alone in a core which is inviolable. Yet the autonomy of the individual is conditioned by her relationships with the rest of society. Those relationships may and do often pose questions to autonomy and free choice. The overarching presence of State and non-State entities regulates aspects of social existence which bear upon the freedom of the individual. The preservation of constitutional liberty is, so to speak, work in progress. Challenges have to be addressed to existing problems. Equally, new challenges have to be dealt with

> in terms of a constitutional understanding of where liberty places an individual in the context of a social order. The emergence of new challenges is exemplified by this case, where the debate on privacy is being analysed in the context of a global information based society. In an age where information technology governs virtually every aspect of our lives, the task before the Court is to impart constitutional meaning to individual liberty in an interconnected world. While we revisit the question whether our Constitution protects privacy as an elemental principle, the Court has to be sensitive to the needs of and the opportunities and dangers posed to liberty in a digital world."

109. Dwelling on essential nature of privacy in paragraphs 297 and 298 following has been laid down by Dr. D.Y. Chandrachud, J.:

> "**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....

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. Liberty has a broader meaning of which privacy is a subset. All liberties may not be exercised in privacy. Yet others can be fulfilled only within a private space. Privacy enables the individual to retain the autonomy of the body and mind. The autonomy of the individual is the ability to make decisions on vital matters of concern to life. Privacy has not been couched as an independent fundamental right. But that does not detract from the constitutional protection afforded to it, once the true nature of privacy and its relationship with those fundamental rights which are expressly protected is understood. Privacy lies across the spectrum of protected freedoms. The guarantee of equality is a guarantee against arbitrary State action. It prevents the State

> from discriminating between individuals. The destruction by the State of a sanctified personal space whether of the body or of the mind is violative of the guarantee against arbitrary State action. Privacy of the body entitles an individual to the integrity of the physical aspects of personhood. The intersection between one's mental integrity and privacy entitles the individual to freedom of thought, the freedom to believe in [499]what is right, and the freedom of self-determination. When these guarantees intersect with gender, they create a private space which protects all those elements which are crucial to gender identity. 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."

110. This Court has further held that like the right to life and liberty, privacy is not absolute. Any curtailment or deprivation of that right would have to take place under a regime of law. In paragraph 313 following has been held:

> **"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."

111. Further elaboration of the core of privacy has been stated in the following words in paragraphs 322, 323 and 326:

> "**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.

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."

112. The first issue which is under consideration is as to whether requirement under the Aadhaar Act to give one's biometric and demographic information is violative of fundamental right of privacy. Demographic and biometric information has been defined in Section 2 as noted above. Biometric information and demographic information are two distinct concepts as delineated in the Act itself. We first take up the demographic information which 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. There is also injunction in Section 2(k) that demographic information shall not include race, religion, caste, tribe, ethnicity, language,

records of entitlement, income or medical history. Thus, demographic information which are contemplated to be given in the Act are very limited information. The Regulations have been framed under Act, namely, Aadhaar (Enrolment and Update) Regulations, 2016. Regulation 4 enumerates demographic information which shall be collected from individuals undergoing enrolment. Regulation 4 is as follows:

> "**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."

113. A perusal of Regulation 4 indicates that information which shall be collected from individual are his name, date of birth, gender and residential address. The additional information which can be collected at the option of the individual is mobile number and e-mail address. Schedule I of the Regulation contains format of enrolment form which contains columns for information as contemplated under Regulation 4.

114. The information contemplated under Regulation 4 are nothing but information relating to identity of the person.

115. Every person born on earth takes birth at a place at a time with a parentage. In the society person is identified as a person born as son or daughter of such and such. The identity of person from the time of taking birth is an identity well known and generally every person describes himself or herself to be son or daughter of such and such person.

116. Every person, may be a child in school, a person at his workplace, relates himself or herself with his or her parent's, place of birth etc., in interaction with his near and dear and outside world a person willingly and voluntarily reveals his identity to others in his journey of life. The demographic information are readily provided by individuals globally for disclosing identity while relating with others; while seeking benefits whether provided by government or by private entities. People who get

registered for engaging in a profession, who take admissions in schools/colleges/ university, who seek employment in the government or private concerns, and those who engage in various trade and commerce are all required to provide demographic information. Hence, it can be safely said that there cannot be a reasonable expectation of privacy with regard to such information. There are large number of statutes which provide for giving demographic information by the individuals. For inclusion of name of a person in the Electoral List as per the Registration of Electoral Rules, 1960 framed under the Representation of People Act, 1950, a person is required to give similar demographic information in Form II, i.e., name, date of birth, gender, current address and permanent address, which also contains optional particulars of email address and mobile number. Under Central Motor Vehicle Rules, 1989 person making an application for driving licence is required to give name, parent, permanent address, temporary address, date of birth, place of birth, educational qualification, etc.

117. Under Special Marriage Act, name, condition, occupation, age, dwelling place, age, etc. are to be given. Thus, providing such demographic information in most of the statutes clearly indicates that those information are readily provided and no reasonable expectation of privacy has ever been claimed or perceived in above respect.

118. It is well settled that breach of privacy right can be claimed only when claimant on the facts of the particular case and circumstances have "reasonable expectation of privacy". In Court of Appeal in ***Regina (Wood) v. Commissioner of Police of the Metropolis, (2009) EWCA Civ 414: (2010) 1 WLR 123,*** following was held:

> "22. This cluster of values, summarised as the personal autonomy of every individual and taking concrete form as a presumption against interference with the individual's liberty, is a defining characteristic of a free society. We therefore need to preserve it even in little cases. At the same time it is important that this core right protected by Article 8, however protean, should not be read so widely that its claims become unreal and unreasonable. For this purpose I think there are three safeguards, or

qualifications. First, the alleged threat or assault to the individual's personal autonomy must (if Article 8 is to be engaged) attain "a certain level of seriousness". Secondly, the touchstone for Article 8(1)'s engagement is whether the claimant enjoys on the facts a "reasonable expectation of privacy" (in any of the senses of privacy accepted in the cases). Absent such an expectation, there is no relevant interference with personal autonomy. Thirdly, the breadth of Article 8(1) may in many instances be greatly curtailed by the scope of the justifications available to the State pursuant to Article 8(2). I shall say a little in turn about these three antidotes to the overblown use of Article 8.

24. As for the second - a "reasonable expectation of privacy" - I have already cited paragraph 51 of Von Hannover, with its reference to that very phrase, and also to a "legitimate expectation" of protection. One may compare a passage in Lord Nicholls' opinion in Campbell at paragraph 21:

> "Accordingly, in deciding what was the ambit of an individual's 'private life' in particular circumstances courts need to be on guard against using as a touchstone a test which brings into account considerations which should more properly be considered at the later stage of proportionality. Essentially the touchstone of private life is whether in respect of the disclosed facts the person in question had a reasonable expectation of privacy."

In the same case Lord Hope said at paragraph 99:

> "The question is what a reasonable person of ordinary sensibilities would feel if she was placed in the same position as the claimant and faced with the same publicity."

In Murray v Big Pictures (UK) Ltd Sir Anthony Clarke MR referred to both of these passages, and stated:

> "35... [S]o far as the relevant principles to be derived from Campbell are concerned, they can we think be summarised in this way. The first question is whether there is a reasonable expectation of privacy. This is of course an objective question. ...
>
> 36. As we see it, the question 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."

119. The reasonable expectation of privacy test was also noticed and approved in privacy judgment, Dr. D.Y Chandrachud, J. has referred judgment of US Supreme Court in ***Katz v. United States, 389 US 347 (1967),*** following has been observed by this Court in ***K.S. Puttaswamy (supra)*** in paragraph 185:

> "The majority adopted the "reasonable expectation of privacy" test as formulated by Harlan, J. in *Katz* and held as follows:
>
> > "7. [The] inquiry, as Mr Justice Harlan aptly noted in his *Katz*[66] concurrence, normally embraces two discrete questions. The first is whether the individual, by his conduct, has "exhibited an actual (subjective) expectation of privacy" … whether … the individual has shown that "he seeks to preserve [something] as private". … The second question is whether the individual's subjective expectation of privacy is "one that society is prepared to recognize as "reasonable" " … whether … the individual's expectation, viewed objectively, is "justifiable" under the circumstances. …
> >
> > *8*. … Since the pen register was installed on telephone company property at the telephone company's central offices, petitioner obviously cannot claim that his "property" was invaded or that

> police intruded into a "constitutionally protected area"."

Thus the Court held that the petitioner in all probability entertained no actual expectation of privacy in the phone numbers he dialed, and that, even if he did, his expectation was not "legitimate". However, the judgment also noted the limitations of the *Katz* test:

> "*Situations can be imagined, of course, in which Katz*[66] *two-pronged inquiry would provide an inadequate index of Fourth Amendment protection*. … In such circumstances, where an individual's subjective expectations had been "conditioned" by influences alien to well-recognised Fourth Amendment freedoms, those subjective expectations obviously could play no meaningful role in ascertaining what the scope of Fourth Amendment protection was."
>
> (emphasis supplied)

120. After noticing several judgments of US Supreme Court, D.Y.Chandrachud, J. in ***K.S. Puttaswamy (supra)***has noted that the reasonable expectation of privacy test has been relied on by various other jurisdictions while developing the right of privacy. In paragraph 195 following has been held:

> "**195.** The development of the jurisprudence on the right to privacy in the United States of

> America shows that even though there is no explicit mention of the word “privacy” in the Constitution, the courts of the country have not only recognised the right to privacy under various amendments to the Constitution but also progressively extended the ambit of protection under the right to privacy. In its early years, the focus was on property and protection of physical spaces that would be considered private such as an individual’s home. This “trespass doctrine” became irrelevant when it was held that what is protected under the right to privacy is “people, not places”. The “reasonable expectation of privacy” test has been relied on subsequently by various other jurisdictions while developing the right to privacy.”

121. As noted above an individual in interaction with society or while interacting with his close relatives naturally gives and reveals his several information e.g. his name, age, date of birth, residential address, etc. We are of the opinion that in giving of those information there is no reasonable expectation of privacy. Thus, we conclude that demographic information required to be given in the process of enrolment does not violate any right of privacy.

122. Every person born gets a name after his birth. He strives throughout his life to establish himself to

be recognised by society. Recognition by fellow man and society at large is cherished dream of all human being, for fulfilling the above dream, he does not hide himself from society rather takes pride in reasserting himself time and again when occasion arises. He proclaims his identity time and again.

123. The right to identity is an essential component of an individual in her relationship with the State. The identification is only the proof of identity and everyone has right to prove his identity by an acceptable means. Aadhaar is contemplated as one PAN INDIA identity, which is acceptable proof of identity in every nook and corner of the country.

124. Reference of International Declaration and covenants have been made to assert that providing for an identity to every resident is an international obligation of India. In this reference following has been referred to:-

Name of the Convention [Date of Accession]	Provision

Universal Declaration of Human Rights,1948 [10.12.1948]	**Article 6:** Everyone has the right to recognition everywhere as a person before the law.
International Covenant on Civil and Political Rights, 1976 [10.04.1979]	**Article 16:** Everyone shall have the right to recognition everywhere as a person before the law.
UN Convention on the Rights of the Child, 1989 [11.12.1992]	**Article 8:** States Parties undertake to respect the right of the child to preserve his or her identity, including nationality, name and family relations as recognized by law without unlawful interference. **Article 29(1):** States Parties agree that the education of the child shall be directed to:....(c) The development of respect for the child's parents, his or her own cultural identity, language and values, for the national values of the country in which the child is living, the country from which he or she may originate, and for civilizations different from his or her own;....

125. We may also notice one of the applications filed by an organisation, namely, Swatantra, which works for and represents the interests of the transgender and sexual minorities communities in India. The submission has been made on behalf of organisation that Aadhaar

Act and Rules making the Unique Identification Number (UID) or the Aadhaar number mandatory and requiring them to provide their personal demographic and biometric information for enrolment is a serious infringement of the constitutional right to privacy and dignity of transgender persons. It is submitted that the transgender community has experienced a history of legally and socially sanctioned violence and discrimination from private individuals and State authorities. Reference of Criminal Tribes Act, 1871 and certain State legislations has been made in this regard. The applicant also refers to judgment of this Court in ***National Legal Services Authority and Union of India and others, 2014 (5) SCC 438,*** where this Court has held that the freedom of expression includes one's right to expression of a self-identified gender identity through dress, action behaviour etc. The submission has been made that making the disclosure of gender under Section 2 of the Aadhaar Act and Regulation 4 of the Aadhaar (Enrolment & Update) Regulations violates Article 14 of the Constitution.

126. Further, the Aadhaar Act amounts to discrimination against transgender persons under Article 15 of the Constitution on the ground of gender. Further, it is contended that disclosure of gender identity violates Article 21 and Article 19(1)(a) of the transgender persons.

127. We having considered the provisions of the Act and Enrolment and Update Regulations and having found that disclosure of demographic information does not violate any right of privacy, the said conclusion shall also be fully applicable with regard to transgender. This Court in ***NALSA (supra)*** has held that Article 19(1)(a) which provides that all citizens shall have the right to freedom of speech and expression which includes one's right to expression and his self-identified gender, it is the right of a person to identify his gender. In paragraphs 69 and 72 of the judgment following has been laid down:

> "69. Article 19(1) of the Constitution guarantees certain fundamental rights, subject to the power of the State to impose restrictions from exercise of those rights.

The rights conferred by Article 19 are not available to any person who is not a citizen of India. Article 19(1) guarantees those great basic rights which are recognized and guaranteed as the natural rights inherent in the status of the citizen of a free country. Article 19(1)(a) of the Constitution states that all citizens shall have the right to freedom of speech and expression, which includes one's right to expression of his self-identified gender. Self-identified gender can be expressed through dress, words, action or behavior or any other form. No restriction can be placed on one's personal appearance or choice of dressing, subject to the restrictions contained in Article 19(2) of the Constitution.

72. Gender identity, therefore, lies at the core of one's personal identity, gender expression and presentation and, therefore, it will have to be protected Under Article 19(1)(a) of the Constitution of India. A transgender's personality could be expressed by the transgender's behavior and presentation. State cannot prohibit, restrict or interfere with a transgender's expression of such personality, which reflects that inherent personality. Often the State and its authorities either due to ignorance or otherwise fail to digest the innate character and identity of such persons. We, therefore, hold that values of privacy, self-identity, autonomy and personal integrity are fundamental rights guaranteed to members of the transgender community Under Article 19(1)(a) of the Constitution of India and the State is bound to protect and recognize those rights. ”

128. When this Court has already recognised the

constitutional right of transgenders of their self-identification and it has been further held that self-identification relates to their dignity. Dignity is a human right which every human being possesses. Article 15 came for consideration in the said judgment where this Court held that Article 15 has used the expression 'citizen' and 'sex' which expressions are 'gender neutral'. The protection of fundamental rights is equally applicable to transgenders. Paragraph 82 is as follows:

> "82. Article 14 has used the expression "person" and the Article 15 has used the expression "citizen" and "sex" so also Article 16. Article 19 has also used the expression "citizen". Article 21 has used the expression "person". All these expressions, which are "gender neutral" evidently refer to human-beings. Hence, they take within their sweep Hijras/Transgenders and are not as such limited to male or female gender. Gender identity as already indicated forms the core of one's personal self, based on self identification, not on surgical or medical procedure. Gender identity, in our view, is an integral part of sex and no citizen can be discriminated on the ground of gender identity, including those who identify as third gender. "

129. This Court having recognised the right of

transgenders to their self-identity in which transgenders also feel pride as human being, the mere fact that under Enrolment and Update Regulations they are required to provide demographic information regarding gender does not, in any manner, affect their right of privacy. There is no expectation of right of privacy with regard to gender. The aforesaid right having been clearly recognised by this Court, expression of those rights of self-identification cannot, in any manner, be said to affect their right to privacy. We, thus, conclude that with regard to transgenders also no right of privacy is breached in giving the demographic information. In so far as biometric information as held above, ample justification has been found which satisfied the three fold test as laid down in ***Puttaswamy case,*** which is equally applicable to transgender also.

130. Now, we come to the biometric information as referred to in Section 2(g) and required to be given in the process of enrolment by a person. Biometric information means photographs, fingerprints, iris scan

and other such biometric attributes of an individual as may be specified by the regulations. Biometric informations are of physical characteristics of a person. A person has full bodily autonomy and any intrusion in the bodily autonomy of a person can be readily accepted as breach of his privacy. In **Regina (Wood) Vs. Commissioner of Police of the Metropolis (supra),** in paragraph 21, following has been laid down by Lord LJ.:-

> “21. The notion of the personal autonomy of every individual marches with the presumption of liberty enjoyed in a free polity: a presumption which consists in the principle that every interference with the freedom of the individual stands in need of objective justification. Applied to the myriad instances recognised in the Article 8 jurisprudence, this presumption means that, subject to the qualifications I shall shortly describe, an individual's personal autonomy makes him - should make him - master of all those facts about his own identity, such as his name, health, sexuality, ethnicity, his own image, of which the cases speak; and also of the "zone of interaction" (the Von Hannover case 40 EHRR I, paragraph 50) between himself and others. He is the presumed owner of these aspects of his own self; his control of them can only be loosened, abrogated, if the State shows an objective justification for doing so.”

131. U.S. Supreme Court in **United States Vs. Antonio Dionisio, 35 L.Ed. 2D 67** had occasion to consider physical characteristic of a person's voice in context of violation of privacy rights. With regard to fingerprints, it was noticed that the fingerprinting itself involves none of the probing into an individual's private life. In paragraph Nos. 21, 22 following was stated:-

> "[21,22] In Katz v. United States, supra, we said that the Fourth Amendment provides no protection for what "a person knowingly exposes to the public, even in his own home or office . . .." 389 U.S., at 351, 19 L Ed 2d 576. The physical characteristics of a person's voice, its tone and manner, as opposed to the content of a specific conversation, are constantly exposed to the public. Like a man's facial characteristics, or handwriting, his voice is repeatedly produced for others to hear. No person can have a reasonable expectation that others will not know the sound of his voice, any more than he can reasonably expect that his face will be a mystery to the world. As the Court of Appeals for the Second Circuit stated:
>
> > "Except for the rare recluse who chooses to live his life in complete solitude, in our daily lives we constantly speak and write, and while the content of a communication is entitled to Fourth Amendment protection . . . the underlying

> identifying characteristics—the constant factor throughout both public and private communications—are open for all to see or hear. There is no basis for constructing a wall of privacy against the grand jury which does not exist in casual contacts with strangers. Hence no intrusion into an individual's privacy results from compelled execution of handwriting or voice exemplars; nothing is being exposed to the grand jury that has not previously been exposed to the public at large."' United States v. Doe (Schwartz), 457 F2d, at 898-899.

The required disclosure of a person's voice is thus immeasurably further removed from the Fourth Amendment protection than was the intrusion into the body effected by the blood extraction in Schmerber. "The interests in human dignity and privacy which the Fourth Amendment protects forbid any such intrusions on the mere chance that desired evidence might be obtained." Schmerber v. California, 384 US, at 769-770, 16L Ed 2d 908. Similarly, a seizure of voice exemplars does not involve the "severe, though brief, intrusion upon cherished personal security," effected by the "pat-down" in Terry—"surely . . . an annoying, frightening and perhaps humiliating experience." Terry v. Ohio, 392 US, at 24-25, 20 L Ed 2d 889. Rather, this is like the fingerprinting in Davis, where, though the initial dragnet detentions were constitutionally impermissible, we noted that the fingerprinting itself "involves none of the probing into an individual's private life and thoughts that marks an interrogation or search." Davis v. Mississippi, 394 US, at 727, 22 L Ed 2d 676: cf. Thom v. New York

Stock Exchange, 306 F Supp 1002, 1009."

132. The petitioners have relied upon **S. and Marper Vs. The United Kingdom,** a judgment of Grand Chamber of European Court of Human Rights dated 04.12.2008. European Court of Human Rights on an application submitted by Mr. S and Mr. Marper allowed their claim of violation of Article 8 of Convention. Applicants had complained that the authorities had continued to retain their fingerprints and cellular samples and DNA profiles after the criminal proceedings against them had ended with an acquittal or had been discontinued. In the above context, nature of fingerprints and DNA samples came to be examined in reference of breach of Article 8 of the Convention. The retention of DNA samples and fingerprints was held to be interference with the right to respect for private life. In paragraph 84, following was held:-

> "84. The Court is of the view that the general approach taken by the Convention organs in respect of photographs and voice samples should also be followed in respect of fingerprints. The Government distinguished the latter by arguing that they constituted neutral, objective and irrefutable material

> and, unlike photographs, were unintelligible to the untutored eye and without a comparator fingerprint. While true, this consideration cannot alter the fact that 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."

133. One important observation, which has been made in the above case was that on the question whether the personal information retained by the authorities involves any of the private-life aspects, due regard has to be given to the specific context in which the information at issue has been recorded. Following was stated in paragraph 67:-

> "67.....However, in determining whether the personal information retained by the authorities involves any of the private-life aspects mentioned above, the Court will have due regard to the specific context in which the information at issue has been recorded and retained, the nature of the records, the way in which these records are used and processed and the results that may be obtained (see, *mutatis mutandis, Friedl, cited above, §§49-51, and Peck v. the United Kingdom, cited above, §59).*"

134. The biometric data as referred to in Section 2(g) thus may contain biological attributes of an individual with regard to which a person can very well claim a reasonable expectation of privacy but whether privacy rights have been breached or not needs to be examined in the subject context under which the informations were obtained.

135. Having found that biometric information of a person may claim a reasonable expectation of privacy, we have to answer as to whether obtaining biometric information in context of enrolment breaches the right of privacy of individual or not.

136. D.Y. Chandrachud, J. in **Puttaswamy (supra)** held that all restraints on privacy, i.e. whether a person has reasonable expectation of privacy, must fulfill three requirements before a restraint can be held to be justified. In Paragraph 319, following has been held:-

> "310. While it intervenes to protect legitimate state interests, the state must nevertheless put into place a robust regime that ensures the fulfillment 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 re-appreciate 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 inter-dependence 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. ”

137. We, thus, have to test the provisions of Aadhaar Act in light of three-fold test as have been laid down above. The First requirement, which need to be fulfilled is existence of law. Admittedly, Aadhaar Act is a Parliamentary law, hence the existence of law is satisfied. Mere existence of law may not be sufficient unless the law is fair and reasonable. The Aadhaar Act has been enacted with an object of providing Aadhaar number to individuals for identifying an individual for delivery of benefits, subsidies and services. Several materials have been brought on the record which reflect that in the several studies initiated by the Government as well as the World Bank and Planning Commission, it was revealed that food grains released by the Government for the beneficiaries did not reach the intended beneficiaries and there was large scale leakages due to the failure to establish identity. Reference to

Audit Report No. 3 of 2000 of Comptroller & Auditor General of India is made in this regard. 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.

138. The Law, i.e., Aadhaar Act, which has been brought to provide for unique identity for delivery of subsidies, benefits or services was a dire necessity, which decision was arrived at after several reports and studies. Aadhaar Act was, thus, enacted for a legitimate State aim and fulfills the criteria of a law being fair and reasonable. Learned Attorney General has also placed reliance on report of United Nations titled "Leaving No One Behind: the imperative of inclusive development", which has stated as follows:-

> "The decision of India in 2010 to launch the Aadhaar programme to enrol the biometric identifying data of all its 1.2 billion citizens, for example, was a critical step in enabling fairer access of the people to government benefits and services. Programmes such as Aadhaar have tremendous potential to foster inclusion by giving all people, including the poorest and most marginalized, an official identify. Fair and robust systems of legal identity and birth registration are recognised in the new 2030 Agenda for Sustainable Development as an important foundation for promoting inclusive societies."

139. Learned Attorney General has also relied on Resolution of the United Nations General Assembly dated 25.09.2015 titled "Transforming our World: the 2030 Agenda for Sustainable Development". It is submitted that by the said resolution, the following goal was adopted"-

> "16.9 by 2030, provide legal identity for all, including birth registration"

140. In this context, judgment of U.S. Supreme Court in **Otis R. Bowen, Secretary of Health and Human Services, et al. Vs. Stephen J. Roy et al., 476 U.S. 693 (1986)** is referred where the statutory requirement that an applicant provide a social security number as a condition of eligibility for the benefits in question was held to be not violative. It was held that requirement is facially neutral in religious terms, applies to all applicants for the benefits involved, and clearly promotes a legitimate and important public interest. Chief Justice Burger writing the opinion of the Court stated:-

> "The general governmental interests involved here buttress this conclusion. Governments

today grant a broad range of benefits; inescapably at the same time the administration of complex programs requires certain conditions and restrictions. Although in some situations a mechanism for individual consideration will be created, a policy decision by a government that it wishes to treat all applicants alike and that it does not wish to become involved in case-by-case inquiries into the genuineness of each religious objection to such condition or restrictions is entitled to substantial deference. Moreover, legitimate interests are implicated in the need to avoid any appearance of favoring religious over nonreligious applicants.

The test applied in cases like Wisconsin v. Yoder, 406 U.S. 205, 92 S.Ct. 1526, 32 L.Ed.2d 15 (1972), is not appropriate in this setting. In the enforcement of a facially neutral and uniformly applicable requirement for the administration of welfare programs reaching many millions of people, the Government is entitled to wide latitude. The Government should not be put to the strict test applied by the District Court; that standard required the Government to justify enforcement of the use of Social Security number requirement as the least restrictive means of accomplishing a compelling state interest. Absent proof of an intent to discriminate against particular religious beliefs or against religion in general, the Government meets its burden when it demonstrates that a challenged requirement for governmental benefits, neutral and uniform in its application, is a reasonable means of promoting a legitimate public interest. ”

141. Repelling an argument that requirement of providing social security account number for obtaining financial aid to dependent children violates the right to privacy, following was held in **Doris McElrath Vs. Joseph A. Califano,** in Para 11 **:-**

> "[11] The appellants' principal contention on appeal is that the federal and state regulations requiring dependent children to acquire and submit social security account numbers as a condition of eligibility for AFDC benefits are statutorily invalid as being inconsistent with and not authorized by the Social Security Act. We find the arguments advanced in support of this contention to be without merit and hold that the challenged regulations constitute a legitimate condition of eligibility mandated by the Congress under the Social Security Act. Accord, Chambers v. Klein, 419 F. Supp. 569 (D.N.J. 1976), aff'd mem., 564 F.2d 89 (3d Cir. 1977); Green v. Philbrook, 576 F.2d 440 (2d Cir. 1978); Arthur v. Department of Social and Health Services, 19 Wn. App. 542, 576 P.2d 921 (1978). We therefore conclude that the district court properly dismissed the appellants' statutory invalidity allegations for failure to state a claim upon which relief could be granted. "

142. Now, we come to third test, i.e., test of proportionality. D.Y. Chandrachud, J. in Puttaswamy **(supra)** has observed "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". In **Modern Dental College and Research Centre and Others Vs. State of Madhya Pradesh and Others, (2016) 7 SCC 353**, Dr. Sikri, J explaining the concept of proportionality laid down following in Paragraphs 64 and 65:-

> "64. The exercise which, therefore, 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 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 (1982) 2 SCC 33. 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 1959 SCR 629). In M.R.F. Ltd. v. State of Kerala (1998) 8 SCC 227, 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 the constitutionality of the Act will naturally arise. ”

143. One of the submissions of the petitioner to contend that proportionality test is not fulfilled in the present case is; State did not adopt an alternative and more suitable and least intrusive method of identification, i.e., smart card or other similar devices. While examining the proportionality of a Statute, it has to be kept in mind that the Statute is neither arbitrary nor of an excessive nature beyond what is required in the interest of public. The Statutory scheme, which has been brought in place has a reasonable relation to the object which the legislation seeks to achieve and the legislation does not exceed the object. The object of Aadhaar Act

as noticed above was to provide for unique identity for purposes of delivery of benefits, subsidies and services to the eligible beneficiaries and to ward of misappropriation of benefits and subsidies, ward of deprivation of eligible beneficiaries. European Court of Justice has taken a view that the proportionality merely involves an assessment that the measures taken was not more than necessary. Reference is made to the judgment of **Digital Rights Ireland Ltd. Vs. Minister for Communications [2015] QBECJ**, wherein it was held:

> "46 In that regard, according to the settled case law of the court, the principle of proportionality requires that acts of the EU institutions be appropriate for attaining the legitimate objectives pursued by the legislation at issue and do not exceed the limits of what is appropriate and necessary in order to achieve those objectives: see Afton Chemical Ltd v Secretary of State for Transport (Case C-343/09) [2010] ECR I-7027, para 45; the Volker case [2010] ECR I-11063, para 74; Nelson v Deutsche Lufthansa AG (Joined Cases C-581/10 and C-629/10) [2013] 1 All ER (Comm) 385, para 71; Sky Osterreich GmbH v Osterreichischer Rundfunk (Case C-283/11) [2013] All ER (EC) 633, para 50; and Schaible v Land Baden- Wiirttemberg (Case C-101/12) EU:C:2013:66I; 17 October 2013, para 29."

144. United Kingdom Supreme Court in **AB Vs. Her**

Majesty's Advocate, [2017] UK SC 25, held that it is not for the Court to identify the alternative measures, which may be least intrusive. In Para 37 and 39, following has been held:-

> "37. I am not persuaded. It is important to recall that the question of whether the Parliament could have used a less intrusive measure does not involve the court in identifying the alternative measure which is least intrusive. The court allows the legislature a margin of discretion and asks whether the limitation on the article 8 right is one which it was reasonable for the Parliament to propose: Bank Mellat v HM Treasury (No 2) [2013] UKSC 38, [2014] AC 700, para 75 per Lord Reed;
>
> 39. The balance, which this court is enjoined to address, is different. It is the question of a fair balance between the public interest and the individual's right to respect for his or her private life under article 8. The question for the court is, in other words, whether the impact of the infringement of that right is proportionate, having regard to the likely benefit of the impugned provision."

145. The biometric information which are obtained for Aadhaar enrolment are photographs, fingerprints and iris scan, which are least intrusion in physical autonomy of an individual. U.S. Supreme Court in **John Davis Vs. State of Mississippi, 394 US 721 (1969),**

indicated that Fingerprinting involves none of the probing into an individual's private life and thoughts that marks an interrogation or search. The physical process by which the fingerprints are taken does not require information beyond the object and purpose. Therefore, it does not readily offend those principles of dignity and privacy, which are fundamental to each **legislation of due process.** One of the apprehension, which was expressed by petitioners that since as per definition of biometric information contained in Section 2(g), further, biological attributes of an individual may be specified by regulations, which may be more intrusive. Section 2(g) use the word “such biological attributes”. Thus, applying the principles of ejusdem generis, the biological attributes can be added by the regulations, has to be akin to one those mentioned in Section 2(g), i.e. photographs, fingerprints and iris scan. In event, such biological attributes is added by regulations, it is always open to challenge by appropriate proceedings but the mere fact that by regulations any such biometric attributes

can be added, there is no reason to accept the contention that biological attributes, which can be added may be disproportionate to the objective of the Act. Biometric information, thus, which is to be obtained for enrolment are not disproportionate nor the provisions of Aadhaar Act requiring demographic and biometric information can be said to be not passing three-fold test as laid down in Puttaswamy **(supra)** case. We, thus, answer Issue Nos. 1 and 2 in following manner:-

Ans.1 and 2:- (i) requirement under Aadhaar Act to give one's demographic and biometric information does not violate fundamental right of privacy.

(ii) The provisions of Aadhaar Act requiring demographic and biometric information from a resident for Aadhaar Number pass three-fold test as laid down in **Puttaswamy (supra)** case, hence cannot be said to be unconstitutional.

ISSUE NOS.3,4 AND 5	**COLLECTION, STORAGE, RETENTION, USE, SHARING AND SURVEILLACE.**

146. The Aadhaar Act provides complete architecture beginning with enrolment. The enrolment means process to collect demographic and biometric information from individuals by enroling agencies. The enroling agencies have to set up enrolment centers and have to function in accordance with the procedure specified by UIDAI. Section 8 contemplates for authentication for Aadhaar number which authentication was done by authority. When a request is made for identification by any requesting entity in respect to biometric or demographic information of Aadhaar number holder, the authority may engage one or more entities to establish and maintain central identity data repository. Section 28 provides for the security and confidentiality of information which is to the following effect:

> 28. (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.

(5) Notwithstanding anything contained in any other law for the time being in force, and

> save as otherwise provided in this Act, the Authority or any of its officers or other employees or any agency that maintains the Central Identities Data Repository shall not, whether during his service or thereafter, reveal any information stored in the Central Identities Data Repository or authentication record to anyone:
>
> Provided that an Aadhaar number holder may request the Authority to provide access to his identity information excluding his core biometric information in such manner as may be specified by regulations.

147. The Act contains specific provision providing that no core biometric information collected under the Act is shared to anyone for any reason whatsoever or use for any purpose other than generation of Aadhaar number or authentication under this Act. The statute creates injunction for requesting entity to use identity information data for any purpose other than that specified to the individual at the time for submitting any identification. Section 29 provides for not sharing information collected or created under this Act, which is to the following effect:

> "29. (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 Security and confidentiality of information.

(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."

148. Section 30 itself contemplates that biometric information are sensitive personal data or information. There are strict conditions envisaged in Section 33 for disclosure of information. The

disclosure of information is contemplated only on two contingencies. Firstly, when an order is passed by a Court not inferior to that of District Judge and secondly when the disclosure is made in the interest of national security in pursuance of a direction of the officer not below the rank of Joint Secretary to the Government of India.

149. Chapter VII of the Act deals with the offences and penalties for impersonation at the time of enrolment penalty for disclosing identity information is provided under Sections 34 to 37. Section 38 provides for penalty who accesses or secures access to the Central Identities Data Repository. Section 39 provides for penalty who uses or tampers with the data in the Central Identities Data Repository. Section 40 provides for penalty whoever, being a requesting entity, uses the identity information of an individual in contravention of sub-section (3) of section 8. Section 41 deals with penalty for non-compliance by an enrolling agency or requesting

entity. Section 42 deals with general penalty. Section 42 is as follows:

> "42. Whoever commits an offence under this Act or any rules or regulations made thereunder for which no specific penalty is provided elsewhere than this section, shall be punishable with imprisonment for a term which may extend to one year or with a fine which may extend to twenty-five thousand rupees or, in the case of a company, with a fine which may extend to one lakh rupees, or with both."

150. 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.

151. We have already noticed the detailed submissions of learned counsel for UIDAI. Following are the measures by which Security Data of privacy is ensured. The security and data privacy is ensured in the following manner:-

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 CIDRis 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 to 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.

152. After the enrolment and allotting an Aadhaar number to individual the main function of the authority is authentication of an Aadhaar number

holder as and when request is made by the requesting agency. The authentication facility provided by the authority is under Section 3 of the Authentication Regulations, 2016 which is to the following effect:

> "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)."

153. Various modes of authentication are provided in Regulation 4 of Authentication Regulations 2016, which are: Demographic authentification; One time pin-based authentication; Biometric-based authentification and Multi-factor authentification. A requesting entity may choose suitable mode of authentication for particular function or business function as per its requirement.

154. Regulation 7 provides for capturing biometric information by requesting entity which is to the following effect:

> "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."

155. Regulation 9 deals with process of sending authentification requests. Sub-Regulation (1) of Regulation 9 contends the safe method of transmission of the authentication requests.

156. The Aadhaar (Data Security) Regulations, 2016 contain detail provisions to ensuring data security. Regulation 3 deals with measures for ensuring information security. Regulation 5 provides security

obligations of the agencies, consultants, advisors and other service providers engaged by the Authority for discharging any function relating to its processes.

157. The Aadhaar (Sharing of Information) Regulations, 2016 also contain provisions providing for restrictions on sharing identity information. Sub-Regulation (1) of Regulation 3 provides that core biometric information collected by the Authority under the Act shall not be shared with anyone for any reason whatsoever.

158. Sharing of Information Regulations, 2016 also contain various other restrictions. Regulation 6 contains restrictions on sharing, circulating or publishing of Aadhaar number which is to the following effect:

> "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."

159. The scheme of the Aadhaar Act indicates that all parts of the entire process beginning from enrolment of a resident for allocation of Aadhaar number are statutory regulated.

160. The Authentication Regulations, 2016 also limit the period for retention of logs by requesting entity.

Regulation 18(1) which is relevant in this context is as follows:

> **"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."

161. The residents' information in CIDR are also permitted to be updated as per provisions of the Aadhaar (Enrolment and Update) Regulations, 2016. An over view of the entire scheme of functions under the Aadhaar Act and Regulations made thereunder indicate that after enrolment of resident, his informations

including biometric information are retained in CIDR though in encrypted form. The major function of the authority under Aadhaar Act is authentication of identity of Aadhaar number holder as and when requests are made by requesting agency, retention of authentication data of requesting agencies are retained for limited period as noted above. There are ample safeguards for security and data privacy in the mechanism which is at place as on date as noted above.

162. Shri Shyam Divan, learned senior counsel appearing for the petitioners has passionately submitted that entire process of authentication as is clear from actual working of the Aadhaar programme reveals that Aadhaar Act enables the State to put the entire population of the country in an electronic leash and they are tracked 24 hours and 7 days. He submits that putting the entire population under surveillance is nothing but converting the State into a totalitarian State. Elaborating his submission, Shri Divan submits that process of authentication creates authentication records of (1) time of

authentication, (2) identity of the requesting entity. Both requesting entity and UIDAI have authentication transactions data which record the technical details of transactions. The devices which are used by the requesting entities have IP address which enables knowledge about geographical information of Aadhaar number holder with knowledge of his location, details of transaction, every person can be tracked and by aggregating the relevant data the entire population is put on constant surveillance. Aadhaar programme endeavours all time mass surveillance by the State which is undemocratic and violates the fundamental rights of individual.

163. The meta data regarding authentication transactions which are stored with the authority are potent enough to note each and every transaction of resident and to track his activities is nothing but surveillance. Regulation 26 of Authentication Regulations, 2016 provides storage of meta data related to the transaction. Regulation 26 which is relevant is as follows:

> **"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."

164. We may first notice as to what is meta data which is referred to in Regulation 26 above. The UIDAI receives the requests for authentication of ANH. The request for authentication received by requesting agency does not contain any information as to the purpose of authentication neither requesting agency nor UIDAI has any record pertaining to purpose for which authentication has been sought by Aadhaar number holder. The meta data referred to in Regulation 26(c) is only limited technical meta data.

165. Shri Kapil Sibal had submitted that CIDR holds the entire Aadhaar database retained by CIDR. It has become a soft target for internal/external/ indigenous /foreign attacks and single point of failure. Shri Sibal has referred to a RBI report which states:

> "Thanks to Aadhaar, for the first time in the history of India, there is now a readily available single target for cyber criminals as well as India's external enemies. In a few years, attacking UIDAI data can potentially cripple Indian businesses and administration in ways that were inconceivable a few years ago. The loss to the economy and citizens in case of such an attack is bound to be incalculable."

166. He has further submitted that a digital world is far more susceptible to manipulation than the physical world. No legislation can or should allow an individual's personal data to be put at risk, in the absence of a technologically assured and safe environment. Such level of assurance is impossible to obtain in the digital space. Biometric, core biometric and demographic information of an individual, once part of the digital world is irretrievable: a genie out of the bottle that cannot be put back. The digital world is a vehicle to benefit the information economy.

A move from an information economy to creating an architecture for an information polity has far reaching consequences impacting the most personal rights, protected by the right to privacy. The technology acquired by the UIDAI has also been criticised by the Opaque Foreign Technologies.

167. The above submissions have been strongly refuted by learned Attorney General and learned counsel appearing for the UIDAI. It is submitted by the respondents that the above submissions regarding mass surveillance have been made on misconception regarding actual operation of the entire process.

168. The meta data which is aggregation of authentication transactions does not contain any detail of actual transaction done by ANH. In the event, in a period of 30 days, 30 requesting agencies, may be one or different, have requested for authentication the UIDAI has only the recipient of demographic/biometric of ANH authentication without any information regarding purposes of authentication.

Thus, even if authentication details are aggregated, there is no information with the UIDAI regarding purpose of authentication nor authentication leaves for any trail so as to keep any track by UiDAI to know the nature of transaction or to keep any kind of surveillance as alleged. Section 32 sub-section (3) of the Aadhaar Act specifically prohibits the authority from collecting or maintaining either directly or indirectly any information for the purpose of authentication.

169. Proviso to Regulation 26 is also to the same effect i.e. provided that the authority shall not, in any case, store the purpose of authentication.

170. Elaborating on CIDR, Shri Dwivedi submits that CIDR is a centralised database which contains all Aadhaar numbers issued with corresponding demographic and biometric information. It is a “Protected System” notified under Section 70 of Information Technology Act, 2000. The storage involves end to end encryption, logical partitioning, fire walling and anonymisation

of decrypted biometric data. The encryption system follows a private key/public model and the private key is available only with UIDAI at the processing location. Hence even if data packets are lost or stolen the biometric information regarding the same cannot be accessed. At the CIDR there is multi-layer technological security to afford protection from hacking, and there is also deployment of armed forces to prevent unauthorised physical access into the CIDR Area. Additionally entry is electronically controlled. There are CIDR at two location already and some other locations are likely to be set up to ensure that data is not lost even in the remote eventuality of a disaster. The CIDR is centrally managed. The templates of finger prints and iris data are generated in ISO format and the same along with demographic data and photo are stored securely in the authentication server database. This database is used for authentication in the manner provided in Aadhaar (Authentication) Regulation 2016.

171. In view of above, the apprehension raised by Shri Kapil Sibal that CIDR is a soft target is misplaced.

172. To support his submission, Shri Shyam Divan, learned counsel for the petitioner has placed reliance on judgment of the United States Supreme Court in **United States vs. Antoine Jones, 132 S.Ct. 945 (2012).**

173. A large number of foreign judgments touching various aspects of accumulation of data, retention of data, surveillance, has been cited by both the parties to support their respective stand. It is necessary to have an over view of the opinion expressed by various Courts in other countries of the world. The present age being the age of technology and information, the issues pertaining to storage and retention of personal data in different contexts have come up before several Courts of different countries which also need to be noted.

174. The petitioners have relied on European Court, Human Rights in **S. and Marper vs. The United Kingdom,**

2008 (48)EHRR 50. The applicants, S and Marper had submitted two applications against the United Kingdom, Great Britain and Northern Ireland under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms (the Convention). The applicants complained that the authorities had continued to retain their fingerprints and cellular samples and DNA profiles after the criminal proceedings against them had ended with an acquittal or had been discontinued. The applicants had applied for judicial review of the police decisions not to destroy the fingerprints and samples which application was rejected. The Court of appeal upheld the decision of the Administrative Court. The House of Lords had also dismissed the appeal on 22nd July, 2004. The House of Lords had taken the view that the mere retention of fingerprints and DNA samples did not constitute an interference with the right to respect for private life but stated that, if he were wrong in that view, he regarded any interference as very modest indeed.

175. BARONESS HALE disagreed with the majority considering that the retention of both fingerprint and DNA data constituted an interference by the State in a person's right to respect for his private life and thus required justification under the Convention. The application of the applicant was taken by European Court of Human Rights (Strasbourg Court). The Strasbourg Court noticed that majority of the Council of Europe member States allow the compulsory taking of fingerprints and cellular samples in the context of criminal proceedings. The United Kingdom is the only member State expressly to permit the systematic and indefinite retention of DNA profiles and cellur samples of persons who have been acquitted or in respect of whom criminal proceedings have been discontinued.

176. Strasbourg Court held that the mere storing of data relating to the private life of an individual amounts to an interference within the meaning of Article 8. It was further held that in determining whether the personal information retained by the

authorities involves any of the private-life aspects mentioned above, the Court will have due regard to the specific context in which the information at issue has been recorded and retained. In paragraph 67 following has been laid down:

> "67....However, in determining whether the personal information retained by the authorities involves any of the private-life aspects mentioned above, the Court will have due regard to the specific context in which the information at issue has been recorded and retained, the nature of the records, the way in which these records are used and processed and the results that may be obtained *(see, mutatis mutandis, Friedl, cited above, 49-51, and Peck v. The United Kingdom, cited above, 59)."*

177. Following was laid down in paragraph 73 & 77:

> "73. Given the nature and the amount of personal information contained in cellular samples, their retention *per se* must be regarded as interfering with the right to respect for the private lives of the individuals concerned. That only a limited part of this information is actually extracted or used by the authorities through DNA profiling and that no immediate detriment is caused in a particular case does not change this conclusion (see Aman cited above, 69).
>
> 77. In view of the foregoing, the Court concludes that the retention of both cellular samples and DNA profiles discloses an

> interference with the applicants' right to respect for their private lives, within the meaning of Article 8(1) of the Convention."

178. The Court also considered the issue of retention of fingerprints, and held that retention of fingerprints may also give rise to important private life concerns. The Court also held that the domestic law must afford appropriate safeguards to prevent any such use of personal data as may be inconsistent with the guarantees of Article 8. Following was held in paragraph 103:

> "103. 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 (see *mutatis mutandis, Z., cited above, 95)*. 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."

179. United Kingdom Supreme Court had occasion to consider the issue of retention of data in ***Regina (Catt) v. Association of Chief Police Officers of England, Wales and Northern Ireland and another,(2015) 2 WLR 664 — (2015) UKSC 9.*** The UK Supreme Court in the above case also noticed the judgment of Strasbourg in ***S. and Marper v. The United Kingdom.*** The appeal before UK Supreme Court was concerned with the systematic collection retention by police authorities of electronic data about individuals and whether it is contrary to Article 8 of the European Convention. The appellant before the Court had accepted that it was lawful for the police to make a record of the events in question as they occurred, but contends that the police interfered with their rights under Article 8 of the Convention by thereafter retaining the information on a searchable database. After noticing the jurisprudence of the European Court of Human Rights **Lord Sumption** stated following in paragraph 33:

> "33. Although the jurisprudence of the European Court of Human Rights is exacting in treating the systematic storage of personal data as engaging article 8 and requiring justification, it has consistently recognised that (subject always to proportionality) public safety and the prevention and detection of crime will justify it provided that sufficient safeguards exist to ensure that personal information is not retained for longer than is required for the purpose of maintaining public order and preventing or detecting crime, and that disclosure to third parties is properly restricted: see Bouchacourt v France, given 17 December 2009, paras 68-69, and Brunet v. France (Application No.21010/10) (unreported) given 18 September 2014, para 36. In my opinion, both of these requirements are satisfied in this case. Like any complex system dependent on administrative supervision, the present system is not proof against mistakes. At least in hindsight, it is implicit in the 2012 report of HMIC and the scale on which the database was weeded out over the next two years that the police may have been retaining more records than the Code of Practice and the MOPI guidelines really required. But the judicial and administrative procedures for addressing this are effective, as the facts disclosed on this appeal suggest."

180. The preponderance of authorities on the subject of retention of data is that retention of personal data effecting personal life of an individual may interfere in his right of privacy and the State can justify its retention subject to proportionality and

subject to there being sufficient safeguards to personal information is not retained for longer than it required.

181. Reverting back to the Aadhaar Act, it is clear that requesting entity as well as authority are required to retain authentication data for a particular period and thereafter it will be archived for five years and thereafter authentication data transaction shall be deleted except such data which is required by the Court in connection with any pending dispute. We had already noticed that data which is retained by the entity and authority for certain period is minimal information pertaining to identity authentication only no other personal data is retained. Thus, provisions of Aadhaar Act and Regulations made thereunder fulfill three fold test as laid down in ***Puttaswamy case (supra)***, hence, we conclude that storage and retention of data does not violate fundamental right of privacy.

182. Now, we come to issue of surveillance, which has been very strongly raised by petitioners. Shri Shyam Divan, learned counsel for the petitioners has relied on judgment of U.S. Supreme Court in **United States Vs. Antoine Jones**, 132 S.Ct. 945 (2012). Antoine Jones, owner and operator of a nightclub was under suspicion of trafficking in narcotics. A warrant was issued authorising installation of an electronic tracking device on the jeep registered in the name of John's wife. Agents installed a GPS tracking device in the jeep when it was parked in a public parking. On the basis of data obtained from the device, the Government charged Jones for several offences. In trial, Jones found a locational data obtained form the GPS device. A verdict of guilt was returned, which on appeal was reversed by United States, Appeal for District Columbia.

183. Matter was taken to the U.S. Supreme Court. Fourth Amendment provides “the right of the people to be secured in their persons, houses, papers, and effects, against unreasonable searches and seizures,

shall not be violated." **Justice Scalia,** delivering the opinion of the Court affirmed the judgment of Court of Appeal. **Justice Sotomayor** concurring wrote:-

> "I join the Court's opinion because I agree that a search within the meaning of the Fourth Amendment occurs, at a minimum, "[w]here, as here, the Government obtains information by physically intruding on a constitutionally protected area." Ante, at 950, n. 3. In this case, the Government installed a Global Positioning System (GPS) tracking device on respondent Antoine Jones' Jeep without a valid warrant and without Jones' consent, then used that device to monitor the Jeep's movements over the course of four weeks. The Government usurped Jones' property for the purpose of conducting surveillance on him, thereby invading privacy interests long afforded, and undoubtedly entitled to, Fourth Amendment protection. See, e.g., Silverman v. United States, 365 U. S. 505, 511-512 S1 S.Ct. 679, 5 L.Ed.2d 734 (1961). "

184. The above case was a case where tracking device, i.e., GPS was installed in the vehicle with purpose and motive of surveillance and obtaining data to be used against Jones. Present is not a case where it can be said that Aadhaar infrastructure is designed in a manner as to put a surveillance on Aadhaar number holder (ANH).

185. Another judgment which is relied by Shri Shyam Divan is judgment of European Court of Human Rights in Strasbourg Court in **Roman Zakharov Vs. Russia** decided on 04.12.2015. In the above case, the applicant alleged that the system of secret interception of mobile telephone communications in Russia violated his right to respect for his private life and correspondence and that he did not have any effective remedy in that respect. In Para 148 of the judgment, the case of the applicant was noted in the following words:-

> "148. The applicant complained that the system of covert interception of mobile telephone communications in Russia did not comply with the requirements of Article 8 of the Convention, which reads as follows:-
>
> > "1. Everyone has the right to respect for his private and family life, his home and his correspondence.
> > 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals,

> or for the protection of the rights and freedoms of others."

186. The Court came to the following conclusion:-

> "175. The Court notes that the contested legislation institutes a system of secret surveillance under which any person using mobile telephone services of Russia providers can have his or her mobile telephone communications intercepted, without ever being notified of the surveillance. To that extent, the legislation in question directly affects all users of these mobile telephone services."

187. The Strasbourg Court held that there had been violation of Article 8 of the Convention. The above case also does not help the petitioners in reference to Aadhaar structure. Above case was a clear case of surveillance by interception of mobile telecommunication.

188. Another judgment relied by Shri Shyam Divan is **Digital Rights Ireland Ltd. Vs. Minister for Communications, Marine and Natural Resources** decided on 08.04.2014. Para 1 of the judgment notice:-

> "These requests for a preliminary ruling concern the validity of Directive 2006/24/EC of the European Parliament and of the Council of 15 March 2006 on the retention of data

> generated or processed in connection with the provision of publicly available electronic communications services or of public communications networks and amending Directive 2002/58/EC(OJ 2006 L 105, p. 54)."

189. Directive 2006/24 laid down the obligation on the providers of publicly available electronic communications services or of public communications networks to retain certain data which are generated or processed by them. Noticing various articles of the Directives, the Court in Paragraph 27 noted:-

> "27. Those data, taken as a whole, may allow very precise conclusions to be drawn concerning the private lives of the persons whose data has been retained, such as the habits of everyday life, permanent or temporary places of residence, daily or other movements, the activities carried out, the social relationships of those persons and the social environments frequented by them."

190. The directives were held to be violating the principles of proportionality. The above case was also a case of retaining data pertaining to communications by service providers. The retention of communication data is a clear case of intrusion in privacy. The above is also a case which in no manner

help the petitioners when contrasted with the Aadhaar architecture.

191. At this juncture, we may also notice one submission raised by the petitioners that Aadhaar Act could have devised a less intrusive measure/means. It was suggested that for identity purpose, the Government could have devised issuance of a smart card, which may have contained a biometric information and retain it in the card itself, which would not have begged the question of sharing or transfer of the data. We have to examine the Aadhaar Act as it exists. It is not the Court's arena to enter into the issue as to debate on any alternative mechanism, which according to the petitioners would have been better. Framing a legislative policy and providing a mechanism for implementing the legislative policy is the legislative domain in which Court seldom trench.

192. We may refer to a judgment of U.K. Supreme Court **AB Vs. Her Majesty's Advocate, [2017] UKSC 25**, where U.K. Supreme Court has not approved the arguments

based on less intrusive means. Court held that whether the Parliament would have used a less intrusive means does not involve the Court in identifying an alternative measure, which is least intrusive. In Para 37, following has been laid down:-

> "37. I am not persuaded. It is important to recall that the question of whether the Parliament could have used a less intrusive measure does not involve the court in identifying the alternative measure which is least intrusive. The court allows the legislature a margin of discretion and asks whether the limitation on the article 8 right is one which it was reasonable for the Parliament to propose: Bank Mellat v HM Treasury (No 2) [2013] UKSC 38, [2014] AC 700, para 75 per Lord Reed; Animal Defenders International v United Kingdom (2013) 57 EHRR 21, para 110. Had the 2009 Act provided that the reasonable belief defence would not be available if on an earlier occasion the accused had been charged with an offence which itself objectively entailed a warning of the illegality of consensual sexual activity with older children, the fact that there were other options, which were less intrusive, to restrict the availability of that defence would not cause an infringement of the individual's article 8 right. The problem for the Lord Advocate in this appeal is where to find such a warning. "

193. We may profitably note the judgment of Privy Council arising from a decision of Supreme Court of

Mauritius — **Madhewoo Vs. State of Mauritius.** The case relates to a national identity card, which was brought in effect by an Act namely, the National Identity Card Act, 1985 providing for adult citizens of Mauritius to carry identity cards. The Act was amended in 2013 by which Government introduced a new smart identity card, which incorporates on a chip on the citizen's fingerprints and other biometric information relating to his/her characteristics. A citizen of the Republic of Mauritius did not apply for National Identity Card and he challenged the validity of the 2013 Act. The Supreme Court of Mauritius held that the provisions of 1985 Act, which enforce the compulsory taking and recording of fingerprints of a citizen disclosed an interference with the appellant's rights guaranteed under Section 9(1) of the Constitution. The Section 9(1) provided "except with his own consent, no person shall be subject to the search of his person or his private or the entry by others in his premises." Supreme Court had rejected the challenge to the other provisions of the

Constitution. Matter was taken to the Privy Council. The challenge made before the Privy Council was noticed in Para 7 of the judgment, which is to the following effect:-

> "7. In this appeal the appellant challenges the constitutionality of (a) the obligation to provide fingerprints and other biometric information under section 4, (b) the storage of that material on the identity card under section 5, (c) the compulsory production of an identity card to a policeman under section 7(1A) in response to a request under section 7(1)(b), and (d) the gravity of the potential penalties under section 9(3) for non-compliance. He claims, first, that the implementation of the new biometric identity card is in breach of sections 1, 2, 3, 4, 5, 7, 9, 15, 16 and 45 of the Constitution coupled with article 22 of the Civil Code (which provides that everyone has the right to respect for his private life and empowers courts with competent jurisdiction to prevent or end a violation of privacy) and, secondly, that the collection and permanent storage of personal biometric data, including fingerprints, on the identity card are in breach of those sections of the Constitution and that article of the Civil Code. "

194. The Privy Council agreed with the decision of the Supreme Court that compulsory taking of fingerprints and the extraction of minutiae involved an interference with the appellant's Section 9 rights

which required to be justified under Section 9(2). The challenge raised before the Privy Council has been noticed in Para 25, which challenges were repelled. Paras 25 and 26 are as follows:-

> "25. The appellant challenges the Supreme Court's evaluation because, he submits, the creation of a reliable identity card system does not justify the interference with his fundamental rights. He submits that the obligation to provide his fingerprints interferes with his right to be presumed innocent and also that an innocuous failure to comply with section 4(2)(c) could give rise to draconian penalties under section 9(3) of the Act (para 6 above). He also points out that in India a proposal for a biometric identity card was held to be unconstitutional, and, in the United Kingdom, libertarian political opposition resulted in the repeal of legislation to introduce biometric identity cards. The interference, he submits, is disproportionate.
>
> 26. In the Board's view, these challenges do not undermine the Supreme Court's assessment. First, the requirement to provide fingerprints for an identity card does not give rise to any inference of criminality as it is a requirement imposed on all adult citizens. It is true that, if circumstances arose in which a police officer was empowered to require the appellant to produce his identity card and the government had issued card readers, the authorities would have access to his fingerprint minutiae which they could use for the purposes of identification in a criminal investigation. But that does not alter the presumption of innocence.

> Secondly, the penalties in section 9(3) are maxima for offences, including those in section 9(1), which cover serious offences such as forgery and fraudulent behaviour in relation to identity cards. The subsection does not mandate the imposition of the maximum sentence for any behaviour. Thirdly, while judicial rulings on international instruments and the constitutions of other countries can often provide assistance to a court in interpreting the provisions protecting fundamental rights and freedoms in its own constitution, the degree of such assistance will depend on the extent to which the documents are similarly worded. ”

195. As noticed above, learned counsel for the petitioners has raised various issues pertaining to security and safety of data and CIDR. Apprehensions raised by the petitioners does not furnish any ground to struck down the enactment or a legislative policy. This Court in **G. Sundarrajan Vs. Union of India and Others. (2013) 6 SCC 620,** had occasion to consider India's National Policy and challenge to a Nuclear Project, which was launched by the Government upholding the legislative policy, the Court laid down following in Paras 15 and 15.1:-

> “15. India's National Policy has been clearly and unequivocally expressed by the legislature in the Atomic Energy Act.

National and International policy of the country is to develop control and use of atomic energy for the welfare of the people and for other peaceful purposes. NPP has been set up at Kudankulam as part of the national policy which is discernible from the Preamble of the Act and the provisions contained therein. It is not for Courts to determine whether a particular policy or a particular decision taken in fulfillment of a policy, is fair. Reason is obvious, it is not the province of a court to scan the wisdom or reasonableness of the policy behind the Statute.

15.1. Lord MacNaughten in Vacher & Sons Ltd. v. London Society of Compositors (1913) AC 107 HL has stated:

> ".....Some people may think the policy of the Act unwise and even dangerous to the community.....But a Judicial tribunal has nothing to do with the policy of any Act which it may be called upon to interpret. That may be a matter for private judgment. The duty of the Court, and its only duty, is to expound the language of the Act in accordance with the settled rules of construction."

196. This Court also held that a project cannot be stopped merely on the ground of apprehension. In the present case, also lot of apprehensions of possibilities of insecurity of data has been raised. In India, there is no specific data protection laws

like law in place in United Kingdom. In Privacy judgment – **Puttaswamy (supra)**, this Court has noticed that **Shri Krishna Commission** is already examining the issue regarding data protection and as has been stated by learned Attorney General before us, after the report is received, the Government will proceed with taking steps for bringing a specific law on data protection. We need not say anything more on the above subject. After we have reserved the judgment, Srikrishna Commission has submitted its report containing a draft Personal Data Protection Bill, 2018 in July 2018. The report having been submitted, we hope that law pertaining to Personal Data Protection shall be in place very soon taking care of several apprehensions expressed by petitioners.

197. The Aadhaar architecture is to be examined in light of the statutory regime as in place. We have noticed the regulations framed under Aadhaar Act, which clearly indicate that regulations brings in place statutory provisions for data protection, restriction on data sharing and other aspects of the

matter. Several provisions of penalty on data breach and violation of the provisions of the Act and regulations have been provided.

198. We have no reason to doubt that the project will be implemented in accordance with the Act and the Regulations and there is no reason to imagine that there will be statutory breaches, which may affect the data security, data protection etc. In view of foregoing discussions, we are of the considered opinion that Statutory regime as delineated by the Aadhaar Act and the Regulations fulfills the three-fold test as laid down in **Puttaswamy (supra)** and the law, i.e. Aadhaar Act gives ample justification for legitimate aim of the Government and the law being proportional to the object envisaged. The petitioners during their submissions have also attacked various provisions of Enrolment and Update Regulations, Authentication Regulations, Data Security Regulations and Sharing of Information Regulations. All the above regulations have been framed in exercise of power under Section 54 of the Act on the matters covered by

the Act. We having held that by collection of data, its retention, storage, use and sharing, no Privacy Right is breached, we are of the view that related regulations also pass the muster of three-fold tests as laid down in ***K.Puttaswamy case***. The provisions of Act in the above regard having passed the muster of three-fold tests, the related regulations also cannot be held to breach Right of Privacy. Thus, challenge to regulations relating to collection, storage, use, retention and sharing fails and it is held that they do not violate Constitutional Rights of Privacy. In result, we answer the Issue Nos. 3, 4 and 5 in following manner:-

Ans. 3, 4, 5:-

(i) Collection of data, its storage and use does not violate fundamental Right of Privacy.

(ii) Aadhaar Act does not create an architecture for pervasive surveillance.

(iii) Aadhaar Act and Regulations provides protection and safety of the data received

from individuals.

Issue Nos. 6 and 7	**Whether Section 7 OF Aadhaar Act is unconstitutional?** **Whether right to food, shelter etc. envisaged under Article 21 shall take precedence on the right to privacy of the beneficiaries?**

199. Shri Pandit Jawahar Lal Nehru while concluding debate on "Aims and Objects Resolution" on 22.01.1947 in the Constituent Assembly of India stated:

> "The first task of this Assembly is to free India through a new constitution to feed the starving people and cloth the naked masses and to give every Indian fullest opportunity to develop himself according to his capacity. This is certainly a great task."

200. After attaining the freedom the country proceeded to realise the dream and vision which founding fathers of our democratic system envisaged. The Constitution of India apart from enumerating various Fundamental Rights including right to life has provided for Directive Principles of State Policy under Chapter IV of the Constitution which was to find objectives in

governess of the country. Article 38 provided that State shall strive to promote the welfare of the people by securing and protecting as effectively as it may a social order in which justice, social, economic and political, shall inform all the institutions of the national life. It further provided that the State shall, in particular, strive to minimise the inequalities in income, and endeavour to eliminate inequalities in status, facilities and opportunities, not only amongst individuals but also amongst groups of people residing in different areas or engaged in different vocations.

201. After enforcement of the Constitution almost all the Governments worked towards the object of elimination of poverty and to empower marginal/poor section of the society. The endeavour of the Government was always to frame policies keeping in view the “little Indian” who is in the centre of all policies and governance.

202. Section 7 of the Aadhaar Act is the most important provision of the Aadhaar Act around which

entire architecture of Aadhaar Act has been built. Section 7 is to the following effect:

> "7. 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."

203. The objects and reasons of the Act as noticed above as well as the Preamble of the Act focus on targeted delivery of financial and other subsidies, benefits and services which are envisaged in Section 7. The petitioners challenge the constitutionality of Section 7. They submit that Section 7 seeks to render the constitutional and statutory obligations of the State to provide benefits, subsidies and services, conditional upon an individual parting with his or her

biometric and demographic information. 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. An individual has constitutional right to receive benefits, subsidies and services which is fundamental right and it is State's obligation to provide for fulfillment of that fundamental right. He submitted that there is no rationale in enactment of Section 7 neither there was any legitimate state interest nor the provision is proportionate. The petitioners submit that provision of requiring every person to undergo authentication to avail benefits/services/ entitlements, falls foul of Article 14. Since, firstly such mandatory authentication has caused, and continues to cause, exclusion of the most marginalised section of society; and secondly this exclusion is not simply a question of poor implementation that can be administratively

resolved, but stems from the very design of the Act. Learned counsel for the petitioners have referred to and relied on several materials in support of their submissions that working of Section 7 has caused exclusion. Since a large number of persons who are entitled to receive benefits, subsidies and services are unable to get it due to not being able to authenticate due to various reasons like old age, change of biometric and other reasons. The petitioners have referred to affidavits filed by several individuals and NGOs who after field verification brought materials before this Court to support their submission regarding large scale exclusion. It is further contended that State's contention that Circular dated 24.10.2017 has resolved implementation issued cannot be accepted. The authentication system in the Aadhaar Act is probabilistic. Biometric technology does not guarantee 100% accuracy and it is fallible, refers UIDAI's own Report on "Role of Biometric Technology in Aadhaar Entrolment" (2012) has been made where Report stated that biometric accuracy

after accounting for the biometric failure to enrol rate, false positive identification rate, and false negative identification rate, was 99.768% accuracy. For a population over 119.22 crore enrolled in Aadhaar, it is a shocking admission of the fact that there are 27.65 lakh people who are excluded from benefits linked to Aadhaar. It is contended that validity of an act is to be judged not by its object or form, but by its effect on fundamental rights. Mandatory authentication at the point of use violates Article 21. It is contended that the Government has failed to discharge its burden of proof under Article 21. The State has also failed to satisfy the test of proportionality which makes Section 7 unconstitutional.

204. The petitioners further submit that the claim of the Government that by Aadhaar authentication the State has been able to save 11 billion per annum is incorrect and without any basis. It is further submitted that massive savings under Mahatma Gandhi National Rural Employment Guarantee Scheme under

Financial Benefits Accrued on account for DBT/Aadhaar since 2014 claims of substantial savings upto 2015-16 the amount of reported savings is shown as Rs.3000 crores and upto 2016-17 it is shown as Rs.11,741 crores. Referring to the claim of the Government that he submitted facts of job cards could be only 67,637 were found to be job cards linked to more than one Aadhaar number. Thus, maximum saving for this period would be 127.88 crores compared to the inflated figure of Rs.3000 crores. The Financial Benefits claimed under PAHAL scheme was Rs.14,672 crores which is not correct. Referring to Comptroller and Auditor General Report, it is pointed out that with respect to 2014-15, the real outcome of savings is only 1.33 crores. He submits that major saving was on account of decrease in off-take of domestic subsidised cylinders of consumer and decrease in fuel prices. On Public Distribution System referring to answer to a question in Lok Sabha on 26.07.2016 it is submitted that the Minister of Consumer Affairs, Food and Public

Distribution has stated only that approximately 2.33 crores ration cards were deleted during 2013-2016.

205. Learned Attorney General has referred to material on record to justify the legitimate state aim which led to enactment of Section 7. Learned Attorney General refers to Report No.3 of 2000 of the Comptroller and Auditor General of India which has been brought on record as Annexure R-I to the common additional affidavit on behalf of respondents. He submits that the Comptroller and Auditor General in his Report states that 1.93 crore bogus ration cards were found to be in circulation in 13 States. Report further states that a signification portion of the subsidised food-grains and other essential commodities did not reach the beneficiaries due to their diversion in the open market. The Performance Report of the Planning Commission of India titled "Performance Evaluation Report of Targeted Public Distribution System (TPDS)" dated March, 2005 which has been brought on record as Annexure-R-6 to the

common additional affidavit on behalf of respondents notes following:

i. State-wise figure of excess Ration Cards in various states and the existence of over 1.52 crore excess Ration Cards issued [Page 362 of CAA]

ii. Exercise 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.[Pg. 369 of CAA)

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% [Pg.370 of CAA].

v. It is concluded that a large part of the subsidised food grains were not reaching the target group.

206. Similar reports regarding few subsidies have been referred and relied.

207. Learned Attorney General has also relied on the

report submitted by V.V. Giri National Labour Institute and sponsored by the Department of Rural Development, Ministry of Rural Development, Government of India which examined various aspects of National Rural Employment Guarantee Scheme while studying the schedule of rates for National Rural Employment Guarantee Scheme. In paragraph 12.8 (Annesure R-4) to the common additional affidavit on behalf of respondents following has been stated:

> 2. "There was great fraud in making fake cards, muster rolls were not maintained properly, and work was not provided to job seekers sometimes. 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."

208. Another report dated 09.11.2012 of National Institute of Public Finance and Policy's "A Cost-benefit analysis of Aadhaar" estimated that a leakage of approximately 12 percent is being caused to the Government on account of ghost workers and manipulated muster rolls. Thirteenth Finance Commission Report for

2010-2015 dated December, 2000 in Chapter 12 states:

> "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."

209. Various other reports have been referred to and relied by Learned Attorney General to substantiate his case that there was large leakage and pilferation of subsidies which were allocated by the Government under different schemes.

210. This Court had occasion to consider public distribution system in ***PUCL vs. Union of India, (2011) 14 SCC 331,*** the Court noticed the report of High Powered Committee headed by Justice D.P. Wadhwa, retired Judge of this Court who had submitted report on the Public Distribution System. One of the actions suggested by the Committee was noticed in paragraphs 2 and 12 , Component II:

> "2. In order to implement this system across the country, the following actions are suggested by the Committee:
>
> … … …

> Component II: Electronic authentication of delivery and payments at the fair price shop level. In order to ensure that each card-holder is getting his due entitlement, computerisation has to reach literally every doorstep and this could take long. Moreover, several States have already started implementing smart cards, food coupons, etc. which have not been entirely successful. Reengineering these legacy systems and replacing it with the online Aadhaar authentication at the time of food-grain delivery will take time. This is therefore proposed as Component II.
>
> 12. As far as possible, the State Governments should be directed to link the process of computerisation of Component 2 with Aadhaar registration. This will help in streamlining the process of biometric collection as well as authentication. The States/UTs may be encouraged to include the PDs related KYR+ field in the data collection exercise being undertaken by various Registrars across the country as part of the UID (Aadhaar) enrolment."

211. This Court again in the same proceeding passed another judgment on 16.03.2012 ***PUCL vs. Union of India, (2013) 14 SCC 368*** in which following was stated in paragraphs 2 and 4:

> "**2.** There seems to be a general consensus that computerisation is going to help the public distribution system in the country in a big way. In the affidavit it is stated that the Department of Food and Public Distribution has been pursuing the States to

> undertake special drive to eliminate bogus/duplicate ration cards and as a result, 209.55 lakh ration cards have been eliminated since 2006 and the annual saving of foodgrain subsidy has worked out to about Rs 8200 crores per annum. It is further mentioned in the affidavit that end-to-end computerisation of public distribution system comprises creation and management of digitised beneficiary database including biometric identification of the beneficiaries, supply chain management of TPDS commodities till fair price shops.
>
> **4.** In the affidavit it is further mentioned that the Government of India has set up a task force under the Chairmanship of Mr Nandan Nilekani, Chairman, UIDAI, to recommend, amongst others, an IT strategy for the public distribution system. We request Mr Nandan Nilekani to suggest us ways and means by which computerisation process of the public distribution system can be expedited. Let a brief report/affidavit be filed by Mr Nandan Nilekani within four weeks from today."

212. As noted above the figures as claimed by the respondents regarding benefits after implementation of Aadhaar scheme in the MGNREGA and PDS etc. are refuted by the petitioners. Petitioners' case is that amounts of savings which are claimed are not correct and at best there was only meager benefit of savings from the implementation of the scheme. We need not to enter

into the issue regarding respective claims in the above regard. The reasons which led to enactment of Section 7 that benefits and subsidies are substantially diverted and are not able to reach have been made out even if saving were not substantial but meager.

213. The report and material which have been brought on record by the Government fully demonstrate the legitimate aim of the State in enacting Section 7. This Court in ***Francis Coralie Mullin vs. Administrator, Union Territory of Delhi and others, 1981 (1) SCC 608,*** while elaborating on right of life under Article 21, held that the right to life includes the right to live with dignity and all that goes along with it namely the bar necessaries of life such as adequate nutrition, clothing and shelter.

214. The United Nation under Universal Declaration of Human Rights also acknowledges everyone has a right to standard of living which includes food, clothing, housing and medical care. Article 25 of the Declaration which was made in 1948 is as follows:

> "25.1 Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and
>
> necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control."

215. The English author, JOHN BERGER said:

> "The poverty of our century is unlike that of any other. It is not, as poverty was before, the result of natural scarcity, but of a set of priorities imposed upon the rest of the world by the rich. Consequently, the modern poor are not pitied...but written off as trash."

216. The identification of the poor, as was referred by **John Berger** is the first step to realise the UN Declaration of Human Rights as well as the Fundamental Rights guaranteed under the Constitution of India. The Aadhaar Act brings into existence a process of identification which is more accurate as compared to other identity proofs.

217. At this stage, we need to notice one more submission which was raised by the learned Attorney General. It has been submitted by the learned Attorney General that subsidies and benefits under Section 7 of the Aadhaar Act are traceable to Article 21. It is submitted that if the rights which are sought to be realised by means of Section 7 are juxtaposed against the right of privacy, the former will prevail over the latter. The issue is as to whether the State by enlivening right to food and shelter envisaged under Article 21 encroach upon the right of privacy ? There cannot be a denial that there may be *inter se* conflict between fundamental rights recognised by the Constitution in reference to a particular person. The Court has to strive a balance to leave enough space for exercise of both the fundamental rights.

218. It cannot be accepted that while balancing the fundamental rights one right has to be given preference. We may notice that privacy judgment i.e. ***Puttaswamy case*** has noticed and already rejected

this argument raised by the learned Attorney General in paragraph 266 in the following words:

> "266. The Attorney General argued before us that the right to privacy must be forsaken in the interest of welfare entitlements provided by the State. In our view, the submission that the right to privacy is an elitist construct which stands apart from the needs and aspirations of the large majority constituting the rest of society, is unsustainable. This submission betrays a misunderstanding of the constitutional position. Our Constitution places the individual at the forefront of its focus, guaranteeing civil and political rights in Part III and embodying an aspiration for achieving socio-economic rights in Part IV. The refrain that the poor need no civil and political rights and are concerned only with economic well-being has been utilised through history to wreak the most egregious violations of human rights...."

219. One of the submissions which has been raised by the petitioners targeting the Aadhaar authentication is that biometric system under the Aadhaar architecture is probabilistic. Biometric technology does not guarantee 100% accuracy and it is fallible, with inevitable false positives and false negatives that are design flaws of such a probabilistic system. We have noted above the reliance

on UIDAI's Report of the year 2012 where UIDAI itself has claimed that biometric accuracy was 99.768%. The petitioner is still criticising that since .232% failures are there which comes to 27.65 lakh people who are excluded from benefits linked to Aadhaar. The above submission of the petitioner ignores one aspect of the matter as has been contended by the respondents that in case where there is biometric mis-match of a person even possession of an Aadhaar number is treated sufficient for delivery of subsidies and benefits. Thus, physical possession of Aadhaar card itself may mitigate biometric mis-match. However, in case of mis-match instruments are there to accept other proof of identity, the respondents have referred to Circular dated 24.10.2017 issued by UIDAI. The Circular dated 24.10.2017 has been criticised by the petitioners stating that violation of right cannot be left to vagaries of administration. There cannot be any dispute to the above propositions. It is the obligation of the State to ensure that there is no violation of fundamental rights of a person. Section 7

is an enabling provision which empowers the State Government to require that such individual undergo authentication for receipt of a subsidy, benefit or service but neither Section 7 nor orders issued by the Central Government and State Government can be read that in the event authentication of a person or beneficiary fails, he is not to be provided the subsidies and benefits or services. The provision is couched as an enabling provision but it cannot be read as a provision to negate giving subsidies, benefits or services in the event of failure of authentication. We are of the view that Circular dated 24.10.2017 which fills a gap and is a direction facilitating delivery of benefits and subsidies does not breach by provisions of the Act.

220. Now, we come to arguments of exclusion as advanced by the petitioners in support of their submission that exclusion makes Section 7 arbitrary and violative of Articles 14 and 21. From the material brought on record by the parties, we have no reason to doubt that there has been denial to few persons due to

failure of authentication. There is ample material on record to indicate that prior to enforcement of Aadhaar Scheme there had been large number of denial of benefits and subsidies to real beneficiaries due to several reasons as noted above. Functioning of scheme formulated by the Government for delivery of benefits and subsidies to deserving persons is a large scale scheme running into every nook and corner of the country. When such scheme of Government is implemented, it is not uncommon that there may be shortcomings and some denial. There is no material on record to indicate that as compared to non-receipt of eligible beneficiaries prior to enforcement of the Act, there is increase of failure after the implementation of the Act. It cannot be accepted that few cases of exclusion as pointed out by the petitioners makes Section 7 itself arbitrary and violative of Articles 14 and 21. Pitfalls and shortcomings are to remove from every system and it has been fairly submitted by the learned Attorney General as well as learned counsel for the UIDAI that

as and when difficulties in implementation and cases of denial are brought into the notice, remedial measures are taken. The respondents are still ready to take such remedial measures to ensure that there is no denial of subsidies to deserving persons. We, however, are of the view that denial of delivery of benefits and subsidies to deserving persons is a serious concern and violation of the rights of the persons concerned. It has to be tackled at all level and the administration has to gear up itself and implementation authority has to gear up itself to ensure that rightful beneficiaries are not denied the constitutional benefits which have been recognised and which are being implemented by the different schemes of the Government. Both the Government and UIDAI are fully empowered to make Rules and Regulations under Sections 53 and 54 of the Aadhaar Act respectively and exclusions have to be taken care by exercising the power under Section 53 by the Central Government and under Section 54 by the UIDAI to remedy such shortcomings and denial. We are sure that both the

Central Government and UIDAI shall advert to the exclusionary factors.

221. We may also notice a judgment of the US Supreme Court in ***Otis R. Bowen, Secretary of Health and Human Services, et al. vs. Stephen J. Roy et al., 476 US 693 (1986)***. The US Supreme Court held that statutory requirement that a state agency utilise Social Security numbers in administering the programs in question does not violate the Free Exercise Clause. The appellants applied and received benefits under the Aid to Families with Dependent Children program and the Food Stamp program. They, however, refused to comply, with the requirement that participants in these programs furnish their state welfare agencies with the Social Security numbers of the members of their household as a condition of receiving benefits. Appellants had contended that obtaining a Social Security number for their 2-year-old daughter, would violate their Native American religious beliefs. On refusal to give Social Number, benefits payable to the appellants were terminated. The claim of the

appellants was dismissed. The challenge raised by the appellants was noticed in the following words:

> “Appellees raise a constitutional challenge to two features of the statutory scheme here.4 They object to Congress' requirement that a state AFDC plan "must . . . provide (A) that, as a condition of eligibility under the plan, each applicant for or recipient of aid shall furnish to the State agency his social security account number." 42 U.S.C. § 602(a)(25) (emphasis added). They also object to Congress' requirement that "such State agency shall utilize such account numbers . . . in the administration of such plan." Ibid. (emphasis added).5 We analyze each of these contentions, turning to the latter contention first.”

222. The U.S. Supreme Court upheld the requirement of providing of Social Security number. Following has been observed:

> “The general governmental interests involved here buttress this conclusion. Governments today grant a broad range of benefits; inescapably at the same time the administration of complex programs requires certain conditions and restrictions. Although in some situations a mechanism for individual consideration will be created, a policy decision by a government that it wishes to treat all applicants alike and that it does not wish to become involved in case-by-case inquiries into the genuineness of each religious objection to such condition or restrictions is entitled to substantial

> deference. Moreover, legitimate interests are implicated in the need to avoid any appearance of favoring religious over nonreligious applicants.
>
> The test applied in cases like Wisconsin v. Yoder, U.S. 205, 92 S.Ct. 1526, 32 L.Ed.2d 15 (1972), is not appropriate in this setting. In the enforcement of a facially neutral and uniformly applicable requirement for the administration of welfare programs reaching many millions of people, the Government is entitled to wide latitude. The Government should not be put to the strict test applied by the District Court; that standard required the Government to justify enforcement of the use of Social Security number requirement as the least restrictive means of accomplishing a compelling state interest.17 Absent proof of an intent to discriminate against particular religious beliefs or against religion in general, the Government meets its burden when it demonstrates that a challenged requirement for governmental benefits, neutral and uniform in its application, is a reasonable means of promoting a legitimate public interest."

223. Another case of the Appellate Division of the Supreme Court of the State of New York which needs to be noticed is in the matter of ***Buchanan v. Wing, 664 N.Y. 2d 865.*** In the above case petitioners were recipients of Aid to Families with Dependent Children, the facts of the case have been noticed in the following words:

> "Petitioners and their four minor children are recipients of Aid to Families with Department Children (hereinafter ADC) (Social Services Law 343 et seq.) and food stamps from the Broome County Department of Social Services (hereinafter the Department). In February 1996, petitioners received notice from the Department that they were to participate in an identity verification procedure known as the automated finger imaging system (hereinafter AFIS) as a condition of eligibility for benefits required by 18 NYCRR 351.2(a)(245 A.D. 2d 635). Petitioners responded that they would not participate because of their religious convictions. Respondent Commissioner of the Department thereafter discontinued their ADC and food stamp entitlements for failure to comply."

224. The petitioners refused to participate in an identify verification by procedure known as automated finger imaging system which was a condition of eligibility for benefits. Upholding the process of verification by finger imaging following was laid down:

> "We have examined petitioners' constitutional claims and find them to be without merit. In our view, petitioners' failure to articulate a viable claim that they are being required to participate in an invasive procedure that is prohibited by their religious beliefs is dispositive of their arguments claiming a violation of their freedom to exercise their religion pursuant to the Federal and State

> Constitutions (US Const 1st Amend; NY Const, art I, 3). We are also unpersuaded by petitioners' contention that the Department violated NY Constitution, article XVII, 1 (which provides that aid and care of the needy are public concerns and shall be provided by the State) by discontinuing their public assistance benefits. Since petitioners cannot be classified as needy until such time as they are finger imaged to determine whether they are receiving duplicate benefits, no violation of this constitutional provision has been stated. Moreover, contrary to petitioners' arguments, the discontinuance of public assistance to their entire family unit (see, 18 NYCRR 352.30)(245 A.D. 2d 637) does not infringe the constitutional rights of their children (who are not named petitioners in light of valid legislation premising the eligibility of the children within the family unit upon the eligibility of the entire household (see, Matter of Jessup v D'Elia, 69 N.Y. 2d 1030)."

225. Another judgment which has been relied by the respondents is ***Doris McElrath v. Joseph A. Califano, Jr., Secretary of Health, Education and Welfare, 615 F.2d 434***. Under Social Security Act, 1935, a public assistance program of federal and state cooperation providing financial aid to needy dependent children and the parents or relatives with whom they reside, one of the conditions which was added so that as a condition of eligibility under the plan, each

applicant for or recipient of aid shall furnish to the State agency his social security account number. The contention of the appellant was noticed in paragraph 11 which is to the following effect:

> "[11] The appellants' principal contention on appeal is that the federal and state regulations requiring dependent children to acquire and submit social security account numbers as a condition of eligibility for AFDC benefits are statutorily invalid as being inconsistent with and not authorized by the Social Security Act. We find the arguments advanced in support of this contention to be without merit and hold that the challenged regulations constitute a legitimate condition of eligibility mandated by the Congress under the Social Security Act. Accord, Chambers v. Klein, 419 F. Supp. 569 (D.N.J. 1976), aff'd mem., 564 F.2d 89 (3d Cir. 1977); Green v. Philbrook, 576 F.2d 440 (2d Cir. 1978); Arthur v. Department of Social and Health Services, 19 Wn. App. 542, 576 P.2d 921 (1978). We therefore conclude that the district court properly dismissed the appellants' statutory invalidity allegations for failure to state a claim upon which relief could be granted."

226. The appellant had also contended that disclosure of social security account number violates their constitutional rights to privacy. Said argument was

rejected. While rejecting the argument following was stated in paragraph 20:

> “[20] Finally, the appellants maintain that the social security account number disclosure requirement violates their constitutional rights to privacy and to equal protection of the law. We disagree. The constitutional guarantee of the right to privacy embodies only those personal rights that can be deemed "fundamental" or "implicit in the concept of ordered liberty." Roe v. Wade, : 410 U.S. 113, 152, 93 S.Ct. 705, 726, 35 L.Ed.2d 147 (1973). It is equally well-settled that "[w]elfare benefits are not a fundamental right . . . ." Lavine v. Milne, 424 U.S. 577, 584, n. 9, 96 S.Ct. 1010, 1015, 47 L.Ed.2d 249 (1976). Accordingly, we regard the decision of Mrs. McElrath whether or not to obtain social security account numbers for her two minor children in order to receive welfare benefits as involving neither a fundamental right nor a right implicit in the concept of ordered liberty. Chambers v. Klein, 419 F. Supp. 569, 583 (D.N.J. 1976), aff'd mem. 564 F.2d 89 (3d Cir. 1977). This case is not concerned with a decision impacting the privacy of the appellants on the magnitude of criminal sanctions or an absolute prohibition on the appellants' conduct. See, e. g., Griswold v. Connecticut, : 381 U.S. 479, 85 S.Ct. 1678, 14 L.Ed.652d 510 (1965); Eisenstadt v. Baird,: 405 U.S. 438, 92 S.Ct. 1029, 31 L.Ed.2d 349 (1972). Rather, it is concerned with a condition of AFDC eligibility and the only sanction for not complying is to forego certain governmental benefits. Simply stated, the claim of the appellants to receive welfare benefits on their own informational terms does not rise to the level of a

> constitutional guarantee. Moreover, the contention that disclosure of one's social security account number violates the right to privacy has been consistently rejected in other related contexts. See, e.g., Cantor v. Supreme Court of Pennsylvania, 353 F. Supp. 1307, 1321-22 (E.D.Pa. 1973); Conant v. Hill, 326 F. Supp. 25, 26 (E.D.Va. 1971)."

227. The trends of judgments as noted above do indicate that condition for identification or disclosing particular identity number for receiving a benefit from State does not violate any of the Constitutional rights. We, thus, find that Section 7 fulfills the three fold tests as laid down in ***Puttaswamy case***.

228. Shri Gopal Subramanium relying on Article 243G and Eleventh Schedule of the Constitution submits that Aadhaar Scheme and its authentication for benefits, subsidies and services militate against the above Constitution provision and hence are ultra vires to the Constitution. Article 243G deals with powers, authority and responsibilities of Panchayats, which is to the following effect:-

> **243G. Powers, authority and responsibilities of Panchayats:-** Subject to the provisions of this Constitution the Legislature of a State may, by law, endow the Panchayats with such powers and authority and may be necessary to enable them to function as institutions of self-government and such law may contain provisions for the devolution of powers and responsibilities upon Panchayats, at the appropriate level, subject to such conditions as may be specified therein, with respect to---
>
> (a) the preparation of plans for economic development and social justice;
>
> (b) the implementation of schemes for economic development and social justice as may be entrusted to them including those in relation to the matters listed in the Eleventh Schedule.

229. Article 243G(b) refers to Eleventh Schedule to the Constitution. Eleventh Schedule contains list of several matters. Shri Subramanium relies on Item No. 11, 12, 16, 17, 23, 25 and 28, which are as under:-

> 11. Drinking Water.
>
> 12. Fuel and Fodder.
>
> 16. Poverty alleviation programme.
>
> 17. Education, including primary and secondary schools.

23. Health and Sanitation, including hospitals, primary health centres and dispensaries.

25. Women and child development.

28. Public distribution system.

230. Article 243G is an enabling provision, which enable the State Legislature, by law, to endow the Panchayats with such powers and authorities as may be necessary to enable them to function as institutions of self-government. The Items on which State, by law, can endow Panchayats in Eleventh Schedule are items to deal with subjects enumerated therein. For example, Item No. 16 deals with Poverty alleviation programme and Item No. 28 deals with Public Distribution System. State is fully competent to make laws to authorise the Panchayats to take over all the matters enumerated in Eleventh Schedule. The question to be considered is as to whether the Aadhaar Act in any manner militate with Constitutional provisions of Article 243G. The Aadhaar Act is an Act enacted by Parliament, which is referable to Entry 97 of List I. The Aadhaar Act has been enacted

to provide for 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. The Act, thus, has been enacted to regulate the expenditure, which is incurred from the Consolidated Fund of India. No conflict between the Aadhaar Act and any law, which may be enacted by State under List II is seen. Even if any conflict is supposed, the Doctrine of Pith and Substance has to be applied to find out nature of two legislations. In Pith and Substance, the Aadhaar Act cannot be said to be entrenching upon any law, which may be made by the State under Item No.5 of List II. In this context, reference is made to judgment of this Court in **State of Uttar Pradesh and Another Vs. Zila Parishad, Ghaziabad and Another, (2013) 11 SCC 783.** In the above case, provisions of Article 243G came to be considered in reference to public distribution orders issued by the State Government in exercise of delegated powers under

Essential Commodities Act, 1955. The Central Government in exercise of power under Section 3 of the Essential Commodities Act, the Government of U.P. issued an order dated 10.8.1999, conferring the power to allot and cancel the fair price shops in rural areas, with certain guidelines, on the Gram Panchayats. Subsequently, the State Government withdrew that order and reinforced the earlier policy dated 03.07.1990 under which the power was vested with the District Magistrate or an authority designated by him to allot or cancel the licenses for Fair Price Shops. The Central Government, in exercise of power under Section 3 of the Essential Commodities Act, issued an order dated 31.8.2001, wherein its powers were delegated to State Government. State Government, in pursuance thereof, issued an order designating the officers of the District level, viz., District Magistrate, Sub-Divisional Magistrate, District Supply Officer to ensure the proper supply and distribution of such commodities. Zila Parishad, Ghaziabad filed a Writ Petition in the High Court challenging the Order dated 13.01.2000 by which the power was withdrawn from the Gram

Panchayats. The Writ Petition was allowed by the High Court against which State of Uttar Pradesh filed an appeal. The submission was raised before this Court on behalf of the writ petitioner that denuding the power from Panchayats will be against the constitutional provision of Article 243G. Such argument on behalf of petitioner has been noticed in Paragraph 14. This Court after considering the provisions of Article 243G and other relevant provisions has laid down in Paras 23 and 24:-

> *"**23**. The High Court has considered the nature of the aforesaid constitutional provision and held as under: (Zila Panchayat case[1], AWC pp. 3981-82, para 16)*
>
> > *"16. In our opinion, this provision is only an enabling provision. It enables the Legislature of a State to endow the Panchayats with certain powers. … Hence, the Legislature of a State is not bound to endow the Panchayats with the powers referred to Article 243-G, and it is in its discretion to do so or not. At any event there is no mention of the public distribution system in Article 243-G of the Constitution."*
>
> *Thus, it is evident that the High Court has taken a view that the provision of Article 243-G is merely an enabling provision, and it*

is not a source of legislation. This view seems to be in consonance with the law laid down by this Court in U.P. Gram Panchayat Adhikari Sangh v. Daya Ram Saroj[4] *wherein an observation has been made that Article 243-G is an enabling provision as it enables the Panchayats to function as institutions of self-government. Further, this Court noted that such law may contain provisions for the devolution of powers and responsibilities upon Panchayats, subject to such conditions as may be specified therein, with respect to the implementation of schemes for economic development and social justice as may be entrusted to them, including those in relations to the matters listed in the Eleventh Schedule. The enabling provisions are further subject to the conditions as may be specified. Therefore, it is for the State Legislature to consider conditions and to make laws accordingly. It is also open to the State to eliminate or modify the same.*

24. *Therefore, it is apparent that Article 243-G read with the Eleventh Schedule is not a source of legislative power, and it is only an enabling provision that empowers a State to endow functions and devolve powers and responsibilities to local bodies by enacting relevant laws. The local bodies can only implement the schemes entrusted to them by the State."*

231. This Court in the above case has reiterated that Article 243G read with Eleventh Schedule is not a source of legislative power, and it is only an enabling provision that empowers a State to endow functions and

devolve powers and responsibilities to local bodies by enacting relevant laws. We, thus, are unable to accept the submission of Shri Gopal Subramanium that Aadhaar Act is ultra vires to Article 243G and Eleventh Schedule to the Constitution.

232. One more submission of the petitioners which needs to be considered is regarding probabilistic nature of biometric solution. We proceed on premise that Aadhaar structure is probabilistic, the petitioners themselves have referred to UIDAI Report where biometric accuracy has been stated to be 99.768%. Stephen Hawkin in his book: "God Created The Integers" states:

> "Over the centuries, the efforts of these mathematicians have helped the human race to achieve great insight into nature, such as the realisation that the earth is round, that the same force that causes an apple to fall here on earth is also responsible for the motions of the heavenly bodies, that space is finite and not eternal, that time and space are intertwined and warped by matter and energy, and that the future can only be determined probabilistically. Such revolutions in the way we perceive the world have always gone hand in hand with revolutions in mathematical thought. Isaac Newton could never have formulated his laws without the analytic geometry of Rene Descartes and Newton's own invention of

> calculus. It is hard to imagine the development of either electrodynamics or quantum theory without the methods of Jean Baptiste Joseph Fourier or the work on calculus and the theory of complex functions pioneered by Carl Friedrich Gauss and Augustin Louis Cauchy- and it was Henri Lebesgue's work on the theory of measure that enabled John von Neumann to formulate the rigorous understanding of quantum theory that we have today. Albert Einstein could not have completed his general theory of relativity had it not been for the geometric ideas of Bernhard Riemann. And practically all of modern science would be far less potent (if it existed at all) without the concepts of probability and statistics pioneered by Pierre-Simon Laplace."

233. The science and technology keeps on changing with pace of time. A scientific invention or module which is invented or launched keeps on improving with time. The ready example is improvement in quality and programmes of mobile phone which has seen steep development in the last one decade. Even if authentication under Aadhaar scheme is probabilistic as on date, we have no doubt that the steps will be taken to minimise the mis-natch and to attain more accuracy in the result. In view of the foregoing discussion we are of the view that the State has given

sufficient justification to uphold the constitutionality of Section 7. We, thus, answer Question Nos.6 and 7 in the following manner:

Ans.6:- Section 7 of the Aadhaar is constitutional. The provision does not deserve to be struck down on account of denial in some cases of right to claim on account of failure of authentication.

Ans.7:- The State while enlivening right to food, right to shelter etc. envisaged under Article 21 cannot encroach upon the right of privacy of beneficiaries nor former can be given precedence over the latter.

Issue No.8	**Whether Section 29 of the Aadhaar Act is liable to be struck down?**

234. The ground to challenge Section 29 is that it permits sharing of identity information. It is submitted that sharing of identity information is breach of Right of Privacy. Section 29 is a

provision, which contains restrictions on sharing information as is clear from the heading of the section. Section 29 sub-section (1) contains prohibition on sharing of any core biometric information collected or created under this Act. Section 29 for ready reference is extracted as below:-

> **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.

235. Sub-section (2) permits sharing of identity information, other than core biometric information, only in accordance with the provisions of this Act and in such manner as may be specified by regulations. Further sub-section (3) prohibits requesting entity to use identity information for any purpose other than that specified to the individual or to disclose any information without the consent of individual. Sub-section (4) provides that no Aadhaar number or core biometric information shall be published, displayed or posted publicly, except for the purposes as may be specified by regulations. The attack on Section 29 that it permits sharing of information is thus wholly misconceived. The objective of the Act is to protect the information and privacy of an individual and so the Section is not liable to be struck down on the specious ground that it permits sharing of the

information. Further sub-section (3) engraft a provision of sharing identity information by requesting entity with consent of the individual. When a person consents about sharing of his identity information, he cannot complain breach of Privacy Right. Petitioners take exception of provision of sub-section(2), which permits identity information other than core biometric information to be shared in accordance with the provisions of this Act and in such manner as may be specified by the regulations. When an Act or Regulation regulates and controls sharing of the information, the provision is regulatory and has been engrafted to protect individual's Privacy Right. The Aadhaar (Sharing of Information) Regulations, 2016 again contains in Chapter II - Restrictions on sharing of identity information. Regulation 3 is restriction on Authority. Regulation 4 is restriction on requesting entity. Regulation 5 fixes responsibility of any agency or entity other than requesting entity with respect to Aadhaar number. Regulation 6 provides restriction on sharing, circulating or publishing of

Aadhaar number.

236. We, thus, conclude that the provision of Section 29 and the Sharing Regulations contains a restriction and cannot be in any manner be held to violate any of the constitutional rights of a person. Objective of the Act is to put restrictions on the sharing information, which also is a legitimate State aim. The provision under Section 29 which permits sharing of identity information except core biometric information in accordance with the Act and Regulations cannot be said to be disproportionate nor unreasonable. Legislature can very well enumerates circumstances and conditions where sharing of information becomes necessary. One of the circumstances where sharing of the information is specifically engrafted in sub-section(2) of Section 33, which provides that nothing contained in 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. Thus, the circumstances which can contemplate for sharing information is reasonable and proportionate. We, thus, held that provisions of Section 29 is constitutional and does not deserves to be struck down. Issue No. 8 is answered in the following manner:-

Ans.8:- Provisions of Section 29 is constitutional and does not deserves to be struck down.

Issue No.9	**Whether Section 33 is Constitutional** ?

237. Section 33 of the Aadhaar Act, 2016 is as follows:

> **"33. Disclosure of information in certain cases.-**(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 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."

238. The first limb of argument of the petitioner is that Section 33 is unconstitutional since it provides for the use of the Aadhaar data base for Police verification which violates the protection against self-incrimination as enshrined under Article 20(3) of the Constitution of India.

239. Sub-section (1) of Section 33 contains an ample restriction in respect of any disclosure information which can be done only in pursuance of an order of the court not inferior to that of a District Judge. The restriction in disclosure of information is reasonable and has valid justification. The authority whose duty is to safeguard the entire data has to be heard before passing an order by the court which amply protects the interest of a person whose data is to be disclosed. An order of the court not inferior to that of a District Judge for disclosure of information itself is an ample protection to that, for no unreasonable purpose data shall be disclosed. Attacking on sub-section (2) of Section 33, it is contended that although (i)disclosure of information has been permitted in the interest of the national security but there is no definition of national security, (ii) there is no independent oversight disclosure of such data on the ground of security, (iii)the provision is neither fair nor reasonable. Section (2) of Section 33 is disproportionate and unconstitutional.

240. Section 33 sub-section (2) contains two safeguards. Firstly, disclosure of information is to be made in the interest of national security and secondly, in pursuance of a direction of an officer not below the rank of Joint Secretary to the Government, who is specially authorised in this behalf by an order of the Central Government. National security, thus, has to be determined by a higher officer who is specifically authorised in this behalf. This Court in ***Ex. Armymen's Protection Services P. Ltd. Vs. Union of India (UOI) and Ors., 2014 (5) SCC 409,*** has held that what is in the interest of national security is not a question of law but that it is matter of a policy. Following was held in paragraphs 16 and 17:

> "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 State or not. It should be left to the Executive. To quote Lord Hoffman in Secretary of State for the Home Department v. Rehman (2003) 1 AC 153:...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 interest 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."

241. The International Courts have also dealt the issue. In a case, namely, **Census Act(BverfGE 65, 1),** judgment of Federal Constitution Court of Germany, judgment dated 11.10.2013, the Court had occasion to consider the case in the context of data processing and protection of individual information against self-incrimination and use of their personal data. Dealing with right of information and self-determination the Court held that individuals have no right in the sense of absolute, unrestricted control over their data.

Following was held by the Court:

> "The guarantee of this right to informational self-determination" is not entirely unrestricted. Individuals have no right in the sense of absolute, unrestricted control over their data; they are after all human persons who develop within the social Community and are dependent upon communication. Information, even if related to individual persons, represents a reflection of societal reality that cannot be exclusively assigned solely to the parties affected. The Basic Law, as has been emphasized several times in the case law of the Federal Constitutional Court, embodies in negotiating the tension between the individual and the Community a decision in favour of civic participation and civic responsibility(see BverfGE 4, 7 [15] ; 8, 274 [329]; 27, 344 [351 and 352]; 33, 303 [334]; 50, 290 [353]; 56, 37 [49]).
>
> Individuals must therefore in principle accept restriction on their right to informational self-determination in the overriding general public interest."

242. Another judgment of European Commission of Human Rights in ***M.S. against Sweden*** was a case that applicant has complained that copies of her medical records containing information on treatment have been forwarded by the clinic without her information to the Insurance Co. The case of the applicant was noticed in paragraph 39 which is to the following effect:

> "39. The applicant submits that the women's clinic's submission of copies of her medical records to the Social Insurance Office without her knowledge or consent interfered with her right to respect for her private life. She maintains that the information contained in these records were of a highly sensitive and private nature. Allegedly, she could not anticipate, when she claimed compensation from the Office, that information on the abortion performed several years after alleged back injury would be forwarded to the Office. She further refers to the fact that the information in question is not protected by the same level of confidentiality at the Office as at the clinic."

243. The Commission held that information was rightly submitted to the Insurance Co. in accordance with law. It is also relevant to refer the judgment of this Court in ***People's Union for Civil Liberties(PUCL) v. Union of India, 1997 (1) SCC 301,*** where the writ petition was filed under Article 32 alleging serious invasion of an individual's privacy on the account of Telephone-tapping. The Court adverted to the Indian Telegraph Act, 1885 and the Rules framed thereunder. The Court has noticed that Section 5(2) of the Telegraph Act permits the interception of messages in accordance with the said section, "Occurrence of any

public emergency" or "in the interest of public safety". In paragraph 28 following was held:

> "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 Apt. 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."

244. This Court issued various directions providing for certain safeguards regarding an order for Telephone- tapping. Thus, on fulfillment of statutory conditions when telephonic conversation can be intercepted no exception can be taken for disclosure of information in the interest of national security.

245. The power given under Section 33 to disclose information cannot be said to be disproportionate. The disclosure of information in the circumstances

mentioned in Section 33 is reasonable and in the public interest.

246. We are satisfied that the provision fulfills three fold test as laid down in ***Puttaswamy case***. There are no grounds to declare Section 33 as unconstitutional.

247. We also need to advert to one of the submissions of the petitioner that permitting disclosure of information for police investigation violates the protection against self-incrimination as provided under Article 20 sub-clause (3). It is true that under Section 33 the Court may order for disclosure of information even for a police investigation. But information so received in no manner can be said to violate the protection given under Article 20 sub-clause (3). The basic information which are with the UIDAI are demographic and biometric information. In this context, reference is made to 11-Judge Constitution Bench judgment of this Court in ***State of Bombay vs. Kathi KALU Oghad, AIR 1961 SC 1808***. The

Constitution Bench had occasion to consider sub-clause (3) of Article 20 of the Constitution. In the above case from the accused who was charged under Section 302/34 IPC during the investigation prosecution has obtained three specimen of hand-writing which were compared by his hand-writing which was part of the evidence. A question was raised as to the admissibility of the specimen of hand-writing, it was contended that use of specimen of hand-writing violated protection under Article 20(3). This Court in paragraph 16 laid down following:

> (16) In view of these considerations, we have come to the following conclusions :-
>
> > (1) An accused person cannot be said to have been compelled to be a witness against himself simply because he made a statement while in police custody, without anything more. In other words, the mere fact of being in police custody at the time when the statement in question was made would not, by itself, as a proposition of law, lend itself to the inference that the accused was compelled to make the statement, though that fact, in conjunction with other circumstances disclosed in evidence in a particular case, would be a relevant consideration in an enquiry whether or not the accused

person had been compelled to make the impugned statement.

(2) The mere questioning of an accused person by a police officer, resulting in a voluntary statement, which may ultimately turn out to be incriminatory, is not 'compulsion'.

(3) 'To be a witness' is not equivalent to 'furnishing evidence' in its widest significance; that is to say, as including not merely making of oral or written Dagduas but also production of documents or giving materials which may be relevant at a trial to determine the guilt innocence of the accused.

(4) Giving thumb impressions or impressions of foot or palm or fingers or specimen writings or showing parts of the body by way of identification are not included in the expression 'to be a witness'.

(5) 'To be a witness' means imparting knowledge in respect of relevant facts by an oral statement or a statement in writing, made or given in Court or otherwise.

(6) 'To be a witness' in its ordinary grammatical sense means giving oral testimony in Court. Case law has gone beyond this strict literal interpretation of the expression which may now bear a wider meaning, namely, bearing testimony in Court or out of Court by a person accused of an offence, orally or in writing.

(7) To bring the statement in question within the prohibition of

> Article 20(3), the person accused must have stood in the character of an accused person at the time he made the statement. It is not enough that he should become an accused, any time after the statement has been made."

248. From what has been held in the above case, it is clear that 'to be a witness' is not equivalent to 'furnishing evidence' in its widest significance. The use of information retained by the UIDAI given by the order of the Court under Section 33 cannot be said to be violating the protection as contained under Article 20(3). Thus, Article 20(3) is not violated by disclosure of information under Section 33. In view of the foregoing discussion, we hold that Section 33 is constitutional.

249. One of the decisions on which Shri K.V. Viswanathan has placed reliance in support of his submission regarding violation of Article 20(3) as well as Article 21 of the Constitution is ***Selvi and others vs. State of Karnataka, 2010(7) SCC 263***. In the above case this Court had considered as to whether certain scientific techniques, namely, narcoanalysis,

polygraph examination and the Brain Electrical Activation Profile (BEAP)test for the purpose of improving investigation efforts in criminal cases violate sub-clause (3) of Article 20 as well as Article 21. The legal issues and questions of law have been noted in paragraphs 2 and 11 to the following effect:

> "2. The legal questions in this batch of criminal appeals relate to the involuntary administration of certain scientific techniques, namely narcoanalysis, polygraph examination and the Brain Electrical Activation Profile (BEAP) test for the purpose of improving investigation efforts in criminal cases. This issue has received considerable attention since it involves tensions between the desirability of efficient investigation and the preservation of individual liberties. Ordinarily the judicial task is that of evaluating the rival contentions in order to arrive at a sound conclusion. However, the present case is not an ordinary dispute between private parties. It raises pertinent questions about the meaning and scope of fundamental rights which are available to all citizens. Therefore, we must examine the implications of permitting the use of the impugned techniques in a variety of settings.
>
> 11. At this stage, it will be useful to frame the questions of law and outline the relevant sub-questions in the following manner:

> I.Whether the involuntary administration of the impugned techniques violates the `right against self-incrimination' enumerated in Article 20(3) of the Constitution?
>
> I-A. Whether the investigative use of the impugned techniques creates a likelihood of incrimination for the subject?
>
> I-B. Whether the results derived from the impugned techniques amount to `testimonial compulsion' thereby attracting the bar of Article 20(3)?
>
> II.Whether the involuntary administration of the impugned techniques is a reasonable restriction on `personal liberty' as understood in the context of Article 21 of the Constitution? ”

250. After considering large number of cases of this Court as well as judgments rendered by Foreign Courts, a conclusion was recorded that those tests, since they are a means for imparting personal knowledge about relevant facts, hence, they come within the scope of testimonial compulsion thereby attracting the protective shield of Article 20(3). In paragraph 189 following was held:

> “189. In light of the preceding

discussion, we are of the view that the results obtained from tests such as polygraph examination and the BEAP test should also be treated as `personal testimony', since they are a means for `imparting personal knowledge about relevant facts'. Hence, our conclusion is that the results obtained through the involuntary administration of either of the impugned tests (i.e. the narcoanalysis technique, polygraph examination and the BEAP test) come within the scope of `testimonial compulsion', thereby attracting the protective shield of Article 20(3). ”

251. In so far as question of violation of Article 21 is concerned, this Court, in paragraphs 225 and 226 has held:

“225. So far, the judicial understanding of privacy in our country has mostly stressed on the protection of the body and physical spaces from intrusive actions by the State. While the scheme of criminal procedure as well as evidence law mandates interference with physical privacy through statutory provisions that enable arrest, detention, search and seizure among others, the same cannot be the basis for compelling a person `to impart personal knowledge about a relevant fact'. 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). Furthermore, the `rule against involuntary confessions' as embodied in Sections 24, 25, 26 and 27 of the Evidence Act, 1872 seeks to serve both the

objectives of reliability as well as voluntariness of testimony given in a custodial setting. A conjunctive reading of Articles 20(3) and 21 of the Constitution along with the principles of evidence law leads us to a clear answer. We must recognise the importance of personal autonomy in aspects such as the choice between remaining silent and speaking. An individual's decision to make a statement is the product of a private choice and there should be no scope for any other individual to interfere with such autonomy, especially in circumstances where the person faces exposure to criminal charges or penalties.

226. Therefore, it is our considered opinion that subjecting a person to the impugned techniques in an involuntary manner violates the prescribed boundaries of privacy. Forcible interference with a person's mental processes is not provided for under any statute and it most certainly comes into conflict with the `right against self-incrimination'. However, this determination does not account for circumstances where a person could be subjected to any of the impugned tests but not exposed to criminal charges and the possibility of conviction. In such cases, he/she could still face adverse consequences such as custodial abuse, surveillance, undue harassment and social stigma among others. In order to address such circumstances, it is important to examine some other dimensions of Article 21. ”

252. The nature of tests which were under consideration in the aforesaid case, were elaborately noticed by this Court and the tests were found to be in nature of

substantial intrusion in the body and mind of an individual, hence, it was held that they violate Article 20(3) as well as Article 21. It is, however, relevant to notice that this Court in ***Selvi*** judgment itself has noticed the distinction in so far as use of fingerprints were concerned. This Court had noticed earlier judgment of ***State of Bombay v. Kathi Kalu Oghad, AIR 1961 SC 1808*** with approval. The biometric information that is fingerprints and iris scan can not be equated to the tests which came for consideration in ***Selvi's case***. Hence, the judgment of this Court in ***Selvi*** does not in any manner support the case of the petitioners. Answer to question No.3 is in following Manner:

Ans.9: Section 33 cannot be said to be unconstitutional as it provides for the use of Aadhaar data base for police investigation nor it can be said to violate protection granted under Article 20(3).

Issue No.10	**Whether Section 47 of the Aadhaar Act is Unconstitutional?**

253. The Petitioner submits that Section 47 of the Aadhaar Act is unconstitutional since it does not allow an individual who is victim of violation of Aadhaar Act to initiate a criminal process. It is submitted that the person who is victim of an offence under the Aadhaar Act has no remedy to file a complaint and Section 47 of the Act restrict the filing of complaint only by Authorities or Officers or persons authorised by it.

254. The above submission is refuted by the respondent that Section 47 has a rationale. The offences and penalties under Chapter VII of the Aadhaar Act are all intended to maintain the purity and integrity of CIDR and the entire enrolment storage in CIDR and authentication exercise can only be efficiently and effectively handled by UIDAI. Thus, jurisdiction to submit a complaint has been conferred to UIDAI which is the most entrusted entity for maintaining the

purity of Aadhaar Scheme and is also affected by offences committed under the Aadhaar Act. Section 47 provides as follows:

> "**47. Cognizance of Offence -** (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."

255. Provisions akin to Section 47 are found in most of Statutes which Statutes defines offences under the Statute and provide penalty and punishment thereunder. Following are some of the Statues which contains a provision akin to Section 47 of Aadhaar Act:

> "1)**Section 22 of Mines and Minerals(Development & Regulation) Act, 1957** — No Court shall take cognizance of any offence punishable under this Act or any rules made thereunder except upon complaint in writing made by a person authorised in this behalf by the Central Government or the State Government.
>
> 2) **Section 34 of the Bureau of Indian Standards Act, 1986 -** No Court shall take cognizance of an offence punishable under this Act, save on a complaint made by or under the authority of the Government or

Bureau or by any officer empowered in this behalf by the Government or the Bureau, or any consumer or any association recognized in this behalf by the Central or State Government.

3) **Section 26(1) of SEBI Act, 1992** — No Court shall take cognizance of any offence punishable under this Act or any rules or regulations made thereunder, save on a complaint made by the Board.

4) **Section 34 of Telecom Regulatory Authority of India Act, 1997** — No Court shall take cognizance of any offence punishable under this Act or the rules or regulations made thereunder, save on a complaint made by the Authority.

5) **Section 57(1) of Petroleum and Natural gas Regulatory Board Act, 2007** — No Court shall take cognizance of any offence punishable under Chapter IX save on a complaint made by the Board or by any investigating agency directed by the Central Government.

6) **Section 47 of Banking Regulation Act, 1949** — No court shall take a cognizance of any offence punishable under sub-section (5) of Section 36AA or Section 46 except upon complaint in writing made by an officer of the Reserve Bank or, as the case may be, the National Bank generally or specially authorised in writing in this behalf by the Reserve Bank, or as the case may be, the National Bank and no court other than that of a Metropolitan Magistrate or a Judicial Magistrate of the first class or any court superior thereto shall try any such offence.

7) **Section 19 of Environment (Protection) Act, 1986** — No court shall take cognizance of

any offence under this Act except on a complaint made by — (a) the Central Government or any authority or officer authorised in this behalf by that Government, or (b) any person who has given notice of not less than sixty days, in the manner prescribed, of the alleged offence and of his intention to make a complaint, to the Central Government or the authority or officer authorised as aforesaid.

8) **Section 43 of The Air (Prevention and Control of Pollution) Act, 1981 —** (1) No Court shall take cognizance of any offence under this Act except on a complaint made by — (a) a Board or any officer authorised in this behalf by it; or (b) any person who has given notice of not less than sixty days, in the manner prescribed, of the alleged offence and of his intention to make a complaint to the Board or officer authorised as aforesaid, and no court inferior to that of a Metropolitan Magistrate or a Judicial Magistrate of the first class shall try any offence punishable under this Act."

256. Large number of Special Acts which defines offences under the Act and their penalty contains provision akin to Section 34 of the Aadhaar Act. Special Acts are enacted for serving special objects towards offences under the Act. The initiation and prosecution of offences under the Special Act are kept by the specified authority to keep the initiation and prosecution in the hands of the authorities under the

Special Act which acts as deterrent and prosecutions are brought to its logical end. Further, objective of such provisions is to discourage frivolous and vexatious complaints.

257. This Court in ***Rajkumar Gupta versus Lt.Governor, Delhi and Others, (1997) 1 SCC 556,*** had occasion to consider Section 34(1) of the Industrial Disputes Act, 1947 and objective behind putting such restriction. Section 34 of Industrial Disputes Act provided that no Court shall take cognizance of any offence punishable under this Act or of the abetment of any such offence, save on complaint made by or under the authority of the appropriate Government. Section 34 of Industrial Disputes Act is *pari materia* with Section 47 of the Aadhaar Act. This Court noticing the objective of Section 34 laid down following in the paragraph 16. The Court held that Section 34 is in the nature of limitation on the entitlement of workman or trade union or an employer to complain of offences under the Act. Following was laid down in paragraph 16:

> " 16. At the same time, the provisions of

> Section 34 are in the nature of a limitation on the entitlement of a workman or a trade union or an employer to complain of offences under the said Act. They should not, in the public interest, be permitted to make frivolous, vexatious or otherwise patently untenable complaints, and to this end Section 34 requires that no complaint shall be taken cognizance of unless it is made with the authorization of the appropriate Govern*ment*."

258. In so far as the submission that there is no forum for a person victim of an offence under Aadhaar Act, suffice to say that Section 47 can be invoked by the authority on its own motion or when it receives a complaint from a victim. The authority i.e. UIDAI has varied powers and functions as enumerated in Section 23 of the Act. It is the authority who is most entrusted in ensuring that the provisions of the Act are implemented in accordance with the Act and offenders should be punished. In so far as remedy of victim is concerned, there are few facts which need to be kept in mind.

259. The Information Technology Act, 2000 defines electronic record in Section 2(t) which is to the following effect:-

> "**Section 2(t)-** "electronic record" means data, record or data generated, image or sound stored, received or sent in an electronic form or micro film or computer generated micro fiche;"

260. The demographic and biometric information which is collected for enrolment of the resident in electronic data as defined in Section 2(t) of Information Technology Act and expressly stated in Section 30 of Aadhaar Act. Chapter 11 of the Information Technology Act defines offences. Section 66C, Section 66D and Section 72 of the Information Technology Act defines offences and provides for penalty, which is to the following effect:-

> "**66C. Punishment for identity theft-** Whoever, fraudulently or dishonestly make use of the electronic signature, password or any other unique identification feature of any other person, shall be punished with imprisonment of either description for a term which may extend to three years and shall also be liable to fine which may extend to rupees one lakh.
>
> **66D. Punishment for cheating by personation by using computer resource-** Whoever, by means for any communication device or computer resource cheats by personating, shall be punished with imprisonment of either description for a term which may extend to three years and shall also be liable to fine

which may extend to one lakh rupees.

> **72. Penalty for breach of confidentiality and privacy** — Save as otherwise provided in this Act or any other law for the time being in force, if any person who, in pursuance of any of the powers conferred under this Act, rules or regulations made thereunder, has secured access to any electronic record, book, register, correspondence, information, document or other material without the consent of the person concerned discloses such electronic record, book, register, correspondence, information, document or other material to any other person shall be punished with imprisonment for a term which may extend to two years, or with fine which may extend to one lakh rupees, or with both."

261. With regard to an offence which falls within the definition of 'offences' a victim can always file complaint or lodge an F.I.R.. Section 46 of the Aadhaar Act clearly provides that the penalties under the Aadhaar Act shall not interfere with other punishments. Section 46 is as follows:

> "**46. Penalties not to interfere with other punishments. -** No penalty imposed under this Act shall prevent the imposition of any other penalty or punishment under any other law for the time being in force."

262. This Court in **State (NCT of Delhi) versus Sanjay, (2014) 9 SCC 772,** had occasion to consider the

provisions of Section 22 of the Mines and Minerals (Development & Regulations) Act, 1957 which provision is similar to Section 47 of the Aadhaar Act. The question arose that whether in case the complaint has not been filed by the authority under Section 22, whether cognizance can be taken of the offence if it falls within definition of any of the offences under the Indian Penal Code. There was divergence of opinions between the different High Courts. This Court after noticing earlier judgments of this Court, laid down following in paragraphs 17 and 73.

> "**17.** Since conflicting views have been taken by the Gujarat High Court, the Delhi High Court, the Kerala High Court, the Calcutta High Court, the Madras High Court and the Jharkhand High Court, and they are in different tones, it is necessary to settle the question involved in these appeals.
>
> ***73.*** *After giving our thoughtful consideration in the matter, in the light of relevant provisions of the Act vis-à-vis the Code of Criminal Procedure and the Penal Code, we are of the definite opinion that the ingredients constituting the offence under the MMDR Act and the ingredients of dishonestly removing sand and gravel from the riverbeds without consent, which is the property of the State, is a distinct offence under IPC. Hence, for the commission of offence Under Section 378 IPC, on receipt of the police report, the*

Magistrate having jurisdiction can take cognizance of the said offence without awaiting the receipt of complaint that may be filed by the authorized officer for taking cognizance in respect of violation of various provisions of the MMDR Act. Consequently the contrary view taken by the different High Courts cannot be sustained in law and, therefore, overruled. Consequently, these criminal appeals are disposed of with a direction to the Magistrates concerned to proceed accordingly. ”

263. The limitation as contained in Section 47 in permitting taking cognizance of any offence punishable under Aadhaar Act only on a complaint made by the authority or any officer or person authorised by it, has legislative purpose and objective, as noticed above. We thus do not find any unconstitutionality in Section 47 of the Aadhaar Act. In view of the foregoing discussions, the answer to Issue No.10 is in following manner:-

Ans.10: Section 47 of the Aadhaar Act cannot be held to be unconstitutional on the ground that it does not allow an individual who finds that there is a violation of Aadhaar Act to initiate any criminal process.

Issue No. 11	Whether Section 57 of Aadhaar Act is unconstitutional?

264. Section 57 of the Act, which contains a heading "Act not to prevent use of Aadhaar Number for other purposes under law" provides:-

> "**57. Act 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."

265. Attacking the provision of Section 57, petitioners contends that broad and unlimited scope of activities covered under Section 57 and kinds of private entities permitted to use Aadhaar is entirely disproportionate beyond the means and objectives of the Act and without any compelling State interests. There are no procedural safeguards governing the actions of private entities and no remedy for undertaking's failure or service denial. The individual, who wish to be

enrolled have given their consent only for Aadhaar subsidies, benefits and services, which cannot be assumed for other purposes. Section 57 has to be struck down on the ground of excessive delegation. “Any purpose” indicates absence of guidelines. Any purpose does not mean all purposes and several aspects of human existence. Section 57 violates all principles of proportionality.

266. Refuting the above submission of the petitioners, the respondents submits that, Section 57 is not an enabling provision, it merely provides as it states that the provisions of the Act would not prevent the use of Aadhaar for other purposes. In fact, Section 57 employs limitation on such user for other purposes, which is engrafted in Proviso to Section 59. The use of Aadhaar having been made subject to procedure and obligations under Section 8 and Chapter VI, the contract must provide for authentication under Section 8 and protection and formulation under Chapter VI also obviously entail the operation of Chapter VII (Offences and Penalties). Section 57 does not have

any relation to other laws, which may be made by Parliament, the other laws made by Parliament would have to be tested on their own merits. Section 57 is not a provision enabling the making of a law or rather it is actually a limitation or restriction to law, which may be made with respect to use of Aadhaar number. The apprehension expressed by the petitioners is about the wide extension of use of Aadhaar in private spheres is completely misplaced.

267. One of the grounds of attack of the petitioners to Section 57 is that it is disproportionate and does not satisfy the proportionality test as laid down in Privacy Judgment – **Puttaswamy case.** Before proceeding further, it becomes necessary to look into the proportionality test, its content and parameters.

268. Patanjali Shastri, Chief Justice, as he then was speaking for a Constitution Bench in **State of Madras Vs. V.G. Row, AIR 1952 SC 196,** while elaborating the expression reasonable restrictions on the exercise of right as occurring in Clause (5) of Article 19 of the

Constitution laid down that reasonable restriction should not be disproportionate. Following was observed in Paragraph 15:-

> "15.....It is important in this context to bear in mind 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. In evaluating such elusive factors and forming their own conception of what is reasonable, in all the circumstances of a given case, it is inevitable that the social philosophy and the scale of values of the Judges participating in the decision should play an important part, and the limit to their interference with legislative judgment in such cases can only be dictated by their sense of responsibility and self-restraint and the sobering reflection that the Constitution is meant not only for people of their way of thinking but for all, and that the majority of the elected representatives of the people have, in authorising the imposition of the restrictions, considered them to be reasonable."

269. A Two Judge Bench of this Court in **Om Kumar and Others Vs. Union of India, (2001) 2 SCC 386**

elaborately considered the concept of proportionality in reference to legislative action. This Court held that ever since the principle of proportionality as noted above applied in India, Jagannadha Rao, J. had referred to judgments of Canadian Supreme Court in **R v. Oakes (1986) 26 DLR 2001** and has noticed the three important components of the proportionality test. First, the measures adopted must be carefully designed to achieve the objective in question. They must not be arbitrary, unfair or based on irrational considerations. In short, they must be rationally connected to the objective. Secondly, the means, must not only be rationally connected to the objective in the first sense, but should impair as little as possible the right to freedom in question. Thirdly, there must be 'proportionality' between the effects of the measures and the objective.

270. Again, in **Teri Oat Estates (P) Ltd. Vs. U.T. Chandigarh and Others, (2004) 2 SCC 130**, Sinha, J. had elaborately reviewed the principle of proportionality. In Paragraph 46, following has been held:-

> "46. By proportionality, it is meant that the question whether while regulating exercise of fundamental rights, the appropriate or least restrictive choice of measures has been made by the legislature or the administrator so as to achieve the object of the legislation or the purpose of the administrative order, as the case may be. Under the principle, the court will see that the legislature and the administrative authority
>
> > "maintain a proper balance between the adverse effects 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".

271. The most elaborate consideration of the Doctrine of Proportionality was made in **Modern Dental College and Research Centre and Others Vs. State of Madhya Pradesh and Others, (2016) 7 SCC 353.** The validity of legislation passed by State of Madhya Pradesh Legislature came for consideration. The Court (speaking through Dr. Justice A.K. Sikri, one of us) held that exercise that is required to be undertaken is the balancing of fundamental right and restrictions imposed, which is known as Doctrine of Proportionality. In Paragraph 60, following has been

stated:-

> "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, 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."

272. Elaborating the constitutional principles, it was laid down that the Constitution permit constitutional rights to be limited to protect public interests or the rights of others. The conflict between two fundamental aspects, i.e. rights on the one hand and its limitation on the other hand - is to be resolved by balancing the two so that they harmoniously co-exist 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. What criteria is to be adopted in for a proper balancing has been explained in Paragraphs 63 and 64:-

> "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. Oakees, (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."

273. The application of Doctrine of Proportionality, while examining validity of the Statute has been accepted in other countries as well. Judgments of the U.S. Supreme Court as well as of United Kingdom, Canadian Supreme Court and Australian Court shows that they have applied proportionality principle while judging a Statute. European Court of Human Rights and other international bodies have recognised the said principle. Privacy judgment in **Puttaswamy case** has also accepted the proportionality doctrine for judging validity of a Statute. In the three-fold test evolved in Privacy Judgment, proportionality is the third

component. Dr. D.Y. Chandrachud, J. in Paragraph 310 has stated following in respect of proportionality:-

> "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."

274. 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.

275. European Court of Justice in **Michael Schwarz Vs. Stadt Bochum** in its judgment dated 17.10.2013, while considering a directive of the European Parliament and on the protection of individuals with regard to the processing of personal data and on the free movement of such data, has applied the proportionality

principle. Following was laid down in Paragraph 40:-

> "40. Fourth, the Court must establish whether the limitations placed on those rights are proportionate to the aims pursued by Regulation No. 2252/2004 and, by extension, to the objective of preventing illegal entry into the European Union. It must therefore be ascertained whether the measures implemented by that regulation are appropriate for attaining those aims and do not go beyond what is necessary to achieve them (see Volker and Markus Schedule and Eifert, paragraph 74)."

276. Court of Justice of the European Union in **Digital Rights Ireland Ltd. Vs. Minister for Communications [2015] QBECJ 127** had occasion to consider the validity of Parliament and Council Directive 2006/24/EC on the retention of data generated or processed by them in connection with the provision of publicly available electronic communications services or of public communications networks. Applying the principle of proportionality, it was held that principle of proportionality requires that acts of the EU institutions be appropriate for attaining the legitimate objectives pursued by the legislation at issue and do not exceed the limits of what is

appropriate and necessary in order to achieve those objectives. Following was laid down in Paragraph 46:

> "46. In summary, Directive 2006/24 is characterised by its functional duality. It is, on the one hand, an entirely traditional Directive which seeks to harmonise national laws that are disparate (recital (5) in the Preamble to Directive 2006/24 states that national laws "vary considerably") or likely to become so, and was adopted in the interests of the functioning of the internal market and precisely calibrated for that purpose, as the court ruled in *Ireland v European Parliament*. However, it is also, on the other hand, a Directive which, even in its harmonising function, seeks to establish where appropriate, obligations- in particular data retention obligations- which constitute, as I shall show later, serious interference with the enjoyment of the fundamental rights guaranteed to European citizens by the Charter, in particular the right to privacy and the right to the protection of personal data."

277. Another judgment by Court of the Justice of European Union (Grand Chamber) is **Tele2 Sverige AB Vs. Post-och telesyrelsen.** A directive of European Parliament and of the Council concerning the processing of personal data and the protection of privacy in the electronic communications sector came for consideration. In Paras 95, 96 and 116 following

was laid down:-

> "95. With respect to that last issue, the first sentence of Article 15(1) of Directive 2002/58 provides that Member States may adopt a measure that derogates from the principle of confidentiality of communications and related traffic data where it is a 'necessary, appropriate and proportionate measure within a democratic society', in view of the objectives laid down in that provision. As regards recital 11 of that directive, it states that a measure of that kind must be 'strictly' proportionate to the intended purpose. In relation to, in particular, the retention of data, the requirement laid down in the second sentence of Article 15(1) of that directive is that data should be retained 'for a limited period' and be 'justified' by reference to one of the objectives stated in the first sentence of Article 15(1) of that directive.
>
> 96. Due regard to the principle of proportionality also derives from the Court's settled case-law to the effect that the protection of the fundamental right to respect for private life at EU level requires that derogations from and limitations on the protection of personal data should apply only in so far as is strictly necessary (judgments of 16 December 2008, Satakunnan Markkinapörssi and Satamedia, C-73/07,EU:C:2008:727,paragraph 56; of 9 November 2010, Volker und Markus Schecke and Eifert, C-92/09 and C-93/09, EU:C:2010:662, paragraph 77; the *Digital Rights* judgment, paragraph 52, and of 6 October 2015, Schrems, C-362/14, EU:C:2015:650, paragraph 92).

116 As regards compatibility with the

> principle of proportionality, national legislation governing the conditions under which the providers of electronic communications services must grant the competent national authorities access to the retained data must ensure, in accordance with what was stated in paragraphs 95 and 96 of this judgment, that such access does not exceed the limits of what is strictly necessary."

278. The U.S. Supreme Court while considering the said test has repeatedly refused to apply the least intrusive test. **Vernonia School District Vs. Wayne Acton, 515 US 646, 132 L.Ed. 2D 564,** was a case where a Student Athlete Drug Policy was adopted by the School District, which authorised random urine analysis drug testing of students participating in the District School Athletic Programme. A student was denied participation in Football game since he and his parents had refused to sign the testing consent forms. The Actons filed suit, seeking for a declaratory and injunctive relief from enforcement of the Policy. One of the submissions raised was that Policy is disproportionate since it asks all the athletes to undergo urine analysis, the test is not least intrusive test. Repelling the least intrusive test,

following was held:-

> “As to the efficacy of this means for addressing the problem: It seems to us self-evident that a drug problem largely fueled by the "role model" effect of athletes' drug use, and of particular danger to athletes, is effectively addressed by making sure that athletes do not use drugs. Respondents argue that a "less intrusive means to the same end" was available, namely, "drug testing on suspicion of drug use." Brief for Respondents 45-46. We have repeatedly refused to declare that only the "least intrusive" search practicable can be reasonable under the Fourth Amendment. Skinner, supra, at 629, n.9, 103 l Ed 2d 639, 109 S Ct. 1402 (collecting cases).

279. To the same effect is another judgment of U.S. Supreme Court in **Board of Education of Independent School District Vs. Lindsay Earls, 536 US 822=153 L.Ed.2d. 735.**

280. The submission of the respondents that least intrusive test cannot be applied to judge the proportionality of Aadhaar Act has been refuted by petitioners. Petitioners submit that least intrusive test is a test, which was applied in large number of cases and i.e. the test which may ensure that there is a minimal invasion of privacy. It is submitted that

the respondents could have switched to a smart card, which itself contain the biometric information of a person. Respondents submitted that least intrusive test has not been approved either in the **Modern Dental (supra)** or in the **Puttaswamy** case. We are also of the view that there are several reasons due to which least intrusive test cannot be insisted. For applying the least intrusive test, the Court has to enter comparative analysis of all methods of identification available, which need to be examined with their details and compared. Court has to arrive at finding as to which mode of identity is a least intrusive. We are of the view that comparison of several modes of identity and to come to a decision, which is least intrusive is a matter, which may be better left to the experts to examine. Further, there are no proper pleadings and material with regard to other modes of identification, which could have been adopted by the State, to come to a definite conclusion by this Court.

281. After noticing the parameters of proportionality, we now need to apply proportionality and other tests

to find out as to whether Section 57 satisfies the proportionality and other tests. Section 57 begins with the phrase "nothing contained in this Act shall prevent the use of Aadhaar number....." for establishing the identity of an individual for any purpose. Section 57 reveals following concepts and ides, which can be para phrased in following manner:-

(a) Nothing contained in this Act shall prevent the use of Aadhaar number for identifying the identity of an individual for any purpose.

(b) Whether by the State or body corporate or private person.

(c) Pursuant to any law, for the time being in force or any contract to this effect.

282. The basic theme of the Aadhaar Act to implement the Aadhaar programme was for purposes of disbursement of subsidies, benefits or services to individuals entitled for the same. By various notifications issued under Section 7, the Government has made applicable Aadhaar authentication for large number of

schemes namely 133 in number. The idea behind Section 57 is that Aadhaar is liberated from the four corners of the Act and it may not be confined to use under Section 7 alone. The Act does not prohibit the use of Aadhaar for any other purpose. Section 57 is thus in a way clarificatory in nature, which enable the use of Aadhaar for any other purposes. The petitioners have two basic objections. Firstly, they submitted that use of word "any purpose" is unguided and uncontrolled and secondly it can be used by body corporate or persons, pursuant to any law, for the time being in force or any contract to this effect. **Puttaswamy** judgment has already laid down that any infringement of Privacy right should pass three-fold test as noticed above. The first test, which needs to be satisfied for non-intrusion in privacy right is that it should be backed by law. Section 57 cannot be treated as a law, which permit use of Aadhaar number for any purpose. The law providing for use of Aadhaar for any purpose should be rational and proportional. There has to be some object to be achieved by use of

Aadhaar, in a particular case, the legislature has ample power to provide for legislative scheme by an enactment making use of Aadhaar and use of Aadhaar has to be backed by a valid law. In event, it is accepted on the strength of Section 57 that a State or body corporate or person, on the basis of any contract to this effect, are permitted to use Aadhaar it shall be wholly unguided and uncontrolled, which is prone to violate the right of privacy. Section 57 makes use of Aadhaar on two basis. Firstly, "pursuant to any law, for the time being in force" and secondly "any contract to this effect". When the legislature uses the phrase "pursuant to any law, for the time being in force", obviously the word law used in Section 57 is a law other than Section 57 of Aadhaar Act, 2016 and the Regulations framed thereunder. When any law permits user of Aadhaar, its validity is to be tested on the anvil of three-fold test as laid down in **Puttaswamy** case, but permitting use of Aadhaar on any contract to this effect, is clearly in violation of Right of Privacy. A contract entered between two parties, even

if one party is a State, cannot be said to be a law.

283. We thus, are of the view that Section 57 in so far as it permits use of Aadhaar on "any contract to this effect" is clearly unconstitutional and deserves to be struck down. We may again clarify that Section 57 has to be read only to mean that it clarifies that nothing contained in Aadhaar Act shall prevent the use of Aadhaar for establishing the identity of an individual for any purpose, in pursuant to any law. Section 57 itself is not a law, which may permit use of Aadhaar for any purpose. There has to be a valid law in existence, which should also pass the three-fold test as laid down in **Puttaswamy** case for making provision for use of Aadhaar.

284. In view of the foregoing discussions, we held that Section 57, to the extent, which permits use of Aadhaar by the State or any body corporate or person, in pursuant to any contract to this effect is unconstitutional and void. Thus, the last phrase in main provision of Section 57, i.e. "or any contract to

this effect" is struck down. **Issue No. 11 is answered in the following manner:-**

Ans.11:- Section 57, to the extent, which permits use of Aadhaar by the State or any body corporate or person, in pursuant to any contract to this effect is unconstitutional and void. Thus, the last phrase in main provision of Section 57, i.e. "or any contract to this effect" is struck down.

Issue No.12	**Whether Section 59 is void or unconstitutional?**

285. Learned counsel for the petitioners have submitted that prior to enactment of Aadhaar Act there was no law and all actions undertaken in pursuance of the executive order dated 28.01.2009 including taking of demographic and biometric information of an individual was not backed by any law violated fundamental right of privacy. Violation of fundamental right of privacy cannot be cured by any subsequent legislation. It is well settled that Executive

actions, which breach fundamental right of a person must have the authority of law to support it. A post-constitutional law or executive act that violates fundamental rights is still born and void ab initio. Further there was no consent, let alone informed consent obtained from individuals at the time of enrolment under the said notification. A validating law must remove the cause of invalidity of previous acts. The cause of invalidity in the present case was the absence of a law governing privacy infringements. However, Section 59 does not create such a legal fiction where the Aadhaar Act is deemed to have been in existence since 2009. It only declares a legal consequence of acts done by Union since 2009, which it cannot do. No procedural safeguards existed pre-2016 and thus, even assuming that Section 59 is validly enacted, it has to be declared unconstitutional for violating Articles 14 and 21.

286. Replying the above submissions, respondents submit that Section 59 is retrospective, saving provision which provides a retrospective effect to the

notification dated 28.01.2009 and anything done or action taken by the Central Government under the said Resolution.

287. The expression 'anything done or any action under the Resolution' is wide enough to cover all the actions including memorandum of undertaken which UIDAI executed as Department of Central Government. Section 59 seeks to save and continue under the said Act what was done under the executive scheme. The submission that breach of fundamental right cannot be retrospectively cured is incorrect. The last phrase of Section 59 uses the expression "shall be deemed", this expression clearly indicates creation of fiction with the object of providing legislative support to the action taken before the Act. That seeks to continue the entire architecture of Aadhaar which established under the Government Resolution dated 28.01.2009. As a result of deeming provision all the actions under the aforesaid scheme shall be deemed to have been done under the Act and not under the aforesaid notification. We may have a look on Section 59 of the

Act which provides:

> "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."

288. Justice G.P. Singh in Principles of Statutory Interpretation, 14th Edition, while explaining the legal fiction sum up the Principle in the following words:

> "The Legislature is quite competent to create a legal fiction, in other words, to enact a deeming provision for the purpose of assuming existence of a fact which does not really exist provided the declaration of non-existent facts as existing does not offend the constitution. Although the word 'deemed' is usually used, a legal fiction may be enacted without using that word. For instance, the words 'as if' can also be used to create a legal fiction.
>
> In interpreting a provision creating a legal fiction, the court is to ascertain for what purpose the fiction is created, 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. But in so

> construing the fiction it is not to be extended beyond the purpose for which it is created, or beyond the language of the section by which it is created."

289. A Constitution Bench judgment of this Court in ***M/s. West Ramnad Electric Distribution Co. Ltd. vs. The State of Madras and another, AIR 1962 SC 1753,*** has been heavily relied by the respondents. The Madras Legislature had passed an Act, the Madras Electricity Supply Undertakings (Acquisition) Act, 1949 for supply of electricity in the province of Madras. By an order dated 17.05.1951 appellant undertaking was acquired and possession was directed to be taken. There was challenge to 1949 Act which challenge was upheld by this Court in ***Rajahmundry Electric Supply Corporation Ltd. v. State of Andhra Pradesh, AIR 1954 SC 251,*** on the ground that Act was beyond the legislative competence of the Madras Legislature. The Madras Legislature passed another Act, the Madras Electricity Supply Undertakings (Acquisition) Act, 1949, which also received the Presidential assent. The Act purported to validate the action taken under the 1949

Act. A writ petition was filed in Madras High Court challenging the action taken under 1949 Act to continue the possession. The writ petition was dismissed and the matter was taken to this Court. The contention which was raised before this Court has been noticed in paragraph 8 in the following words:

> "8....Mr. Nambiar further contends that this notification was invalid for two reasons; it was invalid because it has been issued under the Provisions of an Act which was void as being beyond the legislative competence of the Madras Legislature, and it was void for the additional reason that before it was issued, the Constitution of India had come into force and it offended against the provisions of Art. 31 of the Constitution, and so, Art. 13(2) applied. Section 24 of the Act, no doubt, purported or attempted to validate this notification, but the said attempt has failed because the Act being prospective, s. 24 cannot have retrospective operation. That, in substance, is the first contention raised before us."

290. Section 24 of the 1949 Act which created a deeming fiction validating the actions taken under the earlier Act has been noticed in paragraph 11 which is to the following effect:

> "11. Let us then construe section 24 and decide whether it serves to validate the

impugned notification issued by the respondent on the 21st September, 1951.

Section 24 reads thus :-

> "Orders made, decisions or directions given, notifications issued, proceedings taken and acts of things done, in relation to any undertaking taken ever, if they would have been validly made, given, issued, taken or done, had the Madras Electricity Supply Undertakings (Acquisition) Act, 1949 (Madras Act XLIII of 1949), and the rules made thereunder been in force on the date on which the said orders, decisions or directions, notifications, proceeding, acts or things, were made, given, issued, taken or done are hereby declared to have been validly made, given, issued, taken or done, as the case may be, except to the extent to which the said orders, decisions, directions, notifications, proceedings, acts or things are repugnant to the provisions of this Acts.""

291. Repelling the submission of counsel for the appellant it was held that Section 24 had been enacted for the purpose of retrospectively validating action taken under the provisions of the earlier Act. Following was held in paragraph 13:

> "13....If the Act is retrospective in operation and s. 24 has been enacted for the purpose of retrospectively validating actions taken under the provisions of the earlier Act, it must follow by the very retrospective operation of the relevant provisions that at the time when the impugned notification was issued, these provisions were in existence. That is the plain and obvious effect of the retrospective operation of the statute. Therefore in considering whether Art. 31(1) has been complied with or not, we must assume that before the notification was issued, the relevant provisions of the Act were in existence and so, Art. 31(1) must be held to have been complied with in that sense."

292. The submission was made that notification issued under the earlier Act contravenes Article 31 which is a fundamental right and cannot be cured by the subsequent law. The contention has been noted in paragraph 15:

> 15. That takes us to the larger issue raised by Mr. Nambiar in the present appeals. He contends that the power of the legislature to make laws retrospective cannot validly be exercised so as to care the contravention of fundamental rights retrospectively. His contention is that the earlier Act of 1949 being dead and non-existent, the impugned notification contravened Art. 31(1) and this contravention of a fundamental right cannot be cured by the legislature by passing a subsequent law and making it retrospective. In support of this argument, he has relied on

> the decision of this Court in Deep Chand v. The State of Uttar Pradesh (1959) Supp. 2 S.C.R. 8.(AIR 1959 SC 648)....”

293. It was held by the Constitution Bench that the Legislature can effectively exercise power of validating action taken under the law which was void for the reason that it contravened fundamental right. In paragraph 16 following has been held:

> “16....If a law is invalid for the reason that it has been passed by a legislature without legislative competence, and action is taken under its provisions, the said action can be validated by a subsequent law passed by the same legislature after it is clothed with the necessary legislative power. This position is not disputed. If the legislature can by retrospective legislation cure the invalidity in actions taken in pursuance of laws which were void for want of legislative competence and can validate such action by appropriate provisions, it is difficult to see why the same power cannot be equally effectively exercised by the legislature in validating actions taken under law which are void for the reason that they contravened fundamental rights. As has been pointed out by the majority decision in Deep Chand's case, the infirmity proceeding from lack of legislative competence as well as the infirmity proceeding from the contravention of fundamental rights lead to the same result and that is that the offending legislation is void and honest. That being so, if the legislature can validate actions taken under

> one class of void legislation, there is no reason why it cannot exercise its legislative power to validate actions taken under the other class of void legislation. We are, therefore, not prepared to accept Mr. Nambiar's contention that where the contravention of fundamental rights is concerned, the legislature cannot pass a law retrospectively validate actions taken under a law which was void because it contravened fundamental rights."

294. Shri Shyam Divan submits that the above judgment of this Court in ***M/s. West Ramnad Electric Distribution Co.Ltd.*** is not applicable. He submits that unlike Section 59 of Aadhaar Act, the provisions in ***West Ramnad* case** had no limiting words such as 'action taken by the Central Government'. Further even under the ***West Ramnad* case** principle, the action can be saved would have to be proper under the previous regime. ***West Ramnad*** actions were under an earlier statute that was declared ultra vires, which cannot be saved under Section 59 of the Aadhaar Act. The collection of biometrics from individuals right upto 2016 cannot be described as lawful and intra vires the 2009 notification. If it were ultra vires the 2009

notification, Section 59 of the Aadhaar Act cannot validate the action.

295. We have already noticed the ratio of the judgment as stated in paragraph 16 in the judgment in ***West Ramnad* case** that even if earlier action which is sought to be validated was ultra vires and violates constitutional right, it could have been very well validated by retrospective statute creating a deeming fiction. We are of the view that ratio laid down in ***West Ramnad* case** is fully applicable in the present case.

296. Another Constitution Bench in ***Bishambhar Nath Kohli and others v. State of Uttar Pradesh and others, AIR 1966 SC 573,*** had occasion to consider the deeming fiction as contained under Act 31 of 1950. Section 58(3) of Act 31 of 1950 as deeming provision that anything done or action taken in exercise of the power conferred under Ordinance 27 of 1949 is to be deemed to have been done or taken in exercise of the power

conferred by or under Act 31 of 1950. In paragraphs 7 and 8 of the judgment following has been laid down:

> "7. By Ordinance 27 of 1949 a proceeding commenced under Ordinance 12 of 1949 or anything done or action taken in the exercise of the powers conferred under that Ordinance was to be deemed a proceeding commenced, thing done and action taken under the former Ordinance as if that Ordinance were in force on the date on which the proceeding was commenced, thing was done or action was taken. Section 58(3) of Act 31 of 1950 contained a similar deeming provision that anything done or action taken in exercise of the power conferred under Ordinance 27 of 1949 is to be deemed to have been done or taken in exercise of the power conferred by or under Act 31 of 1950, as if the Act were in force on the day on which such thing was done or action was taken.
>
> 8. By this chain of fictions, things done and actions taken under Ordinance 12 of 1949 are to be deemed to have been done or taken in exercise of the powers conferred under Act 31 of 1950, as if that Act we re in force on the day on which such thing was done or action taken. The order passed by the Deputy Custodian under s. 6 of Ordinance 12 of 1949 was, therefore, for the purpose of this proceeding, to be deemed an order made in exercise of the power conferred by Act 31 of 1950 as if that Act were in force on the day on which the order was passed."

297. The ratio of judgment in ***West Ramnad(supra)*** has been repeatedly applied by this Court in several

judgments. Reference is made to ***Hari Singh and others vs. The Military Estate Officer and another, 1972 (2) SCC 239,*** which was a case rendered by a seven-Judge Constitution Bench. In paragraph 16 following has been held:

> "16. The ruling of this Court in West Ramnad Electric Distribution Co. Ltd.(1) case establishes competence of the legislature to make laws retrospective in operation for the purpose of validation of action done under an earlier Act which has been declared by a decision of the court to be invalid. It is to be appreciated that the validation is by virtue of the provisions of the subsequent piece of legislation."

298. Justice Krishna Iyer, J. in ***Krishna Chandra Gangopadhyaya and others vs. The Union of India and others, 1975 (2) SCC 302,*** while considering validation of Act held that the Legislature can retrospectively validate what otherwise was inoperative law or action. In paragraph 25 following has been held:

> "25. The ratio of West Ramnad (supra) is clear. The Legislature can retrospectively validate what otherwise was inoperative law or action. Unhappy wording, infelicitous expression or imperfect or inartistic drafting may not necessarily defeat, for that reason alone, the obvious object of the

validating law and its retrospective content."

299. This Court again in ***ITW Signode India Ltd. vs. Collector of Central Excise, 2004 (3) SCC 48,*** held that curative statutes by their very nature are intended to operate upon and affect past transaction. In paragraph 61 following has been held:

> "61. A statute, it is trite, must be read as a whole. The plenary power of legislation of the Parliament or the State Legislature in relation to the legislative fields specified under Seventh Schedule of the Constitution of India is not disputed. A statutory act may be enacted prospectively or retrospectively. A retrospective effect indisputably can be given in case of curative and validating statute. In fact curative statutes by their very nature are intended to operate upon and affect past transaction having regard to the fact that they operate on conditions already existing. However, the scope of the validating act may vary from case to case."

300. The argument that an action or provision hit by Article 14 can never be validated was specifically rejected by this Court in ***The State of Mysore and another vs. d. Achiah Chetty, Etc., (1969) 1 SCC 248,*** in paragraph 15 following has been held:

> "15. Mr. S. T. Desai, however, contends that an acquisition hit by Article 14 or anything done previously cannot ever be validated, unless the vice of unreasonable classification is removed and the Validating Act is ineffective for that reason. This argument leads to the logical conclusion that a discrimination arising from selection of one law for action rather than the other, when two procedures are available, can never be righted by removing retrospectively one of the competing laws from the field. This is a wrong assumption...."

301. A statute creates a legal fiction to achieve a legislative purpose. We may refer to the celebrated judgment of Lord Asquith in ***East End Dwelling Co.Ltd. And Finsury Borough Council, 1952 AC 109,*** following is the enunciation of Lord Asquith:

> "If you are bidden to treat an imaginary state of affairs as real, you must surely, unless prohibited from doing so, also imagine as real the consequences and incidents which, if the putative state of affairs had in fact existed, must inevitably have flowed from or accompanied it... The statute says that you must imagine a certain state of affairs; it does not say that having done so, you must cause or permit your imagination to boggle when it comes to the inevitable corollaries of that state of affairs."

302. Legislature has often created legal fiction to save several actions which had happened prior to

enactment. Reference is made to judgment of this Court in ***Nar Bahadur Bhandari and another vs. State of sikkim and others, (1998) 5 SCC 39***. In the above case deeming fiction was created by Section 30 of Prevention of Corruption Act, 1988. Section 30 provides that any action taken or purported to have been done or taken under or in pursuance of the Acts so repeated shall be deemed to have been done or taken under 1988 Act. Following was stated in paragraph 10:

> "10....In the present case, the Act of 1988 is the repealing Act. Sub-sec. (2) of Section 30 reads as follows:
>
> > "30(2) Notwithstanding such repeal, but without prejudice to the application of section 6 of the General Clauses Act 1897 (10 of 1897), anything done or any action taken or purported to have been done or taken under or in pursuance of the Acts so repealed shall, in so far as it is not inconsistent with the provisions of this Act, be deemed to have been done or taken under or in pursuance of the corresponding provision of this Act."
>
> 12. The said Sub-section while on the one hand ensures that the application of Section 6 of the General Clauses Act is not prejudiced, on the other it expresses a different intention as contemplated by the said Section 6. The last part of the above

> Sub-section introduces a legal fiction whereby anything done or action taken under or in pursuance of the Act of 1947 shall be deemed to have been done or taken under or in pursuance of corresponding provisions of the Act of 1988. That is, the fiction is to the effect that the Act of 1988 had come into force when such thing was done or action was taken."

303. An elaborate consideration on deeming fiction was made by three-Judge Bench of this Court in ***State of Karnataka vs. State of Tamil Nadu and others, (2017) 3 SCC 362,*** one of us, Justice Dipak Misra, as he then was, speaking for the Court in paragraphs 72 to 74:

> "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 Amendment Act 2002 (Act No. 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 judicial review which is a part of basic feature of the Constitution. 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 6A 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 condition 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 6A

> 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....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.

304. In paragraphs 75, 76 and 77 following has been laid down:

> “75. In this context, we may usefully refer to the Principles of Statutory Interpretation, 14th Edition 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 created1, 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. But in so construing the fiction it is not be extended beyond the purpose for which is created, or beyond the language of the Section by which it is created4. It cannot also be extended by importing another fiction5. The principles stated above are 'well-settled'. A legal fiction may also be interpreted narrowly to make the statute workable."

76. In Aneeta Hada v. Godfather Travels and Tours, (2012) 5 SCC 661, a three-Judge Bench has ruled thus:

> "37. In 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, AIR 1961 SC 838, J.K. Cotton Spg. and Wvg. Mills Ltd. v. Union of India, 1987 Supp. SCC 350, M. Venugopal v. LIC, (1994) 2 SCC 323 and 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, the Court has held that 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."

305. Applying the ratio of this Court as noticed above, it is clear that Parliamentary legislative intent of Section 59 is to save all actions taken by Central Government under the notification dated

28.01.2009 and notification dated 12.09.2015 deeming the same to have been validly done under the Aadhaar Act by creating a legal fiction. The intention to save all actions taken under the aforesaid two notifications and treat them to have done under that Act is clear, it is the purpose and object of Section 59. Section 59 has to be interpreted to give meaning to the legislative intent to hold otherwise shall defeat the purpose of Section 59. As observed, Legislature by legislative device can cover actions taken earlier while creating any legal fiction which has actually been done by Section 59.

306. There is one more submission of the petitioners to be considered. Petitioner's case is that there was no consent or informed consent obtained from individuals for enrolment made consequent to notification dated 28.01.2009, the notification dated 28.01.2009 and the scheme thereafter does not clearly indicate that the enrolment for Aadhaar was voluntary. This Court has issued an interim order directing the enrolment be treated as voluntary, hence, it cannot be

accepted that those got enrolled after 28.01.2009 did not give consent. The individual provided demographic information and gave biometric information and also signed the enrolment form. The residents after the enrolment were required to confirm that information contained were provided by them and are of his own true and correct. On sign slip, he was required to sign or put his thumb impression themselves. It is on the record that more than 100 crores enrolment were completed prior to enforcement of Aadhaar Act 2016. On the basis of Aadhaar Act large number of persons must have received benefits of subsidies and services, thus, the enrolments prior to enforcement of Act, 2016 cannot be declared illegal and void. In view of the aforementioned discussion, we answer the Issue No.12 in the following manner;

Ans.12:- Section 59 has validated all actions taken by the Central Government under the notifications dated 28.01.2009 and

12.09.2009 and all actions shall be deemed to have been taken under the Aadhaar Act.

Issue No. 13	**Whether Collecting the identity information of children between 5 to 18 years is unconstitutional?**

307. Section 5 of the Act provides that 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. Section 5 contemplates special measures for issuance of Aadhaar number to children. The Aadhaar (Enrolment and Update) Regulations, 2016 contains some special measures. One of the special measures is Regulation 5, which provides for information required for enrolment of children below five years of age. Regulation 5 is as follows:-

5. Information required for enrolment of

children below five years of age. — (1) For children below the five years of age, the following demographic and biometric information shall be collected:

(a) Name

(b) Date of Birth

(c) Gender

(d) Enrolment ID or Aadhaar number of any one parent, preferably that of the mother in the event both parents are alive, or guardian. The Aadhaar number or EID of such parent or guardian is mandatory, and a field for relationship will also be recorded.

(e) The address of such child which is the same as that of the linked parent / guardian.

(f) Facial image of the child shall be captured. The biometric information of any one parent / guardian shall be captured or authenticated during the enrolment.

(2) The Proof of Relationship (PoR) document as listed in schedule II for establishing the relationship between the linked parent/guardian and the child shall be collected at the time of enrolment. Only those children can be enrolled based on the relationship document (PoR), whose names are recorded in the relationship document.

308. For children below five, no core biometric

informations are captured and only biometric information of any one parent/guardian is captured. The objection raised by petitioners is with regard to children between 5 to 18 years on the ground that they being minors, parental consent is not taken. We have noted above that for Aadhaar enrolment, for verification of information consent is obtained from the person submitting for enrolment. Thus, the enrolment for Aadhaar number is on consent basis. Although, it is different matter that for the purpose of obtaining any benefit or service, a person is obliged to enrol for Aadhaar. The petitioners are right in their submissions that for enrolment of a children between 5 and 18 years, there has to be consent of their parents or guardian because they themselves are unable to give any valid consent for enrolment. We, thus, have to read parental consent in Regulation 4 in so far as children of 5 to 18 years are concerned so that the provision in reference to children between 5 to 18 years may not become unconstitutional. We thus answer Question No. 13 in

following manner:-

Ans.13:- Parental consent for providing biometric information under Regulation 3 & demographic information under Regulation 4 has to be read for enrolment of children between 5 to 18 years to upheld the constitutionality of Regulations 3 & 4 of Aadhaar (Enrolment and Update) Regulations, 2016.

Issue No.14	**Whether Rule 9 as amended by the Prevention of Money-Laundering (Second Amendment) Rules, 2017 is unconstitutional?**

309. For answering the above issue we need to advert to the objects and scheme of the Prevention of Money-Laundering Act, 2002(PMLA, 2002). The scheme as delineated by the Prevention of Money-Laundering (Maintenance of Records) Rules, 2005 also need to be looked into before coming to the Second Amendment Rules, 2017. The PMLA, 2002 has been enacted to prevent money-laundering and to provide for confiscation of property derived from, or involved in,

money-laundering and for matters connected therewith or incidental thereto. The Act has long Preamble entire of which needs to be noted, which is as follows:

> "An Act to prevent money-laundering and to provide for confiscation of property derived from, or involved in, money-laundering and for matters connected therewith or incidental thereto.
>
> WHEREAS the Political Declaration and Global Programme of Action, annexed to the resolution S-17/2 was adopted by the General Assembly of the United Nations at its seventeenth special session on the twenty-third day of February, 1990;
>
> AND WHEREAS the Political Declaration adopted by the Special Session of the United Nations General Assembly held on 8th to 10th June, 1998 calls upon the Member States to adopt national money-laundering legislation and programme; AND
>
> WHEREAS it is considered necessary to implement the aforesaid resolution and the Declaration;

310. Two international declarations have been specifically mentioned in the Preamble which pave the way for the enactment. The resolution adopted by the General Assembly of the United Nations on 23rd February, 1990 contained the recommendations on

money-laundering of the Financial Action Task Force aforesaid. The Political Declaration and Action Plan against money-laundering by the United Nations General Assembly held on 10.06.1998 which called upon the States Members of the United Nations to adopt its declaration to the following effect:

"Political Declaration and Action Plan
against Money Laundering

adopted at the Twentieth Special Session of
the United Nations General Assembly devoted
to "countering the world drug problem
together"

New Your, 10 June 1998(excerpts)

"We, the States Members of the United
Nations,

… … … …

15. Undertake to make special efforts against the laundering of money linked to drug trafficking and, in that context, emphasize the importance of strengthening international, regional and subregional cooperation, and recommend that States that have not yet done so adopt by the year 2003 national money-laundering legislation and programmes in accordance with relevant provisions of the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances of 1988, as well as the measures for countering money-laundering, adopted at the present session;

… … … …

"COUNTERING MONEY-LAUNDERING"

The General Assembly,

… … … …

Emphasizing the enormous efforts of a number of States to draw up and apply domestic legislation that identifies the activity of money-laundering as a criminal offence,

Realizing the importance of progress being made by all States in conforming to the relevant recommendations and the need for States to participate actively in international and regional initiatives designed to promote and strengthen the implementation of effective measures against money-laundering,

1. Strongly condemns the laundering of money derived from illicit drug trafficking and other serious crimes, as well as the use of the financial systems of States for that purpose;

2. Urges all States to implement the provisions against money-laundering that are contained in the United Nations Convention against Illicit Trafficking in Narcotic Drugs and Psychotropic Substances of 1988 and the other relevant international instruments on money-laundering, in accordance with fundamental constitutional principles, by applying the following principles:

(a) Establishment of a legislative framework to criminalize the laundering of money derived from serious crimes in order to provide for the prevention, detection, investigation and prosecution of the crime of money-laundering through, inter alia:

(i) Identification, freezing, seizure and confiscation of the proceeds of crime;

(ii) International cooperation; and mutual legal assistance in cases involving money-laundering;

(iii) Inclusion of the crime of money-laundering in mutual legal assistance agreements for the purpose of ensuring judicial assistance in investigations, court cases or judicial proceedings relating to that crime;

(b) Establishment of an effective financial and regulatory regime to deny criminals and their illicit funds access to national and international financial systems, thus preserving the integrity of financial systems worldwide and ensuring compliance with laws and other regulations against money-laundering through:

(i) Customer identification and verification requirements applying the principle of "know your customer", in order to have available for competent authorities the necessary information on the identity of clients and the financial movements that they carry out;

(ii) Financial record-keeping;

(iii) Mandatory reporting of suspicious activity;

(iv) Removal of bank secrecy impediments to efforts directed at preventing, investigating and punishing money-laundering;

(v) Other relevant measures;

(c) Implementation of law enforcement measures to provide tools for, inter alia:

(i) Effective detection, investigation, prosecution and conviction of criminals engaging in moneylaundering activity;

(ii) Extradition procedures;

(iii) Information-sharing mechanisms;"

311. The modern world is more focused on economic growth. Every nation tries to march forward in achieving the rapid economic growth. Economics is factor which not only plays a major role in the future of nation but also in all human organisations. Most of the individuals also aspire for their financial well being but for the financial system and working of economic, road blocks are felt both by the nations and human organisations. The siphoning away of huge volumes of money from normal economic growth poses a real danger to the economics and affects the stability of the global market which also empowers corruption organised crime. Proceeds of money-laundering are disguised to acquire properties and other assets or to make investments. At some stage money-laundering involves conversion process with the objective to give the appearance that the money has a legitimate source. The banking and financial secrecy is another bottleneck for countries who genuinely want to counter money-laundering. It is inherent in the activity of

money-laundering to keep the entire process secret. The Parliament with the objectives outlined in the international declaration enacted the PMLA Act. Para 1 of the Statement of Objects and Reasons of Act is stated as follows:

"STATEMENT OF OBJECTS AND REASONS

It is being realised, world over, that money-laundering poses a serious threat not only to the financial systems of countries, but also to their integrity and sovereignty. Some of the initiatives taken by the international community to obviate such threat are outlined below:—

(a) the United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, to which India is a party, calls for prevention of laundering of proceeds of drug crimes and other connected activities and confiscation of proceeds derived from such offence.

(b) the Basle Statement of Principles, enunciated in 1989, outlined basic policies and procedures that banks should follow in order to assist the law enforcement agencies in tackling the problem of moneylaundering.

(c) the Financial Action Task Force established at the summit of seven major industrial nations, held in Paris from 14th to 16th July, 1989, to examine the problem of money-laundering has made forty recommendations, which provide the foundation material for comprehensive legislation to combat the problem of moneylaundering. The

recommendations were classified under various heads. Some of the important heads are—

(i) declaration of laundering of monies carried through serious crimes a criminal offence;

(ii) to work out modalities of disclosure by financial institutions regarding reportable transactions;

(iii) confiscation of the proceeds of crime;

(iv) declaring money-laundering to be an extraditable offence; and

(v) promoting international co-operation in investigation of moneylaundering.

(d) the Political Declaration and Global Programme of Action adopted by United Nations General Assembly by its Resolution No. S-17/2 of 23rd February, 1990, inter alia, calls upon the member States to develop mechanism to prevent financial institutions from being used for laundering of drug related money and enactment of legislation to prevent such laundering.

(e) the United Nations in the Special Session on countering World Drug Problem Together concluded on the 8th to the 10th June, 1998 has made another declaration regarding the need to combat moneylaundering. India is a signatory to this declaration.

….....”

312. Paragraph two of the Statement of Objects and Reasons noticed the legislative process which was

initiated by introducing the Prevention of Money-Laundering Bill, 1998 which was introduced in the Lok Sabha. The Bill was referred to the Standing Committee on Finance, which submitted its report on 04.03.1999 to the Lok Sabha. Various recommendations of the Standing Committee were accepted by the Central Government and made provisions of the said recommendations in the Bill. Thereafter, the Bill was presented in the Parliament which after receiving the assent of the President published in the Gazette on 01.07.2005. Act, 2002 has been amended by various Parliamentary Acts. By amendments made in the year 2013 by Act 2 of 2013, the Legislature has attempted to keep the pace with the other countries of the world by making more stringent provision to prevent money-laundering which is the root as well as the result of the black money economy. Money-laundering is defined under Section 3 which is to the following effect:

> "3. Offence of money-Laundering.-Whosoever directly or indirectly attempts to indulge or knowingly assists or knowingly is a party or is actually involved in any process or activity connected proceeds of crime including its concealment, possession,

> acquisition or use and projecting or claiming it as untainted property shall be guilty of offence of money-laundering."

313. Section 2 (ha) defines client and Section 2(wa) defines reporting entity which are as follows;

> "2.(ha) "client" means a person who is engaged in a financial transaction or activity with a reporting entity and includes a person on whose behalf the person who engaged in the transaction or activity, is acting;
>
> (wa) "reporting entity" means a banking company, financial institution, intermediary or a person carrying on a designated business or profession;"

314. Section 12 lays down various obligations on reporting entity to maintain records. Section 12(1)(c) reads:

> "**Section 12. Reporting entity to maintain records.-**(l) Every reporting entity shall-
>
> … … … …
>
> (c) verify the identity of its clients in such manner and subject to such conditions, as may be prescribed; "

315. The Central Government in exercise of its rule making power has made Rules, namely, the Prevention of Money-laundering (Maintenance of Records) Rules, 2005 (hereinafter referred to as "Rules, 2005). In the present case challenge is to Rule 9 as amended by Second Amendment Rules, 2017. We may thus notice the amendments made in Rule 9 by Second Amendment Rules, 2017. By Second Amendment Rules, 2017, sub-Rule (4) to sub-Rule (9) of Rule 9 were substituted in following manner:

> "(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 thump 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 Maghalaya 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 document to the reporting entity."

316. The challenge to Second Amendment Rules, 2017 is on the ground that it violate Articles 14, 19(1)(g), 21 and 300A of the Constitution of India; Sections 3, 7 and 51 of the Aadhaar Act and also ultra vires to the provisions of PMLA Act, 2002.

317. Elaborating his submissions Shri Arvind P. Datar learned senior counsel submits that Second Amendment Rules violate Article 14 and 21 since persons choosing

not to enrol for Aadhaar number cannot operate bank account and valid explanation has to be given as to why all banks have to be authenticated.

318. Violative of Article 19(1)(g) because the Rules refer to companies, firms, trusts, etc. whereas Aadhaar Act is only to establish identity of individuals. Violative of Article 300A since even temporary deprivation can only be done by primary legislation. The Second Amendment Rules do not pass proportionality test. No proper purpose has been established. No explanation has been given that the measures undertaken to such are rationale and connected to the fulfillment of the purpose and there are no alternative measures with a lesser degree of legislation. When the banks have already verified all accounts as per e-KYC norms, it is completely arbitrary to make permanent linking/seeding of all Aadhaar numbers with the bank accounts. Second Amendment Rules fail to satisfy the proportionality test, are irrational, and manifestly arbitrary.

319. Shri Tushar Mehta, learned Additional Solicitor General refuting the submission, submits that Second Amendment Rules carry on the object of 2002, Act. The verification of bank account by way of Aadhaar is done for the reason that often bank accounts are opened in either fictitious names or in the name of wrong persons on the basis of forged identity documents and financial crimes are committed. It is seen that accommodation entries are mostly provided through the banking channels by bogus companies to convert black money into white. Benami transactions routinely take place through banking channels. All of the above, can to a large extent be checked by verifying Aadhaar with bank accounts to ensure that the account belongs to the person who claims to be the account holder and that he or she is a genuine person. Verification of bank account with Aadhaar also ensures that the direct benefit transfer of subsidies reach the Aadhaar verified bank account and is not diverted to some other account. Shell companies are often used to open bank accounts to hold unaccounted money of other

entities under fictitious identities which will also be curbed once Aadhaar verification is initiated.

320. Now, we come to the respective submissions of the parties. A perusal of the Second Amendment Rules, 2017 indicates that the State has sought to make the provisions of PMLA more robust and ensure that the ultimate object of the Act is achieved. Aadhaar Act, 2016 having been enacted with effect from 01.07.2016, it was decided to get the accounts verified by Aadhaar. Amended Rules help all concerned to detect fictitious, ghost and benami accounts. The object of the PMLA and the definition of beneficial owner Act seeks to traverse behind the corporate veil of shell companies and spurious Directors in order to ascertain the real natural persons controlling the accounts in the reporting entities. The Amendment Rules applicable to reporting entities and the legitimate aim sought to be achieved by the State that is conclusive identification of a natural person or the beneficial owner. The statutory rules cast an obligation on all account holders to get their identity verified by

Aadhaar mechanism and those who are already holding account in the reporting entity they are required to submit the Aadhaar number or proof of their applied Aadhaar identity. When a statute puts obligation on account holder to get identity verification in a particular manner a person chose not to obtain Aadhaar number cannot complain his dis-entitlement of operating his account. The submission of the petitioner that there is no valid explanation as to why all bank accounts have to be authenticated also cannot be accepted. Aadhaar provides a mechanism truly identifies an account holder, which eliminates fraudulent accounts existed of non-existed persons and in ghost names. The object of inserting the Rule is to make it possible to weed out fake and duplicate PANs and false bank accounts. The Second Amendment Rules are step in direction to cure the menace of fake bank accounts held by the shell companies in the name of dummy directors, money laundering, terror financing etc. It is relevant to notice that Aadhaar number is required to be given at the time of opening of the

account based relationship and not for every transaction conducted by an account holder of the bank. Those who have already existing accounts are required to submit only once their Aadhaar number for verification. The requirement of Aadhaar number being given only for once is not any cumbersome or undue burden on an account holder. The object of the Second Amendment Rules is towards the legitimate aim of the State and having nexus with the object sought to be achieved by the enactment. The submission of Aadhaar number only once by an account holder is a proportionate measure. We have already referred to judgments where doctrine of proportionality has been expounded. While adjudging a statutory provision from the angle of the proportionality the Court has to examine as to whether statutory measure contained in statutory provision is not excessive as against the object which seeks to achieve. The legislature has margin of discretion while providing for one or other measures to achieve an object. Unless the measures foully unreasonable and disproportionate, court does

not normally substitutes its opinion. On the basis of Rule 9(17)(c), petitioner contends that in the event account holder fails to submit the Aadhaar number and PAN within a period as mentioned in the aforesaid Rules account shall cease to be operational till the time Aadhaar number and PAN is submitted by the client. Petitioner alleged violation of Article 300A. The petitioner's case is that account of a person is his property to which he cannot be deprived, saved by the authority of law. For non-submission of Aadhaar number and PAN only consequence which is contemplated by sub-rule (c) is that account shall cease to be operational. We are of the view that the account remains belonging to the account holder and the amount in the account is only his amount and there is no deprivation of the property of account holder. Under the banking rules and procedures, there are several circumstances where account becomes un-operational. A non-operational account also is an account which belongs to the account holder and amount laying in the non-operational account is neither forfeited by the

bank nor taken out from the said account. Further, account is ceased operational only till the time Aadhaar number and PAN is submitted. The consequences provided is only to effectuate the purpose of the Act and the Rules i.e. account be verified by Aadhaar mechanism. It is not the intent to deprive the account holder of the amount lying in the account. We, thus, do not find any substance in the submission of the petitioner that Rule 9(17)(c) violates right under Article 300A. Aadhaar number providing for verification of an account also cannot be held to be violating right under Article 21. The reporting entity i.e. banks and financial institutions under various statutes are required to provide information of a bank account to different authorities including income tax authority, account verification by Aadhaar is not for the purpose of keeping a track on the transaction done by an individual. As noted above Aadhaar number has to be given only once for opening of the account or for verification of the account and transactions are not

to be made on the basis of Aadhaar verification each time.

321. One of the submissions which has been made by the petitioner also is that Rules violate Article 19(1)(g). It is submitted that Rule refers to companies, firms, trusts etc. whereas Aadhaar Act is only to establish identity of individual. For example sub-rule (6) of Rule 9 as amended by Second Amendment Rules, 2017 provides that where client is a company, it shall for the purposes of sub-rule (1), submit to the reporting entity the certified copies of the documents enumerated therein. Rule requiring Aadhaar number and PAN or Form 60 as defined in Income Tax Rules, 1962, issued to managers, officers or employees holding an attorney to transact on the company's behalf, is for the purpose to find out the beneficial owner behind the company. One of the objects of the Act is to detect money-laundering wherever it is found. Inquiring details of the company to find out shell companies and ghost companies and the real beneficial owner cannot be said to be foreign to the

object of the Act. Companies, partnership firms, trusts or incorporated institutions or body of individuals cannot complain any violation of rights under Article 19(1)(g). There is no amount of restriction in the right of aforesaid in carrying out any profession, or any trade or business. Petitioners have also contended that amended Rule 9 also violates Section 3, 7 and 51 of the Aadhaar Act. Section 3 provides for enrolment under Aadhaar scheme. Section 7 provides for requirement of proof of Aadhaar number for receipt of certain subsidies, benefits and services, etc. Section 51 relates to delegation by the authority to any Member, officer of the authority or any other person such of the powers and functions under the said Act except the power under Section 54. Rules cannot be held in any manner violating Sections 3, 7 and 51. The rules provide for use of Aadhaar for verification of bank account by law as contemplated by Section 57 of the Aadhaar Act.

322. It is further submitted that Amendment Rules are also ultra vires to the PMLA, 2002. Shri Arvind P

Datar has also referred to judgment of the U.K. Supreme Court in ***Bank Mellat v. Her Majesty's Treasury, (2013) UKSC 39***. He has relied on principle of proportionality as summed in paragraph 20 which is to the following effect:

> *"20....The classic formulation of the test is to be found in the advice of the Privy Council, delivered by Lord Clyde, in De Freitas v Permanent Secretary of Ministry of Agriculture, Fisheries, Lands and Housing [1999] 1 AC 69 at 80. But this decision, although it was a milestone in the development of the law, is now more important for the way in which it has been adapted and applied in the subsequent case-law, notably R (Daly) v Secretary of State for the Home Department [2001] 2 AC 532 (in particular the speech of Lord Steyn), R v Shayler [2003] 1 AC 247 at paras 57-59 (Lord Hope of Craighead), Huang v Secretary of State for the Home Department [2007] 2 AC 167 at para 19 (Lord Bingham of Cornhill) and R (Quila) v Secretary of State for the Home Department [2012] 1 AC 621 at para 45.* ***Their effect can be sufficiently summarised for present purposes by saying that the question depends on an exacting analysis of the factual case advanced in defence of the measure, in order to determine (i) whether its objective is sufficiently important to justify the limitation of a fundamental right; (ii) whether it is rationally connected to the objective; (iii) whether a less intrusive measure could have been used; and (iv) whether, having regard to these matters and to the severity of the consequences, a fair balance has been struck between the rights of***

> ***<u>the individual and the interests of the community.</u>*** *These four requirements are logically separate, but in practice they inevitably overlap because the same facts are likely to be relevant to more than one of them."(emphasis added)*

323. The principles of proportionality as noticed in the aforesaid judgment are substantially same which had been laid down in ***Puttaswamy case*** and ***Modern Dental (supra)*** only one difference in the above two judgments is that although both the judgments noticed the least intrusive test but in ultimate conclusion the said test was not reflected in the ratio of the above two judgments.

324. In the foregoing discussions, we come to the conclusion that Rule 9 of Second Amendment Rules, 2017 fully satisfies three-fold test as laid down in ***Puttaswamy case*** and the submission that the Rule is unconstitutional has to be rejected. We answer Issue No. 14 in the following manner:-

<u>Ans.14:-</u> Rule 9 as amended by PMLA (Second Amendment) Rules, 2017 is not unconstitutional and does not violate Articles 14, 19(1)(g), 21 & 300A

of the Constitution and Sections 3, 7 & 51 of the Aadhaar Act. Further Rule 9 as amended is not ultra vires to PMLA Act, 2002.

Issue No. 15	**Circular dated 23.03.2017 issued by Ministry of Communications, Department of Telecommunications**

325. The petitioners have attacked the circular dated 23.03.2017 and submitted that the circular is ultra vires. By circular dated 23.03.2017, Department of Telecommunications has directed that all licensees shall re-verify all existing mobile subscribers (prepaid and postpaid) through Aadhaar based e-kyc process. Petitioners submitted that linking the sim with Aadhaar number is breach of privacy violating Article 21 of the Constitution. Elaborating their challenge, it is contended that circular dated 23.03.2017 is not covered by any of the provisions of Aadhaar Act neither Section 7 nor Section 57. Circular dated 23.03.2017 is not a law under Part III of the Constitution and thus same cannot put any restriction on privacy right. It is submitted that

circular dated 23.03.2017 does not satisfy three-fold test as laid down in Privacy judgment.

326. Learned counsel for the respondents justifying the linking of Aadhaar with sim card submits that non-verifying sim cards, have caused serious security threats, which has been noticed by this Court in several judgments. It is submitted that circular dated 23.03.2017 was issued on the basis of recommendation of Telecom Regulatory Authority of India. Respondents further submits that circular dated 23.03.2017 has been issued in reference to this Court's direction in **Lokniti Foundation Vs. Union of India and Another, (2017) 7 SCC 155.** This court having approved the action, no exception can be taken by the petitioner to the circular dated 23.03.2017. It is submitted that the Central Government, which has right to grant license can always put a condition in the license obliging the licensee to verify the sim cards under the Aadhaar verification. To impose such condition is in the statutory power granted to the Government under Section 4 of the Indian Telegraph

Act, 1885.

327. We need to scrutinise the circular dated 23.03.2017 on the ground of attack alleged by the petitioners and justification as offered by the respondents. Circular dated 23.03.2017 has been addressed by the Ministry of Communications, Department of Telecommunications to all Unified Licensees/Unified Access Service Licensees/Cellular Mobile Telephone Service Licensees with subject: implementation of orders of Supreme Court regarding 100% E-KYC of existing subscribers. Para 1 to 3 of the circular may be noticed, which are to the following effect:-

> "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."

328. The circular of the Department of Telecommunications directing the licensees to mandatorily verify existing sim subscribers in turn resulted in mobile telephone service licensees directing the subscribers to get their sim seeded with Aadhaar. Repeated messages and directions have been issued by Cellular Mobile Telephone Service operators. Compulsory seeding of Aadhaar with mobile numbers has to be treated to be an intrusion in Privacy Right of a person. Any invasion on the Privacy Right of a person has to be backed by law as per the three-fold test enumerated in **Puttaswamy case (supra).** Existence of a law is the foremost condition to be fulfilled for restricting any Privacy Right. Thus, we have to first examine whether circular dated 23.03.2017 can be said to be a 'law'.

329. The law as explained in Article 13(3) has to be applied for finding out as to what is law. Article 13(3)(a) gives an inclusive definition of law in following words:-

(a) “law” includes any Ordinance, order, bye-

> law, rule, regulation, notification, custom or usage having in the territory of India the force of law;

330. The circular dated 23.03.2017 at best is only an executive instruction issued on 23.03.2017 by the Ministry of Communications, Department of Telecommunications. The circular does not refer to any statutory provision or statutory base for issuing the circular. The subject of circular as noted above indicate that circular has been issued for implementation of orders of Supreme Court regarding 100% E-KYC based re-verification of existing subscribers. It is necessary to notice the judgment of this Court dated 06.02.2017, a reference to which is made in the circular itself. The order dated 06.02.2017 was issued by this Court in a Writ Petition filed by **Lokniti Foundation Vs. Union of India and Another, (2017) 7 SCC 155.** The petitioners have filed a writ petition with a prayer that identity of each subscriber and also the members should be verified so that unidentified and unverified subscribers cannot misuse mobile phone. After issuing the notice, Union

of India had filed a counter affidavit, where Union of India stated that Department has launched Aadhaar based E-KYC for issuing mobile connections on 16.8.2016.

331. Paras 2 to 6 of the judgment, which is relevant for the present purpose are as follows:-

> 2. Consequent upon notice being issued to the Union of India, a short counter affidavit has been filed on its behalf, wherein, it is averred as under:
>
> > "22. That however, the department has launched `Aadhaar based E-KYC for issuing mobile connections' on 16th August, 2016 wherein the customer as well as Point of Sale (PoS) Agent of the TSP will be authenticated from Unique Identification Authority of India (UIDAI) based on their biometrics and their demographic data received from UIDAI is stored in the database of TSP along with time stamps. Copy of letter No.800-29/2010-VAS dated 16.08.2016 is annexed herewith and marked as Annexure R-1/10.
> >
> > 23. As on 31.01.2017, 111.31 Crores Aadhaar card has been issued which represent 87.09% of populations. However, still there are substantial number of persons who do not have Aadhaar card because they may not be interested in having Aadhaar being 75 years or more of age or not availing

> any benefit of pension or Direct Benefit Transfer (DBT). Currently Aadhaar card or biometric authentication is not mandatory for obtaining a new telephone connection. As a point of information, it is submitted that those who have Aadhaar card/number normally use the same for obtaining a new telephone connection using E-KYC process as mobile connection can be procured within few minutes in comparison to 1-2 days being taken in normal course.
>
> 24. That in this process, there will be almost `NIL' chances of delivery of SIM to wrong person and the traceability of customer shall greatly improve. Further, since no separate document for Proof of Address or Proof of Identity will be taken in this process, there will be no chances of forgery of documents."

3. The learned Attorney General, in his endeavour to demonstrate the effectiveness of the procedure, which has been put in place, has invited our attention to the application form, which will be required to be filled up, by new mobile subscribers, using e-KYC process. It was the submission of the learned Attorney General, that the procedure now being adopted, will be sufficient to alleviate the fears, projected in the writ petition.

4. Insofar as the existing subscribers are concerned, it was submitted on behalf of the Union of India, that more than 90% of the subscribers are using pre-paid connections. It was pointed out, that each pre-paid connection holder, has to per force renew his

> connection periodically, by making a deposit for further user. It was submitted, that these 90% existing subscribers, can also be verified by putting in place a mechanism, similar to the one adopted for new subscribers. Learned Attorney General states, that an effective programme for the same, would be devised at the earliest, and the process of identity verification will be completed within one year, as far as possible.
>
> 5. In view of the factual position brought to our notice during the course of hearing, we are satisfied, that the prayers made in the writ petition have been substantially dealt with, and 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 the case of existing subscribers. While complimenting the petitioner for filing the instant petition, we dispose of the same with the hope and expectation, that the undertaking given to this Court, will be taken seriously, and will be given effect to, as soon as possible.
>
> 6. The instant petition is disposed of, in the above terms."

332. Para 5 of the judgment contains the operative portion of the order, which states "we dispose of the same with the hope and expectation, that the undertaking given to this Court, will be taken

seriously, and will be given effect to, as soon as possible". The order of this Court as extracted above itself states that the Court itself did not give any direction rather noticed the stand of Union of India where it informed to the Court that the department has already launched Aadhaar based e-KYC for issuing mobile connections. For 90 per cent of the existing subscribers, Attorney General has stated that an effective programme would be devised at the earliest and will be completed within one year.

333. We are clear in our mind that this Court on 06.02.2017 only noticed the stand of the Union of India and disposed of the writ petition expecting that undertaking given to this Court shall be given effect to.

334. The circular dated 23.03.2017 cites the order of this Court as a direction, which according to department was to be completed within the time frame of one year. Circular further states that the meeting was held on 13.02.2017 in the Department with the

telecom industry wherein UIDAI, TRAI and PMO representatives also participated.

335. This Court thus in **Lokniti case (supra)** did not examine the Aadhaar based e-KYC process in context of right of privacy. Thus, the order of this Court dated 06.02.2017 cannot absolve the Government from justifying its circular as per law.

336. One of the submissions, which has been raised by the respondents to cite a statutory base to the circular is that the circular has been issued in pursuance of recommendation made by TRAI under Section 11(1)(a) of TRAI Act, 1997. Section 11 of the TRAI Act, 1997 provides for function of authority Section 11(1)(a):-

> (a) make recommendations, either suo motu or on a request from the licensor, on the following matters, namely:—
>
> (i) need and timing for introduction of new service provider;
>
> (ii) terms and conditions of licence to a service provider;
>
> (iii) revocation of licence for non-compliance of terms and conditions of licence;

xxxxxxxxxxxxxxx

337. One of the functions of the TRAI is to give recommendations as per Section 11(1)(a) on the matters enumerated therein. The recommendations of TRAI were only recommendations and the mere fact that circular dated 23.03.2017 was issued after the recommendation was sent by TRAI, circular dated 23.03.2017 does not acquire any statutory character. Circular dated 23.03.2017 thus cannot be held to be a law within the meaning of Part III of the Constitution.

338. Shri Rakesh Dwivedi, learned counsel appearing for the respondents has submitted that the Central Government being licensor, it is fully entitled to provide for any condition in its license, which condition becomes binding on the licensee. Referring to license agreement for Unified Licensees, Shri Dwivedi submits that one of the conditions in the agreement was Condition No. 16.1 which is to the following effect:-

"16.1 The Licensee shall be bound by the

> terms and conditions of this License Agreement as well as instructions as are issued by the Licensor and by such orders/directions/regulations of TRAI as per provisions of the TRAI Act, 1997 as amended from time to time."

339. Shri Dwivedi has also relied on a number of judgments in support of his submissions that conditions can be validly laid down. he has relied on **Bagalkot Cement Co. Ltd. Vs. R.K. Pathan and Others, AIR 1963 SC 439,** where this Court while considering the Industrial Employment (Standing Orders) Act, 1946 observed that object of the Act was to require the employers to make the conditions of employment precise and definite and the Act ultimately intended to prescribe these conditions in the form of Standing Orders so that what used to be governed by a contract herebefore would now be governed by the Statutory Standing Orders.

340. The above judgment at best can be read to mean that conditions, which are enumerated in the Standing Orders become statutory conditions. No benefit of the judgment can be taken by the respondents in the

present case since even if it is put in the condition in the agreement between licensee and subscribers that licensee shall be bound to instructions as issued by licensor, the said condition does not become statutory nor take shape of a law. **Sukhdev Singh and Others Vs. Bhagatram Sardar Singh Raghuvanshi and Another, (1975) 1 SCC 421** was relied, where this Court held that rules and regulations framed by ONGC, LIC and Industrial Finance Corporation have the force of law. There cannot be any denial that rules framed under statutory provisions will have force of law, thus, this case has no application. Similarly, reliance on **Lily Kurian Vs. Sr. Lewina and Others, (1979) 2 SCC 124, Alpana V. Mehta Vs. Maharashtra State Board of Secondary Education and Another, (1984) 4 SCC 27, St. Johns Teachers Training Institute Vs. Regional Director, National Council for Teacher Education and Another, (2003) 3 SCC 321** were all cases, where conditions were laid down under the regulations, which were statutory in nature. Those cases in no manner help the respondents.

341. Shri Dwivedi has also relied on judgment of this Court in **Union of India and Another Vs. Association of Unified Telecom Service Providers of India and Others, (2011) 10 SCC 543.** This Court referring to Section 4 of the Telegraph Act laid down following in paragraph 39:-

> "39. The proviso to Sub-section (1) of Section 4 of the Telegraph Act, however, enables the Central Government to part with this exclusive privilege in favour of any other person by granting a license in his favour on such conditions and in consideration of such payments as it thinks fit. As the Central Government owns the exclusive privilege of carrying on telecommunication activities and as the Central Government alone has the right to part with this privilege in favour of any person by granting a license in his favour on such conditions and in consideration of such terms as it thinks fit, a license granted under proviso to Sub-section (1) of Section 4 of the Telegraph Act is in the nature of a contract between the Central Government and the licensee."

342. There cannot be any dispute to the right of the Central Government to part with exclusive privilege in favour of any person by granting license on such a condition and in consideration of such terms as it

thinks fit. But mere issuing an instruction to the licensees to adopt mandatory process of e-KYC by Aadhaar verification in no manner exalt the instructions or directives as a law. Circular dated 23.03.2017, thus, cannot be held to be a law and direction to re-verification of all existing mobile subscribers through Aadhaar based e-KYC cannot be held to be backed by law, hence cannot be upheld.

343. There is one more aspect of the matter, which needs to be looked into. Aadhaar Act has only two provisions under which Aadhaar can be used, i.e. Section 7 and Section 57. Present is not a case of Section 7 since present is not a case of receiving any subsidy, benefit or service. What Section 57 contemplate is that "use of Aadhaar can be provided by a law". Words "by a law" used in Section 57 obviously mean a valid law framed by competent legislation and other than the Aadhaar Act. No law has been framed by permitting use of Aadhaar for verification of sim of existing subscribers. There being no law framed for such use of Aadhaar, Section 57 is also not attracted.

344. There are only above two contingencies, where Aadhaar can be used and circular dated 23.03.2017 being not covered by any of above contingencies, circular dated 23.03.2017 deserves to be set aside.

Ans.15:- Circular dated 23.03.2017 being unconstitutional is set aside.

Issue No. 16	**Whether Aadhaar Act is a Money Bill and decision of Speaker certifying it as Money Bill is not subject to Judicial Review of this Court?**

345. The Aadhaar Act has been passed by Parliament as Money Bill. Shri P. Chidambaram, learned senior counsel appearing for the petitioners contends that Aadhaar Act is not a Money Bill, it being not covered by any of the Clauses under Article 110 of the Constitution of India. He further submits that decision of the Speaker certifying Aadhaar Bill as Money Bill being illegal and contrary to the express constitutional provisions deserves to be interfered with and such decision of the Speaker is also subject to Judicial Review by this Court. The word “only”

used in Article 110 has significance and a Bill, which does not contain only, the provisions pertaining to Clause (a) to (f) cannot be regarded as Money Bill. Respondents cannot fall on Clause (g) to support the Money Bill, which clause cannot be invoked unless the provisions of Bill are covered by any of the clauses from (a) to (f).

346. Shri K.K. Venugopal, learned Attorney General refuting the above submission submits that Aadhaar Bill has correctly been passed as Money Bill. He submits that the certification granted by Speaker that Aadhaar Bill is a Money Bill has been made final by virtue of Article 110(3), hence it cannot be questioned in any Court. The decision of Speaker certifying the Bill as Money Bill is not subject to Judicial Review. It is further submitted by learned Attorney General that even on looking the Aadhaar Bill on merits, it satisfies the conditions as enumerated under Article 110(1). He submits that Aadhaar Bill is clearly referable to Clause(c), Clause(e) and Clause(g) of Article 110(1). He submits that the

heart of the Aadhaar Act is Section 7 which is with regard to payment of subsidies, benefits or services and for which the expenditure is incurred form the Consolidated Fund of India. Article 122 also puts an embargo in questioning validity of any proceedings in Parliament. Certification of Bill as Money Bill is matter of Parliamentary procedure hence Article 122 also save the said decision from being questioned in a Court of Law.

347. Article 110 and Article 122, which falls for consideration in the present case are as follows:-

> **“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 licences 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 transmitted 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.

> **122. Courts not to inquire into proceedings of Parliament.-**(1) The validity of any proceedings in Parliament shall not be called in question on the ground of any alleged irregularity of procedure.
>
> (2) No officer or member of Parliament in whom powers are vested by or under this **Constitution** for regulating procedure or the conduct of business, or for maintaining order, in Parliament shall be subject to the jurisdiction of any court in respect of the exercise by him of those powers."

348. We need to first advert to the submission pertaining to question as to whether decision of Speaker certifying the Bill as Money Bill is subject to Judicial Review of this Court or being related to only procedure, is immuned from Judicial Review under Article 122. Article 110(3) gives finality to the decision of the Speaker of the House of the People on question as to whether a Bill is Money Bill or not. The word occurring in sub-article (3) of Article 110 are "shall be final". Article 122(1) puts an embargo on questioning the validity of any proceeding in the Parliament on the ground of any alleged irregularity or procedure. The Constitution uses different expressions in different articles like "shall be

final", "shall not be questioned", "shall not be questioned in any Court of Law" etc.

349. This Court has examined the scope of Judicial Review in reference to Parliamentary proceedings. A similar Constitutional provision giving finality to the decision of the Speaker is contained in Para 6 of Tenth Schedule where a question whether a person has become disqualified or not is to be referred to the decision of the Chairman or the Speaker and his decision shall be final. Para 6 sub-clause(1) is quoted as below:-

> "**6. Decision on questions as to disqualification on ground of defection.**— (1) If any question arises as to whether a member of a House has become subject to disqualification under this Schedule, the question shall be referred for the decision of the Chairman or, as the case may be, the Speaker of such House and his decision shall be final:
>
> Provided that where the question which has arisen is as to whether the Chairman or the Speaker of a House has become subject to such disqualification, the question shall be referred for the decision of such member of the House as the House may elect in this behalf and his decision shall be final."

350. The Constitution Bench had occasion to consider Para 6 in **Kihoto Hollohan Vs. Zachillhu and Others, 1992 Supp. (2) SCC 651**, Justice M.N. Venkatachaliah, as he then was elaborately considered the rival contentions. It was also contended before this Court that in view of the finality of the decision of the Speaker in Para 6 of Tenth Schedule, the decision of the Speaker is beyond Judicial Review. In Para 78, following has been stated:-

> "78. These two contentions have certain overlapping areas between them and admit of being dealt with together. Paragraph 6(1) of the Tenth Schedule seeks to impart a statutory finality to the decision of the Speaker or the Chairman. The argument is that, this concept of `finality' by itself, excludes Courts' jurisdiction. Does the word "final" render the decision of the Speaker immune from Judicial Review? It is now well accepted that a finality clause is not a legislative magical incantation which has that effect of telling off Judicial Review. Statutory finality of a decision presupposes and is subject to its consonance with the statute....."

In Para 80 to 85, following has been held:-

> 80. In Durga Shankar Mehta v. Raghuraj Singh, AIR 1954 SC 520 the order of the Election Tribunal was made final and

conclusive by Section 105 of the Representation of the People Act, 1951. The contention was that the finality and conclusiveness clauses barred the jurisdiction of the Supreme Court under Article 136. This contention was repelled. It was observed: (AIR p. 522)

> ...[B]ut once it is held that it is a judicial tribunal empowered and obliged to deal judicially with disputes arising out of or in connection with election, the overriding power of this Court to grant special leave, in proper cases, would certainly be attracted and this power cannot be excluded by any parliamentary legislation.
>
> ... But once that Tribunal has made any determination or adjudication on the matter, the powers of this Court to interfere by way of special leave can always be exercised......
>
> ... The powers given by Article 136 of the Constitution however are in the nature of special or residuary powers which are exercisable outside the purview of ordinary law, in cases where the needs of justice demand interference by the Supreme Court of the land....
>
> Section 105 of the Representation of the People Act certainly gives finality to the decision of the Election Tribunal so far as that Act is concerned and does not provide for any further appeal but that cannot in any way cut down or effect the overriding powers which this Court can exercise in the matter of granting special leave under

Article 136 of the Constitution.

81. Again, in Union of India v. Jyoti Prakash Mitter [1971] 3 SCR 483 a similar finality clause in Article 217(3) of the Constitution camp up for consideration. This Court said: (SCC pp.410-1, Para32)

> ...The President acting under Article 217(3) performs a judicial function of grave importance under the scheme of our Constitution. He cannot act on the advice of his Ministers. Notwithstanding the declared finality of the order of the President the Court has jurisdiction in appropriate cases to set aside the order, if it appears that it was passed on collateral considerations or the rules of natural justice were not observed, or that the President's judgment was coloured by the advice or representation made by the executive or it was founded on no evidence."

82. Referring to the expression "final" occurring in Article 311(3) of the Constitution this Court in Union of India v. Tulsiram Patel, [1985] Supp. 2 SCR 131 held: (SCC p.507. Para 138)

> ...The finality given by Clause (3) of Article 311 to the disciplinary authority's decision that it was not reasonably practicable to hold the inquiry is not binding upon the court. The court will also examine the charge of mala fides, if any, made in the writ petition. In examining the relevancy of the reasons, the court will consider the situation which according to the disciplinary authority made it come

> to the conclusion that it was not reasonably practicable to hold the inquiry. If the court finds that the reasons are irrelevant, then the recording of its satisfaction by the disciplinary authority would be an abuse of power conferred upon it by Clause (b)....

83. If the intendment is to exclude the jurisdiction of the superior Courts, the language would quite obviously have been different. Even so, where such exclusion is sought to be effected by an amendment the further question whether such an amendment would be destructive of a basic feature of the Constitution would arise. But comparison of the language in Article 363(1) would bring out in contrast the kind of language that may be necessary to achieve any such purpose.

84. In Brundaban Nayak v. Election Commission of India [1965] 3 SCR 53, in spite of finality attached by Article 192 to the decision of the Governor in respect of disqualification incurred by a member of a State Legislature subsequent to the election, the matter was examined by this Court on an appeal by special leave under Article 136 of the Constitution against the decision of the High Court dismissing the writ petition filed under Article 226 of the Constitution. Similarly in Union of India v. Jyoti Prakash Mitter [1971] 3 SCR 483, in spite of finality attached to the order of the President with regard to the determination of age of a Judge of the High Court under Article 217(3) of the Constitution, this Court examined the legality of the order passed by the President during the pendency of an appeal filed under Article 136 of the Constitution.

85. There is authority against the acceptability of the argument that the word

"final" occurring in Paragraph 6(1) has the effect of excluding the jurisdiction of the Courts in Articles 136, 226 and 227."

351. The above Constitution Bench Judgment clearly support the case of the petitioners that finality attached to the decision of the Speaker under Article 110(3) does not inhibit the Court in exercising its Judicial Review. We may also refer to the Constitution Bench judgment of this Court in Special Reference No. 1 of 1964, AIR 1965 SC 745 where this Court had occasion to consider Article 212, which is a provision relating to the legislature of the State *para materia* to Article 122. Constitution Bench has held that what is protected under Article 212 from being questioned is on the ground of <u>any alleged irregularity or procedure.</u> The said ground does not apply in case of illegality of the decision. The next case, which needs to be considered is again a Constitution Bench judgment of this Court in **Raja Rampal Vs. Hon'ble Speaker, Lok Sabha and Others, (2007) 3 SCC 184.** The Constitution Bench in the above case had occasion to

consider the question of issue of Judicial Review of a decision of Speaker disqualifying from membership of the Parliament. A submission was raised before the Court by virtue of Article 122 of the Constitution, which puts an embargo on questioning any proceeding of the Parliament, the decision of the Speaker is immuned from the Judicial Review. The above submission has been noticed in Para 364 of the judgment in following words:-

> "364. The submissions of the learned Counsel for the Union of India and the learned Additional Solicitor General seek us to read a finality clause in the provisions of Article 122(1) in so far as parliamentary proceedings are concerned. On the subject of finality clauses and their effect on power of judicial review, a number of cases have been referred that may be taken note of at this stage. "

352. In Paras 376, 377, 384 and 386 following has been held:-

> "376. In our considered view, the principle that is to be taken note of in the aforementioned series of cases is that notwithstanding the existence of finality clauses, this Court exercised its jurisdiction of judicial review whenever and

wherever breach of fundamental rights was alleged. The President of India while determining the question of age of a Judge of a High Court under Article 217(3), or the President of India (or the Governor, as the case may be) while taking a decision under Article 311(3) to dispense with the ordinarily mandatory inquiry before dismissal or removal of a civil servant, or for that matter the Speaker (or the Chairman, as the case may be) deciding the question of disqualification under Para 6 of the Tenth Schedule may be acting as authorities entrusted with such jurisdiction under the constitutional provisions. Yet, the manner in which they exercised the said jurisdiction is not wholly beyond the judicial scrutiny. In the case of the Speaker exercising jurisdiction under the Tenth Schedule, the proceedings before him are declared by Para 6(2) of the Tenth Schedule to be proceedings in Parliament within the meaning of Article 122. Yet, the said jurisdiction was not accepted as non-justifiable. In this view, we are unable to subscribe to the proposition that there is absolute immunity available to the Parliamentary proceedings relating to Article 105(3). It is a different matter as to what parameters, if any, should regulate or control the judicial scrutiny of such proceedings.

377. In U.P. Assembly case (Special Reference No.1 of 1964), AIR 1965 SC 745, the issue was authoritatively settled by this Court, and it was held, at SCR pp. 455-56, as under: (AIR p.768, para 62)

> "Article 212(1) seems to make it possible for a citizen to call in *question in the appropriate court of law the validity of any proceedings*

> *inside the legislative chamber if his case is that the said proceedings suffer not from mere irregularity of procedure, but from an illegality*. If the impugned procedure is illegal and unconstitutional, it would be open to be scrutinized in a court of law, though such scrutiny is prohibited if the complaint against the procedure is no more than this that the procedure was irregular."
>
> (Emphasis supplied)

384. The prohibition contained in Article 122(1) does not provide immunity in cases of illegalities. In this context, reference may also be made to Sarojini Ramaswami v. Union of India, (1992) 4 SCC 506. The case mainly pertained to Article 124(4) read with the Judges (Inquiry) Act, 1968. While dealing, inter alia, with the overriding effect of the rules made under Article 124(5) over the rules made under Article 118, this Court at pp. 187-88 made the following observations: (SCC p. 572, para 94)

> "94. We have already indicated the constitutional scheme in India and the true import of clauses(4) and (5) of Article 124 read with the law enacted under Article 124(5), namely, the Judges (Inquiry) Act, 1968 and the Judges (Inquiry) Rules, 1969, which, inter alia contemplate the provision for an opportunity to the Judge concerned to show cause against the finding of 'guilty' in the report before Parliament takes it up for consideration along with the motion for his removal. Along with the decision in U.P. Assembly Case

> (Special Reference No. 1 of 1964) has to be read the declaration made in Sub-Committee on Judicial Accountability, (1991) 4 SCC 699 that 'a law made under Article 124(5) will override the rules made under Article 118 and shall be binding on both the Houses of Parliament. *A violation of such a law would constitute illegality and could not be immune from judicial scrutiny under Article 122(1)*.' The scope of permissible challenge by the Judge concerned to the order of removal made by the President under Article 124(4) in the judicial review available after making of the order of removal by the President will be determined on these considerations."
>
> (Emphasis supplied)

386. Article 122(1) thus must be found to contemplate the twin test of legality and constitutionality for any proceedings within the four walls of Parliament. The fact that the U.P. Assembly case (Special Reference No.1 of 1964) dealt with the exercise of the power of the House beyond its four walls does not affect this view which explicitly interpreted a constitutional provision dealing specifically with the extent of judicial review of the internal proceedings of the legislative body. In this view, Article 122(1) displaces the English doctrine of exclusive cognizance of internal proceedings of the House rendering irrelevant the case law that emanated from courts in that jurisdiction. Any attempt to read a limitation into Article 122 so as to restrict the court's jurisdiction to examination of the Parliament's procedure in case of unconstitutionality, as opposed to illegality

> would amount to doing violence to the constitutional text. Applying the principle of "expressio unius est exclusio alterius" (whatever has not been included has by implication been excluded), it is plain and clear that prohibition against examination on the touchstone of "irregularity of procedure" does not make taboo judicial review on findings of illegality or unconstitutionality."

353. The above case is a clear authority for the proposition that Article 122 does not provide for immunity in case of illegality. What is protected is only challenge on the ground of any irregularity or procedure. The immunity from calling in question the Parliamentary decision on the ground of violation of procedure as has been provided in the Constitution is in recognition of the principles that Parliament has privilege regarding procedure and any challenge on the ground of violation of any procedure is not permissible.

354. Shri K.K. Venugopal relied on Two Judgments of this Court in support of his submission namely, **Mohd. Saeed Siddiqui Vs. State of Uttar Pradesh and Another,**

(2014) 11 SCC 415 and **Yogendra Kumar Jaiswal and Others Vs. State of Bihar and Others, (2016) 3 SCC 183.** He submits that in both the decisions, this Court while dealing with the question of challenge to Money Bill has clearly held that the decision of Speaker certifying a Bill as Money Bill is final and cannot be questioned.

355. We need to consider the above decisions in detail. **Mohd. Saeed Siddiqui (supra)** was a judgment delivered by a Three Judge Bench of this Court. U.P. Lokayukta Act and U.P. Lokayukta (Amendment) Act, 2012 was subject matter of challenge. One of the submissions in that regard has been noted in Para 12, which is to the following effect:-

> "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."

356. This Court after noticing Articles 199 and 212, which are *pari materia* to Articles 109 and 122 stated that proceeding in support of legislature cannot be called into question on the ground that they have not been carried on in accordance with the rules of business. This Court considered the issues from Paragraphs 34 to 38, which is to the following effect:-

> "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 procedures do not render invalid an Act to which assent has been given by the President or the Governor, as the case may be.

37. In M.S.M. Sharma v. Shree Krishna Sinha AIR 1960 SC 1186 and Mangalore Ganesh Beedi Works v. State of Mysore, AIR 1963 SC 589, the Constitution Benches of this Court held that:

> (i) the validity of an Act cannot be challenged on the ground that it offends Articles 197 to 199 and the procedure laid down in Article 202;
>
> (ii) Article 212 prohibits the validity of any proceedings in a Legislature of a State from being called in question on the ground of

> any alleged irregularity of procedure; and
>
> (iii) Article 255 lays down that the requirements as to recommendation and previous sanction are to be regarded as a matter of procedure only.
>
> It is further held that the validity of the proceedings inside the legislature of a State cannot be called in question on the allegation that the procedure laid down by the law has not been strictly followed and that no Court can go into those questions which are within the special jurisdiction of the legislature itself, which has the power to conduct its own business.
>
> 38. Besides, the question whether a Bill is a Money Bill or not can be raised only in the State Legislative Assembly by a member thereof when the Bill is pending in the State Legislature and before it becomes an Act. It is brought to our notice that in the instant case no such question was ever raised by anyone. ”

357. This Court came to the conclusion that question pertaining to the procedure in the House could not have been questioned by virtue of Article 212. Another judgment, which has been relied by learned Attorney General is judgment of this Court in **Yogendra Kumar Jaiswal (supra).** The above judgment was rendered by Two Judge Bench. This Court in the above case examined the question whether introduction of

Orissa Special Courts Act, 2006 as a Money Bill could be called in question in a Court. This Court considered the issue in Paragraphs 38 to 43, which are to the following effect:-

> "38. First, we shall take up the issue pertaining to the introduction of the Bill as a Money bill in the State Legislature. Mr. Vinoo Bhagat, learned Counsel appearing for some of the appellants, has laid emphasis on the said aspect. Article 199 of the Constitution, defines "Money Bills". For our present purpose, Clause (3) of Article 199 being relevant is reproduced below:
>
> > "199.(3). If any question arises whether a Bill introduced in the legislature of a State which has a Legislative Council is a Money Bill or not, the decision of the Speaker of the Legislative Assembly of such State thereon shall be final.
>
> We have extracted the same as we will be referring to the authorities as regards interpretation of the said clause.
>
> 39. Placing reliance on Article 199, the learned Counsel would submit that the present Act which was introduced as a money bill has remotely any connection with the concept of money bill. It is urged by him that the State has made a Sisyphean endeavour to establish some connection. The High Court to repel the challenge had placed reliance upon Article 212 which stipulates that the validity of any proceedings in the Legislature of a State shall not be called in question on the ground of any alleged irregularity of procedure.
>
> 40. The learned Counsel for the appellants

has drawn inspiration from a passage from Powers, Privileges and Immunities of State Legislatures. In re, Special Reference No. 1 of 1964 AIR 1965 SC 745, wherein it has been held that Article 212(1) lays down that the validity of any proceedings in the legislature of a State shall not be called in question on the ground of any alleged irregularity of procedure and Article 212(2) confers immunity on the officers and members of the legislature in whom powers are vested by or under the Constitution for regulating procedure or the conduct of business, or for maintaining order, in the legislature from being subject to the jurisdiction of any court in respect of the exercise by him of those powers. The Court opined that Article 212(1) seems to make it possible for a citizen to call in question in the appropriate court of law the validity of any proceedings inside the Legislative Chamber if his case is that the said proceedings suffer not from mere irregularity of procedure, but from an illegality. If the impugned procedure is illegal and unconstitutional, it would be open to be scrutinised in a court of law, though such scrutiny is prohibited if the complaint against the procedure is not more than that the procedure was irregular. Thus, the said authority has made a distinction between illegality of procedure and irregularity of procedure.

41. Our attention has also been drawn to certain paragraphs from the Constitution Bench decision in Raja Ram Pal v. Lok Sabha (2007) 3 SCC 184. In the said case, in paras 360 and 366, it has been held thus: (SCC pp. 347 & 350)

> “360. The question of extent of judicial review of parliamentary matters has to be resolved with

reference to the provision contained in Article 122(1) that corresponds to Article 212 referred to in M.S.M. Sharma v. Shree Krishna Sinha AIR 1960 SC 1186 [Pandit Sharma (2)]. On a plain reading, Article 122(1) prohibits "the validity of any proceedings in Parliament" from being 'called in question' in a court merely on the ground of "irregularity of procedure". In other words, the procedural irregularities cannot be used by the court to undo or vitiate what happens within the four walls of the legislature. But then, "procedural irregularity" stands in stark contrast to "substantive illegality' which cannot be found included in the former. We are of the considered view that this specific provision with regard to check on the role of the judicial organ vis-à-vis proceedings in Parliament uses language which is neither vague nor ambiguous and, therefore, must be treated as the constitutional mandate on the subject, rendering unnecessary search for an answer elsewhere or invocation of principles of harmonious construction.

* * *

366. The touchstone upon which parliamentary actions within the four walls of the legislature were examined was both the constitutional as well as substantive law. The proceedings which may be tainted on account of substantive illegality or unconstitutionality, as opposed to those suffering from mere irregularity thus cannot be held

> protected from judicial scrutiny by Article 122(1) inasmuch as the broad principle laid down in Bradlaugh (1884) LR 12 QBD 271 : 53 LJQB 290 : 50 LT 620 (DC), acknowledging exclusive cognizance of the legislature in England has no application to the system of governance provided by our Constitution wherein no organ is sovereign and each organ is amenable to constitutional checks and controls, in which scheme of things, this Court is entrusted with the duty to be watchdog of and guarantor of the Constitution."

42. In this regard, we may profitably refer to the authority in 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 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 (supra) 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 (supra), comes within the concept of "irregularity" and it does come with the realm of substantiality. What has been held in the Special Reference No. 1 of 1964 (supra) 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 (supra) and hence, we unhesitatingly hold that there is no merit in the submission so assiduously urged by the learned Counsel for the appellants."

358. The consideration in the above case indicate that this Court has merely relied on judgment of Three Judge Bench in **Mohd. Saeed Siddiqui (supra).** The Court based its decision on finality attached to the decision of the Speaker in Article 199(3) as well as bar on challenge of proceeding of the legislature on an irregularity procedure as contained in Article 212. The question is, where a Speaker certify a Bill as a Money Bill and it is introduced and passed as a Money Bill, this only a question of procedure or not? Article 107 contains provisions as to introduction of

passing of bills. Article 107(2) state that subject to the provisions of Articles 108 and 109, a Bill shall not be deemed to have been passed by the Houses of Parliament unless it has been agreed to by both Houses of Parliament. However, the requirement of passing a Bill by both the Houses is not applicable in case of Money Bills. Article 110 defines as to what is the Money Bill. A Money Bill is constitutionally defined and a Bill shall be a Money Bill only if it is covered by Article 110(1). A Bill, which does not fulfill the conditions as enumerated in Article 110(1) and it is certified as Money Bill, whether the Constitutional conditions enumerated in Article 110(1) shall be overridden only by certificate of Speaker?

359. We have noticed the Constitution Bench Judgment in **Kihoto Hollohan (supra) and Raja Ram Pal (supra)** that finality of the decision of the Speaker is not immuned from Judicial Review. All Bills are required to be passed by both Houses of Parliament. Exception is given in case of Money Bills and in the case of joint sitting of both houses. In event, we accept the

submission of learned Attorney General that certification by Speaker is only a matter of procedure and cannot be questioned by virtue of Article 122(1), any Bill, which does not fulfill the essential constitutional condition under Article 110 can be certified as Money Bill bye-passing the Upper House. There is a clear difference between the subject "irregularity of procedure" and "substantive illegality". When a Bill does not fulfill the essential constitutional condition under Article 110(1), the said requirement cannot be said to be evaporated only on certification by Speaker. Accepting the submission that certification immunes the challenge on the ground of not fulfilling the constitutional condition, Court will be permitting constitutional provisions to be ignored and bye-passed. We, thus, are of the view that decision of Speaker certifying the Bill as Money Bill is not only a matter of procedure and in event, any illegality has occurred in the decision and the decision is clearly in breach of the constitutional provisions, the

decision is subject to Judicial Review. We are, therefore, of the view that the Three Judge Bench Judgment of this Court in **Mohd. Saeed Siddiqui (supra)** and Two Judge Bench judgment of this Court in **Yogendra Kumar Jaiswal (supra)** does not lay down the correct law. We, thus, conclude that the decision of the Speaker certifying the Aadhaar Bill as Money Bill is not immuned from Judicial Review.

360. We having held that the decision of Speaker certifying the Aadhaar Bill as a Money Bill is open to Judicial Review. We now proceed to examine as to whether Speaker's decision certifying the Aadhaar Bill as Money Bill contravenes any of the Constitutional provisions, i.e., Whether the decision is vitiated by any Constitutional Illegality? For determining the main issue, which need to be answered is as to whether Aadhaar Bill is covered by any of Clauses (a) to (f) of Article 110(1). That Clause(g) shall be applicable only when any of Clauses (a) to (f) are attracted. Clause (g) which contemplate that any matter incidental to any of the matters specified in sub-

clauses (a) to (f), can be a provision in a Bill presupposes that main provisions have to fall in any of the Clauses (a) to (f). The heart of the Aadhaar Act is Section 7, which is to the following effect:-

> **"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."

361. 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, has been provided by Section 7, i.e. undergoing of an individual to an authentication. The Preamble of the Act as well as objects and reasons as

noticed above also indicate that the Act has been enacted 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. Thus, the theme of the Act or main purpose and object of the Act is to bring in place efficient, transparent and targeted deliveries of subsidies, benefits and services, which expenditure is out from the Consolidated Fund of India. Thus, the above provisions of the Act is clearly covered by Article 110(1)(c) and (e).

362. Shri P. Chidambaram, learned counsel for petitioners has laid much emphasis on the word “only“ as occurring in Article 110(1). The word “only” used in Article 110(1) has purpose and meaning. The legislative intendment was that main and substantive provisions should be only any or all of the clauses

from (a) to (f). In event, the main and substantive provision of the Act are not covered by Clauses (a) to (f), the said Bill cannot be said to be a Money Bill. It will not be out of place to mention here that in Constituent Assembly, an amendment was moved for deletion of word “only” on 20.05.1949, Hon'ble Shri Ghanshyam Singh Gupta moved the amendment in Draft Article 90. It is useful to extract the above debate, which is to the following effect:-

> **The Honourable Shri Ghanshyam Singh Gupta** (C.P. & Berar: General): Sir, I beg to move:
>
> "That in clause (1) of article 90, the word `only' be deleted."
>
> This article is a prototype of Section 37 of the Government of India Act which says that a Bill or amendment providing for imposing or increasing a tax or borrowing money, etc. shall not be introduced or moved except on the recommendation of the Governor-General. This means that the whole Bill need not be a money Bill: it may contain other provisions, but if there is any provision about taxation or borrowing, etc. It will come under this Section37, and the recommendation of the Governor-General is necessary. Now article 90 says that a Bill shall be deemed to be a money Bill if it contains only provisions dealing with the imposition, regulation, etc., of any tax or the borrowing of money, etc. This can mean that if there is a Bill which has other provisions and also a

> provision about taxation or borrowing etc., it will not become a money Bill. If that is the intention I have nothing to say; but that if that is not the intention I must say the word "only" is dangerous, because if the Bill does all these things and at the same time does something else also it will not be a money Bill. I do not know what the intention of the Drafting Committee is but I think this aspect of the article should be borne in mind."

363. After discussion, Mr. Naziruddin Ahmad also suggested that the position of the word "only" in connection with Amendment No.1669 should be specially considered. It is a word which is absolutely misplaced. On that day, the consideration was deferred and again in the debate on 06.06.1949, Constituent Assembly took up the discussion. The President of the Constituent Assembly placed the amendment for vote on 08.06.1949, which amendment was negativated. Thus, use of word "only" in Article 110(1) has its purpose, which is a clear restriction for a Bill to be certified as a Money Bill.

364. Other provisions of the Act can be said to be incidental to the above matter. The architecture of

the Aadhaar Act veer round the Government's constitutional obligation to provide for subsidies, benefits and services to the individuals, who are entitled for such subsidies, benefits and services. Section 24 contemplates the appropriation made by Parliament by law for grant of sums of money for the purposes of Aadhaar Act. The disbursement of subsidies, benefits and services from the Consolidated Fund of India is in substance, the main object of the Act for which Aadhaar architecture has been envisaged and other provisions are only to give effect to the above main theme of the Act. Other provisions of the Act are only incidental provisions to main provision. Section 57 on which much attack has been made by the learned counsel for the petitioners that it cannot be covered by any of the provisions from (a) to (f) of Article 110(!). Suffice it to say that Section 57 is a provision which clarifies that nothing contained in Aadhaar 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. The applicability of the provision of Section 57 comes into play when Aadhaar Number is allocated to an individual after completing the process under the Act. Section 57 is also a incidental provision covered by sub-clause(g) of Article 110(1). Section 57 is a limitation imposed under the Act on the use of Aadhaar Number by State or any body corporate or any private party. We, thus, are of the view that Aadhaar Bill has rightly been certified as the Money Bill by the Speaker, which decision does not violate any constitutional provision, hence does not call for any interference in this proceeding. Issue No. 16 is answered in the following manner:-

Ans.16:- Aadhaar Act has been rightly passed as Money Bill. The decision of Speaker certifying the Aadhaar Bill, 2016 as Money Bill is not immuned from Judicial Review.

Issue No.17	**Whether Section 139-AA of the Income Tax Act, 1961 is unconstitutional in view of the Privacy judgment in Puttaswamy case?**

365. Section 139-AA was challenged by a bunch of writ petitions, which were decided by this Court in **Binoy Viswam Vs. Union of India and Others, (2017) 7 SCC 59.** The writ petitions were disposed of upholding the vires of Section 139-AA. Para 136 of the judgment contains operative portion, which is to the following effect:-

> "**136.** Subject to the aforesaid, these writ petitions are disposed of in the following manner:
>
> **136.1** We hold that the 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 139AA 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

> enrollment number for applying for PAN cards, in the income tax returns or notified Aadhaar enrollment 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 cost."

366. As per the above judgment, the validity of the provisions of Section-139AA was upheld subject to passing the muster of Article 21 of the Constitution, which was the issue pending before the Constitution Bench in Writ Petition (C) No. 494 of 2012 and other connected matters. The Constitution Bench Judgment in **Puttaswamy** was delivered on 24.08.2017. Right of Privacy has been held to be fundamental right, any restriction on such fundamental right has been held to be valid when it passes the muster of three-fold test as laid down there. In the lead judgment of Dr.

Justice D.Y. Chandrachud, three-fold test are:-

(a) The existence of law;

(b) A legitimate State interest and

(c) such law should pass the test of proportionality.

367. Dr. Justice Chandrachud has delivered the judgment for himself and three other Hon'ble Judges, Justice Sanjay Kishan Kaul in paragraph 639 has upheld the test of proportionality. As a result, at-least five out of nine Judges requires the proportionality test to be applied. In addition to tests propounded by a Constitution Bench in **Puttaswamy** case, an additional test as propounded by a Five Judges Constitution Bench of this Court in **Shayara Bano Vs. Union of India, (2017) 9 SCC 1,** Justice R.F. Nariman has laid down a test of "manifest arbitrariness". Reading the Nine Judge Bench decision in **Puttaswamy** case and Five Judge Bench decision in **Shayara Bano's** case, the Petitioner can succeed to the challenge to Section 139-AA only if they successfully demonstrate the said provision to be violative of Right to Privacy

on the basis of the following tests:-

(i) Absence of law;

(ii) Absence of Legitimate State Interest;

(iii) The provision being hit by lack of proportionality.

(iv) The provision being manifestly arbitrary, which can be traced to Article 14. [The test to determine "manifest arbitrariness" is to decide whether the enactment is drastically unreasonable and / or capricious, irrational or without adequate determining principle"]

368. The learned Attorney General relies on following interest, which according to him are safeguarded by Section 139-AA to satisfy the legitimate State interest:-

a. To prevent income tax evasion by requiring, through an amendment to the Income Tax Act, that the Aadhaar number be linked with the PAN; and

b. Prevention, accumulation, circulation and use of black money and money laundering by imposing a requirement by law for linking Aadhaar for opening bank accounts;

c. To prevent terrorism and protect national

security and prevention of crime by requiring that Aadhaar number be linked to SIM cards for mobile phones.

369. **Binoy Viswam** has examined Section 139-AA on the Principle of Doctrine of Proportionality in Paragraphs 123 to 125:-

> "**123.** Keeping in view the aforesaid parameters and principles in mind, we proceed to discuss as to whether the "restrictions" which would result in terms of the proviso to sub-section (2) of Section 139-AA of the Act are reasonable or not.
>
> **124.** Let us revisit the objectives of Aadhaar, and in the process, that of Section 139-AA of the Act in particular.
>
> **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 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:

> "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 [146]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 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.

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."

370. In Paragraphs 122 to 125 of **Binoy Viswam,** it has also been observed that the measures taken may go a long way to check and minimise the malaise of black money.

371. Dr. Justice D.Y. Chandrachud in **Puttaswamy** case in Paragraph 311 has stated:-

"**311.** ….....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."

372. In **Puttaswamy** case, Justice Sanjay Kishan Kaul has noted the European Union General Data Protection Regulation and observed that restrictions on the right to privacy may be justifiable on the ground of regulation of taxes and financial institutions. In Paragraph 640, Justice Kaul has held:-

> "**640.** It would be useful to turn to the European Union Regulation of 2016. Restrictions of the right to privacy may be justifiable in the following circumstances subject to the principle of proportionality:
>
> (*a*) *Other fundamental rights*: The right to privacy must be considered in relation to its function in society and be balanced against other fundamental rights.
>
> (*b*) Legitimate national security interest.
>
> (*c*) Public interest including scientific or historical research purposes or statistical purposes.
>
> (*d*) *Criminal offences*: The need of the competent authorities for prevention investigation, prosecution of criminal offences including safeguards against threat to public security;
>
> (*e*) *The unidentifiable data*: The

> information does not relate to identified or identifiable natural person but remains anonymous. The European Union Regulation of 2016 refers to "pseudonymisation" which means the processing of personal data in such a manner that the personal data can no longer be attributed to a specific data subject without the use of additional information, provided that such additional information is kept separately and is subject to technical and organisational measures to ensure that the personal data are not attributed to an identified or identifiable natural person;
>
> (*f*) *The tax, etc.*: The regulatory framework of tax and working of financial institutions, markets may require disclosure of private information. But then this would not entitle the disclosure of the information to all and sundry and there should be data protection rules according to the objectives of the processing. There may however, be processing which is compatible for the purposes for which it is initially collected."

373. Section 139-AA thus clearly enacted to fulfill the legitimate State interest. Section 139-A which came into effect w.e.f. 01.04.1989 provide for Permanent Account Number (PAN) and the provision also provided that statutory mandatory provisions as to

when “every person” shall quote such number (PAN number) for various purposes as enumerated in Section 139A. Introduction of Section 139-AA is an extension and implication of Section 139A. The introduction of Section 139-AA was for the purpose of eliminating duplicate PANs from the system with the help of a robust technology solution.

374. The new Section 139-AA in the Income Tax Act seeks to remove bogus PAN cards by linking with Aadhaar, expose shell companies and thereby curb the menace of black money, money laundering and tax evasion. The fact that the tax base of India is very narrow and that we are a largely tax non-compliant society is evident from some of the startling figures in the budget speech of the Finance Minister. Linking of PAN with Aadhaar will at least ensure that duplicate and fake PAN cards which are used for the purpose of tax evasion will be eliminated and is one of the many fiscal measures to eliminate black money from the system.

375. The **Binoy Viswam** has referred to other relevant rationals for enactment of Section 139-AA. Section 139-AA also cannot be said to be disproportionate. The section has been enacted to achieve the legitimate State aim. Section 139-AA is a law framed by Parliament, which require linking of the Aadhaar with PAN. The means which are sought to be achieved by such enactment cannot be said to be disproportionate in any manner. It has been further submitted that Section 139-AA unfairly attracts only individual assessees and not other tax paying assessees, who may also be involved in financial frauds. The above submission need not detain us since Aadhaar number can be obtained by the individuals and not by the entities hence Section-139AA can only apply to individuals. In any event, the legislature cannot be expected to address all issues relating to a particular evil at one go. Section 139-AA is a required first step to weed out fake PANs for individuals; it is perfectly acceptable for the legislature to weed out fake PANs for other tax-paying entities at a later stage. Such

a view is also endorsed in judicial decisions. In **Namit Sharma Vs. Union of India, (2013) 1 SCC 745** (per Swatanter Kumar, J.) this Court observed:-

> "**43.** The rule of equality or equal protection does not require that a State must choose between attacking every aspect of a problem or not attacking the problem at all, and particularly with respect to social welfare programme. So long as the line drawn by the State is rationally supportable, the courts will not interpose their judgment as to the appropriate stopping point.…….."

376. Thus, the legislature is within its remit to only target individual assessees with Section 139-AA, and not every other tax-paying entity. The law does not have to provide for complete coverage of tax-payers who may be indulging in financial fraud but may envisage 'degrees of harm' and act on that basis. In this context, the Aadhaar number is being mandated for all individual assessees. This is applicable to natural persons as well as persons who together constitute legal persons (e.g. Partners in a partnership, members of a company etc.) and hence provides significant coverage to weed out duplicate PANs and hence reduce the incidence of financial and

tax frauds through these means. Aadhaar's inclusion into PAN is meant to curb tax evasion, sham transactions, entry providers which are rampantly carried out on account of bogus PANs. Aadhaar's unique de-duplication based on biometric identification has been hailed as the most sophisticated system by the World Bank. Inclusion of Aadhaar into PAN eliminates the inequality between honest tax payers and non-compliant, dishonest ones who get away without paying taxes. Inclusion of Aadhaar into PAN promotes rather than negates equality. It bolsters equality and is consistent with Article 14.

377. In result, Section 139-AA is fully compliant of three-fold test as laid down in **Puttaswamy's** case. Section 139-AA, thus does not breach fundamental Right of Privacy of an individual and Section 139-AA cannot be struck down on that ground.

Ans.17:- Section 139-AA does not breach fundamental Right of Privacy as per Privacy Judgment in **Puttaswamy** case.

Issue No. 18	**Whether Aadhaar Act violates the Interim Orders passed by this Court in Writ Petition (C) No. 494 of 2012?**

378. The petitioners submits that this Court has passed various Interim Orders in Writ Petition (C) No. 494 of 2012 from 23.09.2013 to 15.10.2015. On 23.09.2013, this Court directed "In the meanwhile, no person should suffer not getting the Aadhaar card inspite 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".

379. On 11.08.2015, this Court issued following order:-

> "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 UIDA 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 foodgrains, etc. and cooking fuel, such as kerosene. The Aadhaar card may also be used for the purpose of the 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."

By subsequent order of 15.10.2015, some more Schemes were included.

380. It is submitted that the Central Government and the State Government issued various notifications numbering 139, requiring Aadhaar authentication for various benefits, subsidies and schemes. The issuance of such orders is in breach of above Interim Orders passed by this Court.

381. In **Binoy Viswam (supra)** an argument was advanced that enactment of Section 139-AA was in breach of the Interim Order passed in Writ Petition (C) No. 494 of 2012. The said argument was considered and in Para 99 it was held as follows:

> **"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."

382. We have noticed that the Writ Petition (C) No. 494 of 2012 was filed at the time when Aadhaar Scheme was being implemented on the basis of executive's instructions dated 28.01.2009. In the Writ Petition filed prior to enactment of Act, 2016, challenge to Aadhaar Scheme was founded on following:-

i. The requirement of making Aadhaar mandatory for availing benefits under various social service schemes by way of an executive order and

ii. Concerns regarding the right to privacy of the individuals, which emanated on

account of collection of biometric data under the Aadhaar scheme, which is without any legislative backing.

383. Aadhaar Act, 2016 gives legislative backing to the Aadhaar Scheme. The Act contains specific provisions prohibiting disclosure of core biometric information collected in Aadhaar enrolment. It is submitted that Schemes notified under Section 7 of the Act were on the strength of Aadhaar enactment and cannot be said to be a violation of interim orders of this Court. The submission that interim orders directed the Aadhaar to be voluntary, it is submitted by the respondent that consent was obtained from individuals, who came for enrolment under the Aadhaar Act. It is submitted that all those, who were enrolled under the Statutory Scheme dated 28.01.2009, the consent was given by the individuals in verifying their informations.

384. We, thus, conclude that Aadhaar Act cannot be struck down on the ground that it is in violation of interim orders passed by this Court in Writ Petition (C) No. 494 of 2012. Issue No. 18 is answered in

following manner:-

Ans.18:- The Aadhaar Act does not violate the interim orders passed in Writ Petition (C) No. 494 of 2012 and other Writ Petitions.

385. I had gone through the erudite and scholarly opinion of Justice A.K.Sikri (which opinion is on his own behalf and on behalf of Chief Justice and Justice A.M.Khanwilkar) with which opinion I broadly agree. Rule 9 as amended by PMLA (Second Amendment) Rules, 2017 has been struck down by my esteemed brother which provision has been upheld by me. My reasons and conclusions are on the same line except few where my conclusions are not in conformity with the majority opinion.

CONCLUSIONS:-

386. In view of above discussions, we arrive at following conclusions:-

(1) The requirement under Aadhaar Act to give one's demographic and biometric information does not violate fundamental right of

privacy.

(2) The provisions of Aadhaar Act requiring demographic and biometric information from a resident for Aadhaar Number pass three-fold test as laid down in Puttaswamy (supra) case, hence cannot be said to be unconstitutional.

(3) Collection of data, its storage and use does not violate fundamental Right of Privacy.

(4) Aadhaar Act does not create an architecture for pervasive surveillance.

(5) Aadhaar Act and Regulations provides protection and safety of the data received from individuals.

(6) Section 7 of the Aadhaar is constitutional. The provision does not deserve to be struck down on account of denial in some cases of right to claim on account of failure of authentication.

(7) The State while enlivening right to food, right to shelter etc. envisaged under Article 21 cannot encroach upon the right of privacy of beneficiaries nor former can be given precedence over the latter.

(8) Provisions of Section 29 is constitutional and does not deserves to be struck down.

(9) Section 33 cannot be said to be unconstitutional as it provides for the use of Aadhaar data base for police investigation nor it can be said to violate protection granted under Article 20(3).

(10) Section 47 of the Aadhaar Act cannot be held to be unconstitutional on the ground that it does not allow an individual who finds that there is a violation of Aadhaar Act to initiate any criminal process.

(11) Section 57, to the extent, which permits use of Aadhaar by the State or any body corporate or person, in pursuant to any contract to this effect is unconstitutional and void. Thus, the last phrase in main provision of Section 57, i.e. “or any contract to this effect” is struck down.

(12) Section 59 has validated all actions taken by the Central Government under the notifications dated 28.01.2009 and 12.09.2009 and all actions shall be deemed to have been taken under the Aadhaar Act.

(13) Parental consent for providing biometric information under Regulation 3 & demographic information under Regulation 4 has to be read for enrolment of children between 5 to 18 years to uphold the constitutionality of Regulations 3 & 4 of Aadhaar (Enrolment and Update) Regulations, 2016.

(14) Rule 9 as amended by PMLA (Second Amendment) Rules, 2017 is not unconstitutional and does not violate Articles 14, 19(1)(g), 21 & 300A of the Constitution and Sections 3, 7 & 51 of the Aadhaar Act. Further Rule 9 as amended is not ultra vires to PMLA Act, 2002.

(15) Circular dated 23.03.2017 being unconstitutional is set aside.

(16) Aadhaar Act has been rightly passed as Money Bill. The decision of Speaker certifying the Aadhaar Bill, 2016 as Money Bill is not immuned from Judicial Review.

(17) Section 139-AA does not breach fundamental Right of Privacy as per Privacy Judgment in **Puttaswamy** case.

(18) The Aadhaar Act does not violate the interim orders passed in Writ Petition (C) No. 494 of 2012 and other Writ Petitions.

387. Now, we revert back to the batch of cases, which have come up for consideration before us.

388. We having considered and answered the issues arising in this batch of cases, all the Writ Petitions filed under Article 32 deserves to be disposed of in accordance with our conclusions as noted above. All Transfer Cases/Transfer Petitions are also deserves to be decided accordingly.

389. Now, we come to the Criminal Appeal arising out of S.L.P. (Crl.) No. 2524 of 2014. The above S.L.P. (Crl.) arose out of an order passed by Judicial Magistrate First Class dated 22.10.2013 by which Judicial Magistrate First Class directed DG, UIDAI and Dy. Dg. UIDAI Technology Centre, Bangalore to provide the necessary data to the respondent C.B.I. The said order was challenged in the High Court by means of Criminal Writ Petition, in which the order was passed by the High Court on 26.02.2014 giving rise to S.L.P. (Crl.) No. 2524 of 2014.

390. We have noticed above that according to Aadhaar Act Section 33 disclosure of information can be made as per sub-section (1) pursuant to an order of Court, not inferior to that of District Judge. The order directing for disclosure of information having been passed by Judicial Magistrate First Class, in the present case, the order is not in consonance with sub-section (1) of Section 33, hence the order passed by Judicial Magistrate, First Class dated 22.10.2013 and order of the High Court passed in reference to the said order deserves to be set aside. Criminal Appeal is allowed accordingly.

391. No case is made out to initiate any contempt proceedings in the contempt applications as prayed for. All the contempt petitions are dismissed.

392. In result, this batch of cases is decided in following manner:-

(i) All the Writ Petitions filed under Article 32 as well as Transfer Cases are disposed of as per our conclusions recorded above.

(ii) Criminal Appeal arising out of S.L.P. (Criminal) No. 2524 of 2014 is allowed.

(iii) All the contempt applications are closed.

393. Before we part, we record our deep appreciation for the industry, hard work and eloquence shown by learned counsel for the parties appearing before us, which was amply demonstrated in their respective arguments. Learned counsel have enlightened us with all relevant concerned materials available in this country and abroad. The concern raised by these Public Interest Litigations is a concern shown for little Indian for whom the Society, Government and Court exists. We appreciate the concern and passion expressed before us by learned counsel appearing for both the parties as well as those, who were permitted to intervene in the matter. We close by once more recording of our appreciation for the cause espoused in these cases.

.....J.
(ASHOK BHUSHAN)

NEW DELHI,
SEPTEMBER 26, 2018.